THE PATHS OF INTERNATIONAL LAW:

CASE STUDIES

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Abstract

What does it take for international legal rules to change? Key to any serious attempt at accounting for the dynamism of the field – and yet surprisingly understudied – this query constituted the central endeavour of the *Paths of International Law* project, conducted at the Geneva Graduate Institute from 2018 to 2023. The present compilation lays out the empirical materials used in the project to build a theoretical account of change in international legal rules. These consist of 25 case studies, each zooming into the legal history and politics of individual norm-change attempts and seeking to provide an analytical reconstruction of the elements that facilitated or hindered shifts in of each of them. The case studies cover eight issue areas of international law, which provide the structure of this compilation: General International Law, International Human Rights Law, International Humanitarian Law, International Criminal Law, the Law of the Sea, International Environmental Law, International Trade Law, and International Investment Law. This allowed the project to test international rules in different settings and contexts, making for a rich overview of change in international law.

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TABLE OF CONTENTS

Introduction 6
Part I. General International Law 16
Case Study 1: State Offical Immunity 17
Case Study 2: The Concept of an Internationally Wrongful Act 43
Case Study 3: Self-Defense Against Non-State Actors 69
Case Study 4: The Effects Doctrine of Jurisdiction 103
Part II. International Human Rights Law 131
Case Study 5: The Protection of Women from Domestic Violence 132
Case Study 6: Obligations of Corporations 165
Case Study 7: The Right to Truth 195
Part III. International Humanitarian Law 247
Case Study 8: Direct Participation in Hostilities 248
Case Study 9: The Relationship between IHRL and IHL 308
Case Study 10: The Rules of Cyber Warfare 347
Part IV. International Criminal Law 370
Case Study 11: War Crimes in Non-International Armed Conflicts 371
Case Study 12: Universal Jurisdiction 395
Case Study 13: Rape as a War Crime 425
Part V. Law of the Sea 463
Case Study 14: The Equidistance Principle 464
Case Study 15: The Rules for Seabed Mining 488
Case Study 16: Port State Measures Against IUU Fishing 520
Part VI. International Environmental Law 551
Case Study 17: The Human Right to a ‘Good’ Environment 552
Case Study 18: CITES and the Changing Definition of Conservation 586
Case Study 19: The Precautionary Principle 615
Part VII. International Trade Law 663
Case Study 20: General exceptions under GATT Article XX 664
Case Study 21: Subsidies and the Definition of “Public Bodies” 685
Case Study 22: Differentiated treatment in the GATT System 704

Electronic copy available at: https://ssrn.com/abstract=4430270

Part VIII. International Investment Law 731
Case Study 23: The Definition of Investment 732
Case Study 24: The Doctrine of Police Powers in Indirect Expropriation 783
Case Study 25: The Development of Fair and Equitable Treatment 827
ANNEX. List of Potential Case Studies 863

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Introduction

What does it take for legal rules to change? In the context of national law, the answer is usually straightforward: domestic legislation is produced, amended, or derogated through a constitutionally established procedure. If one poses the same question in the context of international law, however, the picture is significantly less clear. Formal procedures exist too – treaty amendment procedures, for instance – but these are few and entail political hurdles that make them unavailable most of the time. Customary law would seem to provide, at least in theory, an alternative, more dynamic, route. Yet customary rules, traditionally understood, require widespread, consistent, and practically uniform practice of states, something that happens only exceptionally – if it ever does.[1] With little else left in the catalogue of formal sources, one would seem to be cornered to admit that international law is for the most part a static, highly impermeable legal order.

E pur si muove. International law is certainly not static. International rules are in flux, mostly through mechanisms which escape these formalistic understandings. Many areas of international law and many specific international norms change on a regular basis by means of jurisprudence, resolutions, expert body reports, and other means. Arguments and forms of argumentation evolve constantly. Take the law on state responsibility, for example. No treaty on state responsibility has ever seen the light, and yet a pre-WWII international lawyer would not be able to recognise this body of law today. Shifts have taken place at all levels in the past 80 years. But even in areas where comprehensive treaty-making has actually taken place – usually at immense diplomatic costs – the more fine-grained meaning of international rules keeps fluctuating through interpretive change. The law of the sea or the law of treaties faithfully attest to this.

The Paths Project set out in early 2018 precisely to explore how and when international law changes. This compilation brings together the 25 case studies conducted within this framework, written from October 2018 to December 2021 by Ezgi Yildiz, Pedro Martínez Esponda, Dorothea Endres, and Nina Kiderlin, under the direction of Prof. Nico Krisch at the Global Governance Center of the Geneva Graduate Institute. The main purpose behind these case studies was to test

[1] United Nations, Report of the International Law Commission 2018, UN Doc. A/73/10, 137

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the different working hypotheses of the project and to provide empirical information on how change happens in international law, as a way to then articulate broader theoretical accounts around change processes in international law. These broader accounts constitute the main outputs of the project and will take the form of one edited volume, *The Many Paths of Change in International Law,* to be published by OUP in 2023, as well as a co-authored, forthcoming book: *Paths of International Law.* This compilation is meant as a complement to these works, providing the readers access to the empirical base of the project.

The case-study approach is a central feature of the Paths Project and one of its main contributions to the scholarly work on the issue of change. As conducted here, the case studies consist fundamentally of in-depth historical and analytical accounts of the trajectory of individual rules of international law. The focus is therefore on the basic unit of legal change: singular, specific international norms. This perspective seeks to first explain shifts at the micro/mezzo level to then zoom out and make conjectures about the systemic, macro level. We have not attempted to cover all forms of norm change in international law, however. The focus has been on interpretive and customary change over outright treaty-making, a phenomenon on which there already exists an important body of literature. This has left us with a sample of complex but deeply insightful empirical studies on topics in which the dynamics of change are not self-evident and often defy the formalistic logic of traditional international legal thinking. This is what the reader will find in this compilation.

The 25 case studies cover eight issue areas of international law: General International Law (GIL), International Human Rights Law (IHRL), International Humanitarian Law (IHL), International Criminal Law (ICL), International Trade Law (ITL), International Investment Law (IIL), International Environmental Law (IEL), and the Law of the Sea (LoS). For each issue area, three case studies were conducted, with the exception of GIL, which included four case studies. While this is certainly only a selection of the universe of possible subareas of international law, we deemed these eight to cover a fair, reasonably representative, part of the discipline. This approach also allowed us to study variation across issue areas and observe the different constellations of paths of change that exist in each of them.

The following two sections outline the criteria of case selection and the methodology used in the case studies, before presenting the compilation of case studies proper. More insights on these

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matters as well as on the findings of the project can be found in *Paths of Change in International Law*.

Case selection

The 25 case studies in this compilation were elaborated for the most part in six phases throughout roughly three years. These phases are reflected in the order in which the case studies are presented in this work. However, before the actual research and drafting of case studies began, we spent some four months creating pools of possible case studies from which to select the 25 that would form part of the final sample. This was done mainly by examining textbooks and other relevant academic materials on each issue area, screening instances where indices of norm change existed – whether explicitly mentioned or not by their authors – and elaborating one-page reports on the main aspects of each potential case study.[2] This yielded a pool of 114 summary reports; 18 for GIL, 22 for IHRL, 12 for IHL, 12 for ICL, 10 for ITL, 12 for IIL, 17 for IEL, and 10 for LoS.[3]

The selection of 25 case studies out of these 114 was done on the basis of three main criteria. First, we were interested in the timeframe in which these change episodes materialized. The aim was to cover different periods, seeking to capture shifts and patters in change dynamics within each issue area. For example, we made sure to include change episodes that materialized before and after the 1990s and the 2000s. This was less plausible in areas which have observed most of their dynamism in recent decades, like IIL or ICL. Here, expanding the lens to the pre-1990 era could have produced a misleading picture, given the radical changes that have taken place since the 1990s. In most other areas, however, casting a broad temporal net not only made sense but was an analytical necessity.

[2] In addition to the classical works such as Malcolm D. Evans, ed., *International Law*, 3rd ed (Oxford: Oxford University Press, 2010); Malcolm N. Shaw, *International Law* (Cambridge University Press, 2017), we also looked at the specialized text books. We examined, for example, Lavanya Rajamani and Jacqueline Peel, eds., *The Oxford Handbook of International Environmental Law*, 2nd edition (Oxford: Oxford University Press, 2021); Donald R. Rothwell et al., eds., *The Oxford Handbook of the Law of the Sea*, 1st edition (Oxford: Oxford University Press, 2017); Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, Reprint edition (Oxford: Oxford University Press, 2015); Peter Muchlinski, Federico Ortino, and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008); Andrew Clapham and Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014).

[3] See the Annex for a full list of these summary reports.

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The second selection criterion was the cases' representativity of the dynamics of change in each field. We, therefore, adopted a *typical* case research design.[4] This was suitable for the purposes of probing causal mechanisms at work, which is one of the project's central aims.[5] For example, in IHL we chose the following cases: a) the meaning of 'direct participation in hostilities'; b) the rule governing the relationship between IHL and IHRL; and c) the development of rules on cyber warfare. These three instances of change go from the very specific executive type of rule to the more principle-type distributive rule, and to then the incipient development of a sub-regime within IHL. This variation allowed for observing norm change dynamics at different levels, involving different actors and stakeholders, and involving different stakes. The same was attempted in the other issue areas. To be sure, three cases cannot give a fully representative picture of an issue area, but the selection aimed at the maximum degree of representativity within the human, financial, and temporal limitations of the project.

Finally, the third selection criterion was the existence of some variation on our dependent variable, namely the degree of success in change attempts (i.e., change in the burden of argument). A caveat is needed here, however. Since we identified the population of cases through an assessment of the textbooks and academic literature, our sample generally reflects a greater number of successful change attempts. This is because textbooks tend to focus on successful change episodes and overlook unsuccessful ones – and also beyond textbooks, the latter remain heavily underreported and are often difficult to identify. Thus, our population and the ultimate sample included more cases where overall it can be said that the change attempt was successful. Yet, when seen in a less binary fashion and more as a spectrum, ranging from fully unsuccessful to fully successful, our sample reflects great diversity. Most cases observe some degree of shift in the burden of argument surrounding a given rule and thus change, but the path from there to higher levels of consolidation varies widely. Since our focus is set precisely on understanding the conditions that determine this consolidation, variation is of great analytical value.

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[4] Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences*, Fourth Printing edition (Cambridge, Mass: The MIT Press, 2005).
[5] Jason Seawright and John Gerring, "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options," *Political Research Quarterly* 61, no. 2 (June 1, 2008): 299–300.

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Methodology

The case studies consist fundamentally of an in-depth genealogical and analytical account of the trajectory of an individual rule of international law. Each had a more or less similar length, usually between 8'000 and 12'000 words, and a similar narrative structure, usually divided in two main sections. First, a chronological reconstruction of the change attempt's trajectory, and second an analysis of several theoretical aspects of the case, meant to provide information on the features of the process and on the conditions that favored or obstructed change. A third, complementary section outlined the features that the drafter of the case study deemed to be specific to the given attempt and particularly revealing of change dynamics.

The chronological reconstruction required a close assessment of relevant primary and secondary resources and occasional background interviews. Crucial in this effort was to cast a wide net when looking at the literature on a given topic. More than extracting a 'correct' account of a given instance of legal change, the purpose was to assess *all* the existing accounts, or as many as possible, as a way to understand the different perspectives and get an idea of the discursive trajectory of a rule throughout time. As does for primary sources, our research required us going beyond resolutions or judgements and looking into debates, *travaux*, separate and dissenting opinions, reports by international organizations or agencies, expert opinions, and similar materials. The degree of archival research that we undertook often depended on the nature of the topic, some matters being more convoluted and complex than others. Most primary sources were accessed through online public databases, for instance the UN Women database in the case study on domestic violence, or the UN Office of Legal Affairs' Division for Ocean Affairs and the Law of the Sea's database in the case on the continental shelf.

The analytical part of the case studies, for its part, follows a three-pronged framework that divides the theoretical elements emerging from the chronology in three stages: *selection*, *construction*, and *reception* (SCR framework). These are not chronological but merely analytical – although some element of temporality is usually visible. In the selection stage, the focus is on the processes whereby actors activate a certain pathway or pathways to realize their vision of change. In the construction stage, actors and authorities associated with a particular pathway process the change attempts and generate statements about the status of the norm in question. Finally, in the

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reception stage, the outcome of the construction stage is appraised by a broader range of actors; change attempts are accepted, partially accepted, or rejected.

In conducting this analysis, the case studies discuss a number of elements that fall into this SCR framework. The first one is the pathways through which change transits. Each field produces different forms of authority and different practices that shape the dynamics of legal change within them. We identify five main, ideal-typical pathways present in different contexts, whose prominence and operation vary from one issue area to another:

1. The *state action path*. Here, change is identified when states modify their behaviour and make corresponding statements, as in the traditional image of change in customary international law and subsequent practice to treaties. Authority on this pathway is that of states, and thus success usually depends on building broader consensus.
2. The *multilateral path*. Here, change is generated as a result of statements issued by many states within the framework of an international organization. It relies on the collective authority of states, but also the institutional authority of the organization that serves as a forum. Change attempts on this path are typically realized by means of the introduction of new ideas via declarations and soft law materials as well as the adoption of formal treaties, which might shift opinion on customary rules or the interpretation of existing agreements even if they are not universally ratified.
3. The *bureaucratic path*. Change on this path is identified as the result of decisions or statements produced by international organizations in contexts that do not involve the direct participation of states in the decision-making processes. It relies on delegated authority or bureaucratic authority deriving from expertise, capacity, and procedures, though it might also reflect principled (moral) authority. It typically operates through the production of texts for purposes of clarification and interpretation and thus in a more technical vein.
4. The *judicial path*. Change in this form is recognized as the result of decisions and findings of courts and quasi-judicial bodies. It relies on judicial expert authority and often also on the delegation from states. Change typically comes about through mechanisms of (broader or narrower) interpretation or channelling of views expressed in other legal instruments (both soft and hard) – without open claims to effecting change.
5. The *private authority path*. Change in this modality follows statements or reports by recognized authorities in a private capacity without a clear affiliation to or mandate from

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states or international organizations. This path's claim to legitimacy is built upon authority from expertise, capacity or principle, and potentially also on inclusive procedures.

The second important element that the SCR framework traces is the type of change involved. We understand by change any modification of the burden of argument for a particular position on the content of the law.[6] Because this understanding goes beyond a monolithic conception of change that sees legal change as the replacement of one norm with another, we focus on three types of change: norm emergence, norm death, and norm adjustment. The first two hardly need an explanation: norm emergence is the creation of a new norm in the international legal order, while inverse process, norm death, happens when a norm disappears from the international legal universe. Norm adjustment, for its part, happens where a given norm has a certain scope or meaning a given point in time but a later point a shift in this scope or meaning is observable.[7] A subtype of norm adjustment that we also trace is paradigm shift, where change goes beyond single norms and has more far-reaching, systemic effects and transforms the orientation of a field.

In addition to *types* and *pathways*, we study several factors that we argue operate as conditions for change. These include *state positions*, *norm properties*, *institutional availability/support*, *discursive openings*, and *salience/stakes*.

The *positions of states* around a specific norm change attempt are relevant given the systemic role that states continue to play in international law. Most observers would in this sense assume that the success of change in international legal norms depends in large part on how strongly it is supported and opposed by states – a view that is deeply rooted in the voluntarist tradition behind the doctrine of sources.[8] This project takes a step back and seeks to assess the extent to which this apparent systemic feature of international law is empirically observable or not. Therefore, in their analysis of change, the case studies inquire, as much as time and resources allowed, about the pronouncements and practices of states.

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[6] This account of legal change goes back to a suggestion in Ingo Venzke, 'What Makes for a Valid Legal Argument?' (2014) 27 Leiden Journal of International Law 811.
[7] For an account on the modes of interpretive norm adjustment, see Ezgi Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights' (2020) 31 European Journal of International Law 73.
[8] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 The American Journal of International Law 757.

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The *properties of the norm* in question are also elements that might influence the likelihood of change attempts' success.[9] These concern in the first place the stability of prior understandings. We hypothesize that the more settled and uncontested an existing interpretation is, the higher the threshold for change. If, on the other hand, competing interpretations are already in circulation, even if they are not dominant, change efforts can take them as a base to further destabilize the existing norm and its interpretation. The proximity of a proposed new norm or interpretation to existing ones is then likely to be a significant factor.[10] The case studies, therefore, seek to gather evidence to test these hypotheses.

Similarly, we conjecture that the existence, shape and accessibility of *institutions* and authorities is a crucial factor at play in international norm change.[11] This is because institutions are crucial sources of authority.[12] And unlike domestic legal systems, where lawmaking and interpretive authority is relatively centralized and formalized, in international law these functions are dispersed and lack formal hierarchy. Thus, having access to some institution is – or so we conjecture – a defining element in the success or failure of change attempts. The authoritative endorsement of a change proposal might tilt the balance in favor of success or failure in a given instance. However, authority types differ greatly from one issue area to another, and thus it becomes important in the case studies to assess the institutional landscape in a given context in order to understand the constraints and opportunities norm entrepreneurs face when attempting change.

Another potential conditioning factor pertains to the relation of legal norms with their *ideational environment*. When a gap exists between the two, and especially when it grows suddenly

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[9] E.g., Miriam Bradley, 'Unintended Consequences of Adjacency Claims: The Function and Dysfunction of Analogies between Refugee Protection and IDP Protection in the Work of UNHCR' (2019) 25 Global Governance: A Review of Multilateralism and International Organizations 620.
[10] Finnemore and Sikkink (n 33).
[11] See Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press 2005); Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 International Organization 367.
[12] "Authority" here is understood as deference, in the sense described by Nico Krisch. In this sense, authority is the ability to induce deference, presupposing "a certain degree of freedom to act otherwise and exclud[ing] open coercion as well as forms of structural or productive power [and that] also implies a certain content-independence - a 'surrender of judgment' - that contrasts with acts that result from substantive persuasion". See: Krisch, 'Liquid Authority in Global Governance Symposium: Liquid Authority in Global Governance', 9 *International Theory* (2017) 237 , at 238, 242.

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or over a short time span, pressure towards an adaptation of the law rises. In such circumstances, we would expect international legal change to occur more easily than otherwise. As such, it becomes relevant in the case studies to identify the discursive openings that exist in the trajectory of a norm. Along the same lines, we trace whether in some instances a discursive opening might be of such magnitude and abruptness that it might be considered a *critical juncture*. Here, the choices of the actors involved regarding the paths of change pursued might prove decisive for the fate of the norm change attempt.

Finally, an important – though tricky – element that we seek to assess in the case studies is the *salience/stakes* of the norm in question. We understand this as the degree to which an attempt at norm change attracts attention by high-level policy-makers or public opinion. On an issue with relatively limited salience, we conjecture that change may happen more smoothly, and objections by some states may not appear as too consequential. When it comes to issues with high salience, in contrast, states' engagement is likely to be stronger and they are less likely to stand on the sidelines if change processes concern them.

After discussing these different features, the case studies conclude by making some notes on the particularities observed in the case in question. This could be the prominence of a given pathway, for example, or the particularly sudden unfolding of change. Any element prone to inspire further reflection on why change materialized (or not) in the way outlined in the case study, is likely to be included in this last section.

Outline

The compilation that follows is divided into eight parts, one for each issue area covered. The order in which they are presented is not indicative of any chronological or other precedence. Within each section, in contrast, the three case studies are presented in their order of elaboration, from older to newer. It is important to note that in four sections, the first and earliest case study that the reader will find is what we labelled a 'pilot case study' in the project's methodology and timeline. These four pilots, conducted at the very beginning of the case-study phase of the project from February to June 2019, were chosen at a point in in which the final methodology to be used was still not fully defined. The purpose here was to pick particularly intricate, heterogeneous cases prone to challenge our expectations and therefore suited for initial hypothesis and theory-building before conducting

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the rest of the case studies. It follows from this that they do not strictly follow the methodology discussed above, although they do reflect most of the elements present in it.

The order of the sections in the compilation is the following: 1) GIL; 2) IHRL; 3) IHL; 4) ICL; 5) LoS; 6) IEL; 7) ITL; 8) IEL. The time period of drafting is indicated at the beginning of each case study. This should be kept in mind when reading the case studies, as there might be aspects that have become slightly outdated by the time of publishing. That said, several cases have undergone important revisions after the time of writing, such as *General Exceptions under GATT XX*, *the Meaning of 'Public Bodies' in Subsidies Law*, and *Universal Jurisdiction*.

We hope that the reader will find this compilation insightful. For more detailed information on methodological aspects as well as on the outcomes of the PATHS Project, please refer to *Paths of International Law.*

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Part I.

GENERAL INTERNATIONAL LAW

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Case Study 1

The International Crimes Exception to Immunity *Ratione Materiae* of State Officials

(February - June 2019)

(Pilot case)

Pedro Martínez Esponda

1. Typical story

The question of whether state officials enjoy immunity from criminal prosecution by foreign jurisdictions for crimes not committed in the territory of the prosecuting state was, throughout the twentieth and previous centuries, absent from academic and judicial debates among international lawyers and within international institutions.[1] Rather, legal debates focused on the issues of state immunity and, less controversially, on diplomatic immunities. On the former, international legal thought and practice gradually consolidated around the notion of relative state immunity, under which states themselves enjoy immunity before foreign courts, except with regard to acts of a private law character. On diplomatic immunities, the Vienna Convention on Diplomatic Relations of 1961 codified the customary rules of absolute immunity *ratione personae* and relative immunity *ratione materiae*, whereby a diplomatic agent enjoys complete penal immunity from the jurisdiction of the receiving country during the time of his or her appointment, but ceases to be immune when having left the post, being prone to prosecution in respect of acts undertaken in a private capacity during his or her tenure. Yet, with regard to non-diplomatic state official immunity,

[1] See, for example, how the immunity of foreign state officials was simply described as being absolute in : J. Bénezet, *Etude Théorique Sur Les Immunités Diplomatiques* (1901), at 23; R. J. Dupuy, *Le Droit International* (1966), at 31; D. A. Retortillo y Tornos, D. M. Colón y Cardany and P. P. Gómez, *Vocabulario de Derecho Internacional Público* (1910), at 121; Reynaud, 'Les Relations et Immunités Diplomatiques', 36 *Revue de Droit International de Sciences Diplomatiques et Politiques* (1958) , at 425.

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no equivalent notion can be said to have developed at the time, neither in customary nor conventional international law. The issue seems to have been simply inexistent.

This radically changed in the last years of the twentieth century. As will be discussed in the next section, the topic became an inescapable component of any discussion about immunities, whether academic or institutional. Yet, authors, institutions, and states, when addressing the immunities of state officials from criminal prosecution by foreign jurisdictions, usually refrained from treating it as novel. Rather, they seem to have dealt with it as an extension of the previous debates on state and diplomatic immunities, and as such tended to import underlying dichotomy of immunity *ratione personae* and *ratione materiae* to address it. Under this rationale, acts performed in an official or public capacity would enjoy absolute immunity, whereas acts performed in a private capacity would not. However – and here is where the shift of interest in this case study lies – the *Institut de droit international* (IDI), several authors, and eventually the International Law Commission (ILC)[2], became of the view that, at least for the purpose of criminal prosecution, international crimes should not be considered covered by immunities *ratione materiae*, thus allowing prosecution once the state official is no longer in office and his or her immunities *ratione personae* no longer apply.[3] The novel element was precisely that: to consider that international crimes, which had been traditionally understood to be linked to the operation of the state apparatus, could no longer be considered to be covered by immunity *ratione materiae*, either because they were not acts undertaken in an official capacity, or because their normative hierarchy, based on *jus cogens*, would trump immunity *ratione materiae*.[4]

What triggered these changes at the end of the nineties? Why did the topic of immunity of former state officials from criminal prosecution by foreign courts transited from being wholly ignored by institutions and academics to being an unavoidable component of any discussion on immunities? And why and to what extent did the mainstream views on the matter progressively adopt an

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[2] Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *European Journal of International Law* (1999) , at 265; Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights', in B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (1997) , at 53.

[3] See next section for a deeper discussion on the IDI's and ILC's views.

[4] See also the highly influential joint separate opinion on the *Arrest Warrant* case by judges Higgins, Kooijmans, and Buergenthal: ICJ, *Joint Separate Opinion by Judges Higgins, Kooijmans, and Buergenthal (Arrest Warrant Case)*, 2002, at 85.

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expansive approach on exceptions to immunity – that is, one considering international crimes to be an exception to the rule of immunity *ratione materiae*?

The first part of the answer to these questions is strictly historical. Two cases with far-reaching effects put the issue on the spotlight around the turn of the millennium: *Pinochet* before the UK House of Lords in 1998, and *Arrest Warrant* before the ICJ in 2002. In *Pinochet,* the extradition from the UK of Augusto Pinochet, the former dictator of Chile, was being requested by Spain to prosecute him for torture, and he sought to prevent that by resorting to British courts. In *Arrest Warrant*, Belgium had issued an arrest warrant against the incumbent minister of foreign affairs of the DRC for war crimes and crimes against humanity, and DRC initiated proceedings before the ICJ under the argument that such action violated the international immunities owed to such high officials. Independently of their outcome,[5] these two cases had the double effect of, first, calling the attention of the general public and the media over the topic of immunities of state officials, and second, of articulating the dogmatic debates on the matter along the lines of immunity *ratione materiae* and thus putting at the centre of the discussion the distinction between acts undertaken in an official and in a private capacity. In other words, the far-reaching public and academic interest that these cases triggered made it highly complicated for international lawyers both to overlook the topic anymore, and to frame it in a different way.

As to the typical story about why these changes transpired, one can see roughly one main type of argument among those who acknowledge that change actually did take place: that international human rights law (IHRL) and international criminal law (ICL) have developed to such an extent and acquired such a normative and ethical prevalence in international law that they have, as Cassese put it, "shattered the shield that traditionally protected state agents acting in their official capacity".[6] In other words, the recurring account seems to be that the deepening of the embeddedness of IHRL and ICL on general international law has, for hierarchical reasons, limited the scope of the rules on

[5] On the substantive issue of immunities, the *Pinochet* decision was of limited relevance because the House of Lords addressed head-of-state immunities not as a matter of general international law, but as a question within the specific regime of the Torture Convention, interpreted by the Lords as implying a tacit waiver to immunity. As concerns the *Arrest Warrant* case, the Court ruled that an incumbent minister of foreign affairs enjoys full immunity *ratione personae* during the time of his or her appointment. However, its highly influential *dictum* in paragraph 61 of the judgement, the ICJ explained that once the officer has ceased official functions, he or she could be tried "in respect of acts committed during [the period in office] in a private capacity".

[6] A. Cassese, *International Criminal Law* (2003), at 271.

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immunities. Along these lines, Joanne Foakes explains the change as a reflex of international law to accommodate the needs and demands of actors other than states, through the development of human rights and international criminal law.[7] Sam Lyes does it by contending that the emergence of rules protecting “fundamental values of the international community” – *jus cogens* rules – relegates the rules of immunity in terms of normative hierarchy.[8] Annyssa Bellal argues that the change is guided by the evolution of international law towards the fight against impunity for the most serious crimes.[9] Olasolo, Martínez and Rodríguez say that at the heart of the change in the rules of immunity lies a process of humanization of international law whereby its centre of gravity slowly shifted from state interest to the protection of individuals.[10] Brigitte Stern takes a more nuanced position, linking the evolution in the rules on immunity to the development of universal jurisdiction in international law.[11]

Such is also the account that the ILC’s Special Rapporteur on the topic of immunity of state officials from foreign criminal jurisdiction, Concepción Escobar Hernández, seems to provide in her Fifth Report. According to her, at the origin of the change lies the concern of the international community for international crimes, which saw the day as a legal manifestation of the convergence of humankind on certain fundamental values, norms, and legal principles; *jus cogens* norms.[12] Similarly, she explains that the consolidation of IHRL and ICL has yielded a legal dimension to the concept of impunity, which has translated into principles that trump certain immunities at a substantive level when confronted with international crimes.[13] The Special Rapporteur also conducts a relatively large study of immunities in the practice of states and concludes that customary international law avows for an exemption to immunities *ratione materiae.*[14]

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[7] J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (2014), at 2.
[8] S. Lyes, *Crimes Internationaux et Immunité de l’acte de Fonction Des Anciens Dirigeants Étatiques* (2015), at 7.
[9] Clapham, 'Préface', in A. Bellal (ed.), *Immunités et Violations Graves Des Droits Humains: Vers Une Évolution Structurelle de l’ordre Juridique International?* (2011) , at 237.
[10] Olasolo Alonso, Martínez Vargas and Rodríguez Polanía, 'La Inmunidad de Jurisdicción Penal Por Crímenes Internacionales de Los Jefes de Estado, Los Jefes de Gobierno y Los Ministros de Asuntos Exteriores', 43 *Revista Chilena de Derecho* (2016) 251 , at 253.
[11] Stern, 'Immunities for Heads of State: Where Do We Stand?', in M. Lattimer and P. Sands (eds.), *Justice for Crimes against Humanity* (2006) , at 95.
[12] ILC, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, Sixty-eighth session (2016), at 191.
[13] *Ibid.*, at 194, 195, 205.
[14] *Ibid.*, at 22–140.

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Quite clearly, however, this line of argument is widely contested. Several authors share the perception that IHRL and ICL have developed significantly, but argue that there is no good reason to think that this evolution has had any bearing on the rules of immunities of former state officials. One such author is Rosanne Van Alebeek, who contends that "the clash between obligations owed to foreign states under the law of state immunity (…) and the obligation to protect the rights and interest of private individuals under IHRL did not change the law of state immunity as such but urged states to change the law".[15] Xiaodong Yang, resonating that position, acknowledges the developments in international law with regard to the consolidation of *jus cogens* around some human rights, but reaches the conclusion that "violations of international law, even of *jus cogens* norms, cannot automatically strip a State of immunity before a domestic court".[16] Lady Hazel Fox – one of the leading academic voices on immunities in international law – also considers that "the *Pinochet* judgment has not led to the development of a general exception to immunity *ratione materiae* for grave human rights violations", under similar arguments.[17]

2. Type of change

As explained above, the international crimes exception to immunity *ratione materiae* of former state officials in domestic criminal procedures involved two changes. On the one hand, the emergence of non-diplomatic state official immunity as a topic in international law and, on the other, the purported shift towards a restrictive approach excluding international crimes from immunity.

At first sight, the first of these changes looks like straightforward norm emergence. Indeed, a comparison of the pre and post-2000 editions of three leading international law text books reflects this; they seem to come close to the issue, but then refrain from engaging with it in any way. Brownlie's 5th edition of his *Principles of Public International Law* of 1998 discusses the issue of crimes committed by former diplomatic and consular agents recalling article 39 of the Vienna

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[15] R. van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), at 5.
[16] X. Yang, *State Immunity in International Law* (2012), at 440.
[17] Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', in M. D. Evans (ed.), *International Law* 3rd ed (2010) , at 552.

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Convention on Diplomatic Relations, which establishes that "with respect to acts performed by [a diplomat] in the exercise of his functions as a member of the mission, immunity shall continue to subsist [after his appointment has ended]". He falls short, however, of questioning what would happen to non-diplomatic state officials in criminal cases.[18] The 4th edition of Shaw's *International Law* of 1997, when addressing the topic of state immunity, mentions the cases of Marcos and Noriega – former heads of state of the Philippines and Panama, respectively, who were sued before US courts for human rights violations. He explains that they did not enjoy immunity in the proceedings because their respective governments had either waived the immunity or did not enjoy the US' recognition, but Shaw says nothing about the possibility of criminal prosecution, as opposed to suits in tort.[19] Finally, Daillier and Pellet, in the 5th edition of *Nguyen Quoc Dinh, Droit International Public*, of 1994, limit their discussion to state immunities and those of diplomatic and consular staff. They do say, nonetheless, when referring to state immunity, that "seules se verront accorder l'immunité les activités spécifiquement publiques, notion qui correspond […] à celles d'actes de puissance publique".[20] Nonetheless, like Shaw, what they have in mind is state immunity generally and in the context of civil suits, not criminal prosecution of high state-officials. Now, if one looks at the post-2000 editions of the three books, they all add sections – without taking a clear stance on the matter – discussing the immunity of non-diplomatic state officials from prosecution in cases involving international crimes.[21]

At the IDI and the ILC, a similar phenomenon took place. For over a century, the IDI exclusively dealt with the issue of state immunity[22], yet in its session of Vancouver it adopted a resolution expressly saying that former heads of state "may be prosecuted and tried when the acts alleged constitute a crime under international law",[23] and then in its session of Naples it adopted another

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[18] I. Brownlie, *Principles of Public International Law* (5th ed, 1998), at 361.
[19] M. N. Shaw, *International Law* (4th ed, 1997), at 514, 515.
[20] Nguyen Quoc Dinh, A. Pellet and P. Daillier, *Droit International Public* (5e éd, 1994), at 434.
[21] I. Brownlie, *Principles of Public International Law* (6th ed, 2003), at 573; M. N. Shaw, *International Law* (5th ed, 2003), at 658; Nguyen Quoc Dinh, A. Pellet and P. Daillier, *Droit International Public* (8e éd, 2008), at 501.
[22] In a remarkably early pronouncement on the matter, the IDI framed the rules of state immunity in its session of Hamburg in 1891 as only allowing civil claims for matters where the state acted in a private capacity, and not for actes de souveraineté, adding in article 6 that the same goes for sovereigns and foreign *chefs d'Etat*. Then, in its only resolutions on immunities during the entire twentieth century – those of Aix-en-Provence of 1954 and Basel in 1991 – the IDI confirmed this relative approach to state immunity, without any reference to heads of state or state officials.
[23] Institut de droit international, Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Vancouver Session), 26 August 2001, article 13.

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one establishing that "no immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes".[24] At the ILC, a working group studying the issue of immunities of states and their property existed since 1977, not touching at all upon non-diplomatic state-official immunities. Then, in 2007, it added the topic of "immunity of state officials from foreign criminal jurisdiction" to its programme of work.

The labelling of this phenomenon as norm emergence is nevertheless troublesome. Assuredly, the subject was basically absent until around 2000. But then, when it came up, authors and institutions tended to treat it as a natural, non-novel extension of state and diplomatic immunities. As such, when the issue of immunities of former state officials popped-up in courts, literature, and in the agenda of different institutions, the tendency was to see it as governed by the logic of state and diplomatic immunities. The first reports by the ILC on the issue are a great example of this,[25] as is the *Arrest Warrant* judgment.[26] They casually refer to the matter as if it had already existed before, and they do so because they ground it in something that was indeed already there: the dichotomy of official and private acts, which translated into the categories of immunity *ratione personae* and immunity *ratione materiae*. Rather than the emergence of rules in the field, what came to be perceived as innovative after the topic's irruption in international law, was the position that construed international crimes as an exception to immunity either because of the non-official nature of the acts involving their commission, or because of normative hierarchy. This change is therefore better understood as norm adjustment, and not as norm emergence.

Such a shift is observable in the stark contrast between the rationale employed by the first ILC Special Rapporteur on immunity of state officials from foreign criminal jurisdiction, Roman Anatolevich Kolodkin, and his above-cited successor, Escobar Hernández. While Kolodkin

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[24] Institut de droit international, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes (Naples Session), 2009, article III.

[25] ILC, *Preliminary Report on Immunity of State Offcials from Foreign Criminal Jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur*, A/CN.4/601 (2008), at 78–83; *Second Report on Immunity of State Offcials from Foreign Criminal Jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur*, A/CN.4/631 (2010), at 21–24.

[26] In *Arrest Warrant*, the ICJ says in paragraph 52 that the conventions cited by the parties to argue about the immunities of the Ministers of Foreign Affairs "do not (…) contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs" and continues to say that "it is consequently on the basis of customary international law that the Court must decide the questions". Yet, when stating what it considers to be the customary law on the matter, in paragraphs 53 and 61, it asserts rather than proves that the said rules exist.

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strongly objects the characterisation of international crimes as private acts, contending that "the very possibility of performing illegal acts on a large scale arises for State officials only by virtue of the fact that they are backed by the State",[27] Escobar Hernández claims that state practice tends to exclude their public or official character, and that in any case the *jus cogens* nature of the prohibition of international crimes makes way for an exception to the rules on immunity.[28] This view was reflected in the text of draft article 7 of the matter provisionally adopted by the Commission,[29] although it raised opposition within the ILC members, the Sixth Committee of the General Assembly, and scholars.[30]

3. Pace and mode of change

It has already been mentioned that the *Pinochet* and the *Arrest Warrant* cases played a major role in bringing the question of the immunities of former high-ranking state officials into public debate. They opened the epistemic "stage" for the matter to become an issue in the eyes of international lawyers, and they laid the ground for different approaches to become plausible, including the consideration of international crimes as excluding immunity *ratione materiae,* either because of their non-public nature or because of normative hierarchy. In this sense, it seems accurate to understand *Pinochet* and *Arrest Warrant* as key breaking points that brought about abrupt change on the law of immunities.[31]

This said, it would be misleading not to balance in the fact that international law had been moving in this direction before those cases, and that, as a matter of fact, it was these previous "movements" in international law that made it possible for *Pinochet* and *Arrest Warrant* to happen in the first

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[27] ILC, *supra* note 25, at 61.
[28] ILC, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, Sixty-eighth session (2016), at 179, 191, 192, 219.
[29] ILC, *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur*, Sixty-eighth session (2018), Draft Article 7.
[30] Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. D. Evans (ed.), *International Law* 5th ed (2018) , at 376; d'Argent, 'Immunity of State Officials and the Obligation to Prosecute', in A. Peters (ed.), *Immunities in the Age of Global Constitutionalism* (2015) , at 252; Franey, 'Immunity from the Criminal Jurisdiction of National Courts', in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (2015) , at 242.
[31] Different authors agree on the key role played by these two cases. See: Alebeek, *supra* note 14, at 1; Clapham, *supra* note 8, at IX; Drumbl, 'Immunities and Exceptions', in M. S. Basyūnī (ed.), *International Criminal Law* 3rd ed.. (2008) , at 238–242; Stern, *supra* note 10, at 73; Yang, *supra* note 15, at 436, 437.

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place. On the one hand, international criminal law saw great developments throughout the twentieth century. From the post-war Nuremberg and Tokyo tribunals, to the creation of the two *ad-hoc* international criminal tribunals and the International Criminal Court (ICC), prosecuting international crimes became a hot topic. This triggered for the first time debates and jurisprudence about the hierarchy of international crimes and their relation to immunities, albeit in the context of international criminal jurisdictions.[32] On the other hand, significant discursive space had been opened since at least the adoption of article 64 of the Vienna Convention on the Law of Treaties in 1969 and the ICJ's famous *dictum* in paragraph 33 of the *Barcelona Traction* judgment, which mainstreamed the notions of *jus cogens* and *erga omnes* norms into international legal thinking. This explains why several states, such as Spain and Belgium – the prosecuting states in *Pinochet* and *Arrest Warrant* – felt empowered to enact legislation to prosecute international crimes under universal jurisdiction, disregarding any traditional understanding of immunities.

After *Pinochet* and *Arrest Warrant*, however, the pace of change seems to have become more gradual. The view that international crimes fall out of the scope of immunity *ratione materiae*, either because of their purported non-public character, or because of normative hierarchy, slowly gained terrain. While many authors still objected – and object – the shift, many others increasingly acknowledged it. Shaw, for instance, in the 2018 edition of his *International Law*, claims timidly that "the definition of official acts is somewhat unclear, but it is suggested that it would exclude acts done in clear violation of international law".[33] Others, like Cassese, straightforwardly acknowledge the change as a finished business: "as stated, international law obliges national and international jurisdiction to set aside any functional immunity the accused may invoke as a defence, any time he is charged with an international crime".[34] Crawford, more conservatively, says in the 2012 edition of Brownlie's *Principles of International Law* that "whether functional immunity still applies in cases where state officials have been accused of violations of international criminal law

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[32] Stern, *supra* note 11, at 73.
[33] M. N. Shaw, *International Law* (8th ed, 2018), at 557.
[34] A. Cassese, *Cassese's International Criminal Law* (3rd ed. / revised by Antonio Cassese, Paola Gaeta ... [et al.], 2013), available at http://data.rero.ch/01-R007184471/html?view=GE_V1 (last visited 23 April 2019], at 320.

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is controversial. While some have argued that customary international law lifts immunity for international crimes, the weight of national practice does not currently support this".[35]

But the slow shift towards the broadening of the acceptance of the restrictive view on immunities is better reflected in the evolution of the topic within the ILC. It was mentioned above how the position of Roman Anatolevich Kolodkin, the first Special Rapporteur on the matter, was overturned by his successor, Concepción Escobar Sánchez. In fact, draft article 7, as originally proposed by Escobar Sánchez in her fifth report – and which pretended to establish that immunity does not apply to international crimes, corruption-related crimes and serious territorial torts – was so controversial that it was first rejected at the 3365th meeting of the Commission, in May 2017. The draft had to be revised by the drafting committee, and then it was approved by 21 votes in favour, 8 votes against and 1 abstention, with the following wording: "1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in relation to the following crimes: a) genocide; b) crimes against humanity; c) war crimes; d) the crime of apartheid; e) torture; f) enforced disappearances". This voting record is good evidence of the state of the matter: it remains controversial, but it seems that the burden of argument has shifted to those upholding immunities *ratione materiae* with regard to international crimes.

As does for judicial state practice, it is difficult to have a clear idea of the pace in which it has evolved. In her Fifth Report, Special Rapporteur Escobar Sánchez claimed that, with regard to an exception to immunity *ratione materiae* for international crimes, the positions of states are not uniform, and cites ten cases in which indeed immunities have been set aside, against five cases in which they have not.[36] No conclusion, however, can be extracted about the time-lapses during which these cases happened. Yet, it must be said that recent developments suggest that the pace of change might be speeding-up again. Several European states – notably France and Germany – have since around 2017 started to attempt to prosecute Syrian state officials for international crimes committed during the civil war, adopting restrictive views on immunity *ratione materiae* and considering that international crimes constitute an exception to it.[37] With all, it seems to be the case

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[35] J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), at 688.
[36] ILC, *supra* note 11, see footnotes 230, 239.
[37] See, for example, the General Assembly's resolution establishing a mechanism to assist states in the prosecution of international criminals acting in the context of the civil war: *UN General Assembly, Resolution 71/248 - International,*

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that, for most of the time, the debate and the purported change have happened mostly within academic circles and at both the IDI and the ILC, and not so much at the level of national jurisdictions.

4. Salience

On a first approach, it would seem that the issue of immunities *ratione materia* of former state officers is one associated with core state interests, and thus that it is one of high salience. Having foreign domestic courts prosecute the state officials of other states, especially for international crimes, involves high stakes in international politics because it implies the possibility of adjudication by one state of the domestic or foreign policies of another state, and carries with it a high risk of politicization of justice. Quite clearly, what is at stake are the principles of sovereign equality, *par in parem non habet imperium*, and non-intervention. Several Lords noted this critical dimension of the issue in *Pinochet,*[38] as did Judges Higgins, Kooijmans, and Buergenthal in their famous joint separate opinion in *Arrest Warrant,*[39] the ICJ itself in *Jurisdictional Immunities* – although when dealing with state immunity[40] – and former ILC's special rapporteur Kolodkin.[41] One would have to add to that the fact that, as in *Pinochet* and *Arrest Warrant*, judicial discussions of immunities *ratione materiae* very often involve former high-ranking state officials, such as heads of state. This undoubtedly tunes the salience of the matter to a still higher pitch.

This high salience is confirmed by the attitudes of states in relation to immunities, which can be observed in the discussions at the Sixth Committee of the General Assembly on the works of the ILC. During 2018, when Committee discussed the fifth and sixth reports of Special Rapporteur Escobar Sánchez, most of the delegations that spoke at the meetings – representing different geopolitical affiliations – expressed the concern that, indeed, the acceptance of an exception to

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Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.

[38] UK House of Lords, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. [1999] UKHL 17*, 1999. See the rulings of Lords Phillips of Worth Matravers and Millett.

[39] , *supra* note 4, at 5.

[40] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) (Judgment)*, 3 February 2012, at 57.

[41] ILC, *supra* note 25, at 96.

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immunity *ratione materiae* based on international crimes endangered sovereign equality and, more generally, the "stability of international relations". Among others, such views were held by Poland, Peru, Sudan, Sweden, Singapore, Mexico, Ireland, Thailand, Azerbaijan, Russia, Israel, Germany and Iran, which are the majority of the states that took the floor to express positions.[42] All in all, however, many of these and other countries supported the international crimes exception to immunity *ratione materiae*, in spite of their concerns.[43]

Parallel to this apparent high salience at the level of state interests is the salience immunities have before the general public. The topic would seem to have, here too, a relatively high salience. In the eyes of the general public the issue is one of impunity, and when it comes to international crimes such as genocide or torture – around which a thick narrative of heinousness and global outrage has been built in the last century – impunity through immunity takes a high political toll before the general public. So much that, in *Arrest Warrant*, the ICJ went at length to explain, in its highly apologetic and technically unnecessary paragraph 60, how "the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed".[44] The media coverage of this affair evidences that the ICJ was not wrong in its assessment of the sensitivities of the matter before public opinion: three days after the release of the judgment, *Le Monde*'s editorial read "*l'immunité des hommes d'Etat en exercice ne cède que devant des tribunaux internationaux*".[45] Yet, judging from a survey conducted using the advanced search tools in Google, it seems that the media coverage of the issue was not particularly high. Similarly, there seems to have been absolutely no report of the outcome of this case in the New York Times, one of the most important media outlets worldwide. By contrast, the *Pinochet* case was much more in the attention of the media. A search using the New York Times'

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[42] See: Sixth Committee, UN General Assembly, Summary Record of the 28th Meeting (A/C.6/73/SR.28), 10 December 2018; Summary Record of the 29th Meeting (A/C.6/73/SR.29), 10 December 2018; Summary Record of the 30th Meeting (A/C.6/73/SR.30), 6 December 2018.

[43] Sixth Committee, UN General Assembly, Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Seventy-Third Session, Prepared by the Secretariat (A/CN.4/724*), 12 February 2019, para. 65.

[44] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Judgment)*, 2002, at 60, 61.

[45] Trean, 'L'immunité Des Hommes d'Etat En Exercice Ne Cède Que Devant Des Tribunaux Internationaux', (2002) , available at https://www.lemonde.fr/archives/article/2002/02/17/l-immunite-des-hommes-d-etat-en-exercice-ne-cede-que-devant-des-tribunaux-internationaux_4209957_1819218.html?xtmc=yerodia&xtcr=14.

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search engine shows dozens of results, such as the headline: "CHILEAN MILITARY FACES RECKONING FOR ITS DARK PAST".[46]

In conclusion, the salience on the issue of immunity for international crimes seems to be high on both ends of the spectrum of stakeholders. States seem to see it as a threat to stability in international relations, whereas public opinion seems to have a hard time understanding why international law would protect international criminals. This can be characterized as a zero-sum game, where the more one camp is satisfied, the less satisfied the other camp is. This might explain why arguments for immunity are usually grounded on deep technicalities that eschew any moral dimension of the issue, as the ones used by the ICJ in *Arrest Warrant* or by the states arguing against Escobar Sánchez' report – which were based on arguments of insufficiency of state practice. Yet, as seen in the statements of the majority of the states at the Sixth Committee and the members of the ILC during the voting rounds on the draft articles, most seem to be ready to find some type of accommodation, which is what seems to be allowing for this change to slowly gain track. 5. Institutional availability

While the law of immunities is not a field that is articulated around any specific institution or sets of institutions – as could be trade law or human rights – it is an area that has successfully managed to get encroached in the different institutional frameworks available in general international law. It would therefore seem reasonable to say that the institutional availability that the topic of immunity *ratione materia* and international crimes has found is medium to high.

An assessment of institutional availability has to begin by noting how the area of immunities was profoundly destabilized by the *Pinochet* and *Arrest Warrant* cases, as seen before. The first of these cases points to the primary and probably most important venue available for the law of immunities: domestic courts. Because the issue is about domestic jurisdictions prosecuting international crimes, it is rather obvious that national courts are the main institutional avenue available in the field. Nevertheless, domestic courts have a rather reduced authority before the different constituencies of international law, so the fact that this institutional channel is widely available does necessarily

[46] Krauss, 'CHILEAN MILITARY FACES RECKONING FOR ITS DARK PAST', *New York Times* (1999) , available at https://www.nytimes.com/1999/10/03/world/chilean-military-faces-reckoning-for-its-dark-past.html?searchResultPosition=13.

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translate into high institutionalization of the field. As reflected by *Pinochet,* it seems that it takes a highly reputed and visible domestic institution – such as the House of Lords at the time – as well as a case involving high stakes, for domestic courts to enjoy a considerable degree of authority in international law.

International courts might also seem to be an open venue for the matter of immunities, and one enjoying a remarkably high degree of authoritativeness, judging from the *Arrest Warrant* case and other cases dealing with immunities before the ICJ, such as *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* of 2008, *Jurisdictional Immunities (Germany v. Italy)* of 2012 and the ongoing *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*. However, the availability of the ICJ for the settlement of disputes concerning immunities is rather low, given the jurisdictional hurdles that it takes for a case to reach its docket. *Arrest Warrant* was an exceptionally easy case to take before the Court because both of the states concerned had very open optional compulsory jurisdiction clauses under article 36(2) of the ICJ's Statue that allowed for the proceedings to reach the merits phase. But most of the relevant states opposing the change or potentially having high stakes involved – the USA, China, Russia – have basically no optional clause and in general avoid very carefully treaty clauses that could make them prone to the jurisdiction of the ICJ. That makes the availability of the ICJ significantly low.

Other international courts are to a certain extent available. Human rights courts are definitely open venues for issues of immunities, and have been an important one for state immunity – for instance the ECtHR. Yet matters of state official immunity seldom reach their dockets. In addition, their authority in general international law is uncertain, as they their field – human rights – is largely perceived as having relative impact on general international law.[47] As for other international courts, it appears that they are either not available because they deal with areas of international law that have no baring over immunities – such as the law of the sea, or trade law – or because international courts actively drive away potential domestic cases of immunities by making them international, such as the ICC or the now numerous *ad hoc* international or mixed criminal tribunals.

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[47] Lamour, 'Are Human Rights Law Rules "Special"? Study on Interactions Between Human Rights Law Rules and Other International Law Rules', in N. Weiß and J.-M. Thouvenin (eds.), *Influence of Human Rights on International Law* (2015) , at 29.

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Where the issue of immunities *ratione materiae* and the purported exception for international crimes has been vastly dealt with is at the ILC. This has probably been the most important institutional avenue for the topic, and it has unquestionably allowed it to evolve in a way that it would not have done otherwise. With all, one has to take into account the fact that the value of the availability of the ILC for the evolution of this topic has been more in the opening of a forum to have different positions voiced and debated, than in creating an authoritative voice to lead the evolution of the matter. The traditionally high authority enjoyed by the ILC in general international law has been hindered by the fact that the reports pushing for exceptions to immunity *ratione materiae* have been contested and the relevant draft articles not adopted by consensus. Thus one cannot say that the ILC in itself has critically guided the evolution of this topic, but it is undeniable that it has been a key available institution for the development of an exception to immunities for international crimes. The same can be said of the Sixth Committee.

In sum, the institutional availability of the issue in question has mainly relied on domestic courts and the ILC, and exceptionally on the ICJ and other international courts, notably human rights courts. That accounts for a medium to high institutional availability.

5. Pathways of change

The gradual acceptance of an "international crimes" exception to immunity *ratione materiae* of state officials has taken place through the interaction of three paths of change, each of them with different degrees of influence. In an order of ascendant influence, these are state action, courts, and the epistemic community/individual experts path.

The first of these, state action, played a crucial role at the outset of the process of change, but has overall been of limited influence. Some states – like Belgium and Spain – strongly pushed for change towards the end of the last century by enacting legislation on universal jurisdiction and initiating criminal cases against foreigners disregarding immunities. This led, inter alia, to *Pinochet* and *Arrest Warrant*, which re-shaped the law of immunities. Yet, legislative action on state official immunity regarding criminal cases has always been highly exceptional. Most of the states that have taken legislative action on issues related to immunity have done so with regard to state immunity,

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and sometimes with regard to immunities of state officials in civil proceedings.[48] On the issue of immunity of state officials *ratione materiae* for criminal matters, however, most states have been at best omissive, and some have even been active against it, to the point that Belgium and Spain were bullied by other states into modifying their laws after 2003[49] – although Spain enacted in 2015 a new law attempting to cover the whole spectrum of immunities.[50] Thus, while some states played a crucial role in destabilizing the former understandings of immunities, since roughly around 2003 the state action path – at the level of national legislation or active foreign policy – has been largely abandoned, leaving it for other actors to take the lead. The most that can be said about it is that a majority of states have adopted a passive stance towards the issue – even if expressing concerns – giving neutral signs in their practice and allowing for the change to transit trough a different path. This is reflected in the previously mentioned debates at the Sixth Committee, but also quite clearly, for example, in the position of the Asian–African Legal Consultative Organization (AALCO), a low-profile inter-governmental board advising African and Asian states on matters of international law. In 2012, this agency issued a position paper intended to inform the positions of the member states with regard to the work of the ILC on state-official immunity, where it took a very uncommitted stance warning against attempts of progressive developments of the law at the ILC, but at the same time underlying the importance of "ending impunity for international crimes".[51]

As concerns the role of the domestic judicial path, national courts being the natural fora for issues of immunities, one would expect their impact to be much more significant than it actually is. National jurisprudence is often cited in debates on the matter, but these references tend to focus on a limited and homogeneous number of cases. A good example is the *Pinochet* case, which is found in basically any work on the issue of immunities. But in general domestic cases dealing with exceptions to immunities *ratione materiae* seem to be scarce and contradictory, and their role in

[48] ILC, *supra* note 12, at 24–31.

[49] Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction', 13 *Journal of International Criminal Justice* (2015) , at 247.

[50] Ley Orgánica 16/2015 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, 27/1072015. See article 23.

[51] Asian–African Legal Consultative Organization, Immunity of State Officials From Foreign Criminal Jurisdiction, 2012, pp. 18, 20.

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narratives of change on the topic secondary. One can notice, for instance, that in most of the works in the field – whether for or against considering international crimes as an exception to immunity – national jurisprudence is used as an indicator of state practice within arguments about customary law. Only exceptionally national jurisprudence is seen as an authoritative source of legal change or prevalence of the *status quo*. This said, it should also be noted that, as mentioned in section 3, domestic judiciaries seem to have started very recently to adopt a more active role in pushing this change, namely with the attempts to prosecute international crimes committed in Syria during the civil war. It seems early, however, to claim that these instances of domestic judicial action will have a defining effect on the evolution of the matter, given that the issues of immunity have not yet been fully dealt with by the national courts concerned.

As for international jurisprudence, the *Arrest Warrant* case shows that, as a path for change, international courts enjoy high authority before the constituencies of the law of immunities, and as such have great potential for changing the law. However, in the topic under analysis here, the ICJ and other international courts – such as the ECtHR[52] – have taken conservative approaches that have at best succeeded in framing the issue in certain ways, rather than fostering change – for example by centering the discussion on the issue of official or private nature of the acts in question. Therefore the importance of the judicial path for the change in question has arguably been medium to low.

More than the state action or judicial paths, the international crimes exception to immunity *ratione materiae* has found its way in international law mostly at the epistemic community/individual experts leveld. Taking hold on the few steps taken by states and courts, academics and experts have, through publications, interventions in international fora, and pronouncements in non-state backed institutions such as the IDI, managed to gradually persuade audiences and gather authority around the claim that immunities do not cover the commission of international crimes. More importantly, as seen before, a body which is better understood as a focal point for expert opinion than as an international organization or agency – the ILC – has become one of the key avenues for

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[52] See, for example, the Al-Adsani and Jones cases, although they concerned civil and not criminal proceedings: European Court of Human Rights, *Al-Adsani v. UK*, Application no. 35763/97, 2001, at 54, 55; European Court of Human Rights, *Jones v. UK*, Applications nos. 34356/06 and 40528/06, 2014, at 202, 204.

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this attempt of change to transit in the last decade. The inclusion of the topic in its programme of work, the work done since then by the two special rapporteurs, and the discussion around the several reports adopted, have provided a crucial platform for expert opinion to cluster and become authoritative. Furthermore, through the discussion of its reports at the Sixth Committee, the ILC has provided a forum for states to take a stance on the matter, where states, facing the discursive complications of arguing for immunities, have expressed considerable support to the international crimes exception. Thus, the trajectory of the issue at the ILC seems to confirm that the epistemic community/individual experts path has been the predominant one in this area.

6. Conditions of change: prior understandings and stability

It has been mentioned above how, despite the fact that the idea of prosecuting former state officials for international crimes through domestic courts was an innovation at the time of *Pinochet* and *Arrest Warrant*, many of the legal questions it triggered were not seen as *non liquet*.[53] On the issue of immunities, in particular, most judges, international lawyers and scholars took the frameworks of state immunity and diplomatic immunities to address it. They imported the old distinction between *acta jure imperium* and *acta jure gestionis* from relative state immunity as well as the logic of article 39 (b) of the Vienna Convention on Diplomatic Relations[54] to create the categories of immunity *ratione personae* and immunity *ratione materiae*, concluding that international law granted immunity to former state officials with regard to acts committed in an official capacity but not for those carried out in a private capacity.[55] As such, the law was perceived as highly stable – at least on that point.

[53] See section 1.
[54] Art. 39 (2) established that "when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist".
[55] See for example the views of Alvaro Borghi, Hazel Fox, Brigitte Stern and Xiadong Yang in: A. Borghi, *L'immunité des dirigeants politiques en droit international* (2003), at 129–135; H. Fox, *The Law of State Immunity* (2002], at 442; Stern, *supra* note 11, at 76; Yang, *supra* note 16, at 433. See also the positions of the different Law Lords in Pinochet and paragraph 61 of the Arrest Warrant judgment.

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What was less settled was the characterisation of the acts involving the commission of international crimes as official acts, and thus covered by immunity *ratione materiae*. This can be seen in the divided opinions of the Law Lords in *Pinochet,*[56] the separate opinion of Judges Higgins, Kooijmans, and Buergenthal in *Arrest Warrant*, and Kolodkin's second report as special rapporteur of the ILC.[57] The law was instable in this point, and this, perhaps, provided an entry point for broader contestation. The interface conflict that existed between the law of immunities and IHRL – one barring the prosecution of international criminals, the other demanding it – saw a possibility of accommodation in this issue: if international crimes were not regarded as acts committed in an official capacity, they would fall from the protection of immunity *ratione materiae* and the demands of IHRL could be satisfied.

Parallel to that, it is also reasonable to think that the consolidation of the idea that international crimes are *jus cogens* norms, and that as such they concern the international community as a whole, eroded the stability of the law of immunities. As Higgins, Kooijmans and Buergenthal contended in their separate opinion: "the increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law".[58] This belief undoubtedly opened discursive space for the contestation of norms that were seen as highly settled, such as those of state-official immunity. Escobar Sánchez' fifth report to the ILC also accounts for this. In a very telling passage, she claims that the notion of impunity acquired a legal dimension through the consolidation of international crimes as norms of *jus cogens*, thus becoming a legal bar against immunities.[59]

7. Conditions of change: influential factors

While there is not one single clear contextual element of rupture in the history of the exceptions to immunity *ratione materiae*, there are a number of contextual factors that, put together, explain the

[56] Fox, *supra* note 53, at 444.
[57] ILC, *supra* note 25, at 61.
[58] , *supra* note 4, at 74.
[59] ILC, *supra* note 12, at 192–195.

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opening of discursive and legal space for this attempt of change to have taken place around the end of the twentieth century.

One of them is the development of international criminal law. The inaction of the international community during the genocides in Rwanda and Bosnia, and the possibility of impunity in their aftermath posed major ethical and political questions to governments worldwide, as well as to the general public. This, as explained above, led to the revisiting and fast development of the notion of international crimes and the prosecution of individuals for having committed them before international bodies. *Ad hoc* tribunals were created by the Security Council, and the negotiation of a permanent international criminal court unleashed, leading to the adoption of the Rome Statute and the creation of the ICC in 1998. This made international crimes and the fight against impunity a common topic in discussions about international law. Furthermore, it helped grounding the relatively settled idea that there are certain norms in the international legal order that concerned the international community as a whole, and in whose compliance every state has an interest. It is therefore not surprising that the idea that states had jurisdiction to prosecute foreign former state officials for international crimes started gaining ground.

Another key factor was the development of a narrative of universal jurisdiction in many circles of the epistemic community of international law.[60] This was fostered by the previous adoption of international treaties creating different versions of such jurisdiction for certain international crimes, namely war crimes in the Geneva Conventions of 1949 and torture in the Torture Convention of 1984. To this followed the adoption of national legislation seeking to enable national prosecutors to apply universal jurisdiction, as that of Belgium and Spain, mentioned above.[61] And one would have to add that the fact that, as *Pinochet* shows, the first cases seeking to apply universal jurisdiction and to prosecute former state officials concerned former heads of state, which magnified to a great extent the perceived impact of the issue of immunity, and gave it an allure of breakthrough. Overall, as Michel Cosnard explains, the context in which this attempt of change took off seems to have been one of a rising culture of fight against impunity.[62]

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[60] Stern, *supra* note 11, at 75. 95.
[61] See Section 6 above.
[62] Cosnard, 'Les immunités du chef d'état', in *Le chef d'Etat et le droit international : colloque de Clermont-Ferrand* (2002) , at 190.

Electronic copy available at: https://ssrn.com/abstract=4430270

8. Conditions of change: influential actors

It was argued in section 6 that, while two states in particular – Spain and Belgium – played a key part in setting-up the stage for the development of exceptions in the law of state-official immunity, the broader role of states in pushing these changes has been rather marginal. Most states have since the dawn of the debate adopted a neutral or ambiguous stance on the matter, affirming the importance of the fight against impunity and acknowledging the problematic nature of state-official immunities in cases of international crimes, while at the same time warning against pushing artificially the development of the law and jeopardizing the stability of international relations.[63] This finding led to the conclusion that the change in question has transited through state action only to a limited extent. However, a parallel issue that has not been sufficiently dealt with so far is that of the opposition by states – and particularly of great powers – to this change. In this regard, the intimidation that both Spain and Belgium faced and that eventually led them to repeal their laws on universal jurisdiction is very telling.

In the case of Belgium, the US exerted great pressure to get it to abrogate its law on universal jurisdiction and restrict its exceptions on immunities after legal action was brought in Belgium seeking to target high-ranking American officers for war crimes committed in Iraq in March 2003. The initial admission of these cases apparently even led Defence Secretary Donald Rumsfeld to threaten with moving NATO's headquarters away from Brussels, and indeed succeeded in getting the Belgian parliament to amend substantially its *Loi relative des violations graves du droit international humanitaire*.[64] In the case of Spain, a number of cases around 2006 equally prompted pressure by different states to modify its law on universal jurisdiction. In particular, several cases against Chinese officials for alleged genocide in Tibet sparked a strong reaction on the side of the Chinese government, which denounced the proceedings as interference in its internal affairs, claimed that its officers were exclusively subject to the jurisdiction of China, and demanded the Spanish government to take immediate action to have the cases dismissed in order "to avoid

[63] See Section 6 above.
[64] Roht Arriaza, 'Universal Jurisdiction: Steps Forward, Steps Back', *Leiden Journal of International Law* (2004) 375 , at 387.

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possible obstacles and damages to the bilateral relations between China and Spain".[65] Israel and the US similarly contested Spain's law and prosecutorial policies in the strongest terms, ultimately leading the *Congreso de los Diputados* to overhaul its legislation by an astonishing majority vote.[66] In sum, big powers seem to have aggressively opposed exceptions to immunities when concerned directly.

More recent developments relativize the stance of big powers on the matter, however. For example, with regard to the international arrest warrant issued by Germany against General Jamil Hassan in June 2018 – an incumbent Syrian officer that would enjoy immunity *ratione materiae* but not *ratione personae* – the US has been vocal in expressing support for the procedures, even if not referring explicitly to the issue of immunity.[67] And while China and Russia clearly oppose these efforts – as seen by their opposition to the existence of the UN International, Impartial and Independent Mechanism (IIIM) assisting states prosecuting international crimes committed in Syria[68] – other significant powers, such as France, have also recently started procedures against Syrian state officials, arguably accepting the exception to immunity *ratione materia* for international crimes.

Withal, it seems that it has been a group of non-governmental organizations that has been crucial in bringing the issue of immunity *ratione materiae* into public attention and pushing for change. They have done so by filing cases before national authorities, but perhaps more importantly by giving these cases visibility before public opinion and by exposing prosecutors, judges and politicians to the political costs of upholding immunities. That has, arguably, been one of the key drivers of discursive shift in the field. To mention some of the most important examples, Amnesty

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[65] Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law* (2011) 1 , at 37, 38. See also: 'China Pide 'Medidas Efectivas' Para Que La Audiencia Abandone El Caso Sobre Tíbet', *El País* (2009) , available at https://elpais.com/elpais/2009/05/07/actualidad/1241684227_850215.html.

[66] Langer, *supra* note 63, at 40.

[67] C. Kreß, *Letter to the Editor – Germany's Extradition Request for Gen. Jamil Hassan, with U.S. Suppor*, 13 March 2019, Just Security, available at https://www.justsecurity.org/63227/letter-editor-germanys-extradition-request-gen-jamil-hassan-u-s-support/; see the press release at: U.S. Department of State, Press Statement, 'Support for Germany's Request for Lebanon to Extradite Syrian General Jamil Hassan', 3 March 2019.

[68] N. Boeglin, *UN General Assembly Adopts a Resolution Establishing an International Investigation Mechanism in Syria on Grave Violations of IHL and Human Rights*, Dipublico.Org, available at https://www.dipublico.org/104791/un-general-assembly-adopts-a-resolution-establishing-an-international-investigation-mechanism-in-syria-on-grave-violations-of-humanitarian-law-and-human-rights/.

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International and an association of victims of the Chilean dictatorship were behind the original complaints in Spain against Augusto Pinochet and were responsible for pulling the strings to get Spain to request his extradition when he visited London in 1998.[69] TRIAL International has also been a key actor, both by issuing publications on the more theoretical aspects of the matter and by taking cases to court in Switzerland and elsewhere.[70] And more recently, organizations such as Fédération Internationale des Droits de l'Homme in France, Guernica 37 in Spain, and the European Center for Constitutional and Human Rights in Germany, have been active in bringing cases of alleged international criminals and litigating for limiting state official immunities.[71] Nevertheless, measuring the impact that the work of these NGOs has had in pushing change in the law of immunities is a complex endeavour. Suffice it to say here that to a large extent it has been them setting up the cases where national courts have limited immunity *ratione materiae* in the last 20 years, and giving the topic great visibility.

Academics, finally, have also been crucial in gradually shifting the discourse of immunities within the epistemic community of international lawyers. More than merely through publications, this has been done through the appropriation of epistemic spaces and fora, such as the IDI and the ILC, whose works on the topic have been controversial, no doubt, but remarkably influential. As said in the second section of this work, the resolutions of the IDI in its sessions of Vancouver and Naples in 2001 and 2009 were an important source of authority at a time where, after *Arrest Warrant,* it seemed unclear whether the development of exceptions to immunity *ratione materiae* would go forward or stagnate. And then the shift of approach at the ILC from the views of special rapporteur Kolodkin to his successor, Escobar Hernández, was a major victory for the camp pushing for change, and has undoubtedly played a major role in cementing the change.

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[69] Amnesty International, L'arrestation Du Général Pinochet : Un Événement Qui a Changé Le Sens de La Justice, 16 October 2013.

[70] B. Bertossa and P. Grant, *La lutte contre l'impunité en droit suisse* (2003), available at http://data.rero.ch/01-R003326609/html?view=GE_V1 (last visited 20 May 2019].

[71] See : https://trialinternational.org/fr/latest-post/jamil-hassan/

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9. Outcome of change

Has the burden of argument shifted from the camp contending there to exist an exception to immunity *ratione materiae* based on international crimes to the camp arguing against it? How can one tell? One way could be to compare the positions of states throughout time – a rationale that could feed an argument of *opinio juris.* The problem though is that there are not many instances where states positions can be compared. Prior to 1998 the subject was largely absent, and until the establishment of the rapporteurship on the topic at the ILC, there were basically no instances where states could voice their positions, other than in the few judicial proceedings that dealt with the matter. The only instance where this comparison is feasible is with regard to the reactions of states participating at the Sixth Committee of the General Assembly when discussing the conflicting ILC reports of Anatolevich Kolodkin in 2011 and of Escobar Hernández in 2016.

This comparison, however, does not show a very clear pattern. There seems to be a slight increase in the number of States supporting the existence of exceptions to immunity *ratione materiae*, but the differential is too low to show a straightforward trend.[72] In addition, very few states show a clear change in their views towards accepting exceptions – Germany and Iran being the most relevant. Yet, zooming-out and appraising the whole development of the matter since its outset in 1998, it is apparent that change has taken place. An issue that was completely absent from international legal debates not only became a hotly debated one twenty years later, but also one where a progressive view seems to have managed to slowly gain the upper hand against a more traditionalist view based on the structures of state and diplomatic immunities. The above mentioned creation of the IIIM – a UN institution seeking to prosecute international criminals through national jurisdictions and not international courts, and thus implicitly relying on the existence of an exception to immunity *ratione materiae* – seems to further confirm this.

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[72] An analysis of the discussions at the Sixth Committee shows that in 2011 roughly 8 states supported exceptions, 15 expressed an ambiguous position, and 12 were vocal against exceptions (including here the 5 permanent members of the UNSC); whereas in 2016 11 states showed support for exceptions, 8 were ambiguous, and 7 were opposed (note that the difference in the addition of the numbers is due to the exclusion of the states that did not mention the issue in their interventions). See: Sixth Committee, UN General Assembly, Summary Record of the 28th Meeting (A/C.6/66/SR.28), 2 December 2011; Summary Record of the 26th Meeting (A/C.6/66/SR.26), 7 December 2011; Summary Record of the 27th Meeting (A/C.6/66/SR.27), 8 December 2011; Summary Record of the 29th Meeting (A/C.6/71/SR.29), 2 December 2016; Summary Record of the 26th Meeting (A/C.6/71/SR.26), 5 December 2016; Summary Record of the 27th Meeting (A/C.6/71/SR.27), 5 December 2016, *supra* note 42.

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In any case, a better indicator that the law on state official immunity has shifted seems to be the change in the positions within the ILC. While the report and draft articles proposed by Escobar Sánchez proved highly divisive, after certain amendments it was voted by 21 votes in favour, 8 votes against and 1 abstention that international crimes constitute an exception to immunity *ratione materiae*.[73] This undoubtedly points to a shift in the general opinions within the epistemic community of international lawyers. Arguing against the international crimes exception nowadays implies going against the opinion of 21 ILC members. If certainly this is not decisive to the underlying question of whether the law has ultimately changed, it is indicative of a discursive shift.

But be it as it may, the opposition by great powers is still there, as are the high stakes that surround immunity *ratione materiae*. The change in the law on this point is still uncertain. What would happen if the ICJ had to deal with the issue again and could not avoid taking a clear stance on it, as happened in *Arrest Warrant*? Surely, the circumstances of the case would have a great bearing, given the salience of immunity. For instance, if the ICJ had to deal with a complaint by Syria regarding Germany's exercise of jurisdiction over its generals, the Court would have to balance many factors, most notably the discredit it would face before public opinion if it were to uphold their immunity. But on the other hand, discarding immunities would probably raise the concern of powerful countries – the US, Russia – which took part in the war in Syria, as their officers could be exposed to prosecution in national jurisdictions as well. The instability of the law on immunities would very likely allow the Court to navigate these high-stakes, and the outcome is impossible to predict. As said before, the change regarding the exceptions based on international crimes to immunity *ratione materiae* is still uncertain.

10. Rhetorical justification of change attempt

The development of exceptions to immunity *ratione materiae* – as with many other developments in international law – has been justified rhetorically at two overlapping levels. The first one is the normative level, where the argument has been twofold. On the one hand, most of the actors making an argument for exceptions at one point or another claim that the expansion is provided for by state

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[73] See Section 3.

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practice and *opinio juris.* One can clearly see by the works of the ILC and by the works of most scholars that this has been an inescapable means of persuasion, while at the same time it has also been the most common and strongest tool for those arguing against change in this area. On the other hand, still at the normative level of rhetoric justification, most of the supporters of the expansion of exceptions – scholars, experts, states – have tried to justify their claims by making an argument of hierarchy, whereby the *jus cogens* nature of international crimes would set aside the rules of immunity.[74] The second level of rhetoric justification – and here the NGOs filing cases and advocating before public opinion are a good example – has been the evocation of moral outrage at the perspective of impunity. This emotional evocation is evident, for instance, in the argument that international crimes cannot be conceived to be acts undertaken in an official capacity, as they are acts that are in essence opposed to the very purpose of the state. It is also evident in the above-motioned arguments of normative hierarchy and the rise of a general legal culture of fight against impunity.[75]

[74] See Section 1.
[75] Cosnard, *supra* note 62, at 190.

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Case Study 2

The Concept of Internationally Wrongful Act

(July - December 2019)

Pedro Martínez Esponda

Synopsis

The concept of international wrongful act has not been uniform throughout the history of international law. At least from the dawn of international law proper in the mid seventeenth century, and up until the second half of the twentieth, the predominant view among international lawyers considered that the central element in an international wrongful act was damage, and its main purpose reparation. This radically changed with the appointment in 1963 of Roberto Ago as Special Rapporteur on State Responsibility at the ILC. Ago rejected the traditional approach under the argument that it reduced responsibility to its consequences rather than fully define it, and that it excluded certain types of state responsibility that transcended the narrow scope of synallagmatic legal relationships – *erga omnes* responsibility, for instance. Accordingly, he introduced two crucial articles in his draft that would stand through the first and second readings of 1980 and 2001 – ultimately becoming article one of the 2001 Draft Articles on State Responsibility. The first one stated that "every international wrongful act of a state entails the international responsibility of that state", and the second one confined to two the elements concerned in the existence of such an act: wrongfulness and attribution. This view thus rejected that damage played any part in defining an internationally wrongful act, and was eventually endorsed by the ILC itself, by states in the Sixth Committee, by the UNGA, by numerous international courts, and by a majority of the international legal scholarship. Perhaps because of the very theoretical rationale in which the change attempt was carried out, the discussion was never perceived to involve high stakes. However, the exclusion of damage had big implications in the whole scheme of international responsibility and went

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against very embedded legal concepts based in traditional understandings from civil law. As such, the issue always aroused some contestation, and continues to do so in a limited way up to this day.

I. Chronology

First phase: Pre-history and early doctrines on state responsibility (Pre-1939)

State responsibility was generally not theorized as a standalone subject of international legal science roughly until the first half of the twentieth century. During that period – from the dawn of international law proper in the mid seventeenth century to around 1900 – most of the international lawyers and judges that dealt with questions of responsibility deduced the notion of international wrong from the ideas of *delictum* and *quasi delictum* under classical roman law.[1] This reasoning was very much in line with the Napoleonic Code of 1804, which stated in article 1382 that "*tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*". The central element in this conception was damage, and its main purpose reparation. This rationale can be seen in authors like Grotius and Vattel, who never attempted to develop a theory of international responsibility, but nonetheless tacitly expounded their own definitions of internationally wrongful act – always anchored to the notion of damage.[2] These mentions of issues of state responsibility were commonly made when dealing with sub-areas of international law – *i.e.* as a matter of *lege specialis* – such as offences against ambassadors and envoys, violations of the rights of foreigners, or breaches of the rights and obligations of neutral states in war.[3]

Towards the end of the nineteenth century and during the first decades of the twentieth, however, an academic interest for state responsibility seen from a general perspective started to grow. Heffter, in 1887, was one of the first authors to dedicate a separate section in his works on international law to the topic, and authors like Cavaglieri, Schoen, Strupp, Triepel, and most

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[1] Hugo Grotius, *Le droit de la guerre et de la paix*, vol II (Édition d'Amsterdam, 1724, J Barbayrac (trans), Presses universitaires de Caen 2011) 522.
[2] Alain Pellet, 'The Definition of Responsibility in International Law', *The Law of International Responsibility* (Oxford University Press 2010) 5.
[3] Robert Kolb, *The International Law of State Responsibility : An Introduction* (Cheltenham, Gloucestershire: Edward Elgar Publishing 2017) 6.

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notably Dionisio Anzilotti followed suit.[4] Kolb explains the emergence of this interest by saying that, around that time, international law shifted from being a system where disputes were usually settled by direct negotiation or through forcible measures including war, to one based on a more judicialized logic of peaceful settlement of disputes. This shift required the development of clear "rules for the reparation of wrongs […] so as to be applied by arbitral commissions and other settlement bodies", and so international lawyers started creating these frameworks.[5]

Withal, the emergence of general studies on state responsibility did not alter the classic definition of international wrongful act as having damage at its core. Heffter, for instance, considered that at the core of state responsibility was the wrongdoing state's obligation to ensure a reparation for the infringement of an international obligation,[6] while Anzilotti characterized in 1929 an internationally wrongful act as a violation of an international obligation which gives rise to a new legal relation where the responsible state is bound to make reparation.[7] Another example is Clyde Eagleton, an American author, who was also among the first to write a monograph exclusively focused on state responsibility. He too followed a definition oriented towards damage and reparation, contending that "responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury".[8]

These views were also reflected in the judgement of the Permanent Court of International Justice (PCIJ) in *Factory at Chorzów*, in which it claimed that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[9] The corollary of this understanding was that, since reparation was the main object of state responsibility, no responsibility would emerge if there existed no damage to be repaired. Underlying it was a very *civil* – *i.e.* private – conception of wrongful act which no one seemed to oppose or perceive as problematic in any way at the time.

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[4] ibid 6, 11.
[5] ibid 8.
[6] August Wilhelm Heffter, *Le droit international de l'Europe* (4e éd. française, augmentée et annotée / par F. Heinrich Geffcken., HW Müller ; A Cotillon 1883) 273.
[7] Dionisio Anzilotti, *Cours de Droit International* (réimprimée, Paris, Panthéon-Assas/LGDJ 1999) 467.
[8] Clyde Eagleton, *The Responsibility of States in International Law* (New York Univ Press 1928) 22.
[9] *Factory at Chorzów, Merits* [1928] PCIJ Series A, No 17 29.

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Second phase: First steps towards a definition of international wrongful act (1945-1969)

After World War II, and with the creation of the UN, there was a renewed interest in the progressive development of international law and its codification – as stated in article 13 of the UN Charter. This led to the creation of the International Law Commission (ILC) by the UN General Assembly (UNGA) in 1947. State responsibility was identified early on as one of the topics deemed "suitable for codification" in the ILC's initial survey of 1949. In this context, the UNGA requested in Resolution 799 (VIII) of 1953 the Commission to "undertake (…) the codification of the principles of international law governing State responsibility", considering that it was desirable for "the maintenance and development of peaceful relations between States".[10]

To comply with the UNGA's request, a special rapporteurship was created in 1955, and the Commission appointed the first rapporteur on the topic, Francisco García Amador. Yet, soon after undertaking his tasks, the special rapporteur decided to narrow down the scope of the study to the "(international) responsibility of the State for injuries caused in its territory to the person or property of aliens". His explanation for it was that the "subject of State responsibility was so vast and complex that the immediate codification covering the entire field was not practicable".[11] He drafted thereafter a total of six reports under this understanding, from 1956 to 1961. Although he did not propose an explicit definition of internationally wrongful act, article 1 of his proposal was based on the classic understanding of responsibility based on reparation. It determined that "international responsibility of the State for injuries caused in its territory to the person or property of aliens involves the duty to make reparation for such injuries".[12]

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[10] ILC, 'Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur. Topic: State Responsibility' (1956) A/CN.4/96 174.

[11] ILC, 'International Responsibility. Second Report by F. V. Garcia Amador, Special Rapporteur' (1957) A/CN.4/106 104.

[12] ibid 105.

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However, this narrow approach to state responsibility focusing on injuries to foreign nationals was eventually rejected by the UNGA, where several states voiced their interest in addressing the topic from a general perspective.[13] In particular, it seems that there existed a big interest on the part of the socialist block of states to adopt an approach to state responsibility that accounted for what they perceived to be recent developments in international law that exceeded the classical notions of state responsibility. They had in mind issues like the prohibition of aggression, the collective interest in international peace and security, the right of peoples to self-determination, the fight against colonialism, and the principle of non-intervention.[14] While Western and capitalist states did not share the same concern, they also did not seem to perceive that a negative outcome could come from the expansion of the works of the ILC. In this vein, when García Amador's tenure as special rapporteur ended in 1963 – without any of his reports having been approved by the Commission – the ILC seized the opportunity to shift the focus of the codification works towards a general approach. It decided to appoint a prominent international legal scholar familiar with the topic of state responsibility, but having particularly progressive views on it: Roberto Ago.

Ago had been already advocating for the adoption of a general perspective to state responsibility – as well as for his particular views on the topic – before his appointment. In 1962, the ILC had established the Sub-Committee on State Responsibility to analyze the continuation of the works on the topic, of which Ago was a leading member. This Sub-Committee recommended in 1963 that the next special rapporteur should follow certain guidelines, among which was the suggestion of two points for an eventual definition of the concept of the international responsibility of the State. The first point was about the origin of international responsibility, and stated that any breach by a State of a legal obligation imposed upon it by a rule of international law "whatever its origin and

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[13] ILC, 'First Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur - Review of Previous Work on Codification of the Topic of the International Responsibility of States' (1969) A/CN.4/217 and Corr.1 and Add.1 137.
[14] See, for example, the positions of the USSR, Yugoslavia, Ukraine, Belarus, Iraq, Bulgaria, Poland, Romania, Czechoslovakia and Mongolia in the debates at the Sixth Committee on the topic of state responsibility in 1961: UNGA Sixth Committee, 'A/C .6/SR.713'; UNGA Sixth Committee, 'A/C .6/SR.714'; UNGA Sixth Committee, 'A/C .6/SR.716'; UNGA Sixth Committee, 'A/C .6/SR.717'; UNGA Sixth Committee, 'A/C .6/SR.720'; UNGA Sixth Committee, 'A/C .6/SR.721'; UNGA Sixth Committee, 'A/C .6/SR.722'; UNGA Sixth Committee, 'A/C .6/SR.723'; UNGA Sixth Committee, 'A/C .6/SR.724'; UNGA Sixth Committee, 'A/C .6/SR.725'; UNGA Sixth Committee, 'A/C .6/SR.726'; UNGA Sixth Committee, 'A/C .6/SR.727'; UNGA Sixth Committee, 'A/C .6/SR.728'; UNGA Sixth Committee, 'A/C .6/SR.729'.

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in whatever sphere" should be considered an international wrongful act. The second point was that such an international wrongful act necessarily was composed of two elements: an objective one, consisting in the act or omission objectively conflicting with an international legal obligation; and a subjective one, consisting in the imputability of the conduct to a subject of international law.[15] This framework clearly reflected Ago's views on state responsibility, as he had defended exactly these elements in his Hague Academy lectures of 1938.[16]

Thus, when Ago started his works as special rapporteur, a number of conditions seem to have been ripe for his attempt to change the definition of internationally wrongful act. First, there was big push by the socialist block at the UNGA to expand the theoretical framework of state responsibility to topics that fell squarely within their foreign policy priorities – and which the exclusion of direct damage from the definition seemed to foster. Second, this push seems not to have been opposed by the Western block – perhaps not identifying any possible harm arising from it, and generally playing along with the general feeling that international law had undergone a "profound transformation" in recent times, and thus that it was "necessary to do something more than to codify".[17]

And third, the last condition that made the moment ripe for Ago's attempt, was that Ago had managed to build for himself a wide margin of maneuver to place his own views – excluding damage from the definition – at the center of the discussion. This was because he had, through the recommendation of the Sub-Committee, already established the guidelines for the development of a definition according to his preferences. But also, and quite significantly, he had been appointed special rapporteur and enjoyed a very large support from all the ILC's members, perhaps being seen as a strong authority on the topic of state responsibility and having the benefit of not having strong attachments to any of the main protagonists of the Cold War, therefore being perceived as politically neutral and intellectually trustworthy.

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[15] ILC, 'First Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur - Review of Previous Work on Codification of the Topic of the International Responsibility of States' (n 13) 139.

[16] Roberto Ago, 'Le Délit International' (1938) 68 Collected Courses of the Hague Academy of International Law 441.

[17] ILC, 'Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur. Topic: State Responsibility' (n 10) paras 9, 10.

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Third phase: Removal of damage from the definition (1970-1973)

The core phase of this case study is very short in temporal terms and very narrow with regard to the venues where it took place. It basically happened in Ago's second and third reports to the ILC in 1970 and 1971 respectively, and culminated with the approval by the ILC on first reading of his draft article 3 in 1973. During these years, the issue of the definition of an internationally wrongful act was expressly addressed by Ago, and it was in these two reports where he launched his attempt to remove damage from the constitutive elements. It must be said, however, that Ago's third report reproduces exactly the content of the second report in the section concerning the elements of a wrongful act, with some minor revisions suggested by members of the ILC which are irrelevant on this point.

Ago started his second report arguing for what he thought was the fundamental principle of the law of state responsibility, namely that "every internationally wrongful act by a State gives rise to international responsibility".[18] He explained how this principle was a corollary of the legal nature of international law, and contended that it was unanimously recognized by international lawyers – referring mostly to academics.[19] Similarly, he argued "that every internationally wrongful act creates new legal relations between the State committing the act and the injured State", but also acknowledged that a new trend seemed to be developing "to single out, within the general category of internationally wrongful acts, certain kinds of acts which are so grave and so injurious, not only to one State but to all States, that a State committing them would be automatically held responsible to all States".[20] Ago then contended, without committing to this last point of view, that it was important for the ILC to adopt the fundamental rule proposed by him as it was capable of covering "all the forms of new legal relationship which may be established in international law by a State's wrongful act".[21] Hence, by encompassing every possible type of legal relationship, his fundamental principle sought to lay the basis for what followed in his report: a definition of internationally

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[18] ILC, 'Second Report on State Responsibility, by Roberto Ago, Special Rapporteur. The Origin of International Responsibility' (1970) A/CN.4/233 para 12, 30.
[19] ibid 15.
[20] ibid 22, 23.
[21] ibid 25.

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wrongful act broad enough to operationalize the principle that every internationally wrongful act entails the international responsibility of the state committing it.

The second chapter of Ago's report accordingly dealt with the definition of internationally wrongful act. He contended that two elements are "usually distinguished": a subjective element consisting in the existence of a conduct that is attributable to a state, and an objective element, consisting in the failure of that conduct to fulfil an international obligation.[22] Interestingly, Ago underlined here the point that these two elements were "generally considered to be the essential elements for recognition of the existence of a wrongful act".[23] In doing so, he seems to have carefully selected who and what to cite. He mentioned, for example, the *Phosphates in Morocco* case of the PCIJ – in which the Court indeed only mentioned these elements – but avoided citing the leading *Chorzów* case, where the Court had clearly mentioned damage and reparation. Similarly, he did not cite any of the pre-1945 authors that had included damage as a component of their definitions of internationally wrongful act, except for Anzilotti. However, when reading the footnote concerning this last author, damage is mentioned.[24] This clearly suggests that Ago made an effort here to exclude anything that could have contradicted his two elements theory.

Some paragraphs below, Ago finally dealt explicitly – yet in a few brief paragraphs – with the issue of damage, of which he said that "reference is sometimes made". Here, he contended that the reason why it is included in the concept of internationally wrongful act by some authors is because they mistakenly conflate the consideration of the general rules of responsibility with those specifically relating to "the treatment of aliens".[25] But a codification of the general rules of state responsibility should avoid falling into the same trap. Then, he quoted Anzilotti in saying that, "every violation of a right is a damage" and therefore every breach of an obligation by a state vis-à-vis another state "in itself constitutes a damage, material or moral, to that state".[26] For this reason, he argued – although the logical chain is not absolutely clear in this point – that "[damage] cannot be of any assistance in establishing whether a subjective right of another state has been impaired and so

[22] ibid 31.
[23] ibid 33.
[24] ibid.
[25] ibid 53.
[26] ibid 54.

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whether an internationally wrongful act has occurred".[27] As said above, Ago restated these same arguments in his third report of 1971.[28]

This framing the issue as one of minor implications – one which was nothing more than a conceptual misunderstanding of those who conflated the principle of state responsibility with the content of substantive rules – hid under the veal of technicality the broader stakes involved in the matter. Ago only referred to the socialist block's concern of expanding the framework of state responsibility very timidly, as seen above, without explicitly endorsing any of their views.[29] Yet, his understanding of state responsibility conceptually enabled a much more communitarian project of international law. It is difficult to imagine that he silenced these implications naively, although thinking that Ago had a commitment to the socialist views seems misleading too. Rather, it seems more likely that Ago was genuinely committed to his technical arguments – considering that he had held these views already in his Hague courses of 1938 – and that he knew the communitarian turn in international law seemed to be proving him right. In this context, it seems feasible to think that he was careful not to say anything that expressly coincided with the socialist block's view – even if it supported his own views – because this would have awoken the opposition of Western states and called into question his purportedly objective and scientific approach.

In any case, Ago disposed of the notion of damage with seemingly convincing arguments and without calling for much attention in his reports. From 1970 to 1973, the Commission, due to its heavy workload, found only a few occasions to debate Ago's reports. One can see, however, in the records of the 1075th, 1076th, 1079th, 1980th, 1205th, 1206th and 1207th meetings, that a large majority of the ILC members supported the views of the special rapporteur. Only two members expressed views opposed to the exclusion of damage from the definition of internationally wrongful act: Doudou Thiam from Senegal and Nagendra Singh from India – unlikely candidates for opposition, considering the political orientation of their countries at the time – who claimed

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[27] ibid.
[28] ILC, 'Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, the Internationally Wrongful Act of the State, Source of International Responsibility' (1971) A/CN.4/246 and Add.1-3 paras 41, 73, 74.
[29] ILC, 'Second Report on State Responsibility, by Roberto Ago, Special Rapporteur. The Origin of International Responsibility' (n 18) paras 22, 23.

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that responsibility is typically associated with reparation for injury.[30] Another five voiced certain doubts on the implications of the proposed definition, although ultimately supporting the proposal of the special rapporteur.[31] The rest were either tacitly or expressly in favor of the Ago's proposal.

The scarce opposition notwithstanding, provisional article 3 was put to decision in the 1225th session of 1973, and approved unanimously on first reading by the members of the ILC. Its final text read: "*There is an internationally wrongful act of a State when: (a) Conduct consisting of an action or omission is attributable to the State under international law; and (b) That conduct constitutes a breach of an international obligation of the State*". Arguably, the burden of the practice of unanimity in the ILC's decision outweighed the impetus of the few opponents to the draft, who perhaps did not deem that the issue was of enough relevance as to merit blocking Ago's proposal.

Fourth phase: Reception and mainstreaming of change (1973-onwards)

After the approval of provisional article 3 on first reading, the exclusion of damage in the definition of internationally wrongful act seems to have been accepted gradually without much controversy in different forums.[32]

At the ILC, it is noteworthy that the topic was not addressed in any way until James Crawford's final report of 2001, where he succinctly said that "there seems to be general acceptance of the proposition that damage is not a necessary constituent of every breach of international law, and that articles 1–2 should not therefore include any specific reference to damage".[33] He sustained this claim replicating Ago's argument that the issue of damage rather concerns the primary rule in question. This view would then translate into article 2 of the final draft articles approved by the ILC unanimously in 2001, which restated Ago's draft article 3.

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[30] ILC, 'Summary Record of the 1079th Meeting (A/CN.4/SR.1079)' paras 19, 33.
[31] See the opinions of Sette Camara, Kearney, Reuter, Yaseen, and Elias. ILC, 'Summary Record of the 1080th Meeting (A/CN.4/SR.1080)'; ILC, 'Summary Record of the 1205th Meeting (A/CN.4/SR.1205)'; ILC, 'Summary Record of the 1206th Meeting (A/CN.4/SR.1206)'.
[32] James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 56.
[33] ILC, 'Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur (A/CN.4/517 and Add.1)' (2001) para 28.

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On the multilateral level, UNGA's Sixth Committee reviewed the articles approved by the ILC on first reading during its 28th session in September 1973. Out of 48 states that took the floor between the 1397th and the 1407th meetings, only Greece, Ghana and France expressly raised concerns with regard to the exclusion of damage from the definition, without actually going into details on their opinions.[34] Moreover, upon the request by the ILC for comments on the approved draft articles, few opinions were received from states between 1980 and 2000. Only those of France and Argentina – both received in 1998 – expressed rejection of the exclusion of damage. France expressed its strong critique in terms that are worth citing here:

> "International responsibility presupposes that, in addition to an internationally wrongful act having been perpetrated by a State, the act in question has injured another State […] This means that a State cannot file a claim without having an identifiable, specific legal interest. The interest in question cannot merely be the interest that any State may have in other States observing international law. International responsibility is limited to the protection of the rights of the State itself; it cannot be extended to the protection of international law as such".[35]

Argentina, for its part, argued that "in the case of a wrongful act caused by one state to another, which would appear to be the *ratio legis* of the draft, the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned".[36] Yet, despite this seemingly deep opposition by France and Argentina, the express support by other countries and the silence of the rest seem to reflect a broad approval of this understanding by states generally.[37] This is proven by the fact that in its Resolution 56/83 of 12 December 2001, adopted without a vote, the plenary of the UNGA endorsed the final outcome of the ILC's draft articles –

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[34] See: UNGA Sixth Committee, 'A/C.6/SR.1398'; UNGA Sixth Committee, 'A/C.6/SR.1404'; UNGA Sixth Committee, 'A/C.6/SR.1405'.
[35] ILC, 'State Responsibility, Comments and Observations Received by Governments (A/CN.4/488 and Add. 1–3)' 101.
[36] ibid 103.
[37] See in particular the favorable opinions of the Netherlands, the German Democratic Republic, Italy and Switzerland. ILC, 'Observations and Comments of Governments on Chapters I, II and III of Part I of the Draft Articles on State Responsibility for Internationally Wrongful Acts (A/CN.4/328 and Add.1-4)'; ILC, 'Comments and Observations of Governments on Part One of the Draft Articles on State Responsibility for Internationally Wrongful Acts (A/CN.4/414)'; ILC, 'State Responsibility, Comments and Observations Received by Governments (A/CN.4/488 and Add. 1–3)' (n 35).

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welcoming the articles, "taking note" of them, and "commending" them to the attention of governments. The later position of the opposing countries is rather difficult to assess, mainly because there have not been many forums where to voice opposition on the matter. One can see, however, signs of persisting rejection, for example in France's comments to the General Assembly on the question of whether an international conference seeking a convention on state responsibility would be desirable. Although it did not address the issue of damage – nor did any other country – in 2010 it stated that "in the light of the importance and novelty of some of the rules set forth in the articles, it is essential to invite States to examine the proposed rules at a conference where they could present their views".[38] This suggests that if the issue of state responsibility transcended the sphere of the ILC and the low legal profile of the draft articles, perhaps countries like France would decide to take a stronger stance on the matter.

At the judicial level, the International Court of Justice made use at least in three occasions of the two-element approach of the ILC to internationally wrongful acts. This was in the *Tehran Hostages* case,[39] the *Genocide* case,[40] and in the *Armed Activities (DRC v. Uganda)* case.[41] In other fields of international law, the ILC definition has been used, for example, by the arbitral tribunals in the *Total v. Argentina* and *Biwater Gauff (Tanzania) Ltd v. Tanzania* investment cases.[42] Also, a leading case on this issue was the *Rainbow Warrior ad hoc* arbitration between New Zealand and France. There, the tribunal ruled that France's removal of two agents from confinement – breaching an agreement with New Zealand – constituted an internationally wrongful act even if, as contended by France, New Zealand had not suffered any direct damage arising from the removal of the agents.[43] All the same, this seemingly scarce overt use by courts of a concept of state responsibility not taking damage into account must be taken with caution. The daily work of international courts concerns disputes where damage, whether material or moral, is a component of the claim in

[38] ILC, 'Responsibility of States for Internationally Wrongful Acts Comments and Information Received from Governments (A/65/96)' 3.
[39] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* (ICJ) [56].
[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* (ICJ) [385].
[41] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* (ICJ) 215.
[42] *Total SA v Argentine Republic (ICSID Case No ARB/04/01), (Decision on Objections to Jurisdiction)* footnote 51; *Biwater Gauff (Tanzania) Ltd v Tanzania, ICSID Case No ARB/05/22, Award* [464–467].
[43] *Rainbow Warrior (New Zealand/France), 82 ILR 500* (*Ad Hoc Arbitral Tribunal*) [569].

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question. Thus the opportunities for them to address the rather academic question of the definition of internationally wrongful act are not many.

Lastly, at the level of international legal scholarship, one can also attest a gradual shift towards excluding damage from the definition of internationally wrongful act. For example, Oppenheim's 1920 edition of his textbook read "an international delinquency is every injury to another state committed […] through the violation of an international legal duty".[44] Yet the much later ninth edition of 1992 – edited by Jennings and Watts – removed that paragraph to contend that "failure to comply with an international obligation constitutes an international wrong by the state giving rise to international responsibility".[45] Nguyen's *Droit International Public* is also a telling example. In its 1987 edition, one can see some deference to draft article 3 of the Ago project, yet it is profoundly skeptical: "cette position [the 2 element theory] est d'une logique irréfutable mais demeure très abstraite. Si le fait internationalement illicite n'a causé aucun dommage, la responsabilité demeurera platonique […] en réalité le préjudice ne détermine pas l'illicéité de l'acte, mais il est bien la condition de la mise en ouvre de la responsabilité".[46] But then, in the seventh edition of the book – revised by Pellet and Daillier – this paragraph has disappeared and instead there is an uncompromised endorsement of the idea damage is not part of the definition.[47] Ian Brownlie, for his part, never considered damage to constitute an element of state responsibility, neither in the 1966 edition of his *Principles of Public International Law*, nor in the much later one of 1998.[48] Then, in the 2012 edition, this rejection of damage is explicitly done on the basis of the ILC's draft articles – although this is unsurprising given that after 2010 the different editions of his book were revised by James Crawford.[49] With regard to his 1983 monograph *State Responsibility*

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[44] Lassa Francis Lawrence Oppenheim, *International Law : A Treatise / Vol. 1, Peace* (3rd ed. / ed. by Ronald F. Roxburgh., Longmans Green 1920) 245.

[45] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law. Vol. 1, [1]: Peace. Introduction and Part 1* (9th impr. (paper), Longman 1992) 500–501.

[46] Nguyen Quoc Dinh, *Droit international public* (3e éd. entièrement refondue et mise à jour., Libr générale de droit et de jurisprudence 1987) 695.

[47] Nguyen Quoc Dinh, Alain Pellet and Patrick Daillier, *Droit International Public* (8e éd, Libr générale de droit et de jurisprudence 2008) 764.

[48] Ian Brownlie, *Principles of Public International Law* (Clarendon Press 1966) 336; Ian Brownlie, *Principles of Public International Law* (5th ed, Clarendon Pr 1998) 438.

[49] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 2012 <http://opil.ouplaw.com/view/10.1093/he/9780199699698.001.0001/he-9780199699698> accessed 8 December 2019.

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(Part I), he strongly endorsed the ILC's articles of 1973 without even mentioning damage at any point.[50]

As for Spanish-speaking authors, one can see a full endorsement of the ILC's work and a dismissal of damage as an element in Gutiérrez Espada's monograph *El hecho ilícito internacional*, of 2005, and in Remiro Brotóns' classic textbook *Derecho Internacional (Curso general).*[51] French speaking authors, on the contrary, seemed to have shown a lot more reluctance to the exclusion of damage. Scelle, Cavaré, Queneudec and Combacau all rejected Ago's perspective on the matter.[52] More recently, Brigitte Stern has also followed a similar line of argument.[53] However, several contemporary authors publishing in French seem to have endorsed the idea that damage is not a part of the definition of internationally wrongful act. Karl Zemanek[54] and Allain Pellet[55] are examples of this. Much more recently, Robert Kolb completely discarded damage in his 2017 monograph *The International Law of State Responsibility* of 2017, saying that: the [wrongfulness of an act] and attribution are the sole elements triggering responsibility […] Damage and fault are relevant only for the type and quantum of compensation respectively, and for the requirements of the primary rule […].[56]

II. Analysis

Trajectory of the case (SCR framework)

This case is one of norm adjustment. While before 1973 it can be said that there existed a definition of internationally wrongful act that a majority of the international legal epistemic community deemed to be determined by the idea of damage, after this year most judges, states, diplomats and

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[50] Ian Brownlie, *System of the Law of Nations: State Responsibility. Part I* (New York: Clarendon Press; Oxford University Press 1983) 22–35.
[51] Cesáreo Gutiérrez Espada, *El hecho ilícito internacional* (Dykinson 2005) 50–52; Antonio Remiro Brotons, *Derecho internacional : curso general* (Tirant lo Blanch 2010) 406.
[52] Gilles Cotterau, 'Système Juridique et Notion de Responsabilité', *La responsabilité dans le système international : Colloque du Mans* (A Pedone 1991) 25, 51.
[53] Brigitte Stern, 'The Elements of An Internationally Wrongful Act', *The Law of International Responsibility* (Oxford University Press 2010).
[54] Karl Zemanek and Jean Salmon, *Responsabilité internationale* (A Pedone 1987).
[55] Pellet (n 2).
[56] Kolb (n 3) 34, 35.

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academics tended to exclude damage when defining the elements of an internationally wrongful act. This section makes an analysis of the conditions that enabled or hindered this change, making use of the Selection/Construction/Reception framework for that purpose.

Selection stage (first and second phases of the chronology)

The bureaucratic path captures most of the trajectory of the present case. The origins as well as the normative development of the exclusion of damage from the definition of international wrongful act took place within the framework of the ILC. However, the initial push within this institution is largely associated to the ideas and the initiative of Roberto Ago. Three main factors account for the selection of this pathway.

Institutional availability

As seen above, since the last decades of the nineteenth century and up to the outbreak of WWII there was a considerable need among states, adjudicators and scholars to develop and codify a set of general rules on state responsibility. This led to the writing of some rather sparse academic studies on the issue during this period. But with the creation of the UN and the tasking of the ILC with the function of "encouraging the progressive development of international law and its codification" under article 13 of the UN Charter, it was only natural that this organ would attempt to concentrate the efforts and codify the general principles of state responsibility. And indeed, the UNGA requested it to do so as early as 1953. There is thus an element of institutional idoneity in the selection of the ILC for the codification project, given its mandate and the theoretical nature of the endeavor.

The ILC also seems to have been the best-suited institutional receptacle for the socialist block's political interest in developing a general framework of state responsibility capable of accounting for the post-WWII developments of international law. After the narrow focus of its first special rapporteur, García Amador, it is therefore unsurprising that the ILC appointed someone like Roberto Ago, receptive to the concerns of the socialist block but being himself a Westerner and

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enjoying a significant degree of reputation in all diplomatic and intellectual circles.[57] He seemed to be sufficiently progressive for the socialist block to support him, and yet ideologically neural enough between the ideological blocks of the Cold War to be trustworthy for other stakeholders. Other possible pathways at the time could have been the UNGA itself or the ICJ. Yet, these venues were either too political or of too narrow access. The UNGA was indeed being used at the time by socialist and newly independent states to push for significant changes in international law – changes with high political implications. However, the highly technical and theoretical nature of the issue developing a general framework of state responsibility made it very unlikely for the matter to be discussed there. The issue was clearly better suited for the ILC. Plus, no one before Ago had framed it with such clarity, and this could only have happened, as it did, within an institution like the ILC. As for the ICJ, few disputes lent themselves to theoretical digressions about damage. This can be confirmed by the fact that the ICJ only referred to the matter once during the time Ago was a member of its bench – from 1979 to 1995 – in the *Tehran Hostages* case of 1980. But in addition, a project like the general structuring of the law of state responsibility required much more theoretical thoroughness and multi-stakeholder debate than what the ICJ could have provided.

<u>Actors and agency</u>

The change in question seems to have had two major driving actors. One is the group of states and members of the ILC that advocated for the ILC to work on a general framework of state responsibility after the disappointment with the first special rapporteur, García Amador. This coalition certainly did not have in mind the specific goal of removing damage from the definition of internationally wrongful act, but they were responsible for creating the conditions under which Roberto Ago – the second and main actor – could do so. The motivations of this coalition have already been explained: they perceived there to exist a need of reframing state responsibility in a way that made it possible to account for matters like decolonization, non-intervention and aggression, perceived by them to fall out of the classical understandings of state responsibility.[58]

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[57] Ago (n 16).
[58] See above the section "Second phase: First steps towards a definition of international wrongful act (1945-1969)",

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As for Roberto Ago, it is difficult – if not impossible – to establish with certainty what motivations drove him to push for excluding damage from the definition of international wrongful act. Other than his reports, there are few documents where evidence of this motivation can be found. One of them are the records of the meetings where he defended his project before his peers at the ILC. There, as in the reports, the only clear indication of his motivation seems to be his intellectual commitment to a framework of state responsibility that was genuinely general and applicable across the board to all branches of international law. For instance, in the ILC's 1205th and 1207th meetings in May 1973, he insisted on the point that the requirement of damage in an assessment of responsibility depended strictly on whether the primary rule in question provided for it, and consequently did not belong in the definition of internationally wrongful act.[59] He said that "in most cases, of course, there was damage in addition to the injury inherent in the violation of an international obligation, but the existence of such damage was not indispensable".[60] He then gave the example of human rights, which he had not mentioned in his reports. According to him, if a state were to subject its own nationals to forced labor, it would indeed infringe the human rights of its citizens, but not provoke any damage to any other state. However, he contended, "if the conventions were to have any meaning, the other States parties must be able to hold [the state infringing human rights] responsible for an internationally wrongful act".[61] Therefore, "the existence of material or moral damage in addition to that injury was not necessary to make an internationally wrongful act".[62] It appears from this that Ago's main concern was thus the intellectual belief that state responsibility should provide a set of rules that rendered every rule of international law operational. Judging from the views expressed by several other members of the ILC, this was a very persuasive argument that won Ago broad support within the Commission.[63]

[59] ILC, 'Summary Record of the 1205th Meeting (A/CN.4/SR.1205)' (n 31) para 16.
[60] ILC, 'Summary Record of the 1207th Meeting (A/CN.4/SR.1207)' (1973) para 12.
[61] ibid.
[62] ibid.
[63] See the interventions of Ellias, Kearney, Reuter, Bedjaoui, Bilge, Bartos, Castañeda, Tammes, Castrén, Ushakov and Alcívar, agreeing with the special rapporteur. ILC, 'Summary Record of the 1075th Meeting (A/CN.4/SR.1075)'; ILC, 'Summary Record of the 1076th Meeting (A/CN.4/SR.1076)'; ILC, 'Summary Record of the 1080th Meeting (A/CN.4/SR.1080)' (n 31); ILC, 'Summary Record of the 1205th Meeting (A/CN.4/SR.1205)' (n 31); ILC, 'Summary Record of the 1206th Meeting (A/CN.4/SR.1206)' (n 31).

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It should be added that Ago enjoyed by 1973 a considerable degree of prestige within the ILC that made his voice authoritative, a point which was made above but not further explained. By that time, Ago had been a member of the ILC for 17 years – since 1956 – and had undertaken a number of other important functions elsewhere, including being the chief of the Italian delegations in a number of diplomatic conferences, most notably several international labor conferences at the ILO and the UN Conference on the Law of the Sea from 1958 to 1960. More importantly perhaps – at least for the members of the ILC – he had been the president of the very celebrated Vienna Conference on the Law of Treaties from 1968 until its successful culmination in 1969.[64] In that sense, his opinions were regarded as highly knowledgeable.

Opening

Another factor that explains why this change happened through the path of the ILC is the opening provided by the disappointment of states with the work of the first special rapporteur on state responsibility, García Amador. None of his reports had been discussed or approved, and many states in the Sixth Committee voiced their wish for addressing the topic from a broader perspective than that of the responsibility for injuries to aliens.[65] This required, as put by Ago himself, "taking up the subject ex novo".[66] It is therefore apparent that there existed a particular receptiveness among states and the members of the Commission to the idea of codifying state responsibility from the basis, and thus for establishing a definition of internationally wrongful act. This provided Ago with the ideal setting for coming to the front with his own definition.

Construction stage (third phase of the chronology)

During the drafting and approval of his second and third reports between 1970 and 1973, Ago gave form to the change in question. Two factors seem to have facilitated his attempt to exclude damage from the definition of international wrongful acts.

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[64] See http://www.sfdi.org/internationalistes/ago/

[65] ILC, 'Second Report on State Responsibility, by Roberto Ago, Special Rapporteur. The Origin of International Responsibility' (n 18) paras 76, 77.

[66] ibid 77.

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Relative Instability of the previous norm

Even though before the ILC's codification process there was a majoritarian tendency by judges and academics to consider that damage was an element of an internationally wrongful act, it is clear that the issue was undertheorized, and commonly addressed in tandem with certain primary rules, like the protection of aliens. As seen above, there were a few different views on the matter and, crucially, there was no single authoritative document expressly defining internationally wrongful act.[67] This made Ago's case that damage was not an element of the definition easier to make. Indeed, his assertion that the two elements he proposed were "generally considered to be the essential elements for recognition of the existence of a wrongful act", would not have been possible to make had it not been for this context of relative normative instability, reflected in the lack of open theorizing and debates on the issue.[68] Withal, the assertion that this instability was only relative underlines the fact that there was an overall generally accepted notion that damage was an element of an internationally wrongful act.

Previous norm availability

Another important element rendering Ago's definition more plausible was the progressive shift taking place since the approval of the UN Charter towards a more communitarian understanding of international law. As explained by Ago himself, the idea that every wrongful act entailed the international responsibility of a state – irrespective of damage – responded to the fact that relations in international law not only took place between states in a synallagmatic way anymore, but that there existed a "trend towards incipient personification of the international community". This required a framework of state responsibility able to encompass – as the socialist block demanded – acts deemed "grave and injurious not to one State but to all States".[69] Three important developments in this direction had taken place very recently.

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[67] ILC, 'First Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur - Review of Previous Work on Codification of the Topic of the International Responsibility of States' (n 13) paras 7–30.
[68] ILC, 'Second Report on State Responsibility, by Roberto Ago, Special Rapporteur. The Origin of International Responsibility' (n 18) para 33.
[69] ibid 23.

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The first one was the adoption in 1966 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which followed a clear attempt of the international community to further embed in binding legal obligations the human rights already envisioned in the Universal Declaration of 1948, and which required to do away with the traditional understandings of damage in state responsibility. The second was the controversial but meaningful adoption of the Vienna Convention on the Law of Treaties in May 1969, which in its famous article 53 established the idea of jus cogens, clearly reshaping the bilateral and synallagmatic paradigm of state responsibility. And lastly, the ICJ's decision in the *Barcelona Traction* case, where it claimed that there existed a certain type of obligations which involved such "important rights" that "all states can be held to have an interest in their protection".[70] Although Ago only made explicit reference to the later, it is apparent that these developments laid the ground for the exclusion of damage from the definition of internationally wrongful act.

Reception stage (fourth phase of the chronology)

After the approval of Ago's definition on first reading in 1973, the two-element approach to internationally wrongful act quickly gained track among different actors. Aside from the already mentioned factors that influenced in making the attempt plausible, the low salience of the matter played an important role in its mainstreaming.

Salience

The degree of salience of the issue in question arguably tended to be rather low. Even if there existed of course an interest within the group of socialist states to create a broad framework of state responsibility, the specific issue of the exclusion of damage from the definition of internationally wrongful act in the ILC project never called any attention by high-level policy-makers or state officials. If one takes the ILC's efforts of codification of the law of state responsibility as a whole, there were clearly more salient issues that indeed received considerable attention by policymakers, such as attribution, circumstances precluding wrongfulness, countermeasures, or reparation. It would thus seem unlikely that states would spend political capital on a preliminary definition that

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[70] *Barcelona Traction, Light and Power Company, Limited, Judgment* (ICJ) [33].

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was too abstract to pose any direct conflict. In addition, the fact that it was always unlikely that the outcome of the codification process would be a draft convention to be discussed in an international conference, lowered the stakes even more.[71]

It therefore seems reasonable that the few objectors to the exclusion of damage within the ILC and at the Sixth Committee would not consider it worth to block or veto Ago's definition. Even France, who seems to have been the starkest opponent to such definition, did not attempt to block the final approval of the draft articles in 2001 and its endorsement by the UNGA – perhaps indeed because it considered this outcome to be far from binding.[72]Its interest on the matter is unclear – probably linked to the *Rainbow Warrior* case, although by then it had already lost it – but it is apparent that it was not worth picking a fight in any of these venues. The same can be said about Argentina, the other significant objector during the last phase of the codification process. In this sense, Ago's definition of internationally wrongful act eventually was taken up by lawyers, judges and academics without much being at stake.

Particular features of the case

Taking all of the above-discussed together, several particularities of this case are noticeable:

Exclusivity of pathway and prominence of individual agency

One clear particularity of this case is that it mostly transited through the bureaucratic/organizational path. The multilateral and judicial pathways were relevant only as venues for reception and endorsement. This was largely because, as it has already been said when discussing institutional availability, the rather abstract nature of the whole endeavor of codifying state responsibility made the ILC the idoneous forum for attempting a definition of internationally wrongful act that would

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[71] Many states and academics expressed throughout the process of codification skepticism of the idea that an international conference for the conclusion of a convention on state responsibility would be a desirable outcome. See Crawford's discussion of the issue: ILC, 'Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur (A/CN.4/517 and Add.1)' (n 33) paras 22–26.

[72] As mentioned before, France has manifested its view that a international conference in state responsibility would be desirable in order for states to be able to voice their views on controversial issues and explicitly agree on conventional rules. See, ILC, 'Responsibility of States for Internationally Wrongful Acts Comments and Information Received from Governments (A/65/96)' (n 38).

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exclude damage. No other public institution had the capacity nor the mandate to undertake such an effort. Thinking counterfactually, it is likely that if the ILC had not been there or if it had not decided to take up the matter, the attempt to exclude damage from the definition would have stayed within the private authority pathway – as it did as a matter of fact before Ago was appointed as special rapporteur. In that scenario, it would have probably taken longer for this approach to be acknowledged and taken up, and certainly today it would be less settled.

But thinking that it was only the idoneity of the ILC that mattered obscures the fact that there was also an active decision not to fully bring the attempt to the multilateral pathway – other than through the very superficial "note taking" of the final draft articles by the UNGA in 2001. At the time of Ago's second report, the possibility – however remote – of the codification process leading to an international convention was perceived by the ILC as a desirable outcome.[73] Towards the end of the process, in 2001, this seems to still have been on the table. Around that time states like the Nordic group, Slovakia and Spain favored the perspective of pushing of a convention on state responsibility, under the argument that this would have a positive stabilizing influence on international law, as the Vienna Convention on the Law of Treaties had had.[74] Yet, the last special rapporteur, James Crawford, voiced the fear that attempting an international convention entailed a risk of a "destabilizing and even 'decodifying' effect" in case of failure.[75] He then suggested that "a less divisive and more subtle approach would be for the Assembly simply to take note of the text and to commend it to States and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law". This view was supported by most members of the ILC and by most states and ended up being exactly what happened; UNGA's Resolution 56/83 of 12 December 2001.[76] The matter of whether or not to convene an international conference on state responsibility in the future, however, still remains an open question at the Sixth Committee.[77]

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[73] ILC, 'Second Report on State Responsibility, by Roberto Ago, Special Rapporteur. The Origin of International Responsibility' (n 18) para 10.
[74] ILC, 'Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur (A/CN.4/517 and Add.1)' (n 33) para 22.
[75] ibid 23.
[76] ibid 24–26.
[77] https://www.un.org/en/ga/sixth/71/resp_of_states.shtml

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Finally, it is remarkable the extent to which this case was driven by Roberto Ago's initiative. Few changes in international law can be identified so clearly with one person. The definition of internationally wrongful act coincided with his positions before becoming special rapporteur,[78] so in this sense it is undeniable that he is the intellectual author of this change. However, it is also true that Ago's definition responded better to the less bilateral and synallagmatic nature of international law that was on the rise at the time. The *erga omnes* norms that had just been put forward by the ICJ in *Barcelona Traction* would not have been operational under the old conception of internationally wrongful act based on damage and reparation. Similarly, Ago´s views payed heed to the active foreign policy concerns of the socialist block during the Cold War without bothering too much the Western block, which certainly further nuances the complete ownership of Ago over the change in question. In that sense, one can reasonably expect that a similar outcome would have been reached even in the absence of Ago's initiative at the ILC.

Pace and mode of change: sudden

Another particular feature of this case is that the core of the change process – the *construction* stage – happened in a very sudden way. Judging by the way authors addressed the issue of damage before and after the adoption of Ago's definition on first reading in 1973, it seems that the moment when the shift in the burden of argument happened was precisely this. Surely this is an oversimplification – several authors had discarded damage before that, like Brownlie, and some would object the change afterwards, like many French authors – but it is feasible to say that this event was the tilting point for the majoritarian point of view. Two reasons for this could be the instability of the previous definition of internationally wrongful act and fact that a definition without damage made sense considering the stage of development of international law at the time. It seems reasonable that where there was no authoritatively stated definition, users of international law would easily hold on to the a clear stated proposal endorsed by an institution such as the ILC and proposed by a highly reputed personality such as Roberto Ago. Specially in a context where international lawyers were starting to face the need for accounting for non-bilateral, more communitarian, legal relationships. Also, the fact that the matter was not salient and perceived as largely theoretical made it easier for

[78] Ago (n 16).

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any international legal operator to hold on to Ago´s definition without being politically compromising.

The role of silence for uptake

It has already been mentioned how there were only a few states expressly supporting or opposing the exclusion of damage from the definition of internationally wrongful act. Silence is therefore a prominent feature in this case. The debates at the Sixth Committee after Ago's third report in September 1973 – the first real occasion the Committee had to debate the definition – evidence this. Out of 48 delegations that took the floor to comment the reports between the 1397th and the 1407th meetings, only five signaled some form of support for the definition, three opposed it, and one said the issue required further discussion. 39 states kept silent on that matter.[79] Similarly, only 25 comments were received by the ILC from states for their call for comments of the draft articles from 1980 to 2000, out of which only eight referred to the issue of the definition of internationally wrongful act.[80] Among the members of the ILC, as seen before, silence on this matter was also prominent.

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[79] Thailand, Finland, Ukraine, Mongolia and Romania expressed favorable opinions; Greece Ghana and France objected the exclusion of damage; Brazil argued that the issue called for further consideration. The following countries did not refer to the matter: Iraq, Sweden, the USA, Belarus, Zaire, DDR, Gabon, Netherlands, Argentina, Nigeria, Kenya, Yugoslavia, Mexico, Poland, Federal Germany, Canada, the Philippines, Denmark, Japan, Libya, India, Israel, Australia, Austria, New Zealand, Bulgaria, Tanzania, Spain, Turkey, the USSR, Hungary, Indonesia, Cyprus, Ecuador, Colombia, the UK, Afghanistan, Norway, Peru, and Czechoslovakia. UNGA Sixth Committee, 'A/C.6/SR.1397'; UNGA Sixth Committee, 'A/C.6/SR.1398' (n 34); UNGA Sixth Committee, 'A/C.6/SR.1399'; UNGA Sixth Committee, 'A/C.6/SR.1400'; UNGA Sixth Committee, 'A/C.6/SR.1401'; UNGA Sixth Committee, 'A/C.6/SR.1402'; UNGA Sixth Committee, 'A/C.6/SR.1403'; UNGA Sixth Committee, 'A/C.6/SR.1404' (n 34); UNGA Sixth Committee, 'A/C.6/SR.1405' (n 34); UNGA Sixth Committee, 'A/C.6/SR.1406'; UNGA Sixth Committee, 'A/C.6/SR.1407'.

[80] The Netherlands, DDR, Italy and Switzerland expressed support for the exlusion of damage, France and Argentina were against it, and Austria and Czechoslovakia expressed some reserves. Barbados, Belarus, Canada, Chile, Mali, Ukraine, the USSR, Yugoslavia, Bulgaria, Federal Germany two different times, Mongolia two different times, Sweden, Spain, Japan and Greece did not say anything on the topic. ILC, 'Comments and Observations of Governments on Part One of the Draft Articles on State Responsibility for Internationally Wrongful Acts (A/CN.4/351, Add.1-2 & Add.2/Corr.1, Add.3 & Corr.1)'; ILC, 'Comments and Observations of Governments on Part One of the Draft Articles on State Responsibility for Internationally Wrongful Acts (A/CN.4/414)' (n 37); ILC, 'Comments and Observations Received from Governments (A/CN.4/492)'; ILC, 'Comments and Observations Received from Governments (A/CN.4/515 and Add.1–3)'; ILC, 'Comments of Governments on Part One of the Draft Articles on State Responsibility for Internationally Wrongful Acts (A/CN.4/342 and Add.1-4)'; ILC, 'Observations and Comments of Governments on Chapters I, II and III of Part I of the Draft Articles on State Responsibility for Internationally Wrongful Acts (A/CN.4/328 and Add.1-4)' (n 37); ILC, 'State Responsibility, Comments and Observations Received by Governments (A/CN.4/488 and Add. 1–3)' (n 35).

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What can be made of this silence? First, considering the success of Ago's definition in standing in the draft articles through two readings – with nearly 30 years between the two – it seems straightforward that this silence reinforced the attempt, or at least it did not hinder it. Second, the low salience of the matter tends to point in the same direction: it is more plausible to attribute this silence to a lack of interest than to an attitude of avoidance. In that sense, silence in this case should be interpreted as acquiescence.

Outcome: low level of formality, yet high level of uptake

The final outcome of this change attempt was the final approval by the ILC of a definition of internationally wrongful act that considers wrongfulness and attribution to be the only relevant elements, thereby excluding damage. Although important, this outcome is not in itself determinant as an indication of change. Final conclusions by the ILC are the opinions of an expert body mandated by the UN Charter to give guidance on where international law stands. They tend to be perceived as authoritative, but they are certainly not unquestionable, let alone binding in any way. However, as explained in the fourth phase of the chronology, article 2 of the final ILC draft has been widely acknowledged as correctly defining the notion of international wrongful act. The Max Planck Encyclopedia of International Law says that these elements are "well established, even axiomatic" in its entry on state responsibility.[81] In that sense, this case seems to confirm that the impossibility of a change attempt to transcend into a binding instrument is by no means an impossibility for a change attempt to succeed in other ways.

[81] Which, it has to be said, is unsurprising given that it was written by James Crawford. See: James Crawford, 'State Responsibility', *Max Planck Encyclopedias of International Law* (Oxford : Oxford University Press 2006) para 17.

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Case Study 3

Self Defense Against Non-State Actors

(January – May 2020)

Pedro Martínez Esponda

Synopsis

Article 51 of the UN Charter establishes the "*inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations*". Conventionally and customarily – at least since 1945 – the rule on self-defense (SD) was interpreted as operating exclusively among states. Thus, for an event to qualify as an armed attack, it required to be attributable to a state under international law. This was arguably the dominant understanding of article 51 and self-defense when, in 1969, Israel started to invoke this provision against the actions of non-state actors (SD against NSA). In the following three decades – and especially in the 1990s – this practice expanded, with other states joining Israel in claiming SD against NSA. However, the normative challenge that this represented remained widely unacknowledged. No state ever rose any concern at international fora to complain, nor did the overwhelming majority of international legal scholars address the issue in academic texts. This radically changed with the terrorist attacks of 9/11. From this point on, SD against NSA became an open and pervasive debate, with states engaging in increasing and explicit practice, and academics addressing the matter expressly. The wake of ISIS around 2014 reaffirmed the tendency: broad coalitions of states claiming SD against NSA, and academic spheres again producing vast amounts of literature and controversy around the topic. Yet, the matter has remained highly controversial. True, those affirming the legality of SD against NSA nowadays – both within states and international lawyers – seem to outweigh those denying it. But the almost absolute lack of institutional endorsement of SD against NSA at the multilateral, bureaucratic, and judicial levels sheds a shadow of uncertainly over the claim that the law of self-defense has changed. In academia, too, the number of ambiguous or undecided views is far too high to consider that the matter has been settled. Therefore, while it is undeniable that,

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since 1969, practices and opinions have shifted to a great extent, the change attempt started by Israel over 50 years ago has had an uneven success.

I. Chronology

First phase: Tacit prohibition (1945-1969)

The first phase of the case under analysis goes from 1945 to 1969,[1] a period in which the use of SD directly against NSA seems to have been tacitly prohibited under the jus ad bellum of the time. As observed from the state practice reported and debated at the UNSC during this period, the right to SD was invoked exclusively in the context of armed activities among states.[2] This was strictly the case in the conflicts between Israel and its Arab neighbors,[3] Tunisia and France,[4] the UK and Yemen,[5] and North Vietnam and the USA.[6] Nothing in these situations suggests interpretations that escape the basic understanding of SD as allowing a state to resort to force in order to defend itself from an armed attack by another state. Only two cases break from this narrow interstate setting,

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[1] 1945 is taken to be the point of departure despite the fact that the right to SD as part of jus ad-bellum came into being long before the foundation of the UN. However, the entry into force of the UN Charter represented the beginning of the modern era of jus ad bellum, and with it the dawn of the contemporary understanding of SD as a – at least theoretically – narrow exception to the general prohibition of the use of force. As such, this case study takes 1945 to be the more adequate beginning of the period under analysis. From the brief review of pre-1945 practice, it seems that in general SD was thought of as a right operating in inter-states settings, not too different from the understanding of this right between 1945 and 1969 as explained in this work. Yet, it is true that the very early Caroline incident of 1837, seen by many as the dawn of the right to SD under IL proper, concerned the use of SD against NSA. This notwithstanding, academic views of SD during the twentieth century seem not to have fully acknowledged this fact, although Ian Brownlie seems to suggest in a paper of 1958 that the customary right of SD prior to the UN Charter might have covered SD against NSA. Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7 The International and Comparative Law Quarterly 712, 732. For a review of pre-1945 practice, see Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) ch XII.

[2] UN, 'Repertoire of the Practice of the UNSC (1946-1951), Chapter XI' <https://www.un.org/en/sc/repertoire/46-51/46-51_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1952-1955 (1st Supplement), Chapter XI' <https://www.un.org/en/sc/repertoire/52-55/52-55_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1956-1958 (2nd Supplement), Chapter XI' <https://www.un.org/en/sc/repertoire/56-58/56-58_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1959-1963 (3rd Supplement), Chapter XI' <https://www.un.org/en/sc/repertoire/59-63/59-63_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1964-1965 (4th Supplement), Chapter XI' <https://www.un.org/en/sc/repertoire/64-65/64-65_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1966-1968 (5th Supplement), Chapter XI' <https://www.un.org/en/sc/repertoire/66-68/66-68_11.pdf>.

[3] UN, 'Repertoire of the Practice of the UNSC (1946-1951), Chapter XI' (n 2) 449, 450; UN, 'Repertoire of the Practice of the UNSC: 1964-1965 (4th Supplement), Chapter XI' (n 2) 196; UN, 'Repertoire of the Practice of the UNSC: 1966-1968 (5th Supplement), Chapter XI' (n 2) 217.

[4] UN, 'Repertoire of the Practice of the UNSC: 1956-1958 (2nd Supplement), Chapter XI' (n 2) 174.

[5] UN, 'Repertoire of the Practice of the UNSC: 1964-1965 (4th Supplement), Chapter XI' (n 2) 193,194.

[6] ibid 195.

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and are therefore more relevant for assessing state practice in this case study. The first was the Indo-Pakistani conflict, where India claimed between 1949 and 1950 that, among other factors, the existence of aggressive Pakistani tribesmen and armed groups supported by Pakistan in Jammu and Kashmir entitled it to invoke article 51 and resort to SD against Pakistan.[7] The second case was Lebanon and Jordan's requests in 1958 of military aid by the USA and the UK under article 51 in order to control internal anti-government threats regarded as set up by the United Arab Republic.[8] In both cases it seems to have been taken for granted – both by the states claiming SD and by other states in the debates – that article 51 required an interstate component in order to be invokable in a situation of armed conflict. In the first case, India quite obviously saw the armed groups' attacks as strengthening its case of use of force under SD against Pakistan, and no state suggested that SD was not invokable on the grounds that the attacks were not attributable to Pakistan. Therefore, it arguably only made sense for India to mention these attacks insofar as it regarded them as orchestrated by Pakistan and thus entitling India to use SD. In the second case – more telling for the point under analysis – both the states arguing for and against the claim of SD by Lebanon in the context of internal civil strife saw the applicability of article 51 as depending on the degree of involvement by a foreign state. The USA, for example, characterized the situation as the "*efforts of the legitimate and democratically elected Government to protect itself from aggression from without, even if that aggression is indirect*",[9] whereas Sweden, opposing the invocation of SD, argued that "*for article 51 to be applicable [one of the conditions] is that an armed attack has occurred against a Member State. The Swedish Government does not consider that this condition has been fulfilled in the present case, nor does my Government consider that there is an international conflict in the terms of article 51*".[10] Therefore, one can deduct from this practice that the prevailing understanding of SD during this period was that it was only invokable in the context of an international armed conflict.

As clear as that seems to be, one has to be careful when transposing this conclusion to the issue of SD against NSA. On the whole, none of these cases concerned the use of armed force under SD on

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[7] UN, 'Repertoire of the Practice of the UNSC (1946-1951), Chapter XI' (n 2) 448.
[8] UN, 'Repertoire of the Practice of the UNSC: 1956-1958 (2nd Supplement), Chapter XI' (n 2) 174–176.
[9] ibid 175.
[10] ibid 176.

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the sole basis of an attack by an NSA – without a link to a foreign state. In the case of the Indo-Pakistani War, the attack by armed groups was relevant precisely because of their link to Pakistan, while in the case of Lebanon the attack by an NSA came from within Lebanon, involved no military operations against targets outside Lebanon, and was in any case argued to have been organized by foreign states. As such, it is impossible to deduce solely from this practice that SD against NSA was deemed to be prohibited under international law at the time. Rather, it seems that the possibility of an NSA mounting on itself an operation capable of fulfilling the standard of an armed attack under article 51 was barely imaginable in this period.

This is also confirmed by the clear tendency in academic spheres not to consider relevant for SD anything outside direct or indirect interstate aggression. Prominent writers such as Kelsen[11] and McDougal[12] evidence this, as does the complete absence of any mention to the possibility of SD against NSA in a panel convened by the American Society of International Law in 1963 entitled "*Fundamental Challenges to Legal Doctrines Affecting International Coercion: Aggression, Self-Defense, Non-Intervention, Self-Determination, Neutrality*", where Henkin, Debevoise, McDougal, and Spofford took part.[13] Two exceptions were found where authors briefly referred to the possibility of applying article 51 against NSA, but soundly rejecting it. One was Josef Kunz, who in an early article of 1947 explicitly said that "armed attack must not only be directed against a state, it must also be made by a state or with the approval of a state".[14] But more on point, Ian Brownlie considered in a paper of 1958 entitled '*International Law and the Activities of Armed Bands'* that "*'armed attack' in [article 51] has never been clearly defined, but it probably refers to some grave breach of the peace, or invasion by a large organized force acting on the orders of a government*" and that "*it is extremely unlikely if negligence in permitting armed bands to operate from State territory constitutes an 'armed attack' on the State which they penetrate; and isolated or sporadic operations by bands with government complicity are probably not sufficiently serious*

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[11] Hans Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations' (1948) 42 The American Journal of International Law 783, 791, 792.
[12] Myres McDougal and Florentino Feliciano, 'Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective' (1959) 68 Yale Law Journal 1134.
[13] 'Panel on "Force, Intervention and Neutrality in Contemporary International Law"' (1963) 57 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 147.
[14] Josef L Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations' (1947) 41 The American Journal of International Law 872, 878.

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to come within the meaning of article 51".[15] He then suggested – although referring to the problem of preventive SD in relation to armed bands – that this standard might also apply customarily given that *"[arguably] Article 51 has become objective law since the majority of the world community has acceded to the Charter and [...] the customary law as represented by the Caroline case has been qualified by the requirement of a more substantial threat*". Furthermore, in his '*International Law and the Use of Force by States'* of 1963, Brownlie rejected in passing the possibility of SD against standalone NSA under article 51 and customarily, though fully endorsing the applicability of SD in cases of indirect aggression. On this point, he said: "*Sporadic operations by armed bands would also seem to fall outside the concept of 'armed attack'. However, it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an 'armed attack*'".[16] Then, in a later chapter of the same book entitled '*The Authors and the Entities Protected from Unlawful Resort to Force'*, he tacitly confirmed his view that NSA attacks would fall outside the scope of SD by framing the discussion on states and not mentioning armed bands whatsoever, nor other forms of NSA short of unrecognized states.[17] These brief remarks ultimately rejecting SD against NSA seem to confirm that, from 1945 to 1969, generally no one considered SD against NSA to be a topic that required particular attention, and stuck to a reading of article 51 and SD as operating exclusively between states.

Why, then, interpreting that SD against NSA during this time as prohibited instead of seeing it as *lacunae* or simply as a point on which international law was indifferent? Firstly, because the very few statements that got close to addressing SD against NSA in those early years – such as Sweden's opinion in the Lebanese crisis or Kunz and Brownlie's remarks– starkly interpreted anything outside the narrow framework of interstate armed attack to be prohibited. This makes sense, considering the prevailing logic under which the prohibition of the use of force came about and has been normally understood since 1945, whereby article 51 and jus ad bellum in general have to be interpreted narrowly – taking silence to mean prohibition. Secondly, because at the time there

[15] Brownlie, 'International Law and the Activities of Armed Bands' (n 1) 731.
[16] Brownlie, *International Law and the Use of Force by States* (n 1) 278, 279.
[17] ibid 379, 380.

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existed a major divide in opinions – at least among states – on whether indirect aggression could indeed be considered to be aggression under international law at all – therefore being capable or uncapable of triggering the applicability of SD under article 51.[18] This divide in opinions during the 1960s makes it seemingly valid to assume that, if the applicability of SD in case of indirect aggression was unclear, cases with an even more tenuous or absent link between an NSA attack and a state would have been rejected by most states and commentators as giving rise to a valid claim of SD.[19] And thirdly, because the overwhelming majoritarian view both among states and scholars once the topic started to be expressly addressed – from 2001 on, as will be seen – was that post-WWII international law restricted SD's applicability to inter-state conflict, and that at some point along the way this restriction changed. Thus, it seems to be the better view to interpret the relative silence between 1945 and 1969 on the point of SD against NSA as tacitly prohibiting it.

Second phase: Unacknowledged yet uncontested practice (1969 – 2001)

In the second phase of this case study, some states increasingly started to invoke SD against NSA without trying to establish any sort of attribution to a state. Interestingly, though, while this practice was publicly known – and actually challenged on grounds other than the NSA origin of the armed attack in question – understandings of jus ad bellum and article 51 remained largely unchanged from the previous phase. Indeed, despite the fact that SD against NSA was taking place on the ground, and that several states unapologetically made claims under this logic at the UNSC, no state ever objected this practice. Moreover, the ICJ and most scholarly writings continued to ignore the possibility of SD against NSA, even if the issue of indirect aggression grew significantly in prominence.

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[18] In the context of the debates on the works for a definition of aggression at the Special Committee created by the UNGA, a large amount of states rejected that the eventual definition should include indirect aggression. This skeptical states were Mexico, the USSR, Syria, Uruguay, Algeria, Bulgaria, Ghana, Iraq and Romania, while the states for the inclusion of indirect aggression in the definition were the USA, Cyprus, Australia, Japan, Italy, Colombia, the UK and Turkey. See: Special Committee on the Question of Defining Aggression UNGA, 'Summary Records of the 79th to 91st Meetings (Fourth Session) (A/AC.134/SR.79-91)'.

[19] Although that debate was eventually settled in favor of including indirect aggression in the definition of aggression when Resolution 3314 (XXIX) was approved by the UNGA in 1974.

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Concerning state practice, Israel was the first and most consistent user of SD against NSA during the period reviewed here. It did it mainly by targeting Hezbollah and PLO positions in the territory of Lebanon uninterruptedly from 1969 to 1999, generally claiming that the "*inability* [and sometimes unwillingness] *of the Government of Lebanon to prevent the use of its territory for attacks against Israel"* entitled it to resort to SD.[20] Other instances in which SD was invoked against NSA include: Southern Rhodesia – although its status as a state was not recognized – targeting anti-apartheid Zimbabwean liberation forces in Mozambican territory;[21] Israel pursuing alleged terrorists in Tunisia;[22] South Africa against the African National Congress forces in Botswana, Zimbabwe and Zambia;[23] Iran against terrorists groups sheltering in Iraqi territory;[24] Angola against Cabindan separatists in the territory of DRC;[25] Tajikistan against armed opposition groups operating from Afghanistan;[26] the USA against terrorists operating from Sudan and Afghanistan;[27] DRC against anti-governmental forces taking shelter in Rwanda,[28] and Liberia against rebel groups operating from Guinea.[29] What seems remarkable of these cases is that, while they did trigger thorough debates at the UNSC on the interpretation of article 51 – mainly on the

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[20] UN, 'Repertoire of the Practice of the UNSC: 1969-1971 (6th Supplement), Chapter XI' 206 <https://www.un.org/en/sc/repertoire/69-71/69-71_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1972-1974 (7th Supplement), Chapter XI' 223 <https://www.un.org/en/sc/repertoire/72-74/72-74_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1975-1980 (8th Supplement), Chapter XI' 402 <https://www.un.org/en/sc/repertoire/75-80/75-80_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1981-1984 (9th Supplement), Chapter XI' 326 <https://www.un.org/en/sc/repertoire/81-84/81-84_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1985-1988 (10th Supplement), Chapter XI' 427 <https://www.un.org/en/sc/repertoire/85-88/85-88_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1989-1992 (11th Supplement), Chapter XI' 942 <https://www.un.org/en/sc/repertoire/89-92/89-92_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1996-1999 (13th Supplement), Chapter XI' 1172 <https://www.un.org/en/sc/repertoire/96-99/96-99_11.pdf>.

[21] UN, 'Repertoire of the Practice of the UNSC: 1975-1980 (8th Supplement), Chapter XI' (n 20); UNSC, '2015th Meeting Record (S/PV.2015)' para 39.

[22] UN, 'Repertoire of the Practice of the UNSC: 1985-1988 (10th Supplement), Chapter XI' (n 20) 430.

[23] ibid 431.

[24] UN, 'Repertoire of the Practice of the UNSC: 1993-1995 (12th Supplement), Chapter XI' 1150 <https://www.un.org/en/sc/repertoire/93-95/93-95_11.pdf>; UN, 'Repertoire of the Practice of the UNSC: 1996-1999 (13th Supplement), Chapter XI' (n 20) 1178; UN, 'Repertoire of the Practice of the UNSC: 2000-2003 (14th Supplement), Chapter XI' 1016 <https://www.un.org/en/sc/repertoire/2000-2003/00-03_11.pdf>.

[25] UN, 'Repertoire of the Practice of the UNSC: 1996-1999 (13th Supplement), Chapter XI' (n 20) 1176.

[26] UNSC, 'Letter Dated 24 August 1994 from the Permanent Representative of Tajikistan to the United Nations Addressed to the Secretary General (S/1994/992)'.

[27] UN, 'Repertoire of the Practice of the UNSC: 1996-1999 (13th Supplement), Chapter XI' (n 20) 1178; UNSC, 'Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (S/1998/780)'.

[28] UN, 'Repertoire of the Practice of the UNSC: 2000-2003 (14th Supplement), Chapter XI' (n 24) 1007.

[29] UNSC, 'Letter Dated 11 May 2001 from the Chargé d'affaires, a.i. of the Permanent Mission of Liberia to the United Nations Addressed to the Secretary-General (S/2001/474)'.

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grounds of the admissibility of preemptive SD and proportionality – no state ever contended that they were illegal because they were directed against NSA, nor indeed gave way to any apprehension of any type on these grounds. None of them involved either a clear claim by the state invoking SD of attribution of the conduct of the NSA to the state sheltering them, but rather generally tended to make the argument that the host states' inaction against the NSA validated their claims to SD independently of questions of attribution.

On the side of scholars and academic positions, from the texts consulted, the clear majority of authors continued not to touch upon the matter of SD against NSA in any way whatsoever. Examples of this are Franck[30] – who changed his position after 2001 – Wright,[31] Schachter,[32] Sicilianos,[33] and Randelzhofer in its commentary to article 51 of 1995.[34] All of them discussed the situation where an armed attack by an NSA would give rise to a valid claim of SD under article because of its attributability to a state – in the logic of indirect aggression. Yet, the separate question of whether SD was invocable against an NSA regardless of state attribution remained untouched, as it had between 1945 and 1969. Similarly, in an edited volume of 1986 by Antonio Cassese entitled '*The current legal regulation of the use of force'*, the possibility of SD against NSA was only mentioned – and rejected – in passing, focusing rather on the issue of indirect aggression. In a chapter entitled '*Indirect Military Aggression',* Zanardi took the view that "*[under article 51] the notion of 'armed attack' denotes a use of armed force that possesses the characteristics of an international wrongful act and must therefore be attributable to a State and also come within the scope of application of the ban contained in Art. 2(4) of the Charter*". He then added that, "*when a State does no more than assist or tolerate groups of individuals which as private citizens prepare or carry out military operations against another State, it is unlikely that the material elements of*

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[30] Thomas M Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States' (1970) 64 American Journal of International Law 809, 817–821.
[31] Quincy Wright, 'The Middle East Problem' (1970) 64 American Journal of International Law 270, 274.
[32] Oscar Schachter, 'Self-Defense and the Rule of Law' (1989) 83 The American Journal of International Law 259, 271.
[33] Linos-Alexandre Sicilianos, 'L'invocation de La Légitime Défense Face Aux Activités d'entités Non-Étatiques' (1989) 2 Hague Y.B. Int'l L 147, 161.
[34] Albrecht Randelzhofer, 'Article 51', *The Charter of the United Nations : a Commentary* (Oxford University Press ; CH Beck 1995).

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an armed attack as defined by Art. 51 will be present".[35] In another chapter in the same edited volume by Jean Combacau, entitled '*The Exception of Self-Defence in U.N. Practice*', he tries to deduct elements for a definition of 'armed attack' under article 51 from the practice of the UN, and asks the question of whether a state allowing "*its territory to be used by third parties as a base for their aggressive operations*" would fall under 'armed attack'. His answer, however, leaves the matter open, acknowledging that "the infrequency of precedents, their heterogeneity, and the fact, above all, that condemnations of States' reactions are dictated by a multitude of motives, […] make it impossible to find a definition of armed attack under the terms of Art. 51 either in U. N. practice or in that of its members".[36] Moreover, it seems clear that in his reasoning he was still holding on to the rationale of indirect aggression, with his hypothesis of a state allowing its territory to be used by "third parties" to launch attacks against other states only being a measure of attribution of the attack to the territorial state, and thus not actually considering the possibility of SD against NSA proper. In sum, it seems clear that most authors during this period framed their analyses of SD in contexts involving NSA under the logic of state attribution and indirect aggression.

The only straightforward and unambiguous exception to this was the Israeli author Yoram Dinstein. In the first edition of his leading 'War, aggression and self-defence' of 1988, he wrote: "*for an armed attack to justify counter-measures of self-defence under Article 51, it need not be committed by another State. Ordinarily, the perpetrator of the armed attack is indeed a foreign State as such. Yet, in exceptional circumstances, an armed attack - although mounted from the territory of a foreign State - is not launched by that State. Whether an armed attack is initiated by or only from a foreign country, the target State is allowed to resort to self-defence*".[37] This position clearly broke with the way his contemporaries and the authors preceding him understood article 51, although he of course did not present his view as revolutionary. Rather, he displayed his arguments as being supported by caselaw and academic authorities. However, the cases he referred to were only tangentially relevant – as *Corfu* and *Teheran Hostages*, which were not linked to article 51 and

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[35] Pierluigi Lamberti Zanardi, 'Indirect Military Aggression', *The current legal regulation of the use of force* (M Nijhoff 1986) 112, 113.
[36] Jean Combacau, 'The Exception of Self-Defense in UN Practice', *The current legal regulation of the use of force* (M Nijhoff 1986) 22, 23.
[37] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge : Grotius 1988) 200, 221–223.

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where in any case the acts in question where attributable to a state – and the academic references did not actually support his views, such as those of Brownlie and Zanardi discussed above.

In consequence, even if Dinstein is a clear-cut exception and even if the literature review conducted here is not exhaustive, it seems unequivocal that the majority of the scholars writing on subjects related to SD did not actually envision SD against NSA, focusing at most on the issue of indirect aggression.

Quite crucially to the future evolution of this case study, this same logic of indirect aggression was used by the ICJ in the *Nicaragua* case. In its ruling, the Court held that for there to exist a valid case of SD, article 51 required that an armed attack, in line with Resolution 3314 on the Definition of Aggression, be somehow attributable to a state under the rules of state responsibility – the oft-cited *effective control doctrine*.[38] However, rather than simply read as a decision against SD against NSA without attribution, one has to consider that the question addressed by the Court in Nicaragua concerned the validity of SD against indirect aggression – El Salvador having an SD claim against Nicaragua for having supported armed groups in the Salvadorian civil war. Therefore, despite the broad language of the case, it is clear that the Court did not have in mind that possibility and thus evidences, as with the academic works previously cited, unawareness rather than rejection of SD against NSA.

Third phase: Explicit, debated and increasingly accepted practice (2001-present day)

The terrorist attacks of 9/11 were the major tipping point for SD against NSA. From 2001 on, the topic became explicitly and extensively addressed and debated, with states engaging in open practice and academic conversations on the topic suddenly appearing and becoming a prominent debate among scholars. Similarly, the topic started being touched upon in resolutions by multilateral and international bureaucratic bodies, such as the UNSC and the UN Secretary General (SG) although – as will be explained – never very straightforwardly. The ICJ, interestingly enough, played a refractory role in the years following 9/11, fueling with its decisions in the *Wall Advisory*

[38] *Case concerning military and paramilitary activities in and against Nicaragua (Judgment)* (ICJ) [195].

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Opinion and *Armed Activities* skepticism towards SD against NSA. 2015, however, brough the topic again into the center stage when military coalitions formed in the context of fighting ISIS in Syria and Iraq. At the same time, some more explicit skepticism started to rise during this period among a small number of states, while academic debates arguably observed the opposite tendency, with the space for contesting SD against NSA seemingly shrinking.

State Practice

With regard to state practice, 9/11 triggered a multitude of acts and statements by different states – although mostly Western countries – explicitly applying and defending SD against NSA. To state the obvious, it was the USA leading this practice. In a letter of 7 October 2001, the USA communicated to the UNSC that it was in the course of exercising its right to SD against Al-Qaeda and the Afghan Taliban regime – separately – by taking forcible actions "*designed to prevent and deter further attacks on the United States*".[39] A vast coalition followed suit informing the UNSC of its actions of collective SD under article 51 of the Charter directly against Al-Qaeda in Afghan territory. This coalition included the UK, Canada, France, Germany, Australia, the Netherlands, New Zealand, Poland, and Belgium.[40] To take an example of the coalition's SD narrative, the letter by Germany emphasized that the forcible measures adopted under article 51 were "*solely directed against the terrorist network of Bin Laden, Al-Qaida, and those harbouring and supporting it*".[41] Other states supported the invocation of SD in this context but without engaging in military action, such as the Rio Group of Latin American and Caribbean states – later CELAC – which expressed that they "*reaffirmed their strong support for the action taken to combat terrorism, in exercise of the right of self-defence*".[42] No state openly opposed the invocation of SD in this context, although some expressed reservations. Mexico, for example, argued in a rather ambiguous tone that the use of force "*must be governed by a valid interpretation of the legitimate right of self-defence and must in all circumstances conform to the principle of proportionality*", while Egypt cautioned that

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[39] UNSC, 'Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (S/2001/946)'.
[40] UN, 'Repertoire of the Practice of the UNSC: 2000-2003 (14th Supplement), Chapter XI' (n 24) 1013.
[41] UNSC, 'Letter Dated 29 November 2001 from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council (S/2001/1127)'.
[42] UNSC, 'Letter Dated 16 November 2001 from the Permanent Representative of Chile to the United Nations Addressed to the Secretary-General on Behalf of the Rio Group (A/56/637–S/2001/1091)'.

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"*terrorism should not be confused with the legitimate right to self defence against foreign occupation*".[43] These positions, however, stayed short of unambiguously challenging the invocation of SD against NSA as a valid entitlement under international law.

In the years that followed 9/11, some states claimed SD against NSA in other contexts. Israel continued to follow the unwilling/unable doctrine – that it had been using to justify military action in neighboring countries since 1969 – in three fronts. The first was against alleged Hamas terrorists in Palestinian-controlled territory, following a series of attacks in Israeli territory that took place throughout 2002. The invocation of SD by Israel was largely criticized at the UNSC, not only by Arab countries but also by Western countries such as France and the UK. However, none of these positions asserted that article 51 was not applicable against NSA. On the opposite, critics reaffirmed Israel's legitimate right to defend itself against attacks but contended that its defensive action had to be proportionate.[44] The Secretary General's interventions – Kofi Annan at the time – are a good example of this tone, arguing that Israel could not use the right to SD as a "*blank cheque*", and that it was fundamental for it to "*comply with all provisions of international law, particularly those that ban indiscriminate and disproportionate use of force as well as the humiliating treatment of the civilian population*".[45] Israel's invocation of SD against alleged Hamas' terrorists in Palestine, together with the tone of this debate, spanned for the next ten years, with no state ever opposing Israel's actions on the basis of article 51's inapplicability in the context of terrorism.[46] The second front where Israel invoked SD against NSA under the unwilling/unable doctrine was against alleged Palestinian terrorists hiding in Syrian territory, following a suicide bombing in Haifa in 2003. Here, again, Israel's military operations where the object of lengthy debates at the UNSC, but no state challenged the availability of SD against NSA.[47] Lastly, the third front where Israel invoked SD against NSA was – as in the 1970s and 1980s – against Hezbollah

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[43] UN, 'Repertoire of the Practice of the UNSC: 2000-2003 (14th Supplement), Chapter XI' (n 24) 1014.
[44] ibid 1010–1012.
[45] ibid 1011.
[46] UN, 'Repertoire of the Practice of the UNSC: 2008-2009 (16th Supplement), Part VII' 583, 584 <https://www.un.org/en/sc/repertoire/2008-2009/Part%20VII/08-09_Part%20VII.pdf>; UN, 'Repertoire of the Practice of the UNSC: 2012-2013 (18th Supplement), Part VII' 512 <https://www.un.org/en/sc/repertoire/2012-2013/Part%20VII/2012-2013%20Part%20VII.pdf>.
[47] UN, 'Repertoire of the Practice of the UNSC: 2000-2003 (14th Supplement), Chapter XI' (n 24) 1012.

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in Lebanese territory 2006.[48] Yet this time the dimension of the military operations was larger and therefore triggered mayor international concern. One can observe, however, that in the heated debates on the matter at the 5489th meeting of the UNSC, no state whatsoever challenged Israel's invocation of SD, focusing rather on the disproportionate extent of its use of military force.[49]

Russia is another state whose practice is relevant in this third phase. In the context of the armed conflicts in South Ossetia and Northern Abkhazia in 2002, Russia used a similar rationale for invoking SD against NSA. It contended at the UNSC that if Georgia failed to put an end to "the bandit sorties and attacks on adjoining areas in the Russian Federation", it would "*reserve the right to act in accordance with Article 51 of the Charter*".[50] Georgia opposed the applicability of article 51, arguing that the whole affair was a set-up by the Russian government, but not contending that SD was unavailable against NSA.[51] No other state commented on the matter.

Another case is Uganda, which also invoked article 51 in statements before the UNSC, claiming that as a responsible and sovereign state, it had the "*obligation to defend itself in accordance with Article 51 of the Charter*" in order to guarantee the peace and security of its citizens, who, for an extended period of time, "*had been terrorized*" by the Lord's Resistance Army and other armed groups which used the territory of neighboring states to attack Uganda.[52] Only the DRC opposed Uganda's argument, yet only denouncing it as a threat, and not objecting it on the basis of its legal grounds.[53]

Kenya also claimed to use SD in the context of its fight against Al-Shabab in Somalian territory in 2011. In a joint communiqué of the Kenyan government and the Transitional Federal Government of Somalia, it was explained that the "*Kenyan security operation inside Somalia was aimed at eliminating the threat posed by Al-Shabaab to the national security and economic well-being of*

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[48] UN, 'Repertoire of the Practice of the UNSC: 2004-2007 (15th Supplement), Chapter XI' 1024–1026 <https://www.un.org/en/sc/repertoire/2004-2007/04-07_11.pdf>.
[49] UNSC, '5489th Meeting (S/PV.5489)'.
[50] UN, 'Repertoire of the Practice of the UNSC: 2000-2003 (14th Supplement), Chapter XI' (n 24) 1015.
[51] UNSC, 'Identical Letters Dated 15 September 2002 from the Permanent Representative of Georgia to the United Nations Addressed to the Secretary-General and the President of the Security Council (A/57/408–S/2002/1033)'.
[52] UN, 'Repertoire of the Practice of the UNSC: 2004-2007 (15th Supplement), Chapter XI' (n 48) 1025.
[53] ibid.

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Kenya, and was based on the legitimate right to self-defense under Article 51 of the Charter".[54] No state commented on the matter.

Turkey's practice of using cross-border military force against the PKK since the late 1990s – and to this day – is also worth mentioning. While it never reported its actions to the UNSC nor explicitly claimed to be using article 51 and SD against the PKK in Iraqi territory,[55] when confronted by Iraq at the UNSC, for example in 2015, Turkey claimed that, whereas it had "*no interest in violating Iraqi sovereignty nor did it have any ambitions for its territory*", it had the right to exercise self-defense against the Kurdish Workers Party, which "*posed significant threats to the safety and security of Turkey from areas beyond the reach of the Iraqi Government*".[56] No state objected the underlying legal claim of this argument.

After this rather scattered state practice in the nearly 14 years after the high point of the war against Al-Qaeda in 2001 and 2002, the second tipping point in terms of state practice came about towards the end of 2014 and mainly in 2015 and 2016. In that period, the advance of ISIS in the territories of Syria and Iraq, plus its terrorist attacks in France, Belgium and other Western countries, gave way to another major coalition justifying its use of force under SD against NSA.[57] In its letter to the Secretary General, the USA stated that "*States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself*".[58]

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[54] UN, 'Repertoire of the Practice of the UNSC: 2010-2011 (17th Supplement), Part VII' 571 <https://www.un.org/en/sc/repertoire/2010-2011/Part%20VII/2010-2011_Part%20VII.pdf>.
[55] Tom Ruys, 'Quo Vadit Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq' (2008) 9 Melbourne Journal of International Law 334–64.
[56] UN, 'Repertoire of the Practice of the UNSC: 2014-2015 (19th Supplement), Part VII' 353 <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/final_webfile_enlish_repertoire_-1-add.19_.pdf#page=304>.
[57] ibid 352.
[58] UNSC, 'Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General (S/2014/695)'.

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Australia[59] and Canada[60] followed that same rationale expressly upholding the unwilling/unable standard. However, an array of Western states also undertook military action claiming the right to individual or collective SD directly against ISIS – although not expounding the unwilling/unable threshold. These were France,[61] Germany,[62] the UK,[63] Denmark,[64] the Netherlands,[65] Norway[66] and Belgium.[67] The only non-Western state joining the operations and justifying it under SD was Turkey.[68]

These actions prompted, for the first time in the history of the discussions on article 51 at the UNSC, some more or less explicit counter-opinions to the use of SD against NSA. Directly concerned, Syria criticized the action taken against ISIS in its territory claiming that "*the attempts by some Member States to justify their military intervention in Syria, on the pretext of combating Da'esh and complying with Article 51 of the Charter, distort those provisions of the Charter and constitute a surreal manipulation of international law that undermines Syrian sovereignty (…). The only effective way to combat terrorism is to establish a legitimate, proactive international coalition with the participation of the countries concerned, including the Syrian Government*".[69] Brazil, perhaps the starkest opponent to the use of SD against NSA – at least from 2016 to 2018 – contended in a meeting in 2018 the following, citing the *Nicaragua* case and the *Wall Advisory*

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[59] UNSC, 'Letter Dated 9 September 2015 from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council (S/2015/693)'.
[60] UNSC, 'Letter Dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations Addressed to the President of the Security Council (S/2015/221)'.
[61] UNSC, 'Identical Letters Dated 8 September 2015 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General and the President of the Security Council (S/2015/745)'.
[62] UNSC, 'Letter Dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council (S/2015/946)'.
[63] UNSC, 'Letter Dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council (S/2015/928)'.
[64] UNSC, 'Letter Dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations Addressed to the President of the Security Council (S/2016/34)'.
[65] UNSC, 'Letter Dated 10 February 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations Addressed to the President of the Security Council (S/2016/132)'.
[66] UNSC, 'Letter Dated 3 June 2016 from the Permanent Representative of Norway to the United Nations Addressed to the President of the Security Council (S/2016/513)'.
[67] UNSC, 'Letter Dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations Addressed to the President of the Security Council (S/2016/523)'.
[68] UNSC, 'Letter Dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council (S/2015/563)'.
[69] UNSC, '7621st Meeting (S/PV.7621)' 40.

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Opinion of the ICJ: "*I would first like to mention the general principle of law, according to which exception to rules must be interpreted restrictively. Article 51 is an exception to Article 2, paragraph 4. Since the latter does mention States, and the former must be interpreted in that light, self-defense is a response to an armed attack undertaken by, or somehow attributable to, a State*".[70] Later, in a meeting in 2018, Brazil stated that "*we simply cannot afford to lose sight of the fundamental notion that the prohibition on the use of force is the rule and that self-defense and Chapter VII authorization are exceptions. Brazil has been consistently voicing its disagreement with interpretations that seek to expand the scope of the right to self-defense, in particular with regard to non-State actors*".[71] Mexico, in less explicit terms, contended that "*a lack of rigor in interpreting Article 51 could lead to abuse, putting international peace and security at risk. Of particular concern is the authorization of the use of force against non-State actors, due to a lack of legal clarity in that regard*".[72] Cyprus, in using a more watery tone, criticized the "*attempts to open the door of Article 51 of the Charter to the threat of terrorism in response to armed attacks perpetrated by non-State actors, which carries the potential for escalating violence and abusive invocations of self-defense*".[73] Lichtenstein, for its part, said that the Charter had made the use of force illegal with the only exceptions of self-defense in accordance with Article 51 and the authorization of the use of force by the Council, and lamented the recent "*widening interpretation*" of the notion of self-defense without much discussion or consequence.[74]

Often cited as rejecting the applicability of SD against NSA are the periodical Non-Aligned Movement's statements concerning article 51 since 2004 – mainly interventions at the UNSC and final documents of their summits. All of these repeat the same formulation: "(…) *consistent with the practice of the UN and international law, as pronounced by the ICJ, Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted*" without adding anything

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[70] UNSC, '8262nd Meeting (S/PV.8262)' 44.
[71] UNSC, '8395th Meeting (S/PV.8395)' 62.
[72] UNSC, '8262nd Meeting (S/PV.8262)' (n 70) 47.
[73] ibid 80.
[74] UN, 'Repertoire of the Practice of the UNSC: 2018 (21st Supplement), Part VII (ADVANCE VERSION)' 115 <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/scpcrb.repertoire.part_vii.21st_supplement_2018_for_webposting.pdf>.

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further.[75] Clearly, the scope of this opposition is very limited and ambiguous, and can hardly be interpreted as concerning SD against NSA – all the more considering that some of the NAM's most prominent members, as for example Iran, have themselves resorted to SD against NSA. Rather, it seems more plausible to interpret these statements as rejecting the doctrine of preemptive SD, which is one of the points that historically the members of the NAM have voiced explicitly in the debates at the UNSC. A similar thing can be said of a statement by CELAC of 2018, where the group of states stated that "*we take note with concern of the increase in the number of letters to the Security Council under Article 51 of the Charter submitted by some States in order to have recourse to the use of force in the context of counter-terrorism, most of the times "ex post facto". We reiterate that any use of force which is not in compliance with the UN Charter is not only illegal, it is also unjustifiable and unacceptable*".[76]

Aside from all of the above-mentioned cases, only one case outside the practice reported to the UNSC was found to be relevant for this case-study. It concerns the incursions of Colombian armed forces into the territory of Ecuador in 2008 pursing FARC rebels. Although Colombia never invoked article 51, it did say that it had undertaken its military operations under the principle of self-defense in order to defend its citizens.[77] Thus it could loosely be counted as practice of SD against NSA. Other cases of unreported SD against NSA sometimes cited in academic works, such as Sudan's operations in Chadian territory in 2008, or India's targeting of "Pakistan-based" terrorists in 2016, fall outside the scope of this study upon review, as in both of them the attacks in question are ultimately attributed to Chad and Pakistan respectively.[78]

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[75] '17th Summit of Heads of State and Government of the Non-Aligned Movement, Final Document (NAM 2016/CoB/DOC.1. Corr.1)' para 25.2.
[76] CELAC, 'Measures to Eliminate International Terrorism. Statement by the Permanent Mission of El Salvador to the UN on Behalf of the Community of Latin American and Caribbean States (CELAC)' 3 <https://celac.rree.gob.sv/wp-content/uploads/2018/10/Measures-to-Eliminate-International-Terrorism.pdf>.
[77] 'Comunicado No. 081 Del Ministerio de Relaciones Exteriores de Colombia' <http://historico.presidencia.gov.co/comunicados/2008/marzo/81.html>.
[78] Mary Ellen O'Connell, Christian J Tams and Dire Tladi, *Self-Defence against Non-State Actors* (Anne Peters and Christian Marxsen eds, Cambridge University Press 2019) 147; Pemmaraju Rao, 'Non-State Actors and Self-Defence: A Relook at the UN Charter Article 51' (2016) 56 Indian Journal of International Law 127, 127, 128.

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Multilateral and institutional practice

Although most of the relevant facts of the third phase concerned the individual state practice and their statements, at the multilateral level, some resolutions at the UNSC can be cited as getting close to endorsing SD against NSA since 2001. The first two are Resolutions 1368 and 1373 of 2001, both of which were adopted in the aftermath of 9/11. They condemned in strong terms the events of 9/11and affirmed, in this context, "the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations)". Both of them also emphasized, citing previous resolutions, the obligation not to harbor terrorists.[79] All of this, taken together, can be loosely interpreted as an endorsement of SD against NSA. However, as is expectable from this type of resolutions, they stayed short of making any more explicit legal assessment on the nature of the attacks and the applicability of article 51.

After 9/11, no UNSC resolution is relevant until 2015, when ISIS terrorist attacks gave way to the international coalition in Syria and Iraq. In this context, the UNSC adopted Resolution 2249, which was not adopted under Chapter VII and which did not refer whatsoever to article 51 and the right to SD. The resolution was limited to making a call upon "*Member States that have the capacity to do so*" to "*take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups*".[80] Clearly, the possibility of Russia or China using their veto power kept these resolution from using a stronger language based on article 51. The outcome, therefore, cannot be said to clearly build a precedent of institutional endorsement of SD against NSA, although it certainly cannot be construed as a precedent against it either. Similarly

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[79] UNSC, 'S/RES/1368 (2001)'; UNSC, 'S/RES/1373 (2001)'.
[80] UNSC, 'S/RES/2249 (2015)' para 5.

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telling, other UNSC resolutions on terrorism in recent years have established complex sanctions regimes in over 100 operative paragraphs, not once mentioning article 51 or the right to SD.[81]

Also relevant to note on the multilateral side, the African Union adopted in 2005 its Non-Aggression and Common Defence Pact, which fully included in its definition of aggression action by NSA non-attributable to states, going beyond the definition of UNGA Resolution 3314. Article 1. C) states that "'*Aggression' means the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact*". These seems to tacitly recognize that acts by NSA are susceptible to attain the threshold necessary to activate the right to SD. In this sense, the AU's Defence Pact is evidence of multilateral endorsement of SD against NSA.

Finally, it is noteworthy that, although the UN Secretary General adopted after 2001 reports in which he referred to the right to SD under article 51, it never addressed SD against NSA. One example of this was the well-known *A more secure world: our shared responsibility* report of 2004. In it, the SG discussed the contemporary issues concerning self-defense, not addressing SD against NSA at any point. Rather, it discussed at length the issue of preemptive SD, ultimately rejecting it. The SG also referred to the responsibility of states not to harbor terrorist organizations, but stayed short of relating it to matters concerning SD.[82]

The ICJ

The ICJ played a refractory role with regard to SS against NSA in the years following 9/11. Following its position in *Nicaragua,* in the *Wall Advisory Opinion*, the Court discarded with almost no discussion Israel's argument that the construction of a wall in occupied territories had been done under the legal entitlement of SD. Rather than discussing the inadequacy of a wall as a means of self-defense – given its permanent and not exceptional character – the Court simply determined that article 51 was not applicable because this legal provision "*recognizes the existence of an*

[81] See, for example: UNSC, 'S/RES/2253 (2015)'; UNSC, 'S/RES/2368 (2017)'.
[82] United Nations, 'A More Secured World: Our Shared Responsibility, Report of the Secretary-General's Highlevel Panel on Threats, Challenges and Change' (2004) A/59/565 paras 188–194.

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inherent right of self-defence in the case of armed attack by one State against another State", and "*Israel does not claim that the attacks against it are imputable to a foreign State*".[83] Thus, in the ICJ's judgment, article 51 was irrelevant in the case. The simplicity of this reasoning, however, was objected in the separate opinions of judges Higgins, Kooijmans, Buergenthal, Simma, Tomka, and Jennings, who overall argued that the issue of SD was simply more complex than that. Interestingly, the Court's argument that SD was not invokable against NSA seems not to have appeared at all in the written and oral statements of the states participating in the procedures. While some states objected the pertinence of article 51 in the case, no state challenged its applicability against NSA – see for example the written statements of the League of Arab States, Egypt, Lebanon, Jordan, Cuba or Brazil. Several states supporting Israel, on the other hand, admitted the right of Israel to defend its citizens against terrorist attacks – see for example the arguments of France of Germany.

Then, in *Armed Activities (DRC v Uganda)*, the ICJ assessed Uganda's claims of SD against NSA in DRC's territory under the logic of attributability. Again in line with *Nicaragua*, this meant in the case, by implication, that article 51 was irrelevant because the NSA acts in question – the armed activities of the Lord Resistance Army in DRC against Uganda – were not attributable to DRC, thus tacitly saying again that SD applies exclusively between states. This notwithstanding, a paragraph later the Court rejected explicitly the need to pronounce itself on the matter of SD against NSA, acting as if it had not evaluated the merits of the SD under the logic of state attribution of *Nicaragua*.[84] Here, again, judges Kooijmans and Simma issued a strong joint separate opinion.

After the *Armed* Activities decision in 2005, the Court has not had any further occasion to pronounce itself on the matter of SD against NSA. However, the refractory pattern of its jurisprudence on the matter perpetuated the debate and gave important legal arguments to those objecting SD against NSA, obscuring the role of the relatively homogenous state practice before and after 2001. It is important to stress, nevertheless, that both of these decisions were adopted by

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[83] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (ICJ) [139].
[84] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* (ICJ) [146, 147].

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a highly divided bench on the point of SD against NSA, revealing that the outcomes were most likely compromises among the judges.

Academic debate

As said above, 9/11 marked the opening of a wide academic debate on the issue of SD against NSA that became exceptionally popular and that was sometimes portrayed as more disputed than it actually was in reality. Overall, it can be said that the largest segments of opinion since 2001, either favor interpreting SD as covering attacks by NSA, or show some ambiguity, sometimes recognizing that practice is unclear or for instance suggesting mixed ways of attribution of NSA conduct to states. A rather narrow minority fully continues to reject the legality of SD against NSA to this day. Although the present study is based mainly on Western voices – out of availability of materials rather than a methodological choice – it seems that there is no significant propensity of opinion on the basis of the Western or non-Western origin or academic orientation of the authors. Indeed, as will be seen, the divide in opinions exists well within Western authors, and the few non-Western authors consulted – Amirhandeh, from Iran, and Rao, from India – both favor SD against NSA. Any hard conclusion on the matter, however, would require further research.

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On the side of those scholars who unambiguously favor SD against NSA are Franck,[85] Tams,[86] Amirhandeh,[87] Gill,[88] Bethlehem,[89] Steenberghe,[90] Trapp,[91] Rao,[92] Tsagourias[93], Henderson,[94] and Brunnée and Toope,[95] among others. They do so based on a myriad of arguments and with very different degrees of academic thoroughness, but generally basing their arguments on the practice of states since 2001. Some of them, as Brunnée and Toope, recognize that in abstract there exists a right to use SD against NSA, but contest, for example, that the unwilling/unable standard has bases in international law.[96] Also relevant to mention are two sets of principles developed in academic settings and fully endorsing SD against NSA – although it must be said that they were issued by very homogenous panels of international lawyers, exclusively Western and from countries actively having invoked SD against NSA, as the UK and the Netherlands. These are the Chatham House Principles of International Law on the Use of Force by States In Self-Defence of

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[85] Thomas M Franck, 'Terrorism and the Right of Self-Defense' (2001) 95 The American Journal of International Law 839, 840; See also: Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press 2002).
[86] Christian J Tams, 'The Use of Force against Terrorists' (2009) 20 European Journal of International Law 359; O'Connell, Tams and Tladi (n 78).
[87] Amin Ghanbari Amirhandeh, 'Examination of the Plea of Self-Defence Vis a Vis Non-State Actors' (2009) 15 Asian Y.B. Int'l L. 125.
[88] Terry D. Gill and Dieter Fleck, 'Part III Military Operations within the Context of the Right of Self-Defence and Other Possible Legal Bases for the Use of Force, Ch.8 Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law', *The Handbook of the International Law of Military Operations* (1st edn, Oxford University Press 2010).
[89] Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors'' (2012) 106 American Journal of International Law.
[90] Raphaël Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 Leiden Journal of International Law 183.
[91] Kimberley Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015).
[92] Rao (n 78).
[93] Nicholas Tsagourias, 'Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule International Law and Practice: Symposium on the Fight against ISIL and International Law' (2016) 29 Leiden Journal of International Law 801.
[94] Christian Henderson, *The Use of Force and International Law* (Cambridge University Press 2018).
[95] Jutta Brunnée and Stephen J Toope, 'Self-Defense against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?' (2018) 67 International & Comparative Law Quarterly 263.
[96] ibid 273.

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2005,[97] and the Leiden Policy Recommendations on Counter-Terrorism and International Law of 2010.[98]

On the side of the more ambiguous scholarly positions are, among others, Kohen,[99] Ruys,[100] Nolte and Randelzhofer,[101] De Hoogh,[102] Kolb,[103] Lehto,[104] Peters and Marxsen,[105] and Corten.[106] Most of these authors tend to see an inconsistent practice, insufficient to determine the matter. Also ambiguous is the resolution of 2007 of the Institut de Droit International "Present Problems of the Use of Armed Force in International Law". It seems to be so because it endorses SD against NSA but only refers to two possible hypothesis, namely that an attack by an NSA is attributable to a state, or that the attack by an NSA is launched from beyond the jurisdiction of any state. Yet, in its last paragraph it also mentions that "*the State from which the armed attack by non-State actors is launched has the obligation to cooperate with the target State*". Therefore, the resolution fails to deal explicitly with the hypothesis of the territorial state failing to cooperate with the target state, and the attack not being attributable directly to it. This omission makes the IDI's resolution ambiguous.

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[97] See pple. 6, at: https://www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf.

[98] See paras. 38 and 42, at: https://www.parlementairemonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvij5epmj1ey0/vify7910urzk/f%3D/blg68451.pdf

[99] Marcelo Gustavo Kohen, 'The Use of Force by the United States after the End of the Cold War, and Its Impact on International Law' in Georg Nolte and Michel Byers (eds), *United States hegemony and the foundations of international law* (Cambridge University Press 2003) 206, 207.

[100] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 529,530.

[101] Georg Nolte and Albrecht Randelzhofer, 'Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression: Article 51' in Bruno Simma and others (eds), *Oxford Commentaries on International Law* (Oxford University Press 2012) paras 38–41.

[102] André De Hoogh, 'Restrictivist Reasoning on the Ratione Personae Dimension of Armed Attacks in the Post 9/11 World' (2016) 29 Leiden Journal of International Law 19.

[103] Robert Kolb, *International Law on the Maintenance of Peace : Jus Contra Bellum* (Edward Elgar Publishing, Incorporated 2018) 385.

[104] Marja Lehto, 'The Fight against Isil in Syria. Comments on the Recent Discussion of the Right of Self-Defence against Non-State Actors' (2018) 87 Nordic Journal of International Law 1.

[105] O'Connell, Tams and Tladi (n 78) 8, 277.

[106] Anne Peters and others, 'Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War' [2017] Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2017-07 <https://papers.ssrn.com/abstract=2941640> accessed 31 March 2020.

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Lastly, on the side of the scholars opposing SD against NSA was Corten[107] – whose opposition in 2009 became ambiguous in the above cited piece of 2017 – and more recently Tladi[108] and O'Connell.[109] Also contrary to SD against NSA was the "Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism" of 2016, which was originally conceived by Corten and endorsed thereafter by 243 international legal scholars of very different backgrounds.[110] While this plea is undoubtedly a strong indication of the extent of the opposition to SD against NSA among academics, it nevertheless fails to say anything about one of the crucial points in the debate – arguably making it easier for many academics to endorse. Following the *Nicaragua* logic, the plea contends that SD is available against NSA only in cases where a terrorist attack is attributable to a state. Similarly, it contends that the "*the mere fact that, despite its efforts*" a state is unable to neutralize the terrorist threat is insufficient to make SD directly available to the state targeted by the terrorist attack, in view of the abuses that this could lead to. However, the plea is silent on the crucial point of a state being not unable, but reluctant to tackle the terrorist threat. This seems to put into question its true value as opposing the use of SD against NSA, as its silence suggests that in this situation an attack would be attributable to a state – which would in turn mean endorsing Israel's "unwilling" standard.

In sum, it seems that there is still a broad and open debate within academic circles on the validity of SD against NSA. However, it also seems that holding a narrow view rejecting SD against NSA on the whole is less tenable these days, as shows the relativization of Corten's own opinion – an academic who has, all along, been one of the main opposers – and the vast number of authors who eschew taking a definite position. This divide in opinions also reflects the contradictory indications on the state of the matter by different stakeholders: individual states, multilateral institutions, and the ICJ all going in different trajectories.

[107] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publ 2010) 161.
[108] O'Connell, Tams and Tladi (n 78) 86, 87.
[109] ibid 256, 257.
[110] Available at: http://cdi.ulb.ac.be/wp-content/uploads/2016/06/A-plea-against-the-abusive-invocation-of-self-defence.pdf

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II. Analysis

a) Trajectory of the case (SCR framework)

This case is one of norm adjustment. While in point A (the first phase) jus ad bellum prohibited SD against NSA, in point C (the third phase) this is not clearly the case anymore. In this sense, one can trace a somewhat linear trajectory, mainly determined by the gradual expansion of individual state practice from 1969 to the present. However, there are a number of discontinuities that make the development of the case fit uneasily to the Selection/Construction/Reception framework. These include, first, the fact that the second phase – where states started to individually resort to SD against NSA – passed largely unnoticed to commentators, institutions, and, paradoxically, to states themselves, who for over thirty years never made any comment on this point of law. The second discontinuity, crucially, is the persistent refractory position of the ICJ, which has throughout the years stuck to its denial of SD against NSA without actually engaging in any real argumentation, largely clogging debates in academia and fueling tenuous and intentionally ambiguous opposition among certain circles, such as the NAM. A third discontinuity exists in this case with regard to the impossibility for this change to transit through multilateral and bureaucratic channels, which with very few exceptions have timidly touched upon the matter. Fourthly and last, it seems counterintuitive that the first explicit rejection of SD against NSA by a state came as late as 2016 and in the voice of countries that had arguably no relevant stakes at play: Brazil, Mexico, Cyprus and to some extent Lichtenstein. In this context, framing the trajectory as comprising fluidly the three stages of selection, construction, and reception, seems problematic. This section nonetheless runs the development of SD against NSA through the SCR framework, in order to get a fuller picture of the different driving forces and relevant factors at play.

Selection stage (second and third phases of the chronology)

This case has to a very high extent transited through the state action path. This started to happen in 1969, when Israel set out targeting Hezbollah in Lebanon under the banner of SD. For the thirty years that followed, several states followed this line of argument in a scattered manner and without any conscious continuity, until the coalitions against Al-Qaeda and ISIS in 2002 and 2015 were formed. Then, several – mainly Western – states acted jointly claiming to take military action

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against NSA under SD. This description captures most of what there is to say about this case, and in this sense there is no doubt that the state action path is by and at large the predominant pathway.

Crucial in explaining why the state action pathway has been so prominent in this case is the fact that SD under article 51 is a right of states only. As such, the main interest and agency concerned is that of states. But beyond the exclusiveness of the entitlement under article 51, it is also clear that individual states and coalitions have never really required the open endorsement of any institution to implement article 51 in whichever way they wanted. In this sense, it is unsurprising that states using SD against NSA generally refrained from investing efforts in getting the multilateral or bureaucratic machineries of international organizations involved. When the circumstances were so grave as to allow for swiftly getting institutional endorsement – as with the UNSC in 2001 – it is undeniable that states benefited from it. But this approval has never been an indispensable source of authority or legitimacy to states. On the opposite, it seems that as long as states could count on not having an open rejection of SD against NSA by international institutions – which was never a serious problem at the UNSC because of veto powers – they did not perceive there to exist sufficient added value in getting institutions involved. In consequence, the selection phase in this case is highly un-institutional.

Institutional availability

While it is true that SD against NSA has mainly transited through pathways of low-institutionality – given that its main entrepreneurs have not felt a strong need for institutional endorsement – it is also true that institutions have not been readily available to them. Certainly, international institutions have served as a forum for expression and debate. The UNSC exemplifies this perfectly: it is a multilateral organ where states are legally bound to explain their invocations of article 51 and where any other state is free to express support, opposition, or to remain silent. For the purpose of expression and debate, then, the UNSC has been undoubtedly available. But for the more substantive purpose of obtaining institutional endorsement – or rejection, for that matter – the hurdles of the voting system at the Council have in general been too difficult to overcome.

This is evidenced by resolutions 1368 and 1373, adopted in the aftermath of 9/11, which are the only resolutions in the history of the UNSC that in some more or less clear way relate terrorism and self-defense. Behind them was a truly exceptional setting: the very high-profile impact of 9/11

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– because of the targeted state, the amount of victims, and the visibility of the attack – and the fact that the Taliban regime in Afghanistan had no real allies among the permanent members of the Council. In less exceptional circumstances, getting the endorsement of the UNSC would have been nearly impossible. The contrast of 9/11 with the ISIS situation in 2015 shows precisely this. ISIS was also an unprecedented challenge that triggered grave concern among the international community. On top of killing an important number of innocent people in several countries, it organized itself as a state and controlled vast amounts of territory. Yet, all of this was not enough to outweigh Russia and China's support of the governing regime in Syria, blocking any possibility of achieving a resolution at the UNSC expressly endorsing the use of article 51 against NSA.

Other institutions have not proven to be any more available than the UNSC. Notable for its absence in this case was is the General Assembly. Although a thorough review of its debates and decisions is lacking in this analysis, it is clear from the overview of its pronouncements and from the literature on the topic that the UNGA has not been seen as an important venue by states in this case. This might be because of the UNSC's very clear mandate over issues of SD and article 51, but also because achieving majorities at the UNGA on this topic has never been feasible. Indeed, it seems that, while states from very different geopolitical camps have resorted individually to SD against NSA, most states would be reluctant to have it publicly endorsed by institutions like the GA, considering the perceived risks of abuse, as shown for example by the recent opposition of Brazil, Mexico and Cyprus at the UNSC. The ICJ, with only three cases where the matter could have been dealt with in 75 years, cannot be said to be readily available either. The hurdles of jurisdictional consent are high and difficult to circumvent, and the resulting backlash for states arguing for SD against NSA in the three cases so far – the USA, Israel and Uganda – discouraging.

This all accounts for a medium-level degree of institutional availability. Yet it is important to keep in mind that, by the nature of this case, institutional endorsement has been clearly secondary. The same can be said about the role of institutions in anti-preneurship; with the odd exception of the ICJ – whose motivations remain unclear – achieving clear institutional pronouncements rejecting SD against NSA has also been close to impossible for those few states and academics contesting it.

Salience

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The matter of SD against NSA seems to be one of very high salience. The use of force, and SD specifically, are matters that are at the core of the states' security functions. In that sense, few cases have a similar degree of prominence within state's inner and foreign policy priorities. This has been evident in this case through the importance given by states to the matter in their debates at the UNSC and elsewhere, where often cabinet members or even heads of state have appeared.

Actors and agency

It has been made sufficiently clear to this point that the main actors in the case under analysis have been states acting individually or collectively – very seldom acting multilaterally or institutionally. Their motivation most of the times has been strongly linked to security purposes, and in that sense it is clear that states have never perceived there to be a strong need of SD against NSA to be publicly or institutionally acknowledged as a formal or quasi-formal rule of international law. Their main interest has been to remain as free as possible from any obstacles in taking military decisions, and it being the case that in practice they are very free under the current wording of article 51, states have not felt a need to embark in quests for achieving a clear-cut formal legal standard establishing SD against NSA. In consequence, the states' interest in having SD against NSA at hand has never translated into an interest in explicitly changing any formal rule of international law. This has also meant that no international institution has taken it for itself to attempt changes on its own.

In this scenario of institutional vacuum, it seems that academics have perceived their own role as more influential than in other cases of international legal change. As such, academic activity has been exceptionally high on this issue since 2001 – 21 positions on the issue were discussed above, and this is clearly only a fraction of the total of academic work on the issue. In addition, as in no other case, here there have been several activist initiatives by collectives of scholars taking position for or against SD against NSA. The Chatham House Principles of International Law on the Use of Force by States In Self-Defence, the Leiden Policy Recommendations on Counter-Terrorism and International Law, the IDI's "Present Problems of the Use of Armed Force in International Law" resolution, and Olivier Corten's "Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism" are all examples of this. It is unlikely that this ample academic activity has made a clear difference in the trajectory of the case, but the depth of academic engagement has undoubtfully been exceptional.

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Opening and Factors

A major contextual factor that has driven change in doctrines of self-defense since 1945 is the radical change in the way armed conflict and threats to international peace and security take place. There has been an exponential growth in international politics of the importance of NSA threats both to internal and international peace and security. In a first moment, from the 1950s up until the 1990s, rebel groups sheltering and operating from within neighboring states – a practice that was not necessarily new – seem to have become more complex and challenging than before, or in any case more present in international relations. Examples of this are Hezbollah, PKK, and the liberation movements during the 1970s. In a second moment – mostly since the 1990s – terrorism became a prominent threat to international security, operating across borders and on purpose hiding from public exposure. And lastly, since around 2010, NSA like ISIS have started to organize in new and complex forms, challenging states beyond terrorist activities, attempting for example to gain control over large portions of territory. All of this critically impacted traditional understandings of jus ad bellum, and with it required new interpretations of article 51 and SD.

Critical Juncture

9/11 was for this case a clear critical juncture. It was a sudden event of the highest political, social and mediatic impact, which demanded clear immediate legal – and political – answers. The terrorist attacks of that day, by having targeted the biggest economic and military power at the time in such a sensitive way, were of sufficient prominence as to merit politically the emergence of a coalition of NATO allies, all claiming SD against NSA and all willing to deploy troops for the effort. On top of that, the outspokenness of NSA behind the attack – Al-Qaeda and Osama Bin Laden personally – together with the political context in Afghanistan, made it all the more justified before large segments of the general public to frame the situation as wartime. In that sense, the whole military operation in Afghanistan and the narratives around it required, more than ever, a wartime legal justification. Therefore, even if SD against NSA had been silently around use since 1969, 9/11 was the critical juncture that elevated it to the category of legal doctrine, making it an obligatory topic to discuss in political and academic venues.

While less momentous than 9/11, the appearance of ISIS in the Middle East and its attacks against Western and non-Western states since 2013 were also a crucial moment for SD against NSA,

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allowing prominent military powers to restate their positions in favor of SD against NSA and reinforce their practice. In addition, the unprecedented nature of an NSA of such strength, structure and power, made it clear that limiting SD to use among states would make little sense in the contemporary context.

Construction stage (second and third phases of the chronology)

The construction stage in the case of SD against NSA is arguably narrow in its scope. As argued before, the states resorting to SD against NSA did not necessarily have an interest in creating a clear and theorized doctrine on the matter. They did not pursue it institutionally – other than attempting to obtain favorable resolutions at the UNSC in times of crisis. As such, the scant normative content provided by them has come in the form of assertions made in the context of real situations, as for example the unwilling/unable test for determining when the sovereign territorial jurisdiction over a situation can be trumped. But there is little content beyond this test – highly controversial, by the way – that states have pushed for. Rather, academics have assumed the role of constructors of this change attempt. It has been them discussing the basis, applicability and extent of the rule – or arguing against it. These efforts, however, have had little impact beyond academic work in state positions or institutional or judicial opinions.

Stability

Under the view that this case is one of norm adjustment, it seems to be the case that the original prohibition of SD against NSA before 1969 was very unstable before disturbance happened. First of all, article 51 of the UN Charter establishes since 1945 SD as a right exclusively belonging to states, but it does not explicitly say that the armed attack triggering it has to come from a state – even if for a long time article 51 was interpreted in this way. Second, the original prohibition of SD against NSA was not spelled out in any document of either hard or soft law. Thirdly, as the first phase of this case shows, the rule was scantly discussed mostly because armed attacks by NSA were simply not a prominent issue in international relations. And fourthly, the total lack of contestation of the practice of certain states using SD against NSA between 1969 and 2001 further confirms that stakeholders in general did not perceive these states to be violating international law. Therefore, the hypothetic prohibition of SD against NSA from 1945 to 1969 was highly unstable.

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Previous norm availability

The previous norm availability in this case seems to have been low. The rule of SD has always been perceived as narrow and very specific, there being in consequence few normative alternatives from which the original prohibition of use against NSA could be challenged. Plus, jus ad bellum is a field with few links to other fields. To some extent, perhaps the developing of rules of IHL for NIAC facilitated the use of SD narratives by states against NSA directly, somehow making it more plausible to treat NSA as subjects of international law against which SD could be invoked. However, the link seems tenuous and the potential influence low.

Reception stage (third phase of the chronology)

It is also not easy to pinpoint exactly what counts as reception in this case. Since the beginning in the 1960s and up to nowadays, this case's main pathway has been state action. Certainly, the numbers of states relying on SD against NS have expanded since 1969, notability with the coalitions against Al-Qaeda and ISIS in 2002 and 2015. This can be seen as evidence of reception. Another isolated but solid element of reception is the inclusion of attacks by NSA in the definition of aggression of the AU's Common Defense Pact. Yet, at the institutional level, with the exceptions of UNSC resolutions 1368 and 1373, there have been basically no other institutional signs of acceptance by other actors – nor of rejection for that matter, except for those of the ICJ. Also relevant on this point, the fact that the first outspoken and explicit rejection SD against NSA by any state happened in 2016 with Brazil, Mexico, Cyprus and Lichtenstein is certainly a discontinuity in the process of reception. In academia, one can see a loose tendency of the position in favor of SD against NSA gaining space, although not in a decisive way. Also pertinent to note on this point, the literature review conducted for this case-study has not fully taken stock of non-Western positions on the matter – out of accessibility and time constraints rather than methodological decisions. Nonetheless, the spread of positions and the few non-Western texts consulted suggest that the tendency endorsing SD against NSA might not only be true in Western international legal literature.

Outcome

Change in this case is partially successful. In terms of state practice, it has nowadays become widespread, with the overwhelming majority of states involved in armed conflict during the last

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fifty years endorsing it, and with very few states openly in opposition. The same applies for academic circles, where it seems that the spaces for arguing against have shrunk. However, the impossibility for these majorities to translate into institutional pronouncements endorsing SD against NSA reflect the extent to which this case is far from being fully successful.

b) ***Particular features of the case***

Prominence of state action pathway and low institutional embeddedness

The dominance of the state action pathway is a remarkable feature of this case. This is first and foremost the consequence of the evident fact that self-defense is a right pertaining to states only. In this sense, there seems to be no reason to have expected other actors to attempt change in this area on their own. This said, the fact that states have engaged so little with other actors in attempting change is less evident. Indeed, as seen above, only exceptionally have states sought to obtain institutional endorsement at the UNSC or other venues. This is perhaps due to a sum of two factors: the difficulty of achieving majorities in multilateral bodies on a topic like this one, plus the fact that states using SD against NSA ultimately do not need institutional approval in order to carry out their military objectives – as long as they manage to avoid institutional disapproval, which is easy to do if a state is close to any of the permanent members of the UNSC.

Discontinuities in trajectory

Four discontinuities – mentioned above – marked the trajectory of this case:

a) Lack of acknowledgment of practice in the second phase and delayed awareness: a factual oddity of this case is the fact that the practice of states implementing SD against NSA between 1969 to 2001 was almost never perceived as something contentious at the level of states or worth noting by the majority of scholars. Indeed, it is perplexing that from the authors of that period that were consulted in this case study, only Dinstein referred to the issue of SD against NSA. The historical explanation might well be that this practice was deemed to be perfectly legal in this respect – thereby not triggering major debate – but that only leads to the more complicated question of why then, after 9/11, and despite the broadening practice, the issue started being perceived as highly contentious – at least in academic settings.

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b) Persistent refractory position of the ICJ and perpetuation of the debate: the ICJ played in this case a countercurrent role with respect to clear patterns of state conduct. While Nicaragua was a judgment very much in line with the legal discourses of its time – focusing and acknowledging indirect aggression – sticking to its rationale after 2001 without even giving appropriate reasons for it was clearly anachronical. The reasons for it are not very obvious, but one can suppose that, facing what was perceived as an unstable and very salient matter, most of the judges found it safer to cling to the apparent solidity of the *Nicaragua* precedent. It is therefore not surprising that the decisions in the *Wall Advisory Opinion* and *Armed Activities* were taken by highly divided votes in the bench. In any case, the ICJ's position arguably played a critical role in perpetuating the debate, by obscuring the rather clear state practice that had taken place before and after 9/11.

c) Blockage of institutional and bureaucratic channels of change: perhaps due to the high salience of this case, multilateral bodies and international organizations have been generally absent from the trajectory of this case, with the exception of two resolutions at the UNSC. At the same time, and as was said above, institutional or bureaucratic endorsement was never deemed to be indispensable by the states to employ SD against NSA. However, this absence of activity on the multilateral and bureaucratic pathways has certainly withheld broader acceptance and perpetuated the debate on SD against NSA.

d) Late-coming opposition among states: although disagreement with certain interpretations of SD were voiced as early as the 1960s, no state ever voiced explicit opposition to SD against NSA until 2016, when Brazil, Mexico, Cyprus and to some extent Lichtenstein questioned the legal basis of the military operations against ISIS in Syrian territory. The reasons for this are by no means clear, all the more considering that none of these states had any real stakes at play. It is yet to be seen if this opposition ever expands, or dissolves in the next years.

Outcome: seemingly unachievable full acceptance

It seems theoretically counterintuitive that a topic in which there exists vast state practice supporting change would find no real means of achieving institutional endorsement of any kind.

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This has been so, one can suppose, because it serves better the interests of a majority of states – especially those not facing direct NSA threats from abroad – to stay ambiguous in their views on article 51, rather than to support formal or informal law-making efforts by states committed to SD against NSA. That can well be due to the fact that having an institutionally unendorsed rule of SD against NSA reduces the risks of abuse by other states and leaves available a useful, anti-interventionist legal and rhetorical tool to fend off foreign intervention, while at the same time remaining at hand in case of a NSA threat emerging at some point. The attitude of states like Russia, Iran or India reflects this balance of incentives: while they have generally tried to keep an anti-imperialist appearance subscribing the vague calls of the NAM for a restrictive interpretation of article 51, when necessary they have used force in neighboring countries under the argument of SD against NSA. As such, it appears that for an important number of states, having a stable and uncontroversial rule permitting SD against NSA would do more harm than good. If that is true, then it is not surprising that international institutions find themselves blocked, despite the support of an important segment of world powers. In consequence, it seems unlikely that SD against NSA will ever achieve full acceptance, but it also that it will reach the point of failure.

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<u>Case Study 4</u>

The Effects Doctrine of Jurisdiction

(June - October 2020)

Pedro Martínez Esponda

Synopsis

In 1945, the US Court of Appeals for the Second Circuit ruled in *Alcoa* that it was legitimate for US courts to exercise antirust jurisdiction in cases where the relevant conduct had taken place abroad and was undertaken by foreign nationals, if it produced a negative effect in US markets. Whether aware of it or not – most likely the Second Circuit Court of Appeals was oblivious to this – the *Alcoa* ruling stretched the boundaries of the doctrine of jurisdiction under international law at the time, opening an era of contestation on the matter. For the next 50 or so years, US judges continued to implement the effects doctrine, while most of its Western allies perceived this to be an encroachment upon their economic sovereignty – often resorting to judicial, legislative, and administrative measures intended to block the extraterritorial antitrust jurisdiction of the US courts. The effects doctrine was largely perceived as an overstretching of international law during this time. Eventually, however, the confrontation eased. Globalization of markets and the increasing awareness of the importance of enacting antitrust legal frameworks during the 1990's led a large number of states to tacitly or explicitly endorse the effects doctrine. Similarly, states sought to institute antitrust cooperation schemes through different international organizations and initiatives. All of this translated into the silencing of opposition to the effects doctrine, the alignment of legal opinions globally, and the technification of the matter. Today, the rules of jurisdiction under international law are perceived in most constituencies to include an exception to the principle of territoriality for the effects doctrine in antitrust legislation – some even contending that the exception is more general, not limited to this field.

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I. Chronology

First phase: Open dispute (1945-1976)

Jurisdiction, understood as the entitlement of the state "to regulate conduct or the consequences of events", was thought under classic IL to rest almost exclusively on the principle of territoriality.[1] This meant that within a given territory, only the state enjoying sovereignty had the right to prescribe and enforce laws. As put by arbitrator Max Huber in the *Island of Palmas* award of 1928, "the development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established [the] principle of the exclusive competence of the state in regard to its own territory".[2] The famous – and on several points controversial – judgment of the PCIJ in the *Lotus* case had a year before *Island of Palmas* underlined this principle in saying that "the first and foremost restriction imposed by international law upon a state is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another state".[3] Very few exceptions vesting jurisdiction on states over persons or situations in the territory of other states were thought to exist at the time. These comprised mainly the rules of diplomatic and military immunities.[4] As unambiguously said by Oppenheim in 1905, "no right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations".[5]

While the principle of territoriality continues to be the main element of the architecture of jurisdiction under IL, several exceptions have arguably developed with regard to prescriptive jurisdiction since the remote times of *Island of Palmas* and *Lotus.* One of these is what has come to be known as the *effects doctrine*. This exception, which on the main concerns the rather narrow

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[1] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law. Vol. 1, [1]: Peace. Introduction and Part 1* (9th edn, Oxford University Press 2008) 456.

[2] *Island of Palmas case (Netherlands, USA)* [1928] Max Huber (sole arbitrator) Reports of International Arbitral Awards. VOLUME II pp. 829-871 838.

[3] *Case of the SS 'Lotus'* [1927] PCIJ Series A. No. 70 18, 19. Although the PCIJ controversially said in the ensuing paragraph that "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law".

[4] L Oppenheim, *International Law: A Treatise*, vol 1 (Longmans, Green, and Co 1905) 195, 196 <https://heinonline.org/HOL/P?h=hein.hoil/inltreat0001&i=194> accessed 10 June 2020.

[5] ibid 197; see also: Hans Kelsen, *Principles of International Law* (Rinehart 1952) 208, 209.

Electronic copy available at: https://ssrn.com/abstract=4430270

field of antitrust law, was first put forward in 1945 by the US Court of Appeals for the Second Circuit in *US v. Aluminium Co. of America* (*Alcoa* case). Judge Learned Hand stated in that ruling that "it is settled law (…) that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders".[6] In saying this, he was extending the prohibition of monopolization under Section Two of the Sherman Act – the main antitrust legislation of the US – to acts of foreigners taking place outside the US but having a harmful effect on the US markets.[7] This overruled the 1909 *American Banana Co. v. United Fruits* decision, in which the US Supreme Court had explicitly rejected the possibility of extraterritorial reach of the Sherman Act.[8] More significantly – although it is certainly not clear whether Learned Hand had this dimension in mind or indeed considered it relevant at all – it opened a crack in the traditional understanding of jurisdiction under IL.

While *Alcoa* did not generate major controversy internationally in itself, the rulings that followed this precedent in the next decades certainly did. In 1951, a district court of New York ruled in *United States v. Imperial Chemical Industries* against an exclusivity agreement among British companies which had the express support of the British government, on the grounds that it excluded American companies from the UK chemicals market. This was strongly opposed by the British government, which saw in the decision of the district court an interventionist attempt by the US judges to open up a market for its nationals.[9] British courts also opposed and granted an injunction preventing the parties in the case from obeying the ruling,[10] and even Parliament eventually passed a bill attempting to restrict foreign enforcement actions, the *Shipping Contracts and Commercial Documents Act* of 1964.[11]

Similarly, in the *United States v. Watchmaking of Switzerland Information Centre* case of 1955, the Swiss government reacted to an antitrust decision against Swiss companies for agreements

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[6] *United States v Aluminum Co of America* [1945] US Circuit Court of Appeals, Second Circuit 148 F.2d 416 444.
[7] Maher M Dabbah, *International and Comparative Competition Law* (Cambridge: Cambridge University Press 2010) 434.
[8] ibid 433.
[9] Nicholas Katzenbach, 'Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law' (1956) 65 The Yale Law Journal 1087, 1148, 1149.
[10] PCF Pettit and CJD Styles, 'The International Response to the Extraterritorial Application of United States Antitrust Laws' (1982) 37 The Business Lawyer 697, 698.
[11] Najeeb Samie, 'Extraterritorial Enforcement of U.S. Antitrust Laws: The British Reaction' (1981) 7 Maryland Journal of International Law 10, 61.

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made in Switzerland with the support of the government, saying that it infringed Swiss sovereignty, violated IL, and harmed the international relations between the two countries.[12] Other cases during this period applying the effects doctrine and giving rise to international reactions include *United States v. General Electric Co.* and *Occidental Petroleum Corp. v. Buttes Gas*.[13] Overall, it can be said that, in the three decades that followed *Alcoa*, the issue remained an open dispute between American courts and foreign governments – mainly, but not only, European – without the former showing any sign of deference to the latter.[14] In general, the issue was hotly debated internationally, with many perceiving the effects doctrine as an interference in domestic affairs and even sometimes referring to it as a "judicial aggression".[15]

During this early period, the EU – then European Economic Community – also implemented an antitrust institutional framework that would have its own internal struggles with respect to the effects doctrine. In 1964, the European Commission (EComm) first imported the effects doctrine in its *Grossfillex* decision, in which it determined that the scope of application of the Community's competition legislation is determined, not by the domicile of the private actor in question or the place where an illegal agreement is arrived at, but by the fact that an anticompetitive conduct affects competition within the common market or is designed to have that effect.[16] In doing this, the EComm clearly followed the American jurisprudence on the effects doctrine. However, eight years later the European Court of Justice (ECJ) declined endorsing this jurisprudential development in the *Dyestuffs* case. There, the EComm had again relied on the effects doctrine to sanction a concerted practice among all leading dyestuffs producers in Europe, including the British Imperial Chemical Industries – the same company that had been the object of antitrust suits in the US.[17] The British firm then challenged the EComm's decision before the ECJ arguing that the EU lacked jurisdiction over it, the UK not being a member of the Community at the time. The claim was also

[12] Dabbah (n 7) 471.
[13] Najeeb Samie, 'The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws' (1982) 14 Lawyer of the Americas 23, 24.
[14] Stanley D Metzger, 'The "Effects" Doctrine of Jurisdiction' (1967) 61 The American Journal of International Law 1015, 60.
[15] Katzenbach (n 9) 1149.
[16] Dabbah (n 7) 453.
[17] Peter Behrens, 'The Extraterritorial Reach of EU Competition Law Revisited: The "Effects Doctrine" before the ECJ' [2016] Discussion Paper, No. 3/16, Europa-Kolleg Hamburg, Institute for European Integration 8.

Electronic copy available at: https://ssrn.com/abstract=4430270

backed by an aide-mémoire of the UK government expressing concern over what it perceived as an infringement of the principle of territoriality and upon its sovereignty.[18] In face of this – and probably aware of the cumbersome negotiations concerning the UK's accession to the EU taking place simultaneously – the ECJ disregarded the EComm's use of the effects doctrine and the Advocate General's recommendation to endorse it. Rather, the ECJ based the EU's jurisdiction over Imperial Chemical Industries on the basis of a stretched notion of territoriality, claiming that the parent company based in the UK had control over its subsidiaries based in the EU – a criteria that came to be known as the "single economic entity" doctrine.[19] This suggests that in these early cases the cumbersome political implications of the effects doctrine within EU institutions were already present, specially vis-à-vis the UK.

During this time, the few international lawyers that were confronted with the question whether IL provided basis for the effects doctrine also seemed to be sceptical of it.[20] F.A. Mann, one of the leading international scholars dealing with the topic of jurisdiction at the time, considered in his influential Hague courses of 1964 that the effects doctrine was groundless under IL. He deemed that "in the light of these contradictory trends [in state practice] it is submitted that 'effect', whether intended or merely foreseeable or unexpected, does not constitute a sufficiently close connection with the importing country so as to permit the assumption of legislative jurisdiction by the latter" and consequently that from "the point of view of public international law the *Alcoa* decision cannot, therefore, be justified".[21] The same mindset seems to have been present at the International Law Association when, at the end of the 1960s, it decided to appoint a "Committee on the Extra-territorial Application of Restrictive Trade Legislation." In its report of 1972, after debating the issue of extraterritorial jurisdiction, the Committee adopted a resolution that read in its article 6: "IL, as evidenced by the general practice of States to date, does not permit a State to assume or exercise prescriptive jurisdiction over the conduct of an alien which occurs within the territory of

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[18] ibid 9.
[19] Dabbah (n 7) 453.
[20] See, for example, Hersch Lauterpacht's 1955 edition of Oppenheim's, where no mention is made to the issue of effects doctrine in the section concerning jurisdiction. L Oppenheim, *International Law: A Treatise*, vol 1 (Hersch Lauterpacht ed, 8th edn, D McKay 1955) 325–335.
[21] F A. Mann, 'The Doctrine of Jurisdiction in International Law (Volume 111)' [1964] Collected Courses of the Hague Academy of International Law 104. See also his footnote 350 for references to other authors opposing the effects doctrine at the time.

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another State or States solely on the basis that such conduct produces 'effects' or repercussions within its territory".[22] However, it must be said that a minority within the members already opposed this formulation at the time.[23]

Second phase: Compromise and backlash (1976-1995)

During the second phase of this case-study, two seemingly contradictory trends can be observed. On the one hand, both US lawmakers and judges took stock of the adverse international reactions the effects doctrine had triggered in the previous decades, and nuanced in different ways its application. On the other hand, the pervasiveness of antitrust cases in the US applying the effects doctrine – even if nuanced – further provoked an increase in the international rejection of it, both quantitatively and qualitatively.[24]

To begin with the first of these trends, it was the US Court of Appeals for the Ninth Circuit that first showed some measure of compromise in the application of the effects doctrine. In *Timberlane Lumber Co. v. Bank of America National Trust and Savings Association* (*Timberlane I)* of 1976, the Court said that *Alcoa* had been right to attach extraterritorial effects to the Sherman Act, but that the effects doctrine as stated in that judgment was "by itself (…) incomplete because it fail[ed] to consider other nations' interests".[25] In doing this, the judges of the Ninth Circuit Court attached to the *Alcoa* precedent a 'jurisdictional rule of reason' based on the notion of comity, allowing other courts to take into consideration the importance of deliberate protectionist policies of other countries when applying the Sherman Act.[26] This view was confirmed and further strengthened in 1984 by the same court in the *Timberlane II* case, where it devised a test for evaluating the appropriateness of exercising extraterritorial jurisdiction in antitrust matters. According to the *Timberlane II* test, a court ought to examine, first, the effect or intended effect on the foreign commerce of the US, then the type and magnitude of the alleged illegal behaviour, and finally the

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[22] 'Extra-Territorial Application of Restrictive Trade Legislation (Including Anti-Trust Legislation) Part II: Report' (1972) 55 International Law Association Reports of Conferences 107, 175.
[23] ibid 170–174.
[24] Nico Krisch, 'The Decay of Consent: International Law in an Age Og Global Public Goods' (2014) 108 The American Journal of International Law 1, 13.
[25] Dabbah (n 7) 345.
[26] ibid 435.

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propriety of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness.[27]

Also worth mentioning was the passing in 1982 of the Foreign Trade Antitrust Improvements Act (FTAIA) by the US Congress, a bill meant to clarify and homogenize the judicial extraterritorial application of the Sherman Act. This was one of the main demands of the countries objecting the US antitrust policies. What the FTAIA did normatively was to limit jurisdiction of US courts over foreign defendants unless such conduct had a "direct, substantial, and foreseeable effect" in the US markets – although in practice it had a minor impact in judicial practices.[28] Withal, it was seen by some as a step back in the pursuance of free markets.[29] Another development cementing the *Timberlane* jurisprudence in favour of international comity was the adoption of the *Restatement (Third) of Foreign Relations Law of the United States* by the American Law Institute. The *Restatement,* which was and still is largely perceived as an authoritative statement of IL in the US, laid some factors that courts should have in mind when asserting extraterritorial antitrust jurisdiction, all akin to reasonability and balance between the US and foreign interests in a given foreign anticompetitive conduct.[30] These included the link of the activity to the territory of the regulating state; the meaningfulness of the connections between the regulating state and the company in question, such as nationality, residence, or economic activity; the importance of the regulatory act to the US; and the importance of the regulation to the international political, legal, or economic system, among other considerations.[31]

Finally, the last compromising developments on the side of the US were, first, the *Hartford* case before the US Supreme Court in 1993, and second, the adoption of the *Antitrust Enforcement Guidelines for International Operations* by the Department of Justice in 1995. To begin with the *Hartford* case, it must be said that it was at the time of its adoption perceived as a long-overdue

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[27] ibid 436, 437.
[28] ibid 449.
[29] See, for example: Joseph P Bauer, 'The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana?' (2012) 65 Me. L. Rev 25; Douglas E Rosenthal, 'Relationship of US Antitrust Laws to the Formulation of Foreign Economic Policy, Particularly Export and Overseas Investment Policy' (1980) 49 Antitrust Law Journal 1189; John Byron Sandage, 'Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law' (1985) 94 The Yale Law Journal 1693.
[30] Dabbah (n 7) 438.
[31] Am. Law Institute, 'Restatement (Third) of Foreign Relations Law of the United States' ss 401, 403.

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endorsement by the Supreme Court of some of the fundamental tenets of American antitrust caselaw – something that had not been seen since *American Banana* in 1905. The Supreme Court concurred with *Alcoa* and both *Timberlane I* and *II* in considering that the Sherman Act vests extraterritorial jurisdiction on US courts even if the conduct under analysis is legal in the countries where it originates from – the UK in that case. That was an unsurprising, yet reassuring finding of the Court in the eyes of the US antitrust community. However, the Court evaded addressing head-on the issue of comity and the interests of foreign states. It tacitly endorsed comity by referring to it as a tool available in deciding the case, but denied its use in the facts before it given that the circumstances allowed for the parties to simultaneously comply with British and US law.[32]

As does for the *Antitrust Enforcement Guidelines for International Operations* by the Department of Justice, these were perceived as a "response to foreign state reactions to the effects doctrine [by] the US antitrust agencies".[33] They endorsed the comity criteria of *Timberlane I* and *II,* providing that "in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each agency takes into account whether significant interests of any foreign sovereign would be affected".[34] Thus the Guidelines followed the compromising tendency also shown in the *Third Restatement*, seeking to bring into balance the interest of foreign states in antitrust cases. This notwithstanding, the UK government published its "*Comments*" on the Guidelines, ultimately claiming that, in spite of the comity considerations, the "US competition rules [were] being used as a trade policy tool to open markets perceived as closed to US firms".[35]

As does for the countertrend – that of increased international outrage at US antitrust policies – it is important to consider, first, that not all US courts followed the *Timberlane I* and *II* deferential route. In particular, there was one case that constituted a "major irritant in US foreign relations",[36] as put by Vaughan Lowe: the *Uranium Antitrust* litigation between 1979 and 1984. Following the

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[32] Dabbah (n 7) 439.
[33] Brendan Sweeney, 'International Governance of Competition and the Problem of Extraterritorial Jurisdiction' in John Duns (ed), *Comparative Competition Law* (1st ed.., Edward Elgar Publishing Limited 2015) 355.
[34] US Department of Justice, Antitrust Division, 'Antitrust Enforcement Guidelines for International Operations' <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>.
[35] JP Griffin, 'Foreign Governmental Reactions to US Assertion of Extraterritorial Jurisdiction' (1998) 6 George Mason Law Review 505.
[36] AV Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution' (1985) 34 International and Comparative Law Quarterly 724, 727.

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imposition of an embargo by the US government upon foreign enriched uranium imports in the 1960s, the governments of Australia, Canada, South Africa and the UK fostered their domestic uranium producers to conclude an agreement on uranium supply and prices. This was in fact a supply cartel, created with the aim of reducing the harms provoked by the American embargo on the Australian, Canadian, South African and British producers. Yet, the agreement led *Westinghouse Electric Corporation*, an American power company, to sue the embargoed companies under the Sherman Act, claiming damages for $6 billion USD.[37]

The favourable outcome for *Westinghouse* arose the indignation of the governments involved, which complained about an infringement of their sovereignty.[38] But this time their resentment transcended the mere issuing of diplomatic notes and *amicus curiae* to the relevant courts. The four countries concerned enacted statutes blocking any effect of the American judgment. The UK passed in 1980 its Protection of Trading Interests Act (POTI Act), which entitles – it is still in force – the British Secretary of State to, at his or her discretion, make any statutory order needed in cases where foreign jurisdictional measures pose a threat to British trading interests.[39] This act was objected by the US government, which claimed that it would "encourage a confrontational rather than cooperative approach to resolving issues in which both our countries are interest", to which the British government replied saying that the introduction of the bill was precisely "a consequence of the failure to resolve the problem in question through diplomatic channels".[40] Canada, Australia and South Africa followed suit in adopting similar blocking statutes.[41] But the backlash against the US concerned not only the countries involved in the *Uranium* case. Belgium, Denmark, Finland, France, the Federal Republic of Germany, Italy, the Netherlands, New Zealand, Norway, the Philippines, Sweden, and Switzerland all adopted legislation neutralising the extraterritorial reach of foreign legislation in some cases.[42]

In these conditions, it was clear that the ECJ was in no position to endorse the effects doctrine. Despite the EComm's enthusiasm displayed in *Grossfilex* and its 11th Report on Competition Policy

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[37] For a full account of the case, see: ibid 725–727.
[38] Samie (n 11) 60.
[39] Pettit and Styles (n 10) 701.
[40] ibid.
[41] ibid 707–711.
[42] Lowe (n 36) 727; Dabbah (n 7) 472–475.

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of 1981,[43] in the *Osakeyhtio and others v. E.E.C. Commission* case – better known as the *Wood Pulp* case – of 1988, the ECJ devised the standard that it would follow in the nearly 30 years to follow: the implementation doctrine. The case concerned 41 wood pulp producers whose offices were in Canada, Finland, Switzerland or the USA, and which had incurred in price-fixing, exchanges of information on prices, and prohibitions on the export or resale of wood pulp sold in the EU.[44] Disregarding the recommendations of the EComm to make use of the effects doctrine, the Court considered that the foreign anticompetitive agreements fell under the scope of the European legislation because they were implemented in European markets insofar as the companies had subsidiaries or agents that indirectly gave it effect within the EU.[45]

Other than at the European institutions, during the period in question the effects doctrine was not the object of debate or pronouncements in other international organizations. It was, however, addressed by the *Institut de droit international* in a resolution of 1977 adopted in its Oslo session, and entitled *Resolution on Multilateral Enterprises.* A compromise between the American and European members of the IDI, the resolution endorsed the effects doctrine – albeit only a remarkably restrictive version of it. In its article VI, it read: "Jurisdiction to regulate, control and penalize restrictive competition practices of multinational enterprises, which shall be based in all cases on the place where such practices are performed, should, in addition, be made dependent on the effects of the latter, but only if these effects are deliberate - or at least predictable -, substantial, direct and immediate within the territory of the State concerned".[46] The wording of this proposal was clearly as restrictive as possible, yet without rejecting the effects doctrine. This seems a remarkable statement at the time, considering that only five years earlier the International Law Association had rejected a similar project. Also relevant to note, the IDI made a call in the same article for states to engage in negotiations akin to a treaty on the matter, something that was never achieved.

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[43] Dabbah (n 7) 453.
[44] Vaughan Lowe, 'International Law and the Effects Doctrine in the European Court of Justice' (1989) 48 The Cambridge Law Journal 9, 9.
[45] Leigh M Davison and Debra Johnson, 'An Exploration of the Evolution of the EU's Twin-Track Approach to the Achievement of Its International Competition Policy Goals' (2015) 36 Liverpool Law Review 73, 91.
[46] Institut de droit international, 'Multinational Enterprises (Oslo Session)'.

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Third phase: Détente, expansion, and harmonization (1995-present)

All throughout the 1990s and specially since 1995, there seems to have been a change in attitude vis-à-vis extraterritoriality based on the effects doctrine at the global scale. The realities of economic globalization and perhaps the ubiquitous neoliberal reformist spirit of the time led to the marked expansion of antitrust legislation in non-Western and developing countries.[47] With this came the realization by many states that the anticompetitive conduct of transnational companies required transnational governance solutions.[48] Thus different global governance frameworks, such as cooperation agreements and soft-law regulatory proposals saw the day.[49] A landmark example of cooperation agreement on antitrust matters was the one concluded between the US and the EU in 1995, establishing rules on information sharing, coordination of enforcement, and comity principles.[50] Even though this accord was concluded by the EU and not directly by its member states, it marked in practice a silent détente of the five decades-long struggle between the US and European states – specially with the UK. Other similar agreements also came to being at the time.[51]

On the side of these bilateral efforts, several international initiatives took place. The OECD started addressing the topic of international antitrust regulation and emitted its first *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* in 1998, suggesting policy measures to states.[52] Similarly, in 2001 many governments came together to form the International Competition Network, a platform dedicated to issuing recommendations and guidance on competition policy issues and their transnational dimension.[53] The United Nations Conference on Trade and Development (UNCTAD), Asia-Pacific Economic Cooperation (APEC) and the World

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[47] Dabbah (n 7) 80.
[48] Sweeney (n 33) 348, 349.
[49] Marek Martyniszyn, 'Export Cartels: Is It Legal to Target Your Neighbour? Analysis in Light of Recent Case Law' (2012) 15 Journal of International Economic Law 1, 2.
[50] 'Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (Approved by the Decision of the Council and the Commission of 10 April 1995 (95/145/EC, ECSC))' <https://ec.europa.eu/competition/international/legislation/usa01.pdf>.
[51] Dabbah (n 7) 85.
[52] OECD, 'Recommendation Concerning Effective Action against Hard Core Cartels (OECD/LEGAL/0294)' <https://www.oecd.org/daf/competition/review-of-the-1998-oecd-recommendation-concerning-effective-action-against-hard-core-cartels.htm>.
[53] https://www.internationalcompetitionnetwork.org/about/

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Bank also joined the international efforts to provide governance solutions to the transnational competitions issues of the time.[54]

Attempts at formal treaty making were also undertaken, particularly at the WTO. In the context of the Doha round of trade negotiations, a Working Group on the Interaction between Trade and Competition Policy was set up to analyse the topic and make suggestions.[55] However, these efforts were to fail by 2003, when competition policy was removed from the agenda of the Doha round. This failure is attributed by some authors to the reluctance of some states – particularly the US – to adopt formal commitments that would force them to modify their regulatory frameworks and judicial practices,[56] as well as to the underlying opposition of multinational companies.[57]

This failure at the WTO, together with the moderate achievements of the other international efforts above-mentioned, point to the fact that, ultimately, the strong transnational governance solutions that states needed were to be found elsewhere.[58] Just as it had happened in 1945 with the US and the *Alcoa* case, around 1995 most states having transnational competition concerns found the solution in the unilateral extraterritorial assertion of antitrust jurisdiction.[59] This was done through incorporating the effects doctrine to their legislation and regulation frameworks.

According to a study conducted by the International Bar Association in 2009, during the 1990s and the 2000s "a fair degree of consensus on the application of an 'effects based' jurisdictional framework to determine the extraterritorial application of competition laws" emerged.[60] The study analyses a number of national regulatory frameworks and concludes that several countries other than the US explicitly enacted the effects doctrine in national legislation during this time; Brazil,

[54] Sweeney (n 33) 348.
[55] Brendan Sweeney, 'Export Cartels: Is There a Need for Global Rules?' (2007) 10 Journal of International Economic Law 87, 88.
[56] Henning Klodt, 'Conflicts and Conflict Resolution in International Anti-Trust: Do We Need International Competition Rules?' (2001) 24 The World Economy 877, 886; Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, Oxford University Press 2015) 819.
[57] Dabbah (n 7) 88, 89.
[58] Andrew T Guzman, 'Chapter 10: International Competition Law' in Andrew T Guzman and Alan O Sykes (eds), *Research Handbook in International Economic Law* (Edward Elgar Publishing 2007) 424, 425.
[59] Jason Coppel, 'A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law Student Contributions' (1993) 6 Leiden Journal of International Law 73, 81; Sweeney (n 33).
[60] International Bar Association, 'Report of the Task Force on Extraterritorial Jurisdiction' 48 <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=597D4FCC-2589-499F-9D9B-0E392D045CD1>.

Electronic copy available at: https://ssrn.com/abstract=4430270

China, France, Germany and Korea.[61] Martyniszyn adds to that list India, Russia, Singapore, South Africa, and Turkey.[62] Other countries incorporated the effects doctrine via jurisprudence. Japan is an example of this,[63] as are Canada and Australia[64] – countries that had previously confronted the US at the time of the *Uranium Litigation* cases. Moreover, a comprehensive study conducted by Columbia Law School and entitled *Competition Law Around the World from 1889 to 2010: The Competition Law Index*, came to the conclusion that, out of the 126 countries in the world with competition legislation in place, 75 included some form of extraterritorial application.[65] While the study did not specify how many out of these 75 embraced extraterritoriality through the effects doctrine, it helps confirm the point that the global wave of antitrust legislation in the 1990s and 2000s had a far reach, and that on this basis more and more states decided to assert their jurisdiction beyond the traditional, territorial criteria of jurisdiction in classic IL.

As does for the historical objector of the effects doctrine, namely the UK, two things seem clear. First, that at some point – perhaps after its principled rejection of the US *Antitrust Enforcement Guidelines for International Operations* in 1995, referred to above – the British diplomats decided to quiet down their candidness against the effects doctrine, as diplomatic notes on this point after 1995 are not registered in the literature. And second, that the UK Competition Act of 1998, while clearly rejecting the effects doctrine as devised in the American jurisprudence, decided to follow the ECJ in *Wood Pulp* and adopt a wording that would enable the British authorities and courts to sanction extraterritorial anticompetitive conduct. Article 2 of the Act prohibits "agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (…) only if the agreement,

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[61] For a detailed analysis of the German legislation, see: David J Gerber, 'The Extraterritorial Application of the German Antitrust Laws' (1983) 77 The American Journal of International Law 756.
[62] Marek Martyniszyn, 'On Extraterritoriality and the Gazprom Case' (2015) 37 European Competition Law Reveiw 4, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2636215&download=yes> accessed 10 June 2020.
[63] Marek Martyniszyn, 'Japanese Approaches to Extraterritoriality in Competition Law Shorter Articles and Notes' (2017) 66 International and Comparative Law Quarterly 747, 754–757.
[64] Sweeney (n 33) 379, 380.
[65] Anu Bradford and Adam S Chilton, 'Competition Law Around the World from 1889 to 2010: The Competition Law Index' (2018) 14 Journal of Competition Law & Economics 11, 34.

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decision or practice is, or is intended to be, *implemented* in the United Kingdom".[66] The notion of "implementation", as seen in *Wood Pulp,* clearly lends itself to cover extraterritorial conduct in the same way as the effects doctrine. Possibly – but this cannot be proved – the British legislator adopted this text acknowledging that some form of extraterritorial jurisdiction was actually needed in contemporary antitrust policy.

The EU jurisprudence, during this third phase, also kept evolving towards acknowledging the effects doctrine. After *Wood Pulp* in 1988, the next significant case was *Gencor v. Commission* in 1999. The case concerned a merger between mining companies from South Africa and the UK. After the Commission rejected the merger under the argument that it would lead to a duopoly in the common market, the South African company – *Gencor* – appealed before the General Court, claiming that the Commission lacked jurisdiction given that the economic activities involved would eventually take place outside the EU, and that South Africa's competition authority had approved the merger.[67] In its judgment, the General Court rejected the appeal under the effects doctrine, claiming that the merger fulfilled the conditions of immediate, substantial and foreseeable effect in the common market.[68] A similar view was again followed by the General Court in 2005 in the *General Electric and Honeywell v. Commission* case,[69] and then in 2010 in the *InnoLux v. Commission* case.[70] Yet, the long awaited endorsement of the effects doctrine by the ECJ – and not merely the General Court – only came in 2017 with the *Intel v. Commission* case. There, Intel argued that two agreements it had reached with Lenovo – one concerning the latter's postponing the global launching of certain products, and the other one granting benefits for the Lenovo's exclusive sourcing from Intel's CPUs for its manufactures – had neither been implemented in the EU nor had any foreseeable, immediate or substantial effect in the common market.[71] In its judgment, the ECJ used the "qualified effects" criterion to find that "while not adopted within the Union, [the agreements had] anticompetitive effects liable to have an impact on the EU market,

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[66] Ros Kellaway, Rhodri Thompson and Christopher Brown, *UK Competition Law: The New Framework* (Oxford University Press 2016) 3.
[67] Davison and Johnson (n 45) 93.
[68] ibid 94; Dabbah (n 7) 459.
[69] Dabbah (n 7) 460, 461.
[70] Luca Prete, 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?) Application of EU Competition Rules' (2018) 9 Journal of European Competition Law & Practice 489.
[71] ibid 490.

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thereby triggering the application of EU competition rules".[72] This amounted to a final endorsement of the effects doctrine by the ECJ. As suggested by Behrens, it is perhaps no coincidence that ECJ took this step only once the UK had voted and announced its withdrawal from the EU.[73]

Another recent development worth mentioning here is the *Restatement (Fourth) of Foreign Relations Law of the United State*, issued in 2018. Unsurprisingly, Section 409 of the *Restatement* asserted that international law provides for prescriptive jurisdiction over conduct outside the territory of a state that has a substantial effect within its territory.[74] This confirmed the *Restatement (Third)* in essence. However, the *Restatement (Fourth)* departed from the *Third* in that it rejected the element of comity and the requirement of reasonableness as baseless under international law, opening a potential avenue for reverting some the compromises that the American judicial and legislative practice had consolidated since the *Timberlane* cases.[75] Yet, it is early to know where this will lead the application of the effects doctrine in American courts.

Summing up, during this third phase the acceptance of the effect doctrine for the purpose of antitrust prescriptive jurisdiction expanded vastly, and the opposition to it shrank considerably. It seems apparent that the moderation of the assertions of extraterritorial jurisdiction by the US – while still upholding fully the effects doctrine – paved the way for many of its opposers to step down from their sovereignty and non-intervention arguments. At the same time, the realities of economic globalization pushed many countries that had beforehand shown no interest whatsoever in exercising extraterritorial jurisdiction on antitrust matters to adopt legislation on the subject and to endorse the effects doctrine. Furthermore, the trajectory of the ECJ's jurisprudence on the topic seems to account for the relaxation of political tensions around within its members and for the opening of space for endorsing the effects doctrine within the competition policies of the EU.

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[72] ibid 492.
[73] Behrens (n 17) 8.
[74] William S Dodge, 'Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of US Foreign Relations Law' (2020) 19 Chinese Journal of International Law 101, paras 13, 14, 15.
[75] ibid; William S Dodge, 'International Comity in the Restatement (Fourth) of Foreign Relations Law' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3311889 <https://papers.ssrn.com/abstract=3311889> accessed 19 June 2020.

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II. Analysis

a) Trajectory of the case (SCR Framework)

This case is one of norm emergence. While before 1945 it is unlikely that any domestic or international lawyer would have perceived the effects doctrine to be a valid exception to the principle of territoriality in prescriptive jurisdiction, after this year the exception started to become accepted in the field of antitrust – markedly so from 1995 onward. This section makes an analysis of the conditions that enabled or hindered this change, making use of the Selection/Construction/Reception framework for that purpose.

Selection stage (first phase of the chronology)

The selection stage in this case – roughly matching the first phase of the chronology, from 1945 to 1976 – mainly transited through the state action pathway. This agency came mostly in the form of judicial decisions, a feature that is predominant not only in this phase, but throughout the whole trajectory of the case. This is evident from the fact that the original change attempt in 1945 was conducted and thereafter pursued mainly by US courts interpreting US law. Legislation was absent at the time. The same can be said about the evolution of the topic within the EU, where the European legislators had a very minor role to play. Agency here rested on the EComm and the ECJ, whose regional nature makes it complicated to situate them within one pathway. The most straightforward characterization would nonetheless locate the EComm and the ECJ both within the judicial pathway, given that both follow adversarial/contentious proceedings. What seems to entangle this categorization though, is that both institutions do not make findings on IL per se, but rather on European antitrust regulation – something that is qualitatively not different from adjudicating on the basis of domestic legislation. Yet, it would misrepresent these regional institutions to locate them within the state action pathway, given that the political environment in which they act is in fact international, despite the technical subject-matter. Antipreneurism, for its part, also followed the state action track in this phase, being states acting unilaterally the main opposers of the effects doctrine – although here the challenge has mainly come in the form of diplomatic or legislative activity.

Actors and agency

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The main agent behind the effects doctrine was, as said, the US. Yet, one cannot say that the decision to pursue extraterritorial antitrust jurisdiction on that basis was one of national economic policy, cutting across the different branches of the state. Rather, the push was purely judicial and in that sense not necessarily homogeneous – at least during the first phase. This makes sense considering the leading role of the judiciary in a common-law country like the US. But the preeminence of the judiciary on this topic might also make sense from a political perspective. Although the US executive and legislative have never been known for being very mindful of international criticism, it seems unlikely that an open political process for vesting unambiguous extraterritorial effects to the Sherman Act would have yielded a positive outcome – especially considering that the main opponent to this was the most important ally of the US: the UK. Therefore, it comes as no surprise that it was the American judges who took the step of applying the Sherman Act extraterritorially, working under the seemingly neutral aura of judicial decision-making. This is confirmed by many American academic voices, who considered that it was the job of the courts to apply the law extraterritoriality "as it was", however painful it might be to other states.[76]

It also comes as no surprise that the main drive for the effects doctrine came from the US and not from any other state. First of all, the US had by 1945 the most developed competition legal framework in the world – in fact it was one of the few that existed – and thus in a way it seems natural that they would be the first in reaching deeper points of legal interpretation, as for instance extraterritorial jurisdiction. But more importantly, the US clearly emerged as the most important economic power after WWII. This meant, on the one hand, that the US was possibly more concerned about the potential impact of foreign anticompetitive conduct in its markets than other countries for the simple reason that the US' economy had more transnational interaction than other economies. And on the other hand, the economic predominance of the US after the war also probably empowered the American judges to see it only natural to enforce free trade and competition to the maximum extent possible.[77]

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[76] Rosenthal (n 29) 1194, 1195; Sandage (n 29).
[77] Sandage (n 29) 1694.

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Way less prominently, the other actor showing agency with regard to the effects doctrine in this period was the EComm in the *Grossfillex* case of 1964. One can only guess that the Commission, a quasi-judicial institution dominated by specialized bureaucrats, was more concerned with the technicalities of antitrust law than with the ongoing political transatlantic dispute, and that this led it to endorse the effects doctrine as a reasonable way of solving the governance problem of transnational anticompetitive conduct. This was quite clearly not the case of the ECJ, who in the *Dyestuffs* case of 1974 felt strongly the pressure of the UK not to endorse the effects doctrine and had to come up with an alternative solution: the "single economic entity" doctrine.[78]

<u>Institutional availability</u>

The attempt to broaden the rules of jurisdiction in IL through the effects doctrine took place primarily through judicial or quasi-judicial domestic and regional institutions. The fact that these institutions were more accessible than other international institutions is clearly linked to the specialization of the field of competition as well as to its origin as an issue of national concern for domestic or regional markets, rather than a truly international governance concern. Thus, it makes sense that attempts at regulating anticompetitive conduct took place primarily in the domestic or regional specialized institutional setting, which were largely available for the attempt.

That said, it is also true that these reasons would in principle not have barred certain international agencies to step in, such as perhaps UNCTAD, which was created in 1964, or other ECOSOC subagencies. Why this did not happen until much later was maybe due to the fact that the issue in fact concerned a group of countries that, even if powerful, was very small at the time. But whether or not this is true, it seems that in the era of decolonialization and New International Economic Order, the idea of Western technocratic institutions meddling with the protectionist policies of other countries would have had virtually no appeal internationally. Maybe aware of this, the US actively strived during this time – and later too – to keep the topic of competition off the agenda of any international institution.[79] And in addition to that, it is clear that the US never perceived there to be

[78] Behrens (n 17) 8, 9.
[79] Guzman (n 58) 424.

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a need to reach out to international institutions to seek institutional endorsement, as they could anyhow carry out its antitrust policies unilaterally.

A more complicated question is why the topic never reached an international court, especially the ICJ. It is remarkable that to this day the only case where the ICJ – PCIJ at the time – has addressed extra-territorial jurisdiction is *Lotus*.[80] Up until the aftermath of the *Nicaragua* case in 1985, the US had a compulsory jurisdiction declaration under article 36.2 of the ICJ's Statute, which could have in principle enabled different European states to get at the very least to the jurisdiction stage of a contentious proceeding against the US.[81] The UK, for example, could have attempted this from 1969 on, when it made its own declaration of compulsory jurisdiction – apparently with no clause that could have barred it from it.[82] Other countries opposing the US' assertions of extraterritorial jurisdiction could have done so as well. It is unclear why they did not, especially considering how far they went in adopting statutes blocking the enforcement of US judicial orders. One can only venture that these countries preferred not to take the matter so far, also taking into account that the ICJ would have very likely ruled in their favor. But the question remains an open one. For the purpose of this study, it can be said that in principle the ICJ was an available institution to address the matter, and that there was a decision not to seize it.

Construction stage (first and second phase of the chronology)

The construction stage of the effects doctrine arguably runs from 1945, when it was first enunciated in *Alcoa*, to 1995, when the US Department of Justice issued its *Antitrust Enforcement Guidelines for International Operations*. This perspective is certainly very US-centric. Yet, the historical and conceptual trajectory between the two points, both in the US and internationally, encompass most of what there is to be said about the normative build-up of the effects doctrine and the tug-of-war that led to its contemporary understanding.

Stability and previous norm availability

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[80] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford : Oxford University Press 2015) 30, 31.
[81] See the US optional clause declaration at https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0140.pdf. It seems that the openness of the declaration could have lent itself for a case against the US on this matter.
[82] Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2010) 418 <https://www.cambridge.org/core/books/handbook-of-international-law/EFBB7F312D22468A2F3AA0DF07B33E1B> accessed 19 June 2020.

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There is no previous norm within the doctrine of jurisdiction in IL clearly constituting a precedent for the effects doctrine before *Alcoa*.[83] It is in that sense that the case is one of norm emergence and not norm adjustment. As explained in the chronology, there had been one case coming relatively close to this scenario, but ultimately different: the *Lotus* case of 1927. There, the PCIJ found no infringement of jurisdiction under IL in Turkey's exercise of criminal jurisdiction over the captain of a French vessel that had collided with a Turkish ship in high seas, ultimately killing eight Turkish sailors. Turkey's assertion of jurisdiction relied, however, on the nationality of the victims and on the fact that the French vessel and its captain were physically in Turkish territory after the incident. Therefore, even if involving an element of extraterritoriality, the case was very different in nature from the premise on which *Alcoa* was decided. No other similar precedent seems to be relevant. Two things are nonetheless worth taking into account when assessing the state of IL before *Alcoa.*

The first is that, even if the principle of territoriality was largely consolidated before 1945, there was some degree of uncertainty about its exceptions, particularly with regard to prescriptive jurisdiction. Evidence of this actually the *Lotus* decision, which was adopted through the casting vote of the president, and which contains several very controversial *dicta* on the extent of prescriptive jurisdiction.[84] Thus the argument *in Alcoa,* even if the ruling seems to have been completely oblivious to *Lotus* and IL in general, targeted perhaps the part of the international rules on jurisdiction that was less solidified. Had the question posed to the Second Circuit Court in *Alcoa* concerned extraterritorial enforcement jurisdiction and not prescriptive jurisdiction, the outcome would have very likely been less liberal.

The second thing to consider is that the effects doctrine, as held in *Alcoa* and up to its contemporary understanding, has a territorial element to it. The doctrine requires that the foreign conduct have an effect *within* the territory of the state asserting jurisdiction. In that sense, it did not represent a

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[83] Szigeti argues, against this, that the logic of the effects doctrine had widely consolidated between the late 19th century and the 1930s through the logic of "continuing offenses" in criminal law, and thus that *Alcoa* was far less groundbreaking as it is usually portrayed. This argument, however, seems to miss the point that in the effects doctrine, the territorial link between the action and the state asserting jurisdiction is much more tenuous than in continuing offenses, and therefore takes the rationale of extraterritoriality even further. He also seems to miss the political dimension behind the debate, precisely a product of the thinness of such link. See: Péter D Szigeti, 'The Illusion of Territorial Jurisdiction' (2017) 52 Texas International Law Journal.
[84] Ryngaert (n 80) 31.

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clear-cut denial of territoriality and thus was still loosely defensible from within the argumentative boundaries of the IL of the time. Perhaps a comparison with universal jurisdiction, another form of extraterritorial prescriptive jurisdiction that broke radically with the premise of territoriality, is telling. Universal jurisdiction came about later in the twentieth century, and has struggled significantly in gaining discursive and legal leverage up to this day. In fact, in order to gain some operability, universal jurisdiction often had to step down and use some form of territorial or personal link to the conduct in order to be able to move forward. What is more, universal jurisdiction has relied largely on conventional bases, provided for instance by the Convention against Torture and the 1949 Geneva Conventions. From this perspective, the effects doctrine had, in a sense, a shorter road ahead of it in *Alcoa* thanks to the territorial element in it.

Pace and mode of change

One of the key features of the construction of the effects doctrine is the fact that the strong contestation of the UK and the other states objecting the US' use of the effects doctrine during the 1950's and up until the first years of the 1990's did in fact impact the trajectory of the rule. As seen in the chronology, the Americans took several steps towards nuancing their position: the two *Timberlane* cases, the adoption of the FTAIA, the *Restatement (Third)*, the *Hartford* case, and the *Antitrust Enforcement Guidelines for International Operations*. All of this attached the consideration of comity to the application of the effects doctrine, which arguably led to the moderation of the assertions of extraterritorial jurisdiction by US judges. A proof of this is the fact that few cases after *Hartford* in 1993, if any at all, stand out in the literature on the topic. No case has since then triggered the type of backlash seen during the first and second phases of the chronology. This compromise by the US in its assertions of extraterritorial jurisdiction together with the expansion of antitrust regulation in an unprecedented number of countries since the 1990's, allowed for a gradual and successful endorsement of the effects doctrine at a global scale. Interestingly though, as seen in the *Restatement (Fourth)* and in recent US case law, the element of comity seems to be receding – without it putting in question the basis of the effects doctrine.[85]

[85] Dodge (n 75); Dodge (n 74).

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In that sense, it can be said that the sudden change attempt made in *Alcoa* was followed by a period of international struggle around the effects doctrine until around 1995, during which the pace of change was discontinuous and at certain points – e.g. the international reaction against the *Uranium* litigation – even regressive. Then, after 1995, uptake has incremented rapid and continuously, there being no setbacks after this year.

Salience

Despite the degree of technicality of antitrust law, it is evident from the history of the struggles around the effects doctrine that it had at least a medium level of salience. While the matter never transcended to the level of high diplomacy or heads of state, it did mobilize at least from the 1960s to the 1980s the diplomatic bodies and the legislatures of many countries. Also, a sign of salience is that the pressure and rejection against the effects doctrine by countries like the UK, Australia, South Africa and Canada eventually managed to make the American judges and lawmakers reconsider their orthodox previous positions on extraterritoriality and include a check of international comity in their jurisdictional tests.

Reception stage (third phase of the chronology)

Opening

The spread of globalization and neoliberalism towards the end of the 1980s was a major opening for the effects doctrine. This was not necessarily due to ideological reasons, but more likely so as a product of the propagation of technical expertise in the area of competition. The liberal reforms around the world during that time brought about the adoption of competition laws and the creation national antitrust authorities and procedures.[86] It is feasible to think that that facilitated the expansion of awareness outside the US of the problematic nature of foreign anticompetitive corporate conduct[87]. Thus the effects doctrine, at least to the economic technocratic community, appeared less as an outrageous interference in domestic business governance and more like a plausible way to protect domestic markets in countries like Brazil, China, India, and of course the

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[86] Beth A Simmons, Frank Dobbin and Geoffrey Garrett, 'Introduction: The Diffusion of Liberalization' in Beth A Simmons, Frank Dobbin and Geoffrey Garrett (eds), *The Global Diffusion of Markets and Democracy* (Cambridge University Press 2008).
[87] Dabbah (n 7) 80.

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UK, which incorporated a light form of extraterritorial jurisdiction to its legislation in 1998.[88] Similarly, globalization brought with it an increase in the general scope of transnational economic activity, which made it all the more relevant for states to implement competition policies capable of addressing the competition concerns arising from it.

Actors – expansion of pathways

The opening described above a brought with it an expansion in the number and type of actors taking part in the conversation. Not only more states started to adopt competition legislation incorporating extraterritorial forms of jurisdiction,[89] but also, as said in the chronology, international – mainly policy – bodies started to address the topic mostly through soft-law mechanisms. These include the OCDE, the International Competition Network, UNCTAD, APEC and the World Bank. Although their activities might not have had a big impact on the normative formation of the effects doctrine, their quiet advocacy for the matter very likely helped to mainstream the notion that the effects doctrine was a desirable form of jurisdiction in the area of competition, and not a cover-up for American economic hegemony. This opened up a narrow but clear bureaucratic pathway in this case.

Outcome of change

The détente in the transatlantic jurisdictional confrontation, the expansion of domestic legislation, and the ultimate endorsement by the ECJ in 2017 are all signs of far-reaching acceptance of the effects doctrine. Just as telling is the fact that no state – not even the UK – continues to object the effects doctrine. No active protest against it seems to have happened since the British objection to the *Antitrust Enforcement Guidelines for International Operations* in 1995. As said by Martyniszyn – although he sets that date in 1992 – "since [then] foreign states' protests in transnational competition cases in the US touching upon the issue of jurisdiction did not challenge the effects doctrine as such, but only questioned the permissible limits of jurisdictional assertions on that basis".[90] All of this clearly signals a successful outcome in this case. From *Alcoa* to *Intel,* one can

[88] Sweeney (n 33) 349.
[89] Bradford and Chilton (n 65) 11.
[90] Martyniszyn, 'On Extraterritoriality and the Gazprom Case' (n 62) 3.

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clearly see that the effects doctrine has consolidated as an exception to the principle of territoriality in prescriptive jurisdiction in IL.

This acceptance notwithstanding, it is certainly interesting to note that some IL textbooks tend to address the topic in passing and with hesitance. For instance, Oppenheim's 2008 edition says the effects doctrine "has not been generally accepted, and the matter is still one of controversy", without further discussion.[91] Ryngaert, on the other hand, seems to imply that the effects doctrine has made it into IL. However, he does not deal with the point at length, and seems hesitant to outspokenly endorse it.[92] Staker, in Evans 2018 edition of *International Law*, deals with the topic in only one page, portrays it as an exclusively American doctrine, and says that European countries and the EU have mostly stuck to forms of jurisdiction with a remaining "intraterritorial" element to them.[93] Moreover, the Max Planck Encyclopedia of International Law, in its entry on jurisdiction, has a very small section dealing with the effects doctrine, and discusses it exclusively through the lens of the *Lotus* case, which – failing to mention antitrust cases – is rather misleading, to say the least.[94]

It is certainly not easy to explain the reasons behind this hesitance among the international legal scholarship. The first thing to say is that a proper analysis of a wider sample of literature is lacking in this study – mainly for lack of time and access to non-European textbooks. In this sense, the references in the previous paragraph should be read taking into account a selection bias. But leaving this aside and going into potential explanations, this hesitance could be a result of the superficial approach of textbooks towards the effects doctrine. It is often the case that authors only touch upon certain topics without delving into the specialized literature, particularly when this literature is in appearance unrelated to international law – as is the case with antitrust law. Therefore, it is not unlikely that the authors cited in the previous paragraphs are somewhat unaware of the extent of the development of the effects doctrine in the different jurisdictions. On the same note, competition scholars are often unaware or uninterested in the implications of their field in the larger picture of

[91] Jennings and Watts (n 1) 476.
[92] Ryngaert (n 80) 84, 85.
[93] Malcolm Evans (ed), *International Law* (Fifth Edition, Oxford University Press 2018) 298.
[94] Bernard Oxman, 'Jurisdiction of States', *Max Planck Encyclopedia of Public International Law* (Oxford : Oxford University Press 2007) para 25 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1436?prd=MPIL> accessed 20 June 2020.

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general international law, which would also explain the disconnection between both scholarly communities.

Lastly, a final element that is relevant to consider regarding the outcome of this case is the extent to which the logic of the effects doctrine in jurisdiction has extended to other fields of international law beyond antitrust legislation. From the literature consulted for this case study, it is clear that the discussion tends to frame it as a matter that is peculiar to the field of competition law, and to avoid relating it to other subareas. That is basically without exception. In this sense, it seems safe to say that the effects doctrine is not perceived to be a generalized jurisdictional trend concerning the whole of international law. That said, two caveats are in order.

The first is that other fields of international law have adopted similar rationales for asserting extraterritorial jurisdiction, as for instance in environmental law under the prohibition of transboundary harm,[95] in human rights with the notion extraterritorial jurisdiction,[96] or more narrowly in the US' securities law.[97] These developments, however, do not fully coincide with the effects doctrine in that the elements for assertion of effects jurisdiction operate differently, and in that the notion of "effects" ultimately seems to be in a less tenuous relationship with the state asserting jurisdiction as in antitrust. Furthermore, these developments in other fields have been brought about without reference to the effects doctrine under antitrust law, and as such arguing that they are directly related seems misguided. To be sure, they have developed simultaneously, yet without there being a strong element of correlation whereby one could say that the effects doctrine is clearly having an influence beyond competition law.

The second caveat, in relation to this last point, is that irrespective of the absence of explicit links between changes in different fields of international law, a broader shift away from territoriality and into new forms of jurisdiction has indeed been taking place for decades now.[98] In this sense, the

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[95] Günther Handl, 'Ch.22 Transboundary Impacts' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OPIL 2008) 546, 547.
[96] Szigeti (n 83) 385.
[97] Joseph Jude Norton, 'Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws' (1979) 28 International and Comparative Law Quarterly 575, 585.
[98] Nico Krisch, 'Jurisdiction Unbound: Global Governance through Extraterritorial Business Regulation' (2020) 6 PATHS Working Papers <https://pathsofinternationallaw.files.wordpress.com/2020/09/working-paper-6-jurisdiction-unbound-global-governance-through-extraterritorial-business-regulation.pdf>.

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consolidation of the effects doctrine undeniably forms part of the development of new forms of global governance through jurisdiction. Yet, this is not to say that the effects doctrine as such has spilled over other fields od international law. Its development seems to have taken place in a somewhat niched way.

Salience

It is feasible to think that the salience that the effects doctrine had during the 1970s and 1980s lowered significantly in the reception stage of the norm's trajectory. The fact that it became mainstream contributed to an increased perception of the topic as a technical one. This "normalized" the effects doctrine in a sense, and in doing it reduced its former salience.

b) ***Particular features of the case***

Prevalence of the state action pathway, exclusion of the multilateral, and modest bureaucratic component

One of the most prominent characteristics of this case is the prevalence of the state action pathway. The fact that it originated in the sphere of domestic economic policy, and that it was states individually trying to protect their domestic markets account for that. In the case of the EU, while being a regional institutional network, it seems apparent that it responded more or less to the same type of "domestic" incentives. Less obvious, however, is the difficulty that the effects doctrine faced in reaching multilateral fora. Here the answer lies in the fact that neither the main advocate for the effects doctrine – the US – nor its opponents, perceived there to be an advantage of doing it. Lastly, the case had a more modest, technocratic transit through the bureaucratic path, only once the international stakes around it had lowered and the need for extraterritorial forms of jurisdiction mainstreamed.

Marked judicial flavour, yet not internationally

It is remarkable of this case that for nearly 50 years it was mostly exclusively driven by domestic courts. This certainly helped it move forward despite the political burdens it faced at the height of the transatlantic dispute between the US and the UK. Legislators and executives before the 1990s had a much less relevant role to play than judiciaries. Interestingly though – and perhaps for the same reason – the case never transcended to the an international judicial forum like the ICJ.

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Western debate

It is also interesting to see that in this case, non-Western voices came very late into the debate – and rather just as followers and not as advocates or objectors. This might be due to the liberal and rather technical nature of competition law, features that are characteristic of Western economic thought. In this sense, for example, it is evident that the Socialist block during the Cold War had nothing to say during the decades of the controversy.

Struggle among allies

The effects doctrine is very likely one of the very few topics that has confronted to such an extent the US and the UK, two historical allies in mostly every other field of international politics. The fact that they allowed themselves to reach the level of controversy that they reached, is a sign of the moderate salience of the topic, in comparison to, for instance, issues of international security. This alliance might also explain, on the one hand, why the topic never reached the ICJ – the UK and the other objectors seeking to avoid a higher degree of confrontation – but also why the US did in fact take steps to curve its orthodoxy and appease its allies.

Reluctance of the ECJ until 2017

The reluctance of the ECJ to endorse the effects doctrine is also interesting to note. The fact that it disregarded so many times the views of the EComm and the Advocate General on the endorsement of the effects doctrine, and found alternative ways to extend antitrust jurisdiction extraterritorially until 2017, is evidence of the politization of the topic within the EU.

Neat trajectory

Unlike many other cases, this one observed a rather fluid dialectic trajectory. The US' courts intention to bring the effects doctrine into IL faced a challenge, and it had to readjust itself through comity considerations in order to gain acceptance. The back and forth of other cases seems to be rather absent here.

Narrow subject-matter

With regard to its subject matter, this case is remarkably narrow. This narrowness is certainly one of the reasons why it could eventually bypass opposition and become mainstream. Had the debate on effects doctrine been a general one, not confined to the field of competition, it would have very likely observed a more complicated trajectory.

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Part II.

INTERNATIONAL HUMAN RIGHTS LAW

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Case Study 5

The Emergence of the Positive Obligation to Protect Women from Domestic Violence

(July – December 2019)

Ezgi Yildiz[1]

The positive obligation to protect women from domestic violence is a part of the states' broader obligation to protect women from violence or eradicate gender-based violence. Domestic violence is a subcategory of gender-based violence – falling within the broader continuum of violence against women.[2] According to Sally Engle Merry, the definition of violence against women originally revolved around domestic violence – which she defines as "men's violence against their partners in the form of rape, assault, and murder".[3] Then over time this definition came to include "female genital mutilation/cutting, gender-based violence by police and military forces in armed conflict as well as in everyday life, violence against refugee women and asylum seekers, trafficking and prostitution, sexual harassment, forced pregnancy, forced abortion, forced sterilization, female foeticide and infanticide, early and forced marriage, honor killings, and widowhood violations."[4] While acknowledging domestic violence's link to other forms of gender-based violence, this case

[1] This case study builds on research carried out for Ezgi Yildiz, *Between Forbearance and Audacity: The European Court of Human Rights and the Norm Against Torture* (Cambridge: Cambridge Univ. Press, 2023); Ezgi Yildiz, "A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights," *European Journal of International Law* 31, no. 1 (August 7, 2020): 73–99, https://doi.org/10.1093/ejil/chaa014.

[2] For more on this, see Rashida Manjoo, "The Continuum of Violence against Women and the Challenges of Effective Redress," *International Human Rights Law Review* 1, no. 1 (January 1, 2012): 1–29.

[3] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2009), 21.

[4] Merry, 21.

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study solely focuses on the creation of a human rights obligation to protect women from domestic violence.

1. Typical story

Synopsis

Although domestic violence was not a new problem, it had not been identified as an important human rights violation until the mid-1980s.[5] Considered to be a crime committed within the private space, domestic violence had not been addressed through traditional human rights tools prior to the mid-1990s.[6] Despite its pervasiveness, domestic violence had been regarded as a private matter – not falling within the scope of state obligations.[7] In order to change this understanding, women rights activists began to creatively construct a new state obligation to protect women from domestic violence from the mid-to-late 1970s onwards through domestic campaigns and using international institutional settings such as the UN conferences in Mexico, Copenhagen, Nairobi, and Beijing.[8] Their attempts propelled more institutional responses, particularly coming from the Committee on the Elimination of Discrimination against Women (the CEDAW Committee), the Special Rapporteur on Violence against Women (SRVAW), the Committee on the Status of Women (CSW), and regional human rights institutions.[9]

Legal basis

The normative basis of this obligation is built upon the duty respect, protect and fulfill and the due diligence standard.[10] The obligation emerged in context of the reformulation of state duties. As the dichotomy between positive and negative obligations eroded, the state duties came to include

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[5] Sally Engle Merry, *Gender Violence: A Cultural Perspective* (John Wiley & Sons, 2011), 1.
[6] Yakın Ertürk and Bandana Purkayastha, "Linking Research, Policy and Action: A Look at the Work of the Special Rapporteur on Violence against Women:," *Current Sociology*, March 22, 2012, 143.
[7] Jennifer Ulrich, "Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?," *7 Indiana Journal of Global Legal Studies 629 (2000)* 7, no. 2 (January 1, 2000): 632–33.
[8] Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 183–86.
[9] Merry, *Human Rights and Gender Violence*, 21–24.
[10] See for example, Frédéric Mégrét, "Nature of Obligations," in *International Human Rights Law*, ed. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, 3rd ed. (Oxford: Oxford University Press, 2018), 86–109; Monica Hakimi, "State Bystander Responsibility," *European Journal of International Law* 21, no. 2 (2010): 341–85.

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respecting, protecting, and fulfilling individual rights – also known as the respect-protect-fulfill framework. This transformation made the emergence of the positive obligation to protect women from domestic violence possible. Going beyond classical negative obligations, this obligation requires states to take measures to protect women from domestic violence and prevent its (re)occurrence. States' failure to fulfil this obligation is checked against due diligence standard, which regulates the extent of state duties to prevent and respond to human rights abuses committed by private actors.[11] However, according to some scholars, due diligence standard is more than a yardstick.[12] For example, Former Special Rapporteur on Violence against Women Yakin Etürk,[13] and Dinah Shelton each underline the role of due diligence standard in the formulation of state duties concerning gender-based violence.[14] Christine Chinkin argues, "States' obligations to respect, protect, and fulfil women's right to be free from violence have been conceptualized and made more concrete through the duty and standard of due diligence."[15]

The construction of this new obligation also relied on existing rights such as right to equality and non-discrimination, right to life, and right to be free from torture and inhuman or degrading treatment. This not only helped to anchor this newly emerging obligation but also allowed different human rights bodies to bring this issue into their mandate. Alice Edwards provides a comprehensive overview of this development and highlights two strategies that human rights treaty bodies followed: (i) conceptualization of violence against women as a form of sex discrimination

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[11] For more on due diligence, see Jonathan Bonnitcha and Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights," *European Journal of International Law* 28, no. 3 (November 13, 2017): 899–919.
[12] There are also some who disagree with this position. For example, Elisabeth Henn criticizes the over-usage of due diligence standard to that end and argues that it is a standard only applied to evaluate whether a state has met his positive obligations. For more, see Elisabeth Veronika Henn, *International Human Rights Law and Structural Discrimination* (Berlin: Springer, 2019), 93–105.
[13] Yakin Etürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?," in *Due Diligence and Its Application to Protect Women From Violence*, ed. Carin Benninger-Budel (Leiden/Boston: Martinus Nijhoff, 2008), 29.
[14] Dinah Shelton, "Positive and Negative Obligations," ed. Dinah Shelton, 2nd ed. (Oxford: Oxford University Press, 2013), 581–82.
[15] Christine Chinkin, "Addressing Violence against Women in the Commonwealth within States' Obligations under International Law," *Commonwealth Law Bulletin* 40, no. 3 (July 3, 2014): 479.

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and (ii) reinterpretation of existing rights, in particular the right to life and the right to be free from torture.[16]

2. Chronology

First phase: Early Attempts to Frame Domestic Violence as a Human Rights Issue & Selection of Institutional Venues (1970-1989)

In the 1970s, neither women's rights groups nor international human rights activists addressed domestic violence as a human rights issue.[17] Similarly, institutions created to tackle women's issues did not pay attention to domestic violence around this time. It was not on the agenda of the Commission on the Status of Women, which was created by the UN Economic and Social Council (ECOSOC) in 1946. Similarly, the Convention on the Elimination of Discrimination against Women (CEDAW) adopted in 1979, does not refer to it. As a matter of fact, there was only a little discussion of domestic violence during its adoption, as Ronagh McQuigg describes.[18] The delegation from Belgium suggested that Article 6 of draft document should include "attacks on the physical integrity of women," and later withdraw this proposal due to lack of support.[19] Alice Edwards explains why it is not surprising that the CEDAW does not make a reference to domestic violence: "Prior to the 1990s (…) violence against women was not seen as a major issue, and if it was recognized as an issue at all, it was considered an issue for national governments (and criminal law) rather than international law."[20]

The fact that local civil society groups had not framed domestic violence as a human rights issue did not effectively mean that they were not paying attention to it. Different activist groups began addressing battering of women in Europe in the 1970s. For example, they opened shelters in the UK and the US in 1971 and 1974, respectively.[21] Similarly, in France, feminist groups that

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[16] Alice Edwards, *Violence Against Women Under International Human Rights Law* (Cambridge: Cambridge University Press, 2011), 2.
[17] Keck and Sikkink, *Activists Beyond Borders*, 182.
[18] Ronagh J. A. McQuigg, "Is It Time for a UN Treaty on Violence against Women?," *The International Journal of Human Rights* 22, no. 3 (March 16, 2018): 305–24.
[19] McQuigg, 306–7.
[20] Edwards, *Violence Against Women Under International Human Rights Law*, 7.
[21] Keck and Sikkink, *Activists Beyond Borders*, 191.

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successfully campaigned to define rape in law moved to tackle domestic violence. Organizations such as *Collectif féministe contre le viol* collected data to show the prevalence of domestic violence across France.[22] At that time, there was not a broad category of "violence against women." Different local civil society groups worked on different aspects of violence against women without seeing how they all part of a continuum. They focused on "rape and domestic battery in the United States and Europe, female genital mutilation in Africa, female sexual slavery in Europe and Asia, dowry death in India, and torture and rape of political prisoners in Latin America."[23] These specialized groups would grow closer in the course of the UN Decade for Women – an achievement which was possible due to lobbying of women rights activist and the CSW.[24]

The UN Decade for Women served as a key ***opening*** moment for triggering the change in legal norms around violence against women in general and domestic violence in particular. The UN General Assembly passed UNGA Resolution 3010, which declared that the year 1975 would be the year of the International Women. According to Margaret Fulton, this was a noteworthy and paradoxical achievement because "[o]nly 8% of UN delegates and employees are women, including clerical staff. In 1975, the General Assembly had 180 women delegates as compared to 2,369 men. Of the 135 member states in the UN, 55 countries had no women in their delegations."[25] One of the events prepared to celebrate the International Women's year was the First World Conference on Women. The conference, organized by the CSW, was held in Mexico. Then in December 1976, the General Assembly passed another resolution, Resolution 31/136, to launch the UN Decade for Women between 1976 and 1985.

In the course of this decade, the CSW organized the World Conferences on Women in Mexico City (1975), in Copenhagen (1980), and in Nairobi (1985). These events were attended by not only member states but also women's rights groups and scholars. 133 states and 6,000 NGO

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[22] Gill Allwood, "Gender-Based Violence against Women in Contemporary France: Domestic Violence and Forced Marriage Policy since the Istanbul Convention," *Modern & Contemporary France* 24, no. 4 (October 1, 2016): 379.
[23] Keck and Sikkink, *Activists Beyond Borders*, 188.
[24] Dorothy Q. Thomas and Michele E. Beasley, "Domestic Violence as a Human Rights Issue," *Human Rights Law Quarterly*, no. 15 (1993): 44.
[25] Margaret Fulton, "Copenhagen—Mid-Decade World Conference on Women 1980," *Atlantis, A Women's Studies Journal* 6, no. 2 (1981): 194.

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representatives participated in the First World Conference for Women in Mexico City. 145 states and 8,000 were present in in Copenhagen. 157 states and 12,000 civil society representatives attended the World Conference to Review and Appraise the Achievements of the UN Decade for Women in Nairobi.[26]

This was a catalyzing moment for two reasons. First, the north-south divide, and the secular and religious divide began dissipating around violence against women.[27] Indeed, broader ideas of gender equality or reproductive rights remained to be a bone of contestation. Yet, everyone including religious groups and countries could rally around stopping violence against women.[28] The issue also bridged the class divide. Working-class women, as well as middle-class women who had been at the forefront of human rights activism, strongly supported the cause.[29] Margaret Keck and Kathryn Sikkink support this claim arguing, "in countries as diverse as Mexico, Turkey, and Namibia, activists have mobilized around violence against women across numerous divisions (politics, race, ethnicity, class, rural vs. urban)."[30]

The unifying nature of this issue was particularly important for creation of a transnational network of women right's activists. Charlotte Bunch, who organized panels on international networking forum parallel to the UN Conferences, explains how different groups rallied around eradicating violence against women:[31]

> We observed in that two weeks of the forum that the workshops on issues related to violence against women were the most successful…they were the workshops where women did not divide along north-south lines, that women felt a sense of commonality and energy in the room, that there was a sense that we could do something to help each other…. It was so visible to me that this issue had the potential to bring women together in a different way,

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[26] UN Women, *World Conferences on Women*, available at https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women#mexico
[27] Keck and Sikkink, *Activists Beyond Borders*, 186.
[28] Merry, *Human Rights and Gender Violence*, 77.
[29] Keck and Sikkink, *Activists Beyond Borders*, 193.
[30] Keck and Sikkink, 213.
[31] Brunch is an experienced civil society leader and the founding director of the Center for Women's Global Leadership at Rutgers University.

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> and that it had the potential to do that without erasing difference. Because the specifics of what forms violence took really were different. There were some things like domestic battery that really were everywhere, but what people chose to put as their first issue was different. So you get a chance to deal with difference, and see culture, and race, and class, but in a framework where there was a sense that women were subordinated and subjected to this violence everywhere, and that nobody has the answers. So northern women couldn't dominate and say we know how to do this, because the northern women were saying: "our country is a mess; we have a very violent society." So it created a completely different ground for conversation. [32]

Indeed, in the course of these conferences, local activists could devise coordinated campaigns, the embodiment of which was the International Network against Violence against Women (INAVAW), created in Nairobi Conference.[33]

Second, women rights activists and scholars used the opportunity to collect information about a variety of systemic problems affecting women in every nation.[34] Domestic violence stood as a widespread problem, as it was acknowledged in the 1986 Nairobi Report. This report issued after the Conference in Nairobi highlighted that violence against women "exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused, and raped. Such violence is a major obstacle to the achievement of peace and other objectives of the Decade and should be given special attention."[35] What also contributed to this opening was the findings coming from national crime surveys from different jurisdictions. These reports collectively showed that domestic violence was a pervasive problem primarily affecting women in all societies.[36] The immediate realization was that something this pervasive cannot be private. This realization

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[32] Qtd. in Keck and Sikkink, *Activists Beyond Borders*, 193.
[33] Keck and Sikkink, 194.
[34] Merry, *Human Rights and Gender Violence*, 21.
[35] *Report of the World Conference to Review and Appraise Achievements of the UN Decade for Women: Equality, Development and Peace,* Chapter I, Section A: The Nairobi Forward- Looking Strategies for the Advancement of Women, para. 258, U.N. Doc. A/CONF. 116/28/Rev:1 (1986)
[36] For a review, see The UN*, The World's Women, 1970-1990:* (UN, 1991), http://digitallibrary.un.org/record/116614.

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galvanized women's right activist who became determined to change the view that domestic violence is a private matter.[37]

More importantly, these conferences opened the pathway to adding domestic violence as an item on the UN's agenda. States that had been confronted with the matter began taking steps at the international level. At the Conference in Copenhagen, Australia, Austria, Barbados, Belgium, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Israel, Kenya, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Sri Lanka, Spain, Sweden, Switzerland, the United States of America, and Zaire proposed a draft resolution entitled "Battered women and violence in the family."[38] The draft resolution was adopted at the 20th plenary meeting the Conference without a vote.[39] The resolution called on the UN Secretary-General, in cooperation with relevant UN organizations, "to prepare a study on the extent and types of physical, sexual, and other forms of abuse in families and institutions and on existing resources available for dealing with this problem" to be submitted to the CSW.[40] The draft resolution further urged member states "to adopt measures to protect the victims of family violence and to implement programmes whose aims are to prevent such abuse as well as to provide centres for the treatment, shelter, and counselling of victims of violence and sexual assault and to provide other services such as alcohol and drug abuse rehabilitation, housing, employment, child care, and health care."[41]

In the course of the Conference in Nairobi, Australia, Austria, Bangladesh, Belgium, Benin, Botswana, Brazil, Canada, Cape Verde, France, Gabon, Germany, Ghana, India, Indonesia, Italy, Kenya, Lesotho, Liberia, Mexico, New Zealand, Norway, Papua New Guinea, Philippines, Samoa, Sierra Leone, Spain, Sweden, Thailand, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United States of America, and Yemen proposed a draft resolution on

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[37] Ertürk and Purkayastha, "Linking Research, Policy and Action," 143;145. See also, Lee Hasselbacher, "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection," *Northwestern Journal of Human Rights* 8, no. 2 (January 1, 2010): 190.
[38] Report of the World Conference of the UN Decade for Women: Equality, Development and Peace, *A/CONF.94/35,* Copenhagen, 14 to 30 July 1980.
[39] Draft Resolution, Battered women and violence in the family *A/CONF.94/C.l/L.24*
[40] Report of the World Conference of the UN Decade for Women: Equality, Development and Peace, pp. 67-68
[41] Report of the World Conference of the UN Decade for Women: Equality, Development and Peace, p. 68

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Domestic Violence against women.[42] In particular, the draft resolution requested the CSW to consider appointing a Special Rapporteur to gather information about domestic violence. The Conference took no action about this draft resolution. However, this was not the only occasion that the domestic violence appeared in the discussions. The matter was also raised as a part of Forward-Looking Strategies, in particular paragraphs 254 and 271. While the former calls on immediate action on domestic violence, the latter lists a number of measures as follows:

> National machinery should be established to deal with the question of domestic violence. Preventive policies should be elaborated and institutionalized economic and other forms of assistance and protection for women and child victims should be provided. Legislative measures should be strengthened and legal aid provided.[43]

It is important to underline that both paragraphs were adopted by consensus, while there were a considerable number of countries that abstained or voted against other provisions of the Forward-Looking Strategies.[44] This was an indication that domestic violence was an issue that countries could reach an agreement on. Even those that persistently objected, such as Muslim and Holy See countries could support this cause.

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[42] Draft Resolution, Domestic Violence against women *A/CONF.116/C.2/L.20*

[43] Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, *A/CONF.116/28/Rev.1*, Nairobi, 15-26 July 1985, p. 64

[44] The participating countries: Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic Kampuchea, Democratic People's Republic of Korea, Democratic Yemen, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Fiji, Finland, France, Gabon, Gambia, German Democratic Republic, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Kiribati, Kuwait, Lao People's Democratic Republic, Lesotho, Liberia, Libyan Arab, Jamahiriya, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Rwanda, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Vanuatu, Venezuela, Viet Nam, Yemen, Yugoslavia, Zaire, and Zambia.

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Second Phase: Creative Construction by Bureaucratic and Multilateral Pathways (1989-1995)

In the first phase, domestic violence began to be discussed at the national and international levels. However, it had not been constructed as a human rights issue. Prescriptions to tackle domestic violence had so far focused on developing national laws. There was no clear mention of states' obligations to take steps to protect women from domestic violence. This was partly because civil and political rights were not considered in positive obligations' terms. They were traditionally thought to limit states' ability to infringe on rights only.[45] States were not expected to take active steps to protect individuals from violations committed by private actors. Such an obligation would be creatively constructed during this phase. That is, the broad policy consensus built in the previous phase could finally be expressed through a legal outlet in this period.

The CEDAW Committee was "at the forefront of" the construction of the positive obligation to protect women from domestic violence.[46] Neil Englehart describes the importance of the CEDAW's norm creation attempts. He argues that the CEDAW Committee "acted more quickly than the CSW, even in the absence of a specific mandate from ECOSOC."[47] It did so even though this issue did not initially fall within the confines of the CEDAW. The CEDAW Committee interpreted the CEDAW in a way to oblige states to take steps towards domestic violence and violence against women in general – even though the Convention does not explicitly refer to violence.

The CEDAW Committee took the first official step in framing the violence against women in human rights language in the General Recommendation No 12 in 1989. Interpreting the CEDAW broadly (in particular articles 2, 5, 11, 12, and 16), the General Recommendation No. 12 established that "the Convention require the States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life." The General Recommendation's framing relied on ***existing norms*** such as non-discrimination norms and an

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[45] Hasselbacher, "State Obligations Regarding Domestic Violence," 192.

[46] Neil Englehart, "CEDAW and Gender Violence: An Empirical Assessment," *Michigan State Law Review* 2014, no. 2 (January 1, 2014): 268.

[47] Englehart, 268.

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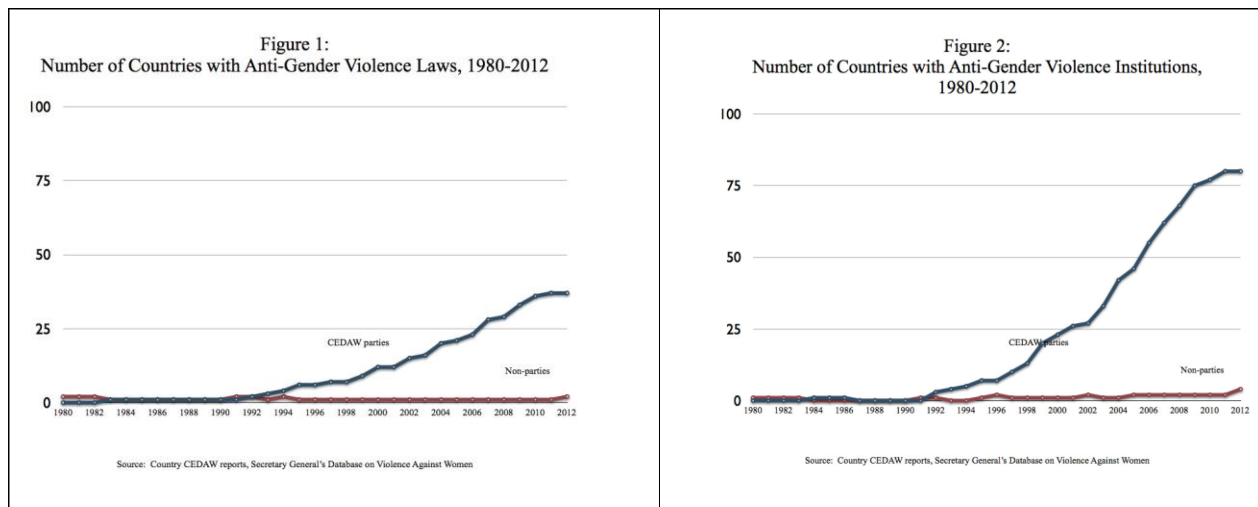
early understanding of positive obligations. The fact that there were previous norms to refer back to made the initial formulation attempt easier. Furthermore, the General Recommendation listed specific measures to be taken by states such as providing information about their legislations to prevent domestic violence or statistical data on incidences of violence against women.

Then, in 1992, the CEDAW Committee issued General Recommendation 19, which specifically framed the issue as gender-based violence – instead of only violence in the family. This is also the first instance where the CEDAW Committee precisely referred to due diligence. More specifically, it pronounced that "states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[48]

According to Neil Englehart, these two recommendations had an impact on the behavior of state parties. Looking at the period between 1980 and 2012, Englehart finds that countries, especially those that are parties to the CEDAW had an increased likelihood of adopting laws and introducing institutions against domestic violence and other forms of gender violence.[49] The graphs below are taken from this study.



[48] CEDAW, General Recommendation 19, General Comments, §9.
[49] Englehart, "CEDAW and Gender Violence," 269.

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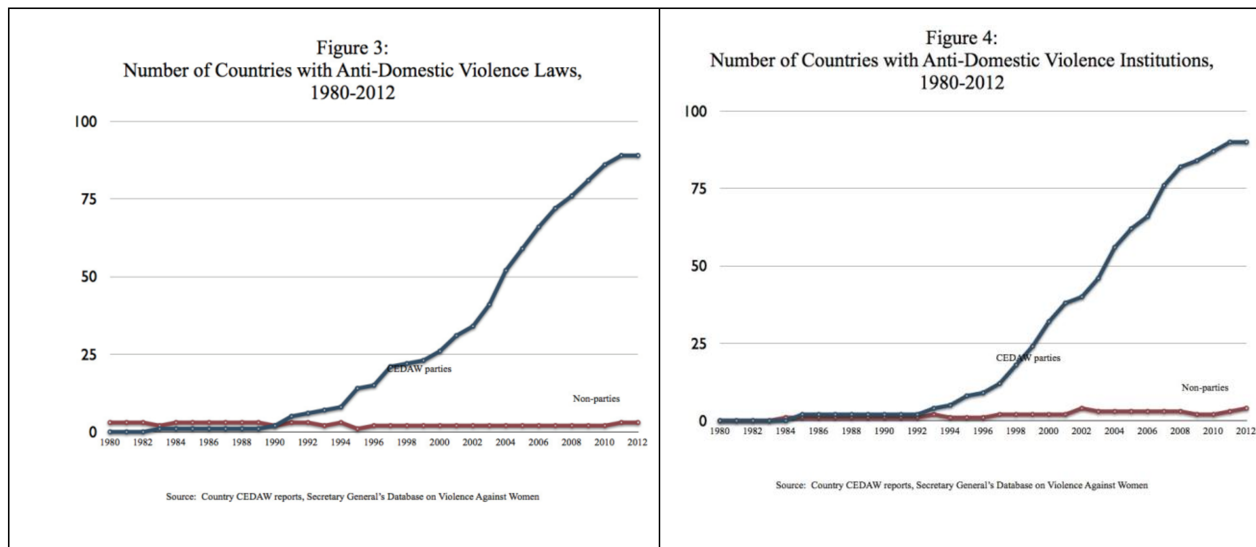

Englehart finds that laws addressing domestic violence is more common than those tackling gender-based violence. He also identifies an upward trend of adopting laws and institutions, which started in 1990, following the General Recommendation 12.[50] He also underlines that this increase predates the UN General Assembly's adoption of *Declaration on the Elimination of Violence Against Women* (DEVAW) in 1993 – a document which included a strong human rights language as well as clear policy objectives.[51]

Why did the CEDAW Committee – which was not considered to be the central human rights institution – assume such a role? Indeed, the CEDAW was not viewed "as part of the UN human rights framework, but of the UN activities on women's affair, which the UN-secretariat in Vienna dealt with at the time."[52] The Committee was located in New York away from Geneva-based human rights institutions. Moreover, its resources were limited and its meeting time was restricted to two weeks per year.[53] Despite its limitations the CEDAW Committee seized the momentum

[50] Englehart, 269.
[51] Englehart, 269.
[52] Susanne Zwingel, "From Intergovernmental Negotiations to (Sub)National Change," *International Feminist Journal of Politics* 7, no. 3 (September 1, 2005): 404.
[53] Zwingel, 404.

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created by the UN conferences and made an intervention that was "more timely, more aggressive, and more binding than the more modest efforts of other UN organizations."[54]

Loveday Hodson argues that the CEDAW's audacity came from the fact that it was a peripheral institution, away from the spotlight.[55] Moreover, the CEDAW Committee, made up of almost entirely of women was more open to the pressure from the women rights' activists.[56] Yakin Ertürk and Bandana Purkayashta point out that "after years of lobbying and advocacy by the global women's movement," the CEDAW Committee began addressing violence against women.[57]

According to Keck and Sikkink what propelled this development in the 1990s were a series of events:

> (1) preparations for the World Conference on Human Rights to be held in Vienna in 1993; (2) international news coverage about the use of rape in wartime as an instrument of the ethnic cleansing campaign in the former Yugoslavia; (3) proactive funding of work on the issue by the Ford Foundation and progressive European foundations, supported by the intermediary work of the Global Fund for Women; and (4) the crucial catalyst role played by the Global Campaign on Women's Human Rights organized by the Center for Women's Global Leadership (CWGL) at Rutgers University.[58]

Indeed, an increased funding from Ford Foundation and European foundations meant that more civil society groups began addressing domestic violence and violence against women. These groups then could have a strong presence at the Vienna World Conference on Human rights in 1993 and the Beijing Conference which was held later in 1995.[59] Moreover, the Global Campaign on Women's Human Rights (i.e. 16 Days of Activism against Gender Based Violence) which

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[54] Englehart, "CEDAW and Gender Violence," 268.
[55] Loveday Hodson, "Women's Rights and the Periphery: CEDAW's Optional Protocol," *European Journal of International Law* 25, no. 2 (May 1, 2014): 561–78.
[56] Women are minority in the case of other human rights treaty bodies.
[57] Ertürk and Purkayastha, "Linking Research, Policy and Action," 144.
[58] Keck and Sikkink, *Activists Beyond Borders*, 196.
[59] Keck and Sikkink, 197–98.

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started in 1991 did not only help raise awareness but most likely inspired some concrete policy changes. For example, only a year after the start of this widespread campaign, the US State Department's Country Reports on Human Rights began adding violence against women as a category.[60]

The first multilateral attempt to actively construct a positive obligation to protect women from violence was the Declaration on the Elimination of Violence Against Women (DEVAW). This declaration was drafted by the CSW following the ECOSOC's recommendation to take action in light of the discussions taken place in the Nairobi Conference.[61] The DEVAW was drafted by the CSW in 1991 and adopted by the General Assembly by the UNGA Resolution 48/104 in 1993.[62] The DEVAW defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm, or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life." The declaration anchored the norm around the CEDAW and other civil and political rights such as right to life or the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

An event that catalyzed considering domestic violence as a human rights issue and the adoption of the DEVAW was the Vienna Convention in 1993. Vienna Declaration and Program of Action did not only urge states to address violence against women but also called upon the CSW and the CEDAW Committee to introduce the right of individual petition through an optional protocol to CEDAW. The Conference also suggested the appointment of a special rapporteur on violence against women.[63]

In 1994, the Commission on Human Rights established the Special Rapporteurship on Violence against Women.[64] The Special Rapporteur in turn contributed to refining the norm and participated

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[60] Keck and Sikkink, 202.
[61] ECOSOC Resolution 1987/24, UN Doc. *E/RES/1987/87* (May 26,1987).
[62] It comes 4 years after the first attempt by the CEDAW Committee to construct the norm via General Recommendation 12 in 1989.
[63] Vienna Declaration and Program of Action, Vienna 25 June 1993, available at https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx, § 40.
[64] The resolution was adopted without a vote at the 56th meeting on 4 March 1994. See chap. XI.- E/CN.4/1994/132

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in the construction phase. One of the earliest reports of the Special Rapporteur concerned domestic violence. In this report, the Special Rapporteur highlighted that domestic violence is a "universal phenomenon" and that its "insidious nature" had been "documented across nations and cultures worldwide."[65] The Special Rapporteur from then on actively participated in constructing a new state obligation to protect women from domestic violence. In particular, they proclaimed "No longer are human rights guarantees restricted solely to the public sphere. They likewise apply to the private realm, including within the family, and oblige the State to act with due diligence to prevent, investigate, and punish violations therein."[66]

The initiatives taken by the UNGA were matched at the regional level. The Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para Convention) in 1994. This was the first legally binding international document on violence against women. Similar to the DEVAW, Article 1 of Belem do Para Convention defines violence against women as: "any act or conduct, based on gender, which causes death, or physical, sexual or psychological harm, or suffering to women, whether in the public or the private sphere."

Third Phase: Creative Construction by Bureaucratic, Multilateral and Judicial Pathways (post-1995)

In this phase, we see more concerted attempts made by bureaucratic, multilateral, and judicial pathways both at global and regional levels. As the norm gained traction, increasingly positive reception, its salience increased through the ranks of the United Nations. Increasingly more actors joined the construction effort through different pathways. As a result, the state obligation to protect women from domestic violence got more solidified. Here I will revisit the initiatives taken by international institutions, regional organizations, and judicial bodies.

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[65] Report of the Special Rapporteur on violence against women, its causes and consequences, *E/CN.4/1996/53* (5 February 1996), § 22

[66] Special Rapporteur on Violence against Women, *Violence against Women, its Causes and Consequences* (1999), § 6

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International Initiatives

1995 Beijing Conference followed the three successful World Conferences on Women in Mexico City, Copenhagen, and Nairobi.[67] 17,000 participants and 30,000 activists attended the conference.[68] Beijing Platform for Action was adopted by the representatives from 189 governments that were present in Beijing in September 1995.[69] This comprehensive global policy framework coordinated by the CSW called on member states to take strategic action concerning 12 critical areas of concern for women. One of them was violence against women. The Beijing Declaration made references to this endemic problem and called member states to "Prevent and eliminate all forms of violence against women and girls."[70] The Beijing Declaration and Platform for action had a five-year (in 2000), ten-year (in 2005), fifteen-year (in 2010) and twenty-year (in 2015) review and appraisal processes. They will hold a twenty-five-year review and appraisal in 2020.

After the adoption of the Beijing Declaration and Platform for Action, the representatives of the following states made general and interpretative statements or expressed reservations: Peru, Kuwait, Egypt, Philippines, Holy See, Malaysia, Iran, Libya, Ecuador, Indonesia, Mauritania, Oman, Malta, Argentina, Brunei Darussalam, France, Yemen, Sudan, Dominican Republic, Costa Rica, United Arab Emirates, Venezuela, Bahrain, Lebanon, Tunisia, Mali, Benin, Guatemala, India, Algeria, Iraq, Vanuatu, Ethiopia, Morocco, Djibouti, Qatar, Nicaragua, Togo, Liberia, Syrian Arab Republic, Pakistan, Nigeria, Comoros, Bolivia, Colombia, Bangladesh, Honduras, Jordan, Ghana, Central African Republic, Cambodia, Maldives, South Africa, United Republic of Tanzania, Brazil, Panama, El Salvador, Madagascar, Chad, Cameroon, Niger, Gabon, United States of America, and Canada, as well as Palestine as an observer.

None of these states raised a concern about the measures devised to tackle violence against women in the Beijing Declaration and Program of Action. Even those that issued interpretive statements

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[67] More on the Beijing Platform for Action, see https://beijing20.unwomen.org/en/about
[68] UN, *Report of the Fourth Conference on Women*, A/CONF.177/20/Rev.1, §44.
[69] To see the list of participating government and organizations see, Annex I.
[70] UN Women, *Beijing Declaration and Platform for Action* (1995), p. 11.

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concerning provisions touching upon violence against women added that they fully condemn violence against women.[71] This can be interpreted as an indication of state support for the creation of a new obligation to protect women from domestic violence.

The fact that the norm construction received positive appraisal is also visible through the Secretary General's interest in the subject matter. Indeed, the Secretary General, Kofi Annan, picked up the issue and contributed an in-depth study on all forms of violence against women. The report employs the concepts that are constitutive parts of the positive obligation to protect women from violence: gender-based violence, due diligence, and discrimination.[72]

Moreover, in the course of this phase, the CEDAW Committee remained an adamant change agent for the positive obligation to protect women from violence. Relocated to Geneva in 2008, the CEDAW Committee came to be closer to the human rights nerve center at Palais Wilson.[73] As the support for eradicating violence against women increased, the CEDAW became even more audacious in the language of its recommendations. For example, in its 2010 General Recommendation No 28, the CEDAW Committee established that "Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence."[74] Finding gender-based violence in essence discriminatory, since it predominantly affects women, the General Recommendation No 28 underlined that states have due diligence obligation to prevent discrimination (and by association gender-based violence) committed by private actors.[75]

Then, the CEDAW updated its Recommendation No. 19 by means of General Recommendation No. 35. It reiterated that gender-based violence is a form of discrimination and made references to due diligence, the right to life, and the prohibition of torture to anchor state obligations even better.

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[71] See for example, the statement of the Holy See. They disclosed that they associate themselves with "the condemnation of violence against women asserted." Report of the Fourth World Conference on Women, A/CONF.177/20/Rev.1, 161 (Beijing 4-15 September).

[72] Secretary General, *Ending Violence Against Women* (2006), available at https://www.unwomen.org/en/digital-library/publications/2006/1/ending-violence-against-women-from-words-to-action-study-of-the-secretary-general

[73] Loveday Hodson, "Women's Rights and the Periphery: CEDAW's Optional Protocol," *European Journal of International Law* 25, no. 2 (May 1, 2014): 566.

[74] CEDAW, General Recommendation 28 (16 December 2010) §19

[75] CEDAW, General Recommendation 28 (16 December 2010) §12

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It also highlighted that gender-based violence against women is a "more precise term that makes explicit the gendered causes and impacts of the violence"[76] – better framing strategy to cover it under the Convention.

General Recommendation No. 35 had another twist. The CEDAW Committee broke new ground by arguing that the prohibition of gender-based violence is a customary norm. More precisely, it presented the following logic: "For more than 25 years, in their practice, States parties have endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law."[77]

Regional Initiatives

Regional treaties and conventions helped better anchor the norm on existing regional human rights systems. The first ever initiative was the abovementioned Belem do Para Convention which was created in 1994. The African Union followed suit and adopted the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (Maputo Protocol) in 2003. Maputo Protocol, under Article 4, prohibits "all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public." Later in 2011, the Council of Europe adopted the Convention on Preventing and Combatting Violence against Women (Istanbul Convention). The initiatives for Istanbul Convention started in 2008 when the Council of Europe set up the Ad Hoc Committee for preventing and combatting violence against women and domestic violence (CAHVIO) with the Parliamentary Assembly's Recommendation 1847(2008).[78] This initiative was strongly supported by the European Women's Lobby (EWL) and the European Policy Action Centre on Violence against Women (EPAC VAW) and UNHRC.[79]

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[76] CEDAW, General Recommendation 35, CEDAW/C/GC/35 (26 July 2017), §9.
[77] CEDAW, General Recommendation 35, CEDAW/C/GC/35 (26 July 2017), §2.
[78] The Council of Europe reported that the drafting process was inspired by the case law of the ECtHR and the CEDAW Committee. For more see, Ronagh J. A. McQuigg, "What Potential Does the Council of Europe Convention on Violence against Women Hold as Regards Domestic Violence?," *The International Journal of Human Rights* 16, no. 7 (October 1, 2012): 949.
[79] For more on the CAHVIO and the legislative history of the Istanbul Convention see, https://www.coe.int/en/web/istanbul-convention/cahvio

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The Istanbul Convention defines violence against women as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological, or economic harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life" under Article 3.[80]

Judicial Decisions

The norm construction effort gained more legal dimension through the judicial pathway. The majority of the landmark decisions concerning domestic violence cases were brought to light with the support of civil society groups. In 2001, the Inter-American Commission of Human Rights reviewed a complaint about domestic violence for the first time. In *Maria da Pehna Maia Fernandes v. Brazil*, the Commission decided that Brazil failed to prosecute and convict the applicant's husband who had been abusing her for years.[81] The civil society groups played a role in bringing Maria's complaint to light. The Center for Justice and International Law (CEJIL) and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) helped Maria bring this case before the Commission.

The CEDAW Committee was the second judicial body to rule on a case concerning domestic violence. Following the UN General Assembly's adoption of the Optional Protocol to CEDAW in 1999, individual applicants to bring their complaints before the CEDAW Committee. The CEDAW Committee's first decision concerned domestic violence. In 2005, in *A.T. v. Hungary*, the CEDAW Committee acknowledged that states are obliged to protect victims from violence, even if it is perpetrated by private actors.[82]

States' obligations to protect women from violence perpetrated by private actors got solidified with two 2009 rulings – one from the European Court of Human Rights (ECtHR) and the other from the Inter-American Court Human Rights (IACtHR). In *Opuz v. Turkey*, the ECtHR decided that

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[80] Istanbul Convention also set up a monitoring body, Group of experts on action against violence against women and domestic violence (GREVIO).
[81] *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2001).
[82] *A.T. v. Hungary*, communication no. 2/2003, CEDAW (26 January 2005).

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Turkish government bore the responsibility of Ms. Opuz's ill treatment in the hands of her husband. This is because the authorities failed to take protective measures that could effectively deter the perpetrator despite the victim's repeated pleas for protection. The ECtHR did not stop there and found Turkish authorities' attitude discriminatory, arguing that "judicial passivity in Turkey, albeit unintentional, mainly affected women."[83] Interights intervened as a third party in support of the applicant's claims.

A few months after this decision, the IACtHR issued the *Cotton Field* ruling.[84] The case concerned the horrific murder of three women whose bodies were discovered in a cotton field in Ciudad Juárez. These were not isolated incidences, however. Since the 1990s, there had been an alarming number of disappearances and murders of women in this region. There were some common factors present in the majority of these murders: "the women were abducted and kept in captivity, their next of kin reported their disappearance and, after days or months, their bodies were found on empty lots with signs of violence, including rape and other types of sexual abuse, torture and mutilation."[85] The IACtHR established that approximately 113 were kidnapped and murdered in these circumstances.[86] The IACtHR issued this decision against this background. In particular, the IACtHR found that Mexico failed to fulfil its obligation to protect the victims, prevent these crimes despite being aware of their apparent patterns, respond to the disappearances in a timely manner, and to provide effective investigation and remedy. The case attracted a significant interest. Various civil society groups and research institutions submitted *amicus curiae* briefs, including the Center for Justice and International Law (CEJIL) TRIAL-Track Impunity Always and the World Organization against Torture; Women's Link Worldwide, Women's Network of Ciudad Juárez, Human Rights Watch, the International Commission of Jurists, Amnesty International, the International Center for Transitional Justice, and Redress.

Two years after, the African Commission on Human and People's Rights issued *Egyptian Initiative for Personal Rights (EIPR) Interights v. Egypt*. This 2011 decision concerned four women

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[83] *Opuz v. Turkey*, application no. 33401/02, ECtHR (09 June 2009) §200.
[84] *González et al. ("Cotton Field") v. Mexico*, (ser. C) 205, f113-136, IACHR (16 November 2009).
[85] *Cotton Field,* §125.
[86] *Cotton Field,* §127.

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journalists that were insulted and physically attacked either by the members of Egypt's State Security Intelligence (SSI) or by private agents that acted on their orders during a demonstration on 25 May 2005. The Commission found their treatment to be discriminatory, and amounting to inhuman or degrading treatment. It then decided that Egypt was in violation of its obligation to prevent, investigate, and punish the inhuman and degrading treatment that these women had to endure.[87] The case was brought by two civil society organizations, EIPR and Interights.

3. Analysis

3.1. Trajectory of Change (SCR Framework)

This is an example of norm creation. The positive obligation to protect women against violence emerged building upon existing norms (right to non-discrimination, right to life and freedom from torture) and due diligence standard. There appears to be three dominant pathways that were utilized by change actors. These are *multilateral pathway*, *bureaucratic pathway*, and *judicial pathway*.

Selection phase

The impetus to create a positive obligation to protect women from domestic violence came from women rights groups that had been campaigning since the 1970s. Their first objective was to raise awareness and defy the notion that domestic violence is a private matter. Once they achieved this objective, they began framing domestic violence as a human rights abuse.

As described above, the UN Decade for women was the key catalyzing moment that created an ***opening*** for the new state obligation to protect women from domestic violence to emerge. The UN Decade for women was not just a symbolic achievement, however. It provided a space to discuss the issues that have an impact on women. It created ***disturbance*** by revealing the pervasiveness of violence against women as an endemic social problem for the first time.

Salience at the time can still be considered relatively low. This is not only because the issue did not reach cabinet or Secretary-General level importance, but also there was not a vibrant discussion

[87] *Interights v. Egypt,* Communication no. 323/06, ACHPR (25 January 2011)

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even in academia. According to 1989 *Violence against Women in the Family* report issued by the UN Commission on the Status of Women in Vienna, domestic violence was not even treated much in academia before the 1970s. Jane Frances Connors, the author of this report, established that only ten out of 250 articles about domestic violence were published before 1971.[88]

The field of Human Rights was less densely populated by organizational bodies in the 1980s than it is today. There were few Human Rights institutions at the time, and the ones ***available*** seemed not too receptive (***institutional availability/receptiveness***). For example, while the Human Rights Commission addressed racial discrimination, it did not take an initiative on sexual discrimination and other issues affecting women.[89] The ***pathway that was most dominant*** in the early years was the CEDAW Committee, which was created in 1979. In response to lobbying from women rights' groups, the CEDAW Committee took a series of steps to frame domestic violence as a human rights issue.

Construction phase

Bureaucratic pathway was the first active and the most predominant pathway in the construction phase. The CEDAW Committee worked on the sidelines and was not the most influential human rights body. Yet, it was the first mover to construct a new norm to protect women from domestic violence. The CEDAW Committee took the first official step in framing the violence against women in human rights language in the General Recommendation No. 12 in 1989. The General Recommendation's framing relied on ***existing norms*** such as non-discrimination norm, and an early understanding of positive obligations. Later construction attempts initiated by multilateral and bureaucratic pathways – most prominently by the CSW, the UNGA, the SRVAW, and the UN Secretary General – also employed the prohibition of torture and right to life and due diligence standard. The existence of such well-established norms allowed these actors to anchor this new norm around them.

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[88]Jane Frances Connors and Centre for Social Development and Humanitarian Affairs (United Nations), *Violence against Women in the Family* (United Nations, 1989).
[89] Thomas and Beasley, "Domestic Violence as a Human Rights Issue," 47.

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At this moment the salience of the issue was still relatively low. However, the ***salience increased*** as the initial ***disturbance*** created by the change vision became an increasingly more successful endeavor with the participation of various actors and pathways. The change was, therefore, fostered by many hands in an ***incremental*** fashion.

The pathway that opened the last was the judicial pathway. This was not a sign of unwillingness to address domestic violence, however. There was not a precedent for finding states in violation for acts perpetrated by private actors. The IACtHR invoked the state responsibility for non-state actors for the first time in its first ever decision, *Velasquez Rodriguez v. Honduras,* in 1988. A decade after, the ECtHR invoked a similar obligation with *Osman v. United Kingdom.* Prior to the late 1990s, the ECtHR showed a lack of sensitivity towards complaints invoking positive obligations. For example, in *X and Y v. the Netherlands,*[90] – a case concerning sexual abuse of a girl with mental disability – both the European Commission and the Court did not find the responding state liable for abuse perpetrated by a private actor under the prohibition of torture in 1985.[91] They motivated this decision by arguing that there was not "a close and direct link between the gap in the Netherlands law and the field of protection covered" by the European Convention.[92] Needless to say, this case would be decided differently by today's standards or the standards of the late 1990s. Once the notions of positive obligations under political and civil rights and due diligence standard settled, their application to domestic violence became much more straightforward.

Reception phase

The attempt to create a positive obligation to protect women from domestic violence received remarkable institutional and state support. Initial appeals made by the women's rights activists and

[90] The girl had been living in a privately-run home for mentally disabled children since 1970. On the night of 14 December 1977, the girl was raped by the directress's son-in-law, who also lived on the premises. Following this traumatic incidence, the girl had a mental breakdown. Seeing her state, her father wanted to bring a complaint before the local authorities. Yet, since this incident took place after the girl's sixteenth birthday, she had to be the one bringing the complaint. However, due to her unstable state, she could not do so. The authorities did not accept a complaint lodged by her father. Therefore, the father took the case before the Commission and then finally the Court. In particular, he complained that the traumatic experience his daughter had to endure amounted to inhuman or degrading treatment.[90] He added that the state was also responsible for the acts perpetrated by private actors particularly considering his daughter's chronic psychological trauma.

[91] *X and Y v. the Netherlands,* application no. 8978/80, ECHR (26 March 1985).

[92] *X and Y v. the Netherlands*, §33.

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the CEDAW Committee created reverberations in the international human rights regime. Various international and regional actors have not only tacitly acknowledged the matter, but were converted to the cause. Therefore, it is a case of successful norm creation. While there was a ***widespread institutional support*** – as evidenced by how well the norm travelled across institutions and pathways – there was ***not a strong state opposition***.

First, the issue was mainstreamed as the General Assembly and the Human Rights Council had continued to address different forms of violence against women in their resolutions.[93] Following the DEVAW adopted in 1993, the UNGA and the Commission on Human Rights readdressed the issue in 2003 in two resolutions – more than 10 years after the initial attempts taken by the CEDAW Committee.[94] Both of these resolutions underlined the states' obligation to "exercise due diligence to prevent, investigate and punish the perpetrators of domestic violence against women and to provide protection to the victims, and also stresses that not to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms."[95] Between 2006 and 2012, the UNGA passed six resolutions calling for Intensification of efforts to eliminate all forms of violence against women.[96] In the 2010s, the UNGA and the Commission on Human Rights (which became the Human Rights Council in 2006) continued to broadened their focus and passed several other resolutions that tackle violence against women in general. For example, the UNGA adopted Resolution 68/137 to tackle violence against women migrants on 18 December 2013.[97] On 18 December 2014, the UNGA passed Resolution 69/147: *Intensification of efforts to eliminate all forms of violence against women and girls*.[98] During the same session, the General Assembly also targeted trafficking in women and girls with Resolution 69/149 and female genital mutilation with

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[93] These resolutions were passed without a vote.
[94] UNGA, Resolution 58/147, *Elimination of violence against women* (22 December 2003); Commission on Human Rights resolution 2003/45, (23 April 2003)
[95] UNGA, Resolution 58/147, §5.
[96] See UNGA Resolutions *A/RES/61/143*, of 19 December 2006; *A/RES/62/133*, of 18 December 2007; *A/RES/63/155*, of 18 December 2008; *A/RES/64/137,* of 18 December 2009; *A/RES/65/187*, of 21 December 2010; *A/RES/67/144*, of 20 December 2012.
[97] UNGA, Resolution 68/137, *Violence against women migrant workers* (18 December 2013).
[98] UNGA passed Resolution 69/147: *Intensification of efforts to eliminate all forms of violence against women and girls* (18 December 2014).

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Resolution 69/150.[99] Similarly, the Human Rights Council passed Resolution 23/25: *Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence* on 14 June 2013,[100] and another one on child marriages on 27 September 2013.[101]

Second, none of the great powers or small powers who are traditionally against women rights opposed to this norm. If we take state's active involvement in drafting and ratifying treaties adopted in multilateral forums as a reference, we see a good track record. Indeed, states have adopted various political documents: from the Vienna Declaration and Program of Action, to the Declaration on the Elimination of Violence against Women in 1993, and the Beijing Declaration and Platform for Action in 1995. They also initiated and supported regional instruments: from Belem do Para in 1994, to the Maputo Protocol in 2003, and Istanbul Convention in 2011.

Moreover, a sizable number of states changed domestic legislation and policies to include measures to tackle domestic violence (and other forms of violence against women) both in the global North and the South.[102] For example, according to Jeremy Sarkin, as of 2018, 119 states have domestic violence laws.[103] It goes without saying that not all of these laws may not be equally sophisticated or deterrent. However, we can still argue that the change attempt has been received well as it successfully altered state behavior.

Closer look at state practice

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[99] UNGA Resolution 69/149, *Trafficking in women and girls* A/69/481 DR III (18 December 2014); UNGA Resolution 69/150

[100] Human Rights Council, Resolution 23/25 *Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence,* A/HRC/RES/23/25 (14 June 2013)

[101] Human Rights Council, Resolution 24/23, *Strengthening efforts to prevent and eliminate child, early and forced marriage: challenges, achievements, best practices and implementation gaps,* A/HRC/24/L.34./Rev.1 (27 September 2013).

[102] See also Ronagh J. A. McQuigg, "The Responses of States to the Comments of the CEDAW Committee on Domestic Violence," *The International Journal of Human Rights* 11, no. 4 (December 1, 2007): 475.

[103] Jeremy Sarkin, "A Methodology to Ensure That States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World," *Human Rights Quarterly* 40, no. 1 (February 9, 2018): 10.

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We see this even in countries that are not traditionally big supporters of women rights. There are seven countries that are not party to CEDAW: Somalia and Sudan from Africa; Brunei Darussalam, Iran, Palau, and Tonga from Asia and the Pacific; and the USA from Western Europe and Other Developed Regions.[104] If we look at the record of non-parties we can see that even these countries have taken some steps.

The data for this analysis comes from the Global Database on Violence against Women, prepared by the UN Women.[105] According to this database, *Somalia* introduced constitutional provisions on violence against women in 2012 and collected data by means of a cluster survey on domestic violence in 2011. *Sudan* established a child and family protection unit in 2005, set up a hotline service for the victims of domestic violence, and introduced a national plan to suppress violence against women and children in 2010 and 2011. Moreover, *Sudan* prohibited female genital mutilation in the Penal Code in 2003, and introduced constitutional provisions on violence against women in 2005. *Brunei Darussalam* included a provision about domestic violence in the Islamic Family Law Order in 2000, created a task force on child abuse and domestic violence in 2005. In addition, it initiated a domestic violence awareness campaign in 2008. *Iran* introduced a bill titled the Provision of Women's Security against Violence and set up a call center to provide legal advice for legal inquiries including violence against women. *Palau* introduced Family Protection Act and a campaign to end violence against women in 2012. Moreover, it conducted a Family Health Survey to address domestic violence in 2013 and 2014. *The USA* introduced 42 measures dedicated to violence against women. Of these the most important ones are the Violence against Women Act introduced in 1994 and amended in 2003 as well as the creation of National Advisory Committee on Violence against women in 1994 and Office on Violence against Women in 1995.

Moreover, if we zoom in on other great powers, we see that they have also taken up action against domestic violence. For example, *Russia* introduced Standard: Order No. 564, which provides a range of social services to the victims of domestic violence in 2007. Moreover, it created a coordination council for the prevention of violence in the family as well as crisis centers and

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[104] All countries in Latin America and the Caribbean region are parties to the CEDAW.
[105] Global Database on Violence Against Women, available https://evaw-global-database.unwomen.org/en

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hotlines for the victims in 2008. *China*'s 1979 Constitution had a provision on violence against women (prohibition of maltreatment of women and children). Moreover, China introduced local regulations to address domestic violence in 1996, another legislation to protect the rights and interests of women in 2005 and a domestic violence law in 2015. *The UK* has 72 measures against violence against women and 44 of these concern domestic violence. More specifically on domestic violence, the UK adopted the Domestic Violence Crimes and Victims Act in 2004. Then in 2005, the government of the UK introduced the National Report and National Delivery Plan on Domestic Violence (a comprehensive response to domestic violence). The UK initiated mandatory domestic violence training programs for the judges, prosecutors, police, and counselors in 2008. The 2010 Crime and Security Act has a chapter on domestic violence and ensures the enforcement of domestic violence protection orders. Finally, *France* has 110 measures available for violence against women and of those 32 relates to domestic violence. 1994 French Penal Code prohibits gender-based violence. In 2000, French government began setting up crisis centers for victims of violence against women. The Act 2004-439 (divorce act of 2004) and the Act 2006-399 (act reinforcing the prevention and punishment of intimate partner violence and violence against minors of 2006) prohibits domestic violence. France introduced a national action plan to combat violence against women in 2005 and conducted a comprehensive study on domestic violence victims in 2010.

As you can see, there has been a serious effort to change domestic policies around domestic violence. This quick review of state practice also suggests that the majority of these domestic initiatives predated the steps taken by the UNGA and the HRC – but not those taken by the CEDAW Committee. However, if we take implementation as a reference, the picture may not appear as optimistic. In its 2015 *Summary Report: the Beijing Declaration and Platform for Action Turns 20*,[106] the UN Women revealed that violence against women remains to be a pervasive problem. This is primarily because of the "persistence of discriminatory attitudes, and social norms that normalize and permit violence."[107] Similarly, in 2015, the Commission on the Status report

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[106] This report summarizes the Report of the Secretary General on the 20-year review and appraisal of the implementation of the Beijing Declaration and Platform for Action and the outcomes of the twenty-third special session of the General Assembly.

[107] UN Women, *Summary Report: the Beijing Declaration and Platform for Action Turns 20* (March 2015), 21.

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showed that 35 per cent of women worldwide had experienced violence in their lifetime.[108] According to this report, “Africa has the highest proportion of women reporting either physical and/or sexual intimate partner violence or non-partner sexual violence, at 45.6 per cent, followed by South-East Asia (40.2 per cent), Eastern Mediterranean (36.4 per cent), the Americas (36.1 per cent), Western Pacific (27.9 per cent), and Europe (27.2 per cent).”[109]

3.2. Particularities of the Case

Unifying nature of the subject matter: Gathering support around some women rights such as equality or reproductive rights has been a difficult endeavor. The North-South division, the religious secular division often hijacked the prospects of reaching a form of agreement. However, violence against women, especially domestic violence had a particularly unifying character. Its pervasiveness did not only make it an urgent matter to be addressed but also ensured a wide-spread support from states, organizations, or funding agencies.

Ripeness of the time: This new obligation’s creation and framing benefited much from the larger developments in International Law. Especially the introduction of positive state obligations under political and civil rights and the establishment of the due diligence standard in the 1990s made it easy to argue for this new obligation.

World Conferences on Women as a facilitator: Meeting in regular intervals not only allowed women rights activists to network and lobby like-minded states but also to pursue their objectives with energy. These conferences provided activists, institutions, and supportive states with opportunities to show the pervasiveness of domestic violence and to creatively construct a new norm to tackle it. From 1975 World Conference on Women in Mexico to the 1995 Beijing Conference the number of actively participating states incrementally increased as mentioned above. 133 states participated in the Mexico Conference; 145 states attended the Copenhagen Conference; 157 states were present in Nairobi; and 189 states took part in the Beijing Conference. Hence, the

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108 Commission on the Status of Women, *Report of the Secretary General: Review and Appraisal of the Implementation of the Beijing Declaration and Platform for Action*, Fifty-ninth session (9-20 March 2015), §115.

109 UN Women, *Summary Report: the Beijing Declaration and Platform for Action Turns 20* (March 2015), 22.

Electronic copy available at: https://ssrn.com/abstract=4430270

state support around gender-related concerns in general and domestic violence in particularly progressively grew over time.

From margins to the center: The CSW and the CEDAW Committee played an important role in this story of change.[110] The CSW took the first step to bring this issue to the UN's attention by means of World Conferences on Women. The CEDAW Committee took an initiative to creatively construct a new state obligation to protect women from violence as early as 1989. Indeed, the CSW and the CEDAW Committee were only marginal actors in the human rights field. However, not long after other institutions jumped on the bandwagon and the issue became of interest to mainstream institutions.

Pace of change*:* This is an example of incremental norm construction. The change agents first identified that domestic violence is not a private matter in the course the World Conferences on Women. Then slowly a new state obligation to protect women from violence perpetuated by private actors was constructed by means of the CEDAW General Recommendations, the SRVAW reports, the UNGA and HRC resolutions, as well as the initiatives of regional human rights bodies. The norm consolidated in the 2000s when it became a common practice to mention the existence of this strong prohibition on gender-based violence. According to SRVAW's 2006 report, states' obligation to "prevent and respond to acts of violence against women with due diligence" constituted a rule of customary international law."[111] The existence of such a customary norm was reiterated in the 2010 CEDAW Committee General Recommendation 35.

Successful change attempt (outcome)*:* It is a successful change attempt. The positive obligation to protect women from violence, which came out of women rights activists' sporadic attempts, first disturbed the system and then became a concern for the mainstream institutions such the General Assembly or the Secretary General. Moreover, it created a meaningful policy change in the

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[110] For more on the CEDAW's effect on rights in general, see Neil A. Englehart and Melissa K. Miller, "The CEDAW Effect: International Law's Impact on Women's Rights," *Journal of Human Rights* 13, no. 1 (January 1, 2014): 22–47, https://doi.org/10.1080/14754835.2013.824274.
[111] Special Rapporteur on Violence against Women, Due Diligence Standard As a Tool for the Elimination of Violence against Women, *E/CN.4/2006/61* (20 January 2006), §29.

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majority of states – especially those that are parties to CEDAW as above-cited Englehart study shows.

Annex I: Attendance at the Beijing Conference in 1995

The following States and regional economic integration organization were represented at the Conference:

Afghanistan	Denmark	Latvia	Russian Federation	United States of America
Albania	Djibouti	Lebanon	Rwanda	Uruguay
Algeria	Dominica	Lesotho	Saint Kitts and Nevis	Uzbekistan
Andorra	Dominican Republic	Liberia	Saint Lucia	Vanuatu
Angola	Ecuador	Libya	Saint Vincent and the Grenadines	Venezuela
Antigua and Barbuda	Egypt	Liechtenstein	Samoa	Viet Nam
Argentina	El Salvador	Lithuania	San Marino	Yemen
Armenia	Equatorial Guinea	Luxembourg	Sao Tome and Principe	Zaire
Australia	Eritrea	Madagascar	Senegal	Zambia
Austria	Estonia	Malawi	Seychelles	Zimbabwe
Azerbaijan	Ethiopia	Malaysia	Sierra Leone	
Bahamas	European Community	Maldives	Singapore	*Palestine, as an observer
Bahrain	Fiji	Mali	Slovakia	
Bangladesh	Finland	Malta	Slovenia	
Barbados	France	Marshall Islands	Solomon Islands	
Belarus	Gabon	Mauritania	South Africa	
Belgium	Gambia	Mauritius	Spain	
Belize	Georgia	Mexico	Sri Lanka	
Benin	Germany	Micronesia	Sudan	
Bhutan	Ghana	Monaco	Suriname	
Bolivia	Greece	Mongolia		
Bosnia and Herzegovina		Morocco		

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<table>
<tr>
<td>Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cambodia
Cameroon
Canada
Cape Verde
Central African Republic
Chad
Chile
China
Colombia
Comoros
Congo
Cook Islands
Costa Rica
Côte d’Ivoire
Croatia
Cuba
Cyprus
Czech Republic
Democratic People’s Republic of Korea</td>
<td>Guatemala
Guinea
Guinea-Bissau
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Haiti
Holy See
Honduras
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
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Italy
Jamaica
Japan
Jordan
Kazakstan
Kenya
Kiribati
Kuwait
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Lao People’s Democratic
Republic</td>
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Myanmar
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Nauru
Nepal
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New Zealand
Nicaragua
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Papua New Guinea
Paraguay
Peru
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Portugal
Qatar
Republic of Korea
Republic of Moldova
Romania</td>
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Sweden
Switzerland
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Tajikistan
Thailand
The former Yugoslav Republic of Macedonia
Togo
Tonga
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Tunisia
Turkey
Turkmenistan
Tuvalu
Uganda
Ukraine
United Arab Emirates
United Kingdom
United Republic of Tanzania</td>
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The following associate members of the regional commissions were represented by observers:

- American Samoa
- Commonwealth of the Northern Mariana Islands
- Guam
- Macau
- Netherlands Antilles
- Puerto Rico

The secretariats of the following regional commissions were represented:

- Economic Commission for Africa
- Economic Commission for Europe
- Economic Commission for Latin America and the Caribbean
- Economic and Social Commission for Asia and the Pacific
- Economic and Social Commission for Western Asia

The following United Nations bodies and programmes were represented:

- United Nations Children's Fund
- United Nations Conference on Trade and Development
- United Nations Development Fund for Women
- United Nations Development Programme
- United Nations Environment Programme
- United Nations Population Fund
- United Nations University
- World Food Programme
- United Nations Relief and Works Agency for Palestine Refugees in the Near East
- United Nations Centre for Human Settlements (Habitat)
- United Nations High Commissioner for Refugees, Office of the
- International Research and Training Institute for the Advancement of Women
- United Nations Research Institute for Social Development
- International Trade Centre
- Joint Inspection Unit
- Committee on the Elimination of Discrimination against Women

The following specialized agencies and related organizations were represented:

- International Labour Organization
- Food and Agriculture Organization of the United Nations

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- United Nations Educational, Scientific and Cultural Organization
- World Health Organization
- World Bank
- International Monetary Fund
- World Meteorological Organization
- International Maritime Organization
- World Intellectual Property Organization
- International Fund for Agricultural Development
- United Nations Industrial Development Organization
- International Atomic Energy Agency

The following intergovernmental organizations were represented:

- African Development Bank
- African Training and Research Centre in Administration for Development
- Agency for Cultural and Technical Cooperation
- Asian Development Bank
- Caribbean Community
- Commission of the European Communities
- Commonwealth of Independent States
- Commonwealth Secretariat
- Council of Europe
- Eastern and Southern African Management Institute
- Inter-American Development Bank
- International Committee of the Red Cross
- International Federation of Red Cross and Red Crescent Societies
- International Organization for Migration
- Latin American Economic System
- Latin American Parliament
- League of Arab States
- Nordic Council
- Nordic Council of Ministers
- Organisation for Economic Cooperation and Development
- Organization of African Unity
- Organization of American States
- Organization of the Islamic Conference
- Preparatory Commission for the Organisation for the Prohibition of Chemical
- Weapons
- South Pacific Commission
- South Pacific Forum

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Case Study 6

Direct Human Rights Obligations of Corporations

(28 April 2020/rev. June 2020/rev. Dec. 2021)

Dorothea Endres[1]

Part I: Chronological Account of the Developments

1. Typical Story

Typically, the story regarding human rights obligations of corporations is embedded on the broader account of human rights obligations of non-state actors and corporate responsibility. The development is then traced from developments in the OECD and ILO to the UN Code of Conduct, to the UN Draft Norms, the UN Guiding Principles and then to the binding treaty project.[2] Depending on the author, other accompanying events are added, like the criminal liability, US Alien Tort Statute litigation, major events highlighting corporate impunity, or multi-stakeholder initiatives. It is undebated on the one hand that the visibility of corporations in the international law discourse increased. On the other hand, it is also clear that all attempts to establish direct binding obligations for corporations to respect human rights have failed to achieve the status of fully successful change. Between those two sign posts, accounts on the particular stage of development vary considerably.

For the precise question on the path towards direct human rights obligations of corporations, 3 peaks can be identified – all of them not leading to the intended norm-change, but spilling over

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[1] I would like to thank Kinda Mohammedieh for comments and inputs on the section regarding the UN-BHR treaty negotiations.

[2] A. Clapham, 'Non-State Actors' in D. Moeckli, S. Shah, S. Sivakumaran (eds.), International Human Rights Law, (Oxford: Oxford University Press, 2018), pp. 557–79 pp. 568–71; M. A. Santoro, 'Business and Human Rights in Historical Perspective' (2015) 14 *Journal of Human Rights* 155–61; D. Weissbrodt, 'Roles and Responsibilities of Non-State Actors' in D. Shelton (ed.), The Oxford Handbook of International Human Rights Law, (Oxford: Oxford University Press, 2013), pp. 719–36 pp. 725–32.

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into other pathways in multiple ways. The first peak is the UN Code of Conduct, the second peak are the UN Draft Norms, and the third peak is the binding treaty project.[3] On this path of change, multiple other parallel and intersecting developments were however relevant for the norm-change-attempt to introduce direct international human rights obligations of corporations.

2. ***Until 1974: Emergence of the concept or corporate social responsibility***

At the time of the emergence of the modern international human rights framework, form the 1950ies to the 1960ies, the general mindset was not to think of corporations as entities separate from the states they were incorporated in. Consequently, human rights issues were to be dealt with by the concerned state. International law-making, in particular by the UN, was concerned with corporations predominantly in the context of the protection of foreign investment.[4]

However, with increasing globalization, corporations became more powerful and more visible as entities acting in considerable independence from their home and host states.[5] As for specific events that triggered this change, different authors point to different events,[6] which leads me to conclude that it was a broader development, best caught with the term globalization, that instigated the changing perception and role of corporations in international law. Most importantly, Civil Society Movements identified corporations as independent targets for their human rights activism.[7] For instance, Nestlé was targeted for their irresponsible marketing of breast-milk substitutes, South African Companies were targeted for their discriminatory work-place policies.[8]

Within the context of the New Economic Order (NEO), the ECOSOC became interested in the regulation of corporations, and, in 1971, requested the Secretary General to establish a study group of 'eminent persons' from the public and the private sector in order to study the role of

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[3] See: S. Deva, 'Alternative Paths to a Business and Human Rights Treaty' in J. Černič Letnar, N. Carillo-Santarelli (eds.), The Future of Business and Human Rights, (Plymouth: Intersentia, 2018) pp. 17–23.
[4] N. Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap* (Routledge, 2017) p. 163; S. Tagi and J. H. Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations* (Indiana University Press, 2008) pp. 21–40.
[5] J. Nolan, 'Business and Human Rights in Context' in J. Nolan, B.-P. Dorothée (eds.), Business and Human Rights - From Principles to Practice, (London/New York: Routledge, 2016), pp. 21–34 p. 24.
[6] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, pp. 42–43; Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 164; Santoro, 'Business and Human Rights in Historical Perspective', 157.
[7] Santoro, 'Business and Human Rights in Historical Perspective', 156–57.
[8] Santoro, 'Business and Human Rights in Historical Perspective', 156.

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multinational corporations and their implications for international relations.[9] The Group of Eminent Persons (GEP) met several times in 1973 and 1974 and held consultations with a wide range of stakeholders.[10] In 1974, they issued their report 'The impact of multinational corporations on development and on international relations'.[11] This report is organized in three sections: (I) The general report, covering particularly the multi-national enterprises' (MNEs) impact on development and international relations, (II) specific issues, and (III) comments by individual members of the group. Most interestingly, none of the sections pays particular attention to notions of human rights.

Upon recommendation of the GEP, the inter-governmental Commission on Transnational Corporations (CTNC) and the Centre on Transnational Corporations were created. Those institutions had the task to gather information on MNEs.[12] On its first meeting, in 1974, the CTNC decided to focus its work on the drafting of a code of conduct.[13]

In all these developments, from the GEP to the CTNC, the tensions between developing and developed states regarding economic matters regularly surfaced in varying intensity.[14] The CTNC provided the infrastructure and focal point for the UN system dealing with corporation related issues.[15] Its impact on knowledge production on MNEs and international law was tremendous: from 1973 to 1994, the Commission produced 278 publications and 710 documents of more limited circulation.[16] Human rights, however, did not feature on their agenda. The commission was predominantly concerned with foreign direct investment and development.[17]

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[9] ECOSOC Resolution 1721 (LIII), 1972 in UN Doc. E/5209, p. 4. Resolution 172 'The impact of multinational corporations on the development process and on inter- national relations'. Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 166.
[10] For a detailed description of the process see: Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, pp. 55–88.
[11] Group of Eminent Persons' final report, The Impact of Multinational Corporations on the Development Process and on International Relations, UN Doc. E/5500/Add.1 (Part I) (24 May 1974) 13 ILM 800 1974.
[12] ECOSOC Resolution 1913 (LVII), December 1974; ECOSOC Resolution 1908 (LVII), December 1974.
[13] Commission on Transnational Corporations, Report on the First Session, E/5655 and Corr. 1; E/C.10/6 and Corr.1 and Add.1.
[14] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 168.
[15] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 92.
[16] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 96.
[17] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, pp. 95–108.

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In short, in the early 1970ies, MNEs were increasingly perceived as relevant actors in the global sphere, acting in considerable independence from their home and hosts states. This increased awareness led to the drafting of several International Organizations' Corporate Social Responsibility (CSR) Guidelines, Multi-stakeholder-initiatives (MSIs) in subsequent decades.[18]

3. 1974 – 1990ies: CSR- Norm Drafting

3.1 In general

It is important to highlight that Corporate Social Responsibility encompasses a much broader set of norms of behaviour which are very regularly dealt with in considerable separation from human rights notions.[19] Consequently, especially early CSR-documents only mention human rights on the periphery. However, the building of a 'moral responsibility' of corporations through the CSR movement was constitutional for the later Business and Human Rights movement.[20]

3.2 UN Code of Conduct

As elaborated above, the core concern of the CTNC was the drafting of the code of conduct. In 1982, the Commission presented a first draft.[21] The project ultimately failed in 1992.[22] The main reason was disagreement on the binding character of document.[23] Broadly, Western States and the socialist bloc supported a binding international instrument aimed at MNEs, but developing-market economy countries insisted on letting market forces operate more freely.[24] Secondary literature suggests that these discussions on the code of conduct nevertheless served as catalyst for

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[18] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 164.
[19] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 163; F. Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22 *Business Ethics Quarterly* 739–70.
[20] Due to Covid-restrictions unable to retrieve: how OECD and ILO declarations came about. The resources I found are not available online; archives are only digitalized 1990 onwards.
[21] U.N. Document E/C.l0/1982/6, 5 June 1982, reprinted in 22 ILM 192 (1983).
[22] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 174.
[23] For a substantive analysis of the negotiations see: Sauvant, Karl P., 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 *The Journal of World Investment and Trade* 11–87 at 38–56; See: J. Nolan, 'Mapping the movements: business and human rights regulatory framework' in J. Nolan, D. Baumann-Pauly (eds.), Business and Human Rights - From Principles to Practice, (New York: Routledge, 2016), pp. 66–88 p. 75.
[24] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 109.

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subsequent developments within the UN framework, such as the UN Global Compact, or the UN Convention on Corruption.[25]

In 1993, the issues underpinning the work of the CTNC were transferred to UNCTAD, and the Commission was dissolved.[26] Within UNCTAD, the approach became much more analytical and focused on the role of corporations in the economic development of states.[27] In other words, this transfer rather pushed the issue further away from concise formulations of human rights obligations.

3.3 OECD Guidelines

Potentially to some extent in reaction to the deliberations on the UN Code of Conduct, the OECD initiated its own approach on the issue – focused on OECD member states, and consequently side-lining some of the tensions blocking the UN Code of Conduct discussions.[28] In 1976, OECD issued its 'Guidelines for Multinational Enterprises – national treatment, international investment incentives and disincentives, consultation procedures'.[29] Those guidelines are legally non-binding recommendations to OECD member states.[30] Human rights are no independent topic they are only considered peripherally in relation to workers' rights (transparency, non-discrimination in employment policies, freedom of association). The Turkish Government did not participate in the Declaration and abstained from the Decisions.[31]

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[25] A. Heinemann, 'Business Enterprises in Public International Law: the Case for an International Code on Corporate Responsibility' From Bilateralism to Community Interest: Essays in Honour of Bruno Simma, (Oxford: Oxford University Press, 2011), pp. 718–135 pp. 719–20; Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 110.

[26] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 175.

[27] P. Muchlinski, 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD' in M. T. Kamminga, S. Zia-Zarifi (eds.), Liability of Multinational Corporations under International Law, (The Hague/London/Boston: Kluwer Law International (, 2000) pp. 114–15.

[28] Heinemann, 'Business Enterprises in Public International Law: the Case for an International Code on Corporate Responsibility', p. 720; Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 111.

[29] OECD, Guidelines for Multinational Enterprises – national treatment, international investment incentives and disincentives, consultation procedures,1976.

[30] R. Blanpain, *The Badger Case and The OECD Guidelines for Multinational Enterprise* (Springer, 1977) pp. 38–39; For a detailed analysis see: C. Hägg, 'The OECD Guidelines for Multinational Entreprises - A Critical Analysis' (1984) 3 *Journal of Business Ethics* 71–76.

[31] Blanpain, *The Badger Case and The OECD Guidelines for Multinational Enterprise*, p. 37; S. Coonrod, 'The United Nations Code of Conduct for Transnational Corporations' (1977) 18 *Harvard International Law Journal* 273–308 at

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While this first version focuses – as the title suggests – on international investment, subsequent versions of those guidelines expanded increasingly towards the realm of human rights.

3.4 ILO Tripartite Declaration

In 1977, ILO passed its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. This declaration distinguishes itself from the other instruments through the characteristics of the ILO: in the drafting process, representatives of employers, employees and government were involved.[32] Unlike Conventions, the declaration is however not considered to be legally binding – but also, directly aimed at employers.[33] In that regard, the declaration goes not beyond encouragement to implement labour rights.[34]

Also, like all ILO instruments until the 1990ies, the Declaration is adopted with implicit consideration of human rights concerns, but without adoption of human rights language.[35]

In the 2000 amendment, principle 8 holds that 'all the parties concerned' by the Declaration, including multinational enterprises themselves, "should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations."[36]

3.5 Apartheid

UN Level

In the mid-1970ies, the UN became concerned with the role corporations played in the South African Apartheid regime.[37] Based on the numerous GA and ECOSOC resolutions on the South African Apartheid regime, the CTNC was able to get involved in the issue.

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289. Further resources I found are not available online; archives are only digitalized from 1990 onwards. Secondary literature suggests, unwillingness or inability to agree on a legally binding document

[32] Nolan, 'Business and Human Rights in Context', pp. 70–71.

[33] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 51.

[34] Nolan, 'Business and Human Rights in Context', p. 71.

[35] L. Swepston, 'How the ILO embraced human rights' in J. R. Bellace, B. ter Haar (eds.), Research handbook on labour, business and human rights law, (Cheltenham/Northampton: Edward Elgar, 2019), pp. 295–313 pp. 301–2.

[36] ILO Declaration on Fundamental Principles and Rights and Work, 1977, 2000 amendment, principle 8, at p. 3.

[37] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 112.

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In 1977, the General Assembly adopted a series of resolutions condemning TNC activities,[38] and the Security Council called for an end to arms sales to that country.[39] Furthermore, the European Community proposed a voluntary code of conduct for TNCs that would ensure the equal pay of all workers, and the right to unionize.[40] Although clearly concerned with human rights issues, all those documents were not drafted in human rights language.

The CTNC conducted several background studies, and a specific panel for South Africa was established.[41] The panels' report was submitted to and endorsed by the UNGA and ECOSOC in 1986.[42] In 1985 and 1989, the commission conducted broad hearings for corporations with respect to their divestment in South Africa.[43] While it is impossible to establish a clear link between those activities and the downfall of the apartheid regime, the involvement of the CTNC arguably was crucial for the impact and visibility of the UN in this process of regime change.[44] While the CTNC continuously highlighted the social responsibility of corporations, human rights vocabulary only appeared peripherally.

Sullivan Principles

In 1977, a US-American minister and civil rights leader, Leon Sullivan, proposed 6 principles that should govern US investments and business operations in South Africa.[45] This was directly inspired by his previous activities in favor of equal employment opportunities for African Americans in the

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[38] UNGA, Resolution 32/35 (28 Nov. 1977), Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia and Namibia and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa.

[39] UNSC, Resolution 418, 4 November 1977 (adopted unanimously). This arms trade embargo was obligatory, while the previous resolution had established restrictions on a voluntary basis (UNSC, Resolution 282, 23 July 1970, (12 voted for, 3 abstained)).

[40] M. Holland, 'The EEC Code for South Africa: A Reassessment' (1985) 41 *The World Today* 12–14; European Community, *Background Information - Code of Conduct adopted for EC companies in South Africa* (1977); Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 113.

[41] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 113.

[42] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, pp. 113–14.

[43] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, pp. 112–19.

[44] Tagi and Dunning, *From Code of Conduct to Global Compact, The UN and Transnational Corporations*, p. 118.

[45] The Global Sullivan Principles, 1977, available online: http://hrlibrary.umn.edu/links/sullivan principles.html.

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US.[46] The principles aim directly at guiding the behaviour of corporations to assume their social responsibility. Human rights language is absent. The effective impact of the principles on the apartheid regime is assessed fairly differently by different actors.[47] It is however undebated that those principles were pioneering the emergence of corporate social responsibility commitments of corporations.[48]

3.6 Bhopal

Event

'Bhopal' remains the short-cut notion for corporate impunity, as well as civil society movements and transnational litigation for corporate social responsibility. Arguably, this disaster is the first (after 1945) to attract global attention to corporate and governments' failure to protect people from adverse (human rights) effects caused by corporate activity.

Union Carbide India Ltd., a subsidiary of Union Carbide Corporation, an MNE based in the US, ran a chemical plant in Bhopal, in India. On the night of the 2 December 1984, there was a massive leakage of toxic gases from a storage tank of the plant, because water had entered that tank.[49] It was never settled whether the water entered during cleaning activities of the company or due to a sabotage act.[50] Between 7'000 and 10'000 people died immediately after the accident.[51] Ultimately, the more than 60 percent of Bhopal's' population was affected by the gas leakage.[52] Furthermore, vast environmental pollution resulted from the leakage.[53]

Litigation

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[46] Z. Larson, 'The Sullivan Principles: South Africa, Apartheid, and Globalization' (2020) 0 *Diplomatic History* 1–25 at 1.
[47] See for a summary: Larson, 'The Sullivan Principles: South Africa, Apartheid, and Globalization', 2–4.
[48] Santoro, 'Business and Human Rights in Historical Perspective', 2.
[49] Amnesty International, *Clouds of Injustice: Bhopal Desaster 20 years on* (2004) pp. 8–9.
[50] Amnesty International, *Clouds of Injustice: Bhopal Desaster 20 years on*, p. 31; S. Deva, 'Bhopal: the saga continues 31 years on' in J. Nolan, D. Baumann-Pauly (eds.), Business and Human Rights - From Principles to Practice, (New York: Routledge, 2016), pp. 49–55 p. 50.
[51] Amnesty International, *Clouds of Injustice: Bhopal Desaster 20 years on*, p. 10.
[52] Deva, 'Bhopal: the saga continues 31 years on', p. 50.
[53] Amnesty International, *Clouds of Injustice: Bhopal Desaster 20 years on*, pp. 17–20.

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In response to this event, a complex set of litigation was initiated in India and in the US.[54] Proceedings before the US courts were dismissed based on forum non-conveniens in 1986.[55] A second round of cases was filed in 2004, and resulted in a series of non-liability rulings regarding the company from 2013 to 2016.[56] Proceedings before Indian courts lead to a settlement in 1989, which has been criticized as unfair and unreasoned.[57] A second round of proceedings in India led to some criminal convictions in 2010.[58]

This endless and - for the victims - not very fruitful litigation exemplifies one of the legal core problems that is yet to be solved: parent companies are only in a very limited way legally responsible for the failures of their subsidiaries, and this question is treated in considerable independence from the flow of income/assets between parent company and subsidiary.[59] Strands of the BHR movement will couple this problem with allegations of host state (particularly Global South) countries being unable or unwilling to protect the human rights of their own citizen.[60]

The way in which NGOs covered Bhopal is representative of the general shift in language used to target corporations' responsibility: While the immediate aftermath and the subsequent litigation were dominated by corporate social responsibility, and civil/criminal liability, the retrospective accounts established in the 2000s are framed in human rights language.[61]

3.7 Human rights language in the Naming and Shaming activities of NGOs

It is in the 1990ies that the civil society activists concerning the role of corporations in the global sphere start to frame their claims and accusations in human rights terms.[62] For instance, Shell and

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[54] Deva, 'Bhopal: the saga continues 31 years on', p. 51.
[55] In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842 (1986).
[56] For a good summary see: http://www.bhopal.com/Bhopal-Litigation-in-the-US (all websites have last been accessed 28 April 2020).
[57] Deva, 'Bhopal: the saga continues 31 years on', p. 51; Amnesty International, *Clouds of Injustice: Bhopal Desaster 20 years on*, pp. 60–61.
[58] State of Madhya Pradesh v Anderson & Ors, Cr. Case No. 8460/1996; For a good overview see: http://www.bhopal.com/Bhopal-Litigation-in-India.
[59] J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* (2008) p. 6.
[60] Nolan, 'Business and Human Rights in Context', p. 25; See for instance: Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* p. 6.
[61] See: Amnesty International, *Clouds of Injustice: Bhopal Desaster 20 years on*.
[62] Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide', 742.

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its subsidies were called out for their involvement in the mistreatment of the Ogoni people in the Niger Delta.[63] In response to these NGO activities, many companies, including Shell, adopted a human rights policy.[64] From the 2000s onwards this would then expand into academia with increasing publications on human rights obligations of non-state actors.[65]

3.8 Emergence of numerous MSIs

The period of the 1980ies and 1990ies saw the emergence of numerous movements out of different corners of society, concerned with the amelioration of business behaviour towards its social environment. The concept of MSIs emerged with the UN Summit on Environment and Development 1992 in Rio.[66] The concept expanded then into the sphere concerning corporate social responsibility. Typically, the initiatives were not legally binding and composed of a multiplicity of stake-holders – some only from the private sector, some mixed from public and private sector; some focused on specific business domains, some more broadly; some based in a specific part of the word, some with more universal aspirations. The subsequent enumeration aims at highlighting some initiatives in an exemplary manner, in order to demonstrate that the development traced in this case-study was embedded in a much broader dynamic.

In 1986, FREDERICK PHILLIPS, former President of Philips Electronics and OLIVIER GISCARD D'ESTAING, former Vice-Chairman of INSEAD, founded the *Caux Roundtable* as a means of reducing escalating trade tensions. The Caux Round Table for Moral Capitalism is an international network of principled business leaders working to promote a moral capitalism. They are the product of collaboration among executives from the U.S., Europe and Japan and were fashioned, in part, from a document called "The Minnesota Principles." The principles are directed at businesses,

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[63] Amnesty International, *Human Rights Principles for Companies* (1998); Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999); Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999).

[64] Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide', 247.

[65] A. Clapham, *Human Rights' Obligations of Non-State Actors* (Oxford University Press, 2006); R. McCorquodale, 'Non-State Actors and International Human Rights Law' in S. Joseph, A. MachBeth (eds.), Research handbook on international human rights law, (Cheltenham: Edward Elgar, 2010), pp. 97–114; Weissbrodt, 'Roles and Responsibilities of Non-State Actors'.

[66] United Nations Conference on Environment and Development (1992), Rio de Janeiro, Brazil, Agenda 21, Chapter 30, Point 7 (UN Doc.A/CONF.151/26 [vol. III], 30.7)See also: A. Tamo, 'Multi-Stakeholder Initiatives and the Evolution of the Business and Human Rights Discourse - Lessons from the Kimberley Process and Conflict Diamonds' in J. Martin, K. E. Bravo (eds.), The Business and Human Rights Landscape: Moving Forward, Looking Back, (2015), pp. 75–105 p. 79.

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governments, citizens. They contain no explicit mention of HR, but direct moral obligations of business (leaders).[67] In 1997 *Social Accountability International* was founded. This NGO seeks to ensure socially responsible workplaces.[68] They work through standard setting and training programs for business leaders.[69] The *Ethical Trading Initiative* was founded in 1998. It is an alliance of companies, trade unions and NGOs that promotes respect for workers' rights around the globe. They main focus is eliminating exploitation and discrimination at the workplace.[70] One of the most cited MSIs is the *Kimberley Process*,[71] that resulted from NGO awareness raising regarding 'conflict diamonds'.[72] Since 2003 this process has established a scheme allowing to certify that diamonds are not contributing to the financing of military conflicts.[73] Those developments would provide the basis for the establishment of the Global Compact, elaborated in section 4.2.

3.9 Interim Conclusion

In sum, the period from 1974 to the 1990ies saw the emergence of several attempts to translate the previously emerged awareness on the need to constrain corporate social misbehaviour into more normative, but legally non-binding frameworks: Codes of Conduct, Guidelines and diverse multi-stakeholder-initiatives emerged. While they were quite diverse in their approaches, they all have in common that human rights language was strikingly absent from their formulations. Only in the late 1990ies this pattern seems to slowly change towards increasing reliance on human rights language.

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[67] See: https://www.cauxroundtable.org/about/.
[68] See: http://www.sa-intl.org/.
[69] See: http://www.sa-intl.org/.
[70] See: https://www.ethicaltrade.org/about-eti.
[71] https://www.kimberleyprocess.com/.
[72] Tamo, 'Multi-Stakeholder Initiatives and the Evolution of the Business and Human Rights Discourse - Lessons from the Kimberley Process and Conflict Diamonds', p. 84.
[73] Tamo, 'Multi-Stakeholder Initiatives and the Evolution of the Business and Human Rights Discourse - Lessons from the Kimberley Process and Conflict Diamonds', p. 84.

Electronic copy available at: https://ssrn.com/abstract=4430270

4. 1997-2003: Emergence of human rights language

4.1 Draft Norms

In 1998, with its resolution 1998/8, the OHCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities established for a period of three years a sessional working group to examine the working methods and activities of transnational corporations.[74] With its resolution 2001/3, the Sub-Commission on the Promotion and Protection of Human Rights decided to extend, for a three-year period, the mandate of the sessional working group of the Sub-Commission established to examine the working methods and activities of transnational corporations, so that it could fulfil its mandate.[75]

In 2003, the working group presented the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights: draft Norms / submitted by the Working Group on the Working Methods and Activities of Transnational Corporations pursuant to resolution 2002/8. This instrument explicitly established direct human rights obligations of corporations.

Ultimately, this progressive stand was then also the reason why the Draft Norms were never formally adopted – and later, by JOHN RUGGIE, declared a 'ship wreak'.

4.2 Global Compact

Since his election as Secretary General in 1996, Kofi Anan had the rapprochement of UN and business community on his agenda.[76] In this context, on 31 January 1999, speaking at the World Economic Forum of Davos, UN Secretary-General KOFI ANNAN proposed that the business leaders gathered in Davos, and the United Nations, 'initiate a global compact of shared values and

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[74] OHCHR, The Sub-Commission on Prevention of Discrimination and Protection of Minorities, The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations, 20 August 1998, E/CN.4/SUB.2/RES/1998/8.

[75] OHCHR, *The Sub-Commission on the Promotion and Protection of Human Rights,* Responsibilities of transnational corporations and other business enterprises with regard to human rights E/CN.4/Sub.2/2003/L.11 at 52 (13 August 2003).

[76] For the broader context, see: Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, pp. 176–77.

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principles, which will give a human face to the global market.'[77] Upon this invitation, on the 26 June 2000, the Global Compact, containing 10 principles on human rights, labour rights, environment, anti-corruption was established.[78] Corporations signing up to participate in this Global Compact commit to respect those principles – and to report on that.[79]

This initiative has been widely successful in attracting participation: over 10'000 businesses committed to the principles,[80] and the general 'rapprochement' of the UN with the private sector.[81] However, the Compact is also criticized for the participants' lack of commitment and limited accountability.[82] In the change towards the establishment of binding human rights obligations of corporations, this was however a profoundly successful step, as it placed human rights broadly on the corporate agenda.[83] While this change may have multiple reasons, it certainly is related to the parallel discussions on the UN Draft Norms.

4.3 US Alien Tort Statute Litigation

On the national level, the US court activity gained outstanding traction. For a couple of years, human rights proponents of the US managed to activate a century old law, the Alien Tort Statute (ATS), in order to push for extraterritorial application of human rights law.

In 1980, *Filartiga v Pena-Irala*,[84] allowed victims of human rights abuses in other countries to use the statute to sue the perpetrators of the abuse in U.S. courts. In that case, two citizens of Paraguay were allowed to sue a former police inspector from Paraguay for his alleged involvement in the torture and murder of a Paraguayan citizen in Paraguay. This suit fell within the terms of the ATS, the court reasoned, because it was brought by aliens, it concerned tortious conduct, and the conduct violated the modern customary international law of human rights.

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[77] UN Press Release, Secretary-General, 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos', UN Doc. SG/SM/6881, 1 February 1999.
[78] See: https://www.unglobalcompact.org/.
[79] See: https://www.unglobalcompact.org/participation/report.
[80] See: https://www.unglobalcompact.org/.
[81] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 177.
[82] P. S. Sethi and D. H. Schepers, 'United Nations Global Compact: The Promise-Performance Gap' (2014) *Journal of Business Ethics* 193–208.
[83] Nolan, 'Mapping the movements: business and human rights regulatory framework', pp. 76–77.
[84] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

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At first, most suits in this context were brought against current or former foreign government officials. Starting in the late 1990s, however, suits were increasingly brought against private corporations, often on the theory that the corporations had "aided and abetted" foreign governments in committing human rights abuses.[85] Courts generally assumed that any ATS suit that could be brought against private individuals could also be brought against corporations. There was some disagreement in the courts, however, over the standard for aiding and abetting liability, and, relatedly, over the materials that should be consulted in determining this standard.

In *Sosa v Alvarez-Machain*,[86] a Mexican citizen was suing another Mexican citizen for the latter's involvement in a kidnapping that occurred in Mexico at the behest of the U.S. government. The Court held that a "narrow class of international norms today" could be brought under the ATS, subject to "vigilant door keeping" by the lower courts. Reasoning that the Congress that enacted the ATS would have expected it to be available for a modest number of claims under the law of nations, most notably for violations of safe conducts, infringement of the rights of ambassadors, and piracy, the Court held that modern law of nations claims would be allowed under the ATS if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." At the same time, the Court emphasized the need for "judicial caution" in recognizing new claims under the ATS in light of fundamental changes in both the common law and international law as well as the foreign relations issues that this litigation can generate.

This path was however broadly blocked by the *Kiobel v Royal Dutch Petroleum Co.* decision.[87] It held that claims will generally not be allowed under the Alien Tort Statute (ATS) if they concern conduct occurring in the territory of a foreign sovereign. In short, the decision introduced a presumption against extraterritoriality. In 2018, in *Jesner et al. v Arab Bank, PLC* the Court went even further and held that foreign corporations could not be sued under the ATS.[88]

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[85] *Doe v. Unocal Corp.,* 963 F. Supp. 880 (C.D. Cal. 1997), aff'd in part and rev'd in part, 395 F.3d 932 (9th Cir. 2002).
[86] *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004).
[87] *Kiobel v. Royal Dutch Petroleum Co.* decision. No. 10-1491, slip op. at 5 (U.S. Sup. Ct. Apr. 17, 2013).
[88] *Jesner v. Arab Bank*, *PLC*, No. 16-499, 584 U.S. (2018).

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However, the human rights litigation based on the ATS was of fundamental influence for the development of the UN Business and Human Rights (BHR) Guiding Principles. JOHN RUGGIE followed the concepts established by this litigation quite closely.[89]

5. 2004-2011: Constructing Human Rights for Business: the BHR Guiding Principles

5.1 Mandate

In 2005, with the Commission on Human Rights requested the Secretary General (SG) to establish a Special Rapporteur (SR) on Business and HR.[90] In response to that request, KOFI ANNAN called his former assistant, and current Professor in International Relations at the University of Harvard, JOHN RUGGIE, to serve the UN in the capacity as Special Rapporteur on Business and Human Rights.[91]

Regarding the mandate, two elements need to be highlighted: Firstly, the document explicitly precludes any further development of norms. The SR is "to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights".[92] Secondly, with the appointed person, JOHN RUGGIE, an international relations scholar was mandated to tidy a field up – BHR proponents will suggest also to de-block a path – traditionally dominated by (human rights-) lawyers.[93] JOHN RUGGIE'S scholarly approach is then also manifest in the development of the Framework and Guiding Principles.[94]

[89] R. Mares, 'Business and Human Rights after Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' The UN Guiding Principles on Business and Human Rights. Foundations and Implementation, (Leiden: Martinus Nijhoff, 2010), pp. 1–49 pp. 19–20.

[90] OHCHR Resolution, Human rights and transnational corporations and other business enterprises Human Rights Resolution 2005/69 (20 April 2005) E/CN.4/RES/2005/69, adopted by a recorded vote of 49 votes to 3, with 1 abstention. See chap. XVII, E/CN.4/2005/L.10/Add.17.

[91] J. Ruggie, *Just Business - Multinational Corporations and Human Rights* (Norton, 2013) chap. Introduction.

[92] OHCHR Resolution, Human rights and transnational corporations and other business enterprises Human Rights Resolution 2005/69 (20 April 2005) E/CN.4/RES/2005/69, adopted by a recorded vote of 49 votes to 3, with 1 abstention. See chap. XVII, E/CN.4/2005/L.10/Add.17, at par. 1 (a).

[93] Mares, 'Business and Human Rights after Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress', p. 9.

[94] T. Melish and E. Meidinger, 'Protect, Respect, Remedy and Participate: New Governance Lessons for the Ruggie Framework' in R. Mares (ed.), The UN Guiding Principles on Business and Human Rights. Foundations and Implementation, (Leiden: Martinus Nijhoff, 2010), pp. 304–36 pp. 305–15.

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Based on his mandate, the SR developed the Framework addressing what should be done, and the Guiding Principles pointing out how to do it.[95]

5.2 Framework

The SR on BHR conducted broad consultations with diverse stakeholders from the public and private sector,[96] and concluded that the debate on the implication of corporations in human rights violations lacks an authoritative focal point.[97] The Framework and Guiding Principles obviously aim at providing such a focal point. At the same time, the SR repeatedly emphasized that there so single silver bullet solution to the issue.[98]

RUGGIE draws also on previous developments regarding multi-stakeholder initiatives (see section 3.8 and 4.2): he highlights that multi-stake holder initiatives are changing the traditional roles and relationships of states and other actors: they may become new modes of governance,[99] and sets forth as a condition for legitimacy of the multi-stake holder initiative that inclusive and equal participation is ensured.[100]

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[95] Ruggie, *Just Business - Multinational Corporations and Human Rights*, chap. 3 (emphasis in original).

[96] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* para. 4; J. Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Addendum - Summary of five multi-stakeholder consultations* (2008).

[97] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* para. 6.

[98] Ruggie, *Just Business - Multinational Corporations and Human Rights*, chap. 2; Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* p. 7.

[99] John RUGGIE, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Addendum - Summary of five multi-stakeholder consultations, A/HRC/8/5/Add.1, UN, HRC, 2008, par. 222, available online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/131/10/PDF/G0813110.pdf?OpenElement>; see also: Tamo, 'Multi-Stakeholder Initiatives and the Evolution of the Business and Human Rights Discourse - Lessons from the Kimberley Process and Conflict Diamonds', p. 83.

[100] John RUGGIE, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Addendum - Summary of five multi-stakeholder consultations, A/HRC/8/5/Add.1, UN, HRC, 2008, par. 229-230, available online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/131/10/PDF/G0813110.pdf?OpenElement>; see also: Tamo, 'Multi-Stakeholder Initiatives and the Evolution of the Business and Human Rights Discourse - Lessons from the Kimberley Process and Conflict Diamonds', pp. 92–95.

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So, in 2008, JOHN RUGGIE presented his Framework for Business and Human Rights. The Human Rights Council (HRC) welcomed this Framework unanimously.[101] The framework is structured in three differentiated but complementary pillars: (1) the state duty to protect against human rights abuses by third parties, including businesses; (2) the corporate responsibility to respect human rights; and (3) the need for effective remedies.

For the present case study, the second pillar is of most interest: Based on a study of 320 cases (from all regions and sectors) of alleged corporate-related human rights abuse reported on the Business and Human Rights Resource Centre website from February 2005 to December 2007, RUGGIE concludes that Businesses can basically have adverse impacts on any human right.[102] To have a list of specific rights as put forward by the Draft Norms is consequently deemed the wrong approach.[103] He identifies – based on social expectations - a responsibility of corporations to respect human rights which exists independently from State duties,[104] and links this (amongst others) responsibility to due diligence standards.[105]

This move is crucial in several aspects: (1) it accepts that as of now, corporations have no binding direct human rights obligations (2) it constructs a responsibility to respect as the undebatable focal point of the discourse on BHR. (3) it anchors this focal point in the UN system – making other stakeholders to orbit around this system. (4) it detaches this responsibility from the State duties and links it to independent due diligence standards.

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[101] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,*.

[102] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* paras 51–53; Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Addendum - Summary of five multi-stakeholder consultations*.

[103] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* para. 53.

[104] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* paras 53 and 55.

[105] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* paras 56–59.

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5.3 Guiding Principles

As implementation and operationalization of the 2008 framework, JOHN RUGGIE developed Guiding Principles with the aim of changing the social structure in which the activity of a corporation takes place.[106] This approach is fundamentally informed by his academic understandings on social construction and embedded institutionalism.[107]

The Guidelines are structured in the same 3 pillars as the framework. All 3 pillars are divided in fundamental principles and operational principles. The second pillar, the corporate responsibility to respect the fundamental principle refers to the internationally recognized human rights, and then points to the operational principle of 'human rights due diligence'.[108] Broadly, this due diligence principle requires the corporations to conduct human rights impact assessments and to address adverse human rights impacts in accordance with their leverage.[109] In short, businesses has to avoid violating human rights and to seek to prevent or mitigate harm when it has already occurred.[110]

RUGGIE emphasizes that for corporations, there is no legally binding obligation to respect human rights. Furthermore, in respect of his mandate, he underlines that he is also not going to create new norms,[111] albeit recognizing that the current unstable stage of developing norms will be influenced by his activity.[112]

The HRC endorsed the Guiding Principles unanimously.[113] Arguably exactly because they do not insist on binding human rights obligations of corporations, the guiding principles were successful

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[106] J. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011).

[107] Melish and Meidinger, 'Protect, Respect, Remedy and Participate: New Governance Lessons for the Ruggie Framework', p. 305-315.

[108] Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, paras 17–21.

[109] Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, para. 19.

[110] Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, para. 13.

[111] John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations « Protect, Respect and Remedy » Framework, A/HRC/17/31, UN, HRC, 2011, p. 6.

[112] J. G. Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (2006) para. 54; See also: J. Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' The UN Guiding Principles on Business and Human Rights Foundations and Implementations, (Leiden/Boston: Martinus Nijhoff, 2012), pp. 51–83 pp. 52–53.

[113] Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*.

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in establishing a broad multi-stakeholder consensus around a clear authoritative role of the UN regarding business and human rights.[114] In order to maintain the UN as the focal point for this multi-stakeholder consensus and to push social construction of the established norms further, Ruggie set up the Business and Human Rights Forum, an annual meeting place for Business and Human Rights stakeholders. Recently, this approach has been expanded to the establishment of regional Business and Human Rights fora in Africa (2014) and South Asia (2019).[115]

6. ***2011- 2020: Developments influenced by the Guiding Principles***

6.1 Reference in other instruments

The instruments which were cited in the 2008 Framework as basis for the corporate responsibility to respect human rights, have been amended in response to the publication of the Guiding Principles:[116] The OECD Guidelines,[117] the ILO Tripartite Declaration,[118] but also the Global Compact,[119] reference now the Guiding Principles as crucial instrument for the identification of corporate responsibility. Many other initiatives, mechanisms, treaty bodies etc. have used the Guiding Principles, too.[120]

6.2 Rana Plaza movements

On 24 April 2014, in Dhaka, Bangladesh, a factory building collapsed, killing over thousand people, crippling many more. This event is considered the worst industrial accident since Bhopal.[121]

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[114] Bernaz, *Business and Human Rights History, law and policy – bridging the accountability gap*, p. 196; C. Pitts, 'The United Nations' "Protect, Respect, Remedy" Framework and Guiding Principles' in J. Nolan, D. Baumann-Pauly (eds.), Business and Human Rights - From Principles to Practice, (New York: Routledge, 2016), pp. 89–104 p. 89.

[115] https://www.ohchr.org/EN/Issues/Business/Pages/2020SouthAsiaRegionalForum.aspx; https://www.ohchr.org/EN/HRBodies/HRC/Regular Sessions/Session29/Documents/A_HRC_29_28_Add_2_ENG.DOCX.

[116] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* para. 23.

[117] OECD, Guidelines for Multinational Enterprises (2011), available online: http://mneguidelines.oecd.org/guidelines/.

[118] ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017), available online: https://www.ilo.org/ empent/areas/mne-declaration/lang--en/index.htm. However, in this case, the Guiding Principles are a lot less directly influential on the update than in the case of the OECD Guidelines.

[119] UN Global Compact, Guiding Principles and the Global Compact's Human Rights Principles (2011, updated in 2014), available online: https://www. unglobalcompact.org/library/1461.

[120] Nolan, 'Mapping the movements: business and human rights regulatory framework', p. 93.

[121] J. Nolan, 'Rana Plaza: the collapse of a factory in Bangladesh and its ramifications for the global garment industry' in J. Nolan, D. Baumann-Pauly (eds.), Business and Human Rights - From Principles to Practice, (New York: Routledge, 2016), pp. 56–62 p. 57.

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While this is a debatable opinion, the construction of this event highlights some change in the business and human rights movement: While Bhopal concerned the extraction company and the separation of parent and subsidiary company, Rana Plaza concerned the garment industry and the relation of Global North based companies to companies in the Global South going beyond the legal personality constructions: the so-called global supply chains.[122]

Furthermore, in the response to that event we can discern a difference to the Bhopal event: While in the Bhopal case NGO activity ultimately lead to a complex set of litigation in the US and India, the response to Rana Plaza is multifaceted and highly dispersed – one may also say uncoordinated.[123] What in particular did not happen, was that the Guiding Principles would have served as a focal point channelling the response.[124]

6.3 Change on the national level

A considerable number of States has adopted or plans to adopt a National Action Plan, based on the Guiding Principles.[125] It is striking how many States started to adopt National Action Plans the moment the binding treaty project was initialized (see section 7).[126] However, the large majority of States has not substantially engaged with the Guiding Principles at the level of National Action Plans.

Already in 2012, Swiss Civil Society pushed for a change the Swiss Civil Code in order to introduce a due diligence obligation for Swiss based corporations regarding their whole supply chain. This motion was much more closely aligned with notions corporate social responsibility, and did not

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[122] See: Nolan, ‘Rana Plaza: the collapse of a factory in Bangladesh and its ramifications for the global garment industry’, p. 58.

[123] D. Baumann-Pauly, S. Labowitz, and N. Banerjee, ‘Closing Governance Gaps in Bangladesh’s Garment Industry – The Power and Limitations of Private Governance Schemes’ (2015) *SSRN*; For an overview see: Nolan, ‘Rana Plaza: the collapse of a factory in Bangladesh and its ramifications for the global garment industry’, pp. 50–60.

[124] See: B. Hamm, ‘Challenges to secure human rights through voluntary standards in the textile and clothing industry’ in W. Cragg (ed.), Business and Human Rights, (Cheltenham/Northampton: Edward Elgar, 2012), pp. 220–42.

[125] UN, OHCHR, State national action plans on Business and Human Rights, available online: https://www.ohchr.org/EN/Issues/Business/ Pages/NationalActionPlans.aspx.

[126] UN, OHCHR, « State National Action Plans », *United Nations, Office of the High Commissioner on Human Rights* (2019), available online: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>; see also: Maria Fernanda ESPINOZA, *Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, With the Mandate of Elaborating an International Binding Instrument*, A/HRC/31/50, UN, HRC, 2016, par. 38, available online: <http://www.ohchr.org/EN/HRBodies /HRC/WGTransCorp/Session1/Pages/Session1.aspx>.

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pay much attention to the Guiding Principles.[127] This motion was accepted in the first round but centre-right parties and economy Suisse pushed for a repetition of the vote. In the second vote, the motion was denied.[128] Some of the activism around this motion may be the reason why Switzerland pioneered in the establishment and revision of its National Action Plan.[129]

In 2016, a broad coalition of Swiss civil society, submitted an Initiative to introduce an additional article into the Swiss Constitution, concerning the responsibility of corporations. This initiative is explicitly based on the Ruggie Guiding Principles.[130] This has been used by Economy Suisse, the 'NGO' representing Swiss Business, to argue against the Initiative, since the Guiding Principles are supposed to be 'soft-law'.[131]

On 12 February 2017, the French National Assembly adopted a law establishing a "duty of vigilance" for large multinational firms carrying out all or part of their activity in France. The Business and Human Rights movement has widely celebrated this development.[132] It is however striking that this process of codification referenced the Guiding Principles a lot less than the Swiss Responsible Business Initiative.

Much in alignment with the French due diligence law, on 10 September 2019, a civil society coalition of 64 human rights, development and environmental organizations, trade unions and churches launched a campaign calling for the introduction of a law requiring German companies to conduct human rights and environmental due diligence along their supply chains.[133]

On the EU level, the Guiding Principles were and are fundamental in ongoing change regarding the update of its stand on corporate social responsibility and due diligence obligations. This process

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[127] http://www.droitsansfrontieres.ch/fr/campagne/faq/#faq1.
[128] https://konzern-initiative.ch/wp-content/uploads/2018/05/KVI_Factsheet_1_D_Lay_1801.pdf.
[129] https://konzern-initiative.ch/wp-content/uploads/2018/05/KVI_Factsheet_1_D_Lay_1801.pdf.
[130] https://konzern-initiative.ch/wp-content/uploads/2018/06/Factsheet-II_1802_D.pdf.
[131] https://www.economiesuisse.ch/de/artikel/konzern-initiative-schadet-ihrem-eigenen-ziel.
[132] See for instance: S. Cossart, J. Chaplier, and T. B. de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business & Human Rights Journal* 317–23; L. Knöpfel, 'Die Bestimmung von Verantwortung in globalen Wirtschaftsbeziehungen: Ein Beitrag zur interdisziplinären Rechtsforschung' (2019) 2 *cognitio* 1–9 at 3.
[133] https://lieferkettengesetz.de/.

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was initiated in 2011, and the latest stage is the Study on Due Diligence published by the European Commission in 2020.[134]

7. 2014-2018: Binding States to bind Corporations: the Treaty Project

7.1 Mandate

Although civil society did support the *Guiding Principles*, it did not stop pushing towards binding instruments.[135] Nevertheless, the successful initiation of binding treaty project caught NGOs quite by surprise.[136]

In 2013, the Republic of Ecuador stressed the importance of a legally binding international framework at the 24th Session of the Human Rights Council. This statement was supported by at least 85 states and hundreds of civil society organizations.[137] The signing civil society organizations formed then the Treaty Alliance, which would become the crucial civil society player in the treaty negotiations.[138] In 2014, the Human Rights Council decided to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights and to mandate it to elaborate a legally binding, international instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[139]

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[134] EU, Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress, SWD (2019) 143 final (20.3.2019), at p. 3 and 5; European Commission, Study on due diligence requirements through the supply chain, Final Report, (January 2020).

[135] H. Cantú Rivera, 'Negotiation a Treaty on Business and Human Rights: the Early Stages' (2017) 40 *University of New South Wales Law Journal* 1200–1222 at 1201-1202.

[136] A. Ganesan, 'Towards a business and human rights treaty' in J. Nolan, D. Baumann-Pauly (eds.), Business and Human Rights - From Principles to Practice, (New York: Routledge, 2016), pp. 118–21 p. 118.

[137] Republic of Ecuador, Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council General Debate – Item 3 "Transnational Corporations and Human Rights" Geneva, September 2013, available online: https://www.business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions; Statement to the Human Rights Council in support of the initiative of a group of States for a legally binding instrument on transnational corporations (13 September 2013) available online: https://www.stopcorporateimpunity.org/statement-to-the-human-rights-council-in-support-of-the-initiative-of-a-group-of-states-for-a-legally-binding-instrument-on-transnational-corporations/. Deva, 'Alternative Paths to a Business and Human Rights Treaty', pp. 20–21.

[138] https://www.treatymovement.com/.

[139] UN, Working Group on Business and Human Rights, *The report of the Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/73/163, United Nations, 2018; see also the first draft on a binding treaty: Open-enden intergovernmental working group on transnational and other business enterprises, *Zero Draft of the UN Binding Treaty*, UN, OHCHR, Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 20 July 2018, available online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/ WGTransCorp/Session3/ Draft LBI.pdf>.

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Behind the closed doors of the Human Rights Council, heated discussions took place on the initiative. The United States and the EU in particular strongly opposed the draft. On 26 June 2014 the supporters of the resolution won a crucial vote. The 47 members of the Human Rights Council adopted the resolution. The votes were: 20 in favour (Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Viet Nam); 14 against (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom, United States); and 13 abstentions.(Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates). China, India and Russia voted in favor. Both China and Russia, however, emphasized the principle of national sovereignty and expressed their reservations about extraterritorial jurisdiction. The United States, the United Kingdom and European countries voted against the resolution, which they thought counterproductive and polarizing, and announced that they would not participate in the treaty process.[140]

7.2 Negotiations

During the negotiations conducted by this working group, much of the tensions experienced in the process around the UN Code of Conduct surfaced again.[141] It was Ecuador and South Africa that brought back the divisive binding vs. non-binding rhetoric, initiating the working group.[142] Within the early stages of the deliberation process, the EU was a crucial driving force, in particular with the suggestion to construct the new legal regime on the foundations of the *Guiding Principles*.[143] The turning point of the deliberations towards a more productive path was provided by the EU's proposition to base the new legal regime on the foundations of the *Guiding Principles*.[144] Indeed,

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[140] See also: N. Bernaz and I. Pietropaol, 'The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations' (2017) 9 *Journal of Human Rights Practice* 287–31 at 293–94.
[141] Deva, 'Alternative Paths to a Business and Human Rights Treaty', p. 21.
[142] Cantú Rivera, 'Negotiation a Treaty on Business and Human Rights: the Early Stages', 1202.
[143] Cantú Rivera, 'Negotiation a Treaty on Business and Human Rights: the Early Stages', 1211-1212. NGOs however argue that EU has been obstructive from the beginning. See for instance: http://www.foeeurope.org/EUdoubleagenda.
[144] See for instance Maria Fernanda ESPINOZA, Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, With the Mandate of Elaborating an International Binding Instrument, A/HRC/31/50, UN, HRC, 2016, par. 39, available online: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1 /Pages/Session1.aspx>; Cantú Rivera, 'Negotiation a Treaty on Business and Human Rights: the Early Stages', 1211.

Electronic copy available at: https://ssrn.com/abstract=4430270

the discussions of the legally binding instruments should be considered to be based on the idea of a gradual development of the *Guiding Principles*.[145] In particular, the adoption of *National Action Plans* was proposed as a means to adapt domestic legal spheres for the future legally binding instrument.[146]

This changed however in the later stages of the negotiation process, with many Global North States, as well as the EU withdrawing from the process.[147]

During the first session of the OIWG in July 2015, Russia's position was notably less supportive of the treaty process than a year before. The Russian representative declared that he saw no urgent need to establish a legally binding instrument. He argued that the debate on the possible content of such a treaty was premature, and discussions should instead focus first on the feasibility of such an instrument. Latin American countries did not look united: Venezuela supported Ecuador's proposal, but other countries in the region, including Brazil, Chile and Mexico abstained - Brazil, however, announced that it was willing to collaborate constructively with the OIWG and to conduct inter-ministerial consultations with actors from government and civil society to coordinate its position. During the first session of the OIWG other countries in the region, among them Bolivia, Cuba, El Salvador and Nicaragua, supported the treaty.

Throughout the negotiation process NGOs, in particular the aforementioned Treaty Alliance participated actively.[148]

Disagreements and tensions were multifaceted. The tension between Global North and Global South States revolved predominantly around the question what kind of business the treaty should

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[145] Maria Fernanda Espinoza, *Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, With the Mandate of Elaborating an International Binding Instrument*, A/HRC/31/50, UN, HRC, 2016, par. 26, available online: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>.
[146] Maria Fernanda Espinoza, *Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, With the Mandate of Elaborating an International Binding Instrument*, A/HRC/31/50, UN, HRC, 2016, par. 49, available online: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>.
[147] See: https://www.somo.nl/reflections-on-the-first-round-of-negotiations-for-a-united-nations-treaty-on-business-and-human-rights/; https://corporatejustice.org/news/16786-un-treaty-on-business-human-rights-negotiations-day-1-the-round-of-discussions-kicks-off-with-an-improved-draft; https://geneva.usmission.gov/2019/10/16/the-united-states-governments-continued-opposition-to-the-business-human-rights-treaty-process/.
[148] Bernaz and Pietropaol, 'The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations', 288–89.

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be concerned with: multinationals only, or all kinds of businesses. For the present case study it is crucial to highlight the positions on the introduction of binding obligations for corporations. While human rights NGOs pushed for such a norm,[149] the final Draft does not contain it.

7.3 Zero Draft Treaty and Revised Draft Treaty

The Zero Draft Treaty was released on 16 July 2018.[150] The Revised Draft Treaty was released in July 2019.[151] It brings about changes from the Zero Draft Treaty in several core points.[152] What does not change, is the focus on State party regulation to ensure that corporations can be held liable for violations of human rights (See in particular Art. 10 Zero Draft Treaty, Art. 6 Revised Draft Treaty regarding legal liability of corporations).

Compared with the UN Code of Conduct, it is striking that the notion of 'human rights obligations' of corporations is a lot less prominent – the focus is on civil and criminal liability. Furthermore, this treaty focuses on the obligation of states to ensure responsible behaviour of their corporations – and consequently somewhat moves further away from direct human rights obligations of corporations on the international level.

8. Conclusion

Looking retrospectively at the intertwined and complex developments regarding norms for human rights obligations of corporations, we can identify 3 waves: the first leading to the UN Code of Conduct, the second leading to the UN Draft Norms, the third leading to the UN binding treaty project.[153] All of those projects did not result in successful norm change as intended. However, the discourse spilled over in many neighbouring pathways, driving the agenda of human rights obligations of corporations into a diverse and entangled net of initiatives and changes.

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[149] https://www.somo.nl/reflections-on-the-first-round-of-negotiations-for-a-united-nations-treaty-on-busin ess-and-human-rights/.
[150] OHCHR, OEIGWG, Zero Draft Treaty (2018), available online: https://www.ohchr.org/Documents/HRBodies /HRCouncil/WGTransCorp/Session3/ DraftLBI.pdf.
[151] OHCHR, OEIGWG, Revised Zero Draft Treaty (2019), available online: https://www.ohchr .org/Documents/HRBodies/HRCouncil/WGTransCorp/ OEIGWG_RevisedDraft_LBI.pdf.
[152] C. Lopez, 'The Revised Draft of a Treaty on Business and Human Rights: A Big Leap Forward' (August 2019).
[153] Deva, 'Alternative Paths to a Business and Human Rights Treaty', pp. 17–23.

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In sum, this net of pathways has so far resulted in no direct human rights obligations of corporations, but wide-spread recognition of the responsibility to respect human rights in particular through due diligence. The most recent evidence for this stage is the preoccupation of concerned actors to ensure that corporations act with due diligence in response to the Covid19 pandemic.[154]

[154] See: UNDP, Human Rights Due Diligence and COVID-19: Rapid Self-Assessment for Business (10 April 2020), available online: https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/ human-rights-due-diligence-and-covid-19-rapid-self-assessment-for-business.html.

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Part II: Analysis

1. SCR Framework

The pathways towards change in this case are particularly intertwined. Consequently, it is hard to distinguish the stages clearly. Without doing justice to the whole development, I structure the change in the Selection Stage when CSR and HR were taken up as norms to deal with corporate behaviour, in the UN Code of Conduct and the UN Draft Norms; the construction phase in the events around the UN Guiding Principles; and in the reception phase in the aftermath of the UN Guiding Principles and the Binding treaty project.

Selection Stage

In response to increasing globalization and decolonization, the concept of corporate social responsibility concept emerged in the 1970ies and 1980ies, and solidified in several Guidelines and the UN Code of Conduct. Only in the 1990ies emerged a parallel and intersecting selection of human rights language in order to deal with the same phenomenon.

Stability: The International Human Rights System is very state-centred and quite stable in this. Consequently, the early discussions on corporations in the global sphere were framed in the alternative language of corporate social responsibility.

Opening: The opening for the introduction for global corporate responsibility was mainly provided by increasing globalization. The opening for the introduction of human rights language may be found in the expansion of the human rights field in general.

Pathways: The predominant pathway triggered was the multilateral path (section 3.2 and 3.3), and then subsequently the bureaucratic path. Beyond that, the whole phase was influenced profoundly by multiple multi-Stakeholder initiatives section 3.4, 3.5,and 3.8). In particular, it was a MSI, the Global Compact, that put human rights broad and square on the corporate agenda (see section 4.2). Actors were diverse and spread widely in different fields. For instance, in reaction to the Apartheid

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movement and pioneering MSIs/private norm-setting, Rev. Sullivan was of crucial importance (section 3.5).[155]

Institutional availability: For the whole case, the judicial pathway is situated at the periphery of the change. This is due to the chosen focus on UN-intern development and the fact that within the UN-framework, there is no judicial institution dealing with business and human rights.

Salience: NGO awareness raising activities contributed largely to waves of salience on the issue: two of the most famous events are the Bhopal gas leakage (see section 3.6) and (later) the Rana Plaza factory building crash (section 6.2). While they influenced developments at UN-level, they more specifically triggered movements focused on those specific events. Much like many other Multi-stakeholder Initiatives like for instance the Kimberley Process (section 3.8).

Construction Stage

As SR on BHR, John Ruggie successfully combined norm-elements from the CSR and the HR language in order to construct a responsibility of the corporations to respect human rights. At the same time, he explicitly rejected the idea of existing direct human rights obligations of corporations (see section 5).

Subsequently, various actors took those Guidelines up in order to construct more concise norms. However, some actors continued to rely more on a codification of corporate social responsibility than on the introduction of human rights obligations for corporations (see section 6).

Reception Stage

Ruggie's construction spread widely, but not everywhere with the same success (see section 6).

The attempt to build on the Guiding Principles in order to construct a binding treaty is encountering numerous difficulties (see section 7) It can however be taken as evidence of an increasingly widespread reception of Ruggie's establishment that there are no direct human rights obligations of corporations (see section 7.3). The attempt to change international human rights law in order to include direct human rights obligations or corporations has not been successful.

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[155] Regarding the development leading up to the Guidelines, archives were not digitalized, Covid limitations hence blocked research in that regard.

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2. Particularities of the Case

Layering

This case-study is peculiar in its non-success: taken by itself each and any of the mentioned instrument fell short of achieving its aims. However, together, the instruments link, intersect and build upon each other, incrementally changing the international law position regarding human rights obligations of corporations. In short, there is no single silver bullet solution, but a multifaceted approach to change international law in order to incorporate corporations' responsibility to respect human rights. For instance, it was the Global Compact, at a time when the drafting process of the Draft Norms was ongoing, that put human rights obligations on the corporate agenda (see section 4.2). Sometimes the intersections are also more ambiguous: in the Binding Treaty Project try to draw legitimacy for their claims from the Guiding Principles – in support and in opposition to the Treaty (see section 7.2).

NGO activity

While the actual drafting of instruments remained in the hands of the States, this process is particularly pushed through agenda and norm-setting of NGOs.[156] This becomes most evident in the emergence of Multi-stakeholder initiatives but also the implications of the drafting of the UN instruments, like Ruggie's wide consultation processes, or the implication of the Treaty Alliance in the negotiation process for a Business and Human Rights Treaty (see sections 3.5, 3.7, 3.8, 4.2, 5, 6.2, 7).[157]

Spill over

Within the traditionally very Stat-centric human rights field, the path towards direct human rights obligations of corporations seems somewhat blocked. Consequently, change attempts spilled over into neighbouring fields - most importantly: Investment Arbitration,[158] (national) Civil Law

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[156] See: C. Jochnick, 'Shifting Power on Business and Human Rights: States, Corporations and Civil Society in Global Governance' in C. Rodriguez-Garavito (ed.), Business and Human Rights: Beyond the End of the Beginning, (Cambridge: Cambridge University Press, 2017), pp. 127–28.

[157] Bernaz and Pietropaol, 'The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations'.

[158] In 2016, an Investment Tribunal accepted the relevance of International Human Rights Law for the settlement of the dispute as well as the possibility of direct human rights obligations of corporations: Urbaser S.A. and Consorcio

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/Criminal Law Legislation and Litigation (see sections 4.3 and 6.3) or private norm setting (see section 3.8)

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de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, (2016) ICSID Case No. ARB/07/26, par. 1210.

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Case Study 7

From the Positive Obligation to Inform the Family of the Disappeared to the 'Right to the Truth'

(Sept. - Dec 2021)

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I. Chronology

1. Background

Under International Human Right Law, the concept of the right to the truth has been grounded in the context of disappearances and the families' right to the truth about the fate of their disappeared family member. The definition of enforced disappearance can be found in the 2010 International Convention for the Protection of All Persons from Enforced Disappearance. (ICPPED), which consolidated the right to truth in IHRL:

> [T]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[2]

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[1] The section on the European human rights system is adapted from Ezgi Yildiz's PhD dissertation, "A Court with Many Faces: Institutional Identities and Interpretative Preferences; The Case of the European Court of Human Rights and the Norm against Torture." PhD thesis, Graduate Institute of International and Development Studies, 2016. 428 p.
[2] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, art. 2. The Convention was adopted in 2006 and entered into force 2010. It has 98 signatories and only 68 ratifiers.

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Enforced disappearances are, therefore, immediately related to states' obligation to respect an individual's right to life and liberty.[3] However, there is another dimension linked to these negative obligations: States' positive obligation to the family of the disappeared persons. This positive obligation concerns the relatives of the disappeared individuals and deals with the procedural steps that the state authorities should take when dealing with the allegations of enforced disappearance. This includes not only conducting an effective and timely investigation but also providing the next-of-kin of the disappeared persons with information concerning the fate and whereabouts of their disappeared family member, in due course.

Accordingly, an important dimension of this obligation is the families' access to justice, as well as the moral imperative to inform them about the fate of their disappeared relatives and the circumstances under which their disappearance took place. Hence, the objective of this obligation is a form of truth recovery and dissemination. The scope of this obligation determines the purpose of the truth recovery task. To be more precise, the duty of truth recovery can be tailored for narrower or broader purposes. Iosif Kovras explains the difference as follows: *narrow truth recovery* concerns in practical terms "forensic evidence related to the whereabouts of the disappeared or missing persons" (*minimalist conception of truth*).[4] As for *wider truth recovery,* it involves "the official and unofficial efforts of societies emerging from conflict and authoritarian regimes to democratize the process of dealing with the past by broadening the accessibility to the public discourse of previously excluded voices" (*maximalist conception of truth*).[5]

The positive obligation to the family of the disappeared, which initially had a narrower scope (minimalist truth conception), began to increase in scope and to be associated with the right to the truth for all (maximalist truth conception). In other words, this obligation, which was somewhat limited in its scope, has paved the way for the development of a new right, the 'right to the truth,'

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[3] Concerning the link between enforced disappearances and right to life see, Carla Buckley, "The European Convention on Human Rights and the Right to Life in Turkey," *Human Rights Law Review* 1 (2001): 55.
[4] Iosif Kovras, "Explaining Prolonged Silences in Transitional Justice: The Disappeared in Cyprus and Spain," *Comparative Political Studies* 46 (2013): 733.
[5] Ibid.

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an emerging international principle.[6] The right is most clearly enshrined in Article 24 of the above-mentioned ICCPED, which outlines that "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."

However, with only 68 ratified member states, ICCPED does not necessarily represent the full consolidation of the new right.[7] Moreover, this formulation is quite thin. It does not fully explain what this right entails. Rather, the right to truth appears to be more of an obligation (of states to investigate and provide information) and a right that victims have. Victims have a right to ask states to provide information and their right hinges on states' ability and willingness to provide this information.

The status of this principle is also subject to an academic debate. For example, William Schabas draws attention to a "growing recognition of a fundamental 'right to truth'" but mentions international courts and tribunals, including the ECtHR's unwillingness to fully embrace the principle and "extent the right to truth too far into the past."[8] Yasmin Naqvi raises some hesitation about characterizing the right to truth as a customary norm, arguing that "beyond the clear norm under IHL of providing victims' families with information about the circumstances of a missing person, the definition of a more general 'right to the truth'.[9] In a similar vein, James Sweeney argues that "there is thus clearly a groundswell of international opinion in favor of recognizing a right to truth but this does not translate straightforwardly into international legal rights and duties."[10] He further claims that despite such references to the right to truth in soft law instruments,

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[6] Ibid., 731.

[7] Albania, Argentina, Armenia, Austria, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Burkina Faso, Cambodia, CAR, Chile, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Dominica, Ecuador, Fiji, France, Gabon, Gambia, Germany, Greece, Honduras, Iraq, Italy, Japan, Kazakhstan, Lesotho, Lithuania, Luxembourg, Malawi, Mali, Malta, Mauritania, Mexico, Mongolia, Montenegro, Morocco, Netherlands, Niger, Nigeria, Norway, Oman, Panama, Paraguay, Peru, Portugal, Samoa, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Switzerland, Togo, Tunisia, Ukraine, Uruguay, and Zambia.

[8] William A. Schabas, 'Time, Justice, and Human Rights: Statutory Limitation on the Right to Truth?', in *Understanding the Age of Transitional Justice* (Rutgers University Press, 2018), 37.

[9] Yasmin Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?', *International Review of the Red Cross* 88, no. 862 (June 2006): 255.

[10] Sweeney, 'The Elusive Right to Truth in Transnational Human Rights Jurisprudence', 357; See also, James A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge, 2013).

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this right's status "status as a legal right in public international law is moot,"[11] and its strongest implications of this right are found in human rights jurisprudence.[12]

In what follows, we explain how this new right—or emerging principle—developed originally through soft law and jurisprudence before it was formalized in the ICPPED.

2. ***Enforced Disappearances and the Right to the Truth: Global Developments***

Until the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), there was not an international treaty specifically prohibiting disappearances.[13] However, as Helen Keller and Corina Heri underline, "enforced disappearance has been considered a violation of human rights and international humanitarian law for decades, arguably even since the Nuremberg trials."[14]

The phenomenon of enforced disappearances, which was practiced widely in Latin America in the 1970s, particularly in Chile, Guatemala, and Argentina,[15] spurred a series of reactions within the United Nations in the late 1970s.[16] The UN General Assembly passed a resolution related to disappeared persons, asking the Commission on Human Rights (today called the Human Rights Council) to investigate the practice of enforced disappearances and to prepare "appropriate recommendations."[17] In addition, the Economic and Social Council and the Sub-Commission on Prevention of Discrimination and Protection of Minorities also issued similar resolutions

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[11] Sweeney, 'The Elusive Right to Truth in Transnational Human Rights Jurisprudence', 356.
[12] Sweeney, 354.
[13] Urum Taqi, "Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach," *Fordham International Law Journal* 24 (2000): 941.
[14] Helen Keller and Corina Heri, "Enforced Disappearance and the European Court of Human Rights," *Journal of International Criminal Justice* 12 (2014): 736.
[15] Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America," *International Organization* 54 (2000): 634-635. For more on enforced disappearance in Latin America, see Heinz Dieterich, "Enforced Disappearances and Corruption in Latin America," *Crime and Social Justice* 25 (1986); Margaret Popkin and Naomi Roht-Arriaza, "Truth as Justice: Investigatory Commissions in Latin America," *Law and Social Inquiry* 20 (1995); Alison Brysk, "From Above and Below: Social Movements, the International System, and Human Rights in Argentina, *Comparative Political Studies* 26 (1993).
[16] Aliso Brysk, "The Politics of Measurement: The Contested Count of the Disappeared in Argentina," *Human Rights Quarterly* 16 (1994): 689
[17] UN General Assembly, Resolution 33/173 *On Disappeared Persons,* A/C.3/33/L.76/Rev.1 (20 December 1978), available at http://www.un.org/documents/ga/res/33/ares33r173.pdf

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requesting the Commission to address the issue.[18] As a response, the Commission on Human Rights passed resolution 20(XXXVI) and established a working group "to examine questions relevant to enforced and involuntary disappearance of persons" in 1980.[19] The Working Group on Enforced and Involuntary Disappearances, still operational to this day, has a mandate to assist the families of disappeared persons by establishing communication between them and government authorities. The Working Group receives reports from the families of the disappeared persons or human rights organizations on alleged enforced disappearances, and follows-up on the progress of investigations.[20]

Moreover, the UN General Assembly issued the Declaration on the Protection of all Persons from Enforced Disappearances in 1992, which served as a basis for the ICPPED.[21] With this declaration, the Working Group's mandate had been extended to include monitoring the States' compliance with obligations stemming from this Declaration, as well as helping the States implement the Declaration by means of providing country visit reports and advisory services, when solicited.[22] Following the establishment of the Committee of Enforced Disappearances (CED) in 2010, the UN framework on enforced disappearances became more formalized. The CED is tasked with monitoring the implementation of the ICPPED. It receives reports submitted by state parties in relation to the implementation of the Convention and issues recommendations.[23] The CED may also receive inter-state complaints[24] and individual complaints, if the state concerned already recognized the competence of the Committee, with respect to allegations of enforced disappearance.[25]

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[18] UN Commission on Human Rights, *Resolution 20(XXXVI) Questions of Missing and Disappeared Persons* (29 February 1980)
[19] Ibid.
[20] UN Working Group on Enforced or Involuntary Disappearances, *Mandate*, available at http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx
[21] UN General Assembly, *Declaration on the Protection of all Persons from Enforced Disappearances*, A/RES/47/133 (18 December 1992), available at http://www.un.org/documents/ga/res/47/a47r133.htm
[22] UN Working Group on Enforced or Involuntary Disappearances, *Mandate*.
[23] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, art.29.
[24] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, art.32.
[25] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, art.31.

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As for the right to the truth,[26] its origins go as far back as the First Additional Protocol to the Geneva Conventions of 1977.[27] Article 32 outlines the obligations of the Contracting States as follows: "the activities of the High Contracting Parties (…) shall be prompted mainly by the right of families to know the fate of their relatives."[28] Similarly the Preamble of the ICPPED emphasizes "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person."[29] This right concerns the families' right to know the truth about the fate of their disappeared relatives.

To be sure, the right to truth or seeking the truth is an important part of transitional justice as well,[30] as it is established by the UN Secretary General in its 2004 report on transitional justice in conflict and post-conflict situations.[31] Similarly, references to the right to knowing the truth can be found in the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,* as an "inalienable right," and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[32] The importance of knowing the truth in the fight against impunity has also been emphasized in several resolutions issued by the UN Human Rights Commission, the Human Rights Council, and the UNGA.[33]

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[26] For a general take on the right to know, see Lani Watson, *The Right to Know: Epistemic Rights and Why We Need Them* (Routledge, 2021).
[27] Dermot Groome, "The Right to Truth in the Fight against Impunity," *Berkeley Journal of International Law* 29 (2011).
[28] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html
[29] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, available at: http://www.refworld.org/docid/47fdfaeb0.html
[30] See, for example, Rosa Freedman, 'UNaccountable: A New Approach to Peacekeepers and Sexual Abuse', *European Journal of International Law* 29, no. 3 (9 November 2018): 961–85; Michal Ben-Josef Hirsch and Jennifer M. Dixon, 'Conceptualizing and Assessing Norm Strength in International Relations', *European Journal of International Relations*, 3 September 2020.
[31] Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations, *S/2004/616* (23 August 2004).
[32] Sweeney, 'The Elusive Right to Truth in Transnational Human Rights Jurisprudence', 356–57.
[33] These references are taken from Sweeney, 'The Elusive Right to Truth in Transnational Human Rights Jurisprudence'. Human Rights Commission Resolution 2005/66, *E/CN.4/RES/2005/ 66* (20 April 2005); Human Rights Council Resolution 12/12, *A/HRC/RES/12/12* (12 October 2009); UNGA Resolution 68/165, *A/RES/68/165* (18 December 2013).

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The Office of the High Commissioner of Human Rights issued a report in response to the Commission on Human Rights resolution 2005/66. This comprehensive study traces the origins of the right to truth to humanitarian law, namely the Geneva Conventions, customary law (according to the ICRC),[34] UNGA resolutions about missing persons, and truth commissions. [35] The report also refers to regional initiatives such as the Parliamentary Assembly of the Council of Europe (PACE) recommendations about the family of the disappeared persons,[36] the EU Parliament resolution on the right to truth and missing persons in Cyprus,[37] and the General Assembly of the Organization of American States (OAS) resolutions on enforced disappearances.[38] In addition, Argentina, Colombia, Cuba, Mauritius, Peru, Slovenia, Uruguay, and Venezuela submitted their views to the report mentioned that the right to truth is an autonomous right.[39] Argentina, Chile, Italy, Mexico, Uruguay, and the Latin American and Caribbean Group reaffirmed the right to truth in the context of enforced disappearances.[40] The report then turned to the practices of courts and tribunals (which will be explained below) as well as truth commissions to explain the scope and the application of this emerging right.[41] The report concludes with an aspirational tone and mentions that "the right to the truth as a stand-alone right is a fundamental right of the individual and therefore should not be subject to limitations. Giving its inalienable nature and its close relationship with other non-derogable rights, such as the right not to be subjected to torture and ill-treatment, the right to the truth should be treated as a non-derogable right."[42]

Beyond resolutions, and reports, the attempts at the UN culminated in the appointment of a new Special Rapporteur on the promotion of truth, justice, and reparation in 2011,[43] by the Human Rights Council.[44] While the Special Rapporteur's majority of the contribution came in the field of

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[34] Rule 117 in ICRC, *Customary International Humanitarian Law, Volume I, Rules*, Cambridge Press University, 2005, p. 421.
[35] Commission on Human Rights, Study on the Right to Truth, *E/CN.4/2006/91* (8 February 2006).
[36] PACE, Resolution 1056 (1987); Resolution 1414 (2004), and Resolution 1463 (2005).
[37] European Parliament, Resolution on missing persons in Cyprus, (11 January 1983).
[38] OAS Permanent Council, Resolution *OES/Ser.G CP/CAJP-2278/05/rev.4* (23 May 2005).
[39] Study on the Right to Truth, *E/CN.4/2006/91,* p. 7.
[40] Study on the Right to Truth, *E/CN.4/2006/91,* p. 8
[41] Study on the Right to Truth, *E/CN.4/2006/91,* p. 11-14.
[42] Study on the Right to Truth, *E/CN.4/2006/91,* p. 15.
[43] The first Special Rapporteur war Pablo de Greiff (2012-18) and the current Special Rapporteur is Fabian Salvioli.
[44] Human Rights Council, *A/HRC/18/L.22* (26 September 2011). The draft resolution was presented by Albania, Argentina, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Canada, Chile, Costa Rica, Côte

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transitional justice, the Special Rapporteur's report still served as a reference point for the development of the right to the truth. While the UN institutions and multilateral initiatives have thus invoked the right, they have not fully explained its contents. It is the courts and quasi-judicial bodies that fill the gaps in this regard.

Before turning to jurisprudential developments, both global and regional, we open a bracket here and highlight the role of civil society as a driving force behind the emergence and partial consolidation of the right to truth in and through case law.

Civil Society and the Right to Truth

The emergence of the right to truth in IHRL is historically the result of two crucial converging struggles by civil society at different times and in different parts of the world. Its success, as Particia Naftali explains, is largely explained by the capacity of the narrative of truth to "accommodate a plurality of causes".[45]

The first of these causes was, as mentioned above, linked to the fight against enforced disappearance in the context of the military dictatorships in Latin America throughout the 1960s, 1970s, and 1980s. Family members of people disappeared by the military juntas of Argentina, Chile, Uruguay, and Brazil started demanding information on the whereabouts of their next-of-kin. They did it by mobilizing the notion of truth—a seemingly neutral concept detached from the political issues that had made their family members targets of the state.[46] This avoided giving the authorities any grounds to prosecute them while securing the empathy of the general public, to

d'Ivoire, Croatia, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Ecuador, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Maldives, Mauritania, Mexico, Morocco, Nigeria, Norway, Palestine, Paraguay, Peru, Poland, Portugal, Republic of Moldova, Senegal, Serbia, Slovenia, Spain, Sweden, Switzerland, Thailand, Tunisia, Ukraine, the UK, Uruguay, Venezuela.

[45] Patricia Naftali, 'Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?', *Champ pénal/Penal field* XIII (2016): para. 2, https://doi.org/10.4000/champpenal.9245.

[46] Naftali, para. 5.

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which the suffering of a mother whose son or daughter is missing appeared legitimate beyond political considerations.

The founding Argentinian organization *Madres de Plaza de Mayo*, for instance, issued a momentous request to the military authorities, published in one of the largest Argentinian newspapers in December 1977, demanding the truth on the life or death of their relatives and saying emphatically: "we cannot take the cruelest possible torture for a mother any longer: the UNCERTAINTY of the fate of their children".[47] Truth provided the powerful, apolitical rhetoric that allowed the Madres de Plaza de Mayo to depict themselves as victims of the disappearances of their sons and daughters, and thus to claim the right to truth as theirs.[48]

Moreover, the different Latin American associations working on this topic quickly realized that embedding their demands in international legal discourse and taking them to international venues—that is, attempting international norm-entrepreneurship—was a promising path to success. These associations formed the *Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos* (FEDEFAM), which as early as 1981 proposed a draft convention on enforced disappearance. This draft addressed the issue of truth by establishing the wrongfulness of "any act or omission intended to conceal the fate of an opponent or a political dissent and whose whereabouts are unknown to his family (…)".[49] Eventually, and with the collaboration of activists pursuing similar causes in other parts of the world, FEDEFAM succeeded in channeling their claims into organizational and multilateral fora and unleashing the processes of adoption of the Declaration against Enforced Disappearance and later the Convention.

In these efforts, the receptiveness of the Interamerican Commission of Human Rights (IACommHR) proved fundamental. Thanks to the mobilization of civil society organizations, the Commission, as early as 1977, included in its annual report to the OAS an analysis of the issue of enforced disappearance in the region, emphasizing what was later to become the right to truth.[50] It

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[47] 'Sólo Pedimos La Verdad', *Diario La Nación*, 10 December 1977, https://issuu.com/memoriaabierta/docs/solicitada_la_naci_n_10-12-77.
[48] Naftali, 'Crafting a "Right to Truth" in International Law', para. 7.
[49] Naftali, para. 6.
[50] IACommHR, 'Derecho a La Verdad En América', 13 August 2014, 25–28.

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said, among other things, that "as experience shows, 'disappearance constitutes not only an arbitrary deprivation of freedom, but also a utter danger for the personal integrity, the security, and the life of the victim. It is, on the other hand, a real form of torture for its family and friends, given the uncertainty on their fate, and the impossibility to assist their family member legally, morally, and materially".[51] Similarly, in its report on the situation of human rights in Argentina of 1980, the Commission said, crucially, that states have the obligation to adopt measures such as "the investigation and timely communication to the relatives of the victim of the situation in which the disappeared persons are. It is necessary to establish beyond any doubt whether they are alive or death, when and how they died, and where their rests have been inhumated".[52] These findings and interactions of the IACommHR would prove highly influential on the jurisprudence of the IACtHR some years later, as is discussed below. The second important civil society movement that found an anchor in the right to truth was the struggle against amnesties for serious violations of IHRL and IHL throughout the 1990s.[53] Different countries had experienced or were experiencing transitions to democracy in these years, and amnesties were a frequent tool for negotiation in the ensuing political processes. In this context, human rights activists denounced the impunity that amnesties sometimes implied and thus focused on the human rights questions that they gave rise to. This led to a turn towards accountability in human rights activism, marked by the emergence of the field of "transitional justice"–a framework to which the narrative of truth is central.[54] NGOs like the International Center for Transitional Justice or the South-African Justice in Transition were crucial in this step, making a key contribution to the what Melanie Klinkner calls the "professionalisation of truth-finding".[55] That is to say, the institutionalization of the tasks of establishing the truth, creating reparation and remembrance schemes, and seeking reconciliation.[56] The South African Truth and Reconciliation Commission, established in 1994, is a paradigmatic

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[51] CIDH, *Informe Anual de la Comisión Interamericana de Derechos Humanos 1977*, OEA/Ser.L/V/II.43, Doc. 21 corr. 1, 20 abril 1978, Parte, II. (Free translation as original is only in Spanish)
[52] CIDH, Informe sobre la Situación de los Derechos Humanos en Argentina, OEA/Ser.L/V/II.49, doc. 19, 11 abril 1980, Cap. III, F.e., para. 11. (Free translation as original is only in Spanish)
[53] Naftali, 'Crafting a "Right to Truth" in International Law', para. 7.
[54] Naftali, para. 7.
[55] Melanie Klinkner and Howard Davis, *The Right to the Truth in International Law: Victims' Rights in Human Rights and International Criminal Law*, 1st ed., Human Rights and International Law (Florence: Routledge, Taylor & Francis Group, 2020), 33, https://doi.org/10.4324/9781315659787.
[56] Klinkner and Davis, 33.

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example of this institutionalization. There, as elsewhere, the combined work of activists, lawyers, scholars, policymakers, journalists, and donors proved crucial in setting up, running, and safeguarding these institutions.[57]

This alliance also played an important role in fleshing out the necessary elements of the right to truth through the case-law of UN treaty bodies and regional human rights courts, as we will see below.

UN Human Rights Committee

The earliest articulation of the right truth in a judicial setting came from the UN Human Rights Committee (HRC),[58] in the 1983 *Quinteros v Uruguay* decision.[59] In this decision, the Committee found "the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts" to be constituting a violation. It added that the applicant has "the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7" of the International Covenant on Civil and Political Rights.[60] This understanding was anchored within the prohibition of torture and cruel, inhuman, or degrading punishment—something repeated by other regional bodies.[61]

The Committee followed a similar approach in *Schedko and Bondarenko v. Belarus.* This case concerned the authorities' refusal to provide information about the execution of a death row prisoner and the local of his grave to his family members. The Committee established that "persisting uncertainty of the circumstances that led to [the death of the applicant's son] as well as the location of his gravesite" was a violation.[62] The Committee applied this logic in the *Mariam,*

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[57] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly* 31, no. 2 (2009): 324, https://doi.org/10.1353/hrq.0.0069.
[58] Sweeney, 'The Elusive Right to Truth in Transnational Human Rights Jurisprudence', 361.
[59] *Quinteros v Uruguay*, Comm No 107/1981, HRC, (21 July 1983).
[60] *Quinteros v Uruguay*, Comm No 107/1981, HRC, (21 July 1983), §14.
[61] Sweeney, 'The Elusive Right to Truth in Transnational Human Rights Jurisprudence', 361.
[62] *Schedko and Bondarenko v. Belarus,* Natalia Schedko v. Belarus, comm. no. 886/1999, U.N. Doc. CCPR/C/77/886/1999 (1999) § 10.2; See also *María del Carmen Almeida de Quinteros et al. v. Uruguay,* comm. no. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990).

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Philippe, Auguste and Thomas Sankara v. Burkina-Faso case, which was brought by the wife of Thomas Sankara, assassinated President of Burkina Faso. The events took place during the 1987 coup d'état in Ouagadougou. The Committee concluded that "the family of a man killed in disputed circumstances, have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara, or the precise location where his remains were officially buried. Thomas Sakara's family have the right to know the circumstances of his death."[63]

3. ***Regional Developments***

a) Inter-American Court of Human Rights

This principle was reproduced in the jurisprudence of the Inter-American Court of Human Rights (IACtHR) despite being absent from its constitutive documents.[64] According to Dermot Groome, this right has its legal basis "as an enforceable right" from two types of protections: (i) the obligation to disclose information on the fate of persons in custody to their family members, and (ii) the obligation to conduct an effective investigation and prosecute crimes committed against the persons in custody. While the former protection falls within the provisions prohibiting "inhumane treatment" (with respect to the family member of the disappeared person), the latter concerns the "family's right of access to justice."[65]

The IACtHR has observed a gradual recognition of the right to truth. The first case where it dealt issues touching upon truth was *Velasquez Rodriguez v. Honduras* of 1988— coincidingly the Court's first case ever. It concerned a large number of disappearances in Honduras in the early 1980s, and the Court came to the—at the time innovative— conclusion that enforced disappearances constituted a "radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention".[66] Yet, the Court did not recognize explicitly a

[63] *Mariam, Philippe, Auguste and Thomas Sankara v. Burkina-Faso,* comm. no. 1159/2003, U.N. Doc. CCPR/C/86/D/1159/2003 (2006) §12.2
[64] Groome, "The Right to Truth in the Fight against Impunity," 177.
[65] Ibid.
[66] *Velasquez Rodriguez v. Honduras,* Ser. C No. 4, IACtHR (1988) §158.

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right to truth in this case. Rather, it considered that the uncertainty regarding the fate of the victims was in itself a continuous form of breach, underscoring the need for an "effective search for the truth by the government."[67] Thus what the IACtHR had in mind was not a violation parallel to the enforced disappearance, but a component of it.

Castillo Páez v. Peru of 1997 announced a more meaningful acknowledgment of the right to truth. For the first time, the Commission raised before the Court the argument that the uncertainty regarding the whereabouts of a disappeared person was a breach in itself; a violation of the right to truth. The IACtHR spoke of "a right that does not exist in the American Convention, although it may correspond to a concept that is being developed in doctrine and case law",[68] and went ahead to recognize that "the victim's family still have [sic] the right to know what happened to him and, if appropriate, where his remains are located".[69] However, this acknowledgement was done only in the context of article 25 of the American Convention: the right to effective remedy. Hence the right to truth was considered to be only a component of the broader right to access to justice.

This reasoning has marked the jurisprudence of the Court up until recently. Soon after *Castillo Páez*, the IACtHR established in *Bámaca Velasquez v. Guatemala* its doctrine of a truth as right "subsumed" to other rights in the Convention. In its judgement, it acknowledged that the ineffectiveness of the judicial remedies and the unwillingness of the authorities to identify the whereabouts of the victim had prevented the victim's family from knowing the truth. However, it underlined that "the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigations and prosecution established in Articles 8 and 25 of the Convention."[70]

A year after this judgment, the IACtHR went a step further into acknowledging the right to truth in the *Myrna Mach Chang v. Guatemala* case. In its judgment, the IACtHR proclaimed that

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[67] Ibid §177.
[68] *Castillo Páez v. Peru,* IACtHR (1997) § 86.
[69] Ibid § 90.
[70] *Bamaca Velasquez v. Guatemala*, Ser. C No. 91, IACtHR (2002) § 75.

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"every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations."[71] Two caveats are nonetheless pertinent with regard to this case. The first is that it did not concern enforced disappearance, but rather the known assassination and lack of investigation of Ms. Mach Chang. That is why this case is often not considered to form part of the Court's case law on the right to truth, but simply adding to the repertory on the right to life. And second, as with cases concerning enforced disappearance, the Court reasoned truth in terms of articles 8 and 25, that is access to justice. In that sense, despite the clear-cut language recognizing the right to truth in the judgment, in fact, it did not go much further than it had already done in *Castillo Páez* and *Bámaca Velasquez.*

It is therefore not surprising that the Court continued after *Myrna Mach Chang* using the doctrine of "subsumed right" with regard to truth, despite voices calling for an autonomous right.[72] This was the case in a number of judgements, including *Barrios Altos v. Perú*, *Blanco Romero et al. v. Venezuela*, *Servellón García et al. v. Honduras*, *Pueblo Bello Massacre v. Colombia* and *Montero Aranguren et al. v. Venezuela*. In them, the Court held that truth was not "a separate right enshrined in Articles 8, 13, 25 and 1(1) of the [American] Convention," but rather that it "was subsumed in the right of the victim or his relatives to obtain the elucidation of the wrongful acts and the corresponding responsibilities from the State's competent organs, through investigation and prosecution."[73]

Only in *Gomes Lund et al. v. Brazil*, of 2010, did the Court refer to the right to truth in the context of enforced disappearance without arguing that it was a "subsumed right". It said, using nearly the exact same wording as in *Myrna Mach Chang*, that "all persons, including the next of kin of the victims of gross human rights violations, have the right to know the truth. As a consequence, the next of kin of the victims and society must be informed of all that occurred in

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[71] *Myrna Mack Chang v. Guatemala*, Ser. C No. 101, IACtHR (2003) § 274.
[72] Eduardo Ferrer Mac-Gregor, 'The Right to the Truth as an Autonomous Right Under the Interamerican Human Rights System', *Mexican Law Review* IX, no. 1 (2016): 121–39.
[73] Case of Blanco Romero et al. v. Venezuela. Merits, reparations and costs, No. Series C No. 138 (IACtHR 28 November 2005); Ferrer Mac-Gregor, 'The Right to the Truth as an Autonomous Right Under the Interamerican Human Rights System', 127.

Electronic copy available at: https://ssrn.com/abstract=4430270

regard to said violations".[74] Much more recently, the Court has fully dropped the "subsumed right" doctrine and acknowledged the autonomy of the right to truth. In *Terrones Silva v. Perú,* of 2018, the IACtHR determined that "even if the right to know the truth has been usually framed within the scope of the right to access to justice, this right is better understood as autonomous, considering that its violation can breach several rights contained in the American Convention".[75] This marks the full acknowledgement of the right to truth by the IACtHR.

Both the IACtHR and the Human Rights Committee have been proponents of developing the notion of the right to the truth, the basis of which can be attributed to the states' positive obligation to the family of the disappeared since the late 1980s. However, unlike the positive obligation to the family of the disappeared, the right to the truth involves the states' obligation to duly inform not only the disappeared persons' close family as well as society as a whole. This right, which has been acknowledged in the case-law of the IACtHR and the HR Committee, has become a contentious issue for the European Court (ECtHR).

b) Limited Right to Truth within the European Regime

While the practice of enforced disappearances was an issue of the 1970s and 1980s in Latin America, this topic traveled to Europe in the 1990s and 2000s. The European Court has been rather reluctant to frame the positive obligation to the family of the disappeared within the right to the truth paradigm (maximalist truth recovery), particularly in the earlier cases, however.[76] Later decisions came closer to this understanding, which according to Keller and Heri, "verges on a 'right to know the truth.'"[77]

States' positive obligation to the family of the disappeared was formulated against the backdrop of several incidents–including the Kurdish conflict in Turkey and the Russian-Chechen wars, instances of transitional justice, the conflict in Cyprus, the deeds of the former communist

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[74] *Gomes Lund et al. v. Brazil*, IACtHR (2002) § 200.
[75] Translation is free, as no versión in English exists. See: *Terrones Silva v. Perú*, IACtHR (2018) § 215.
[76] *Kurt v. Turkey,* app. no. 15/1997/799/1002, ECHR (25 May 1998); *Cakici v. Turkey*, app. no. 23657/94, ECHR [GC] (8 July 1999).
[77] Keller and Heri, "Enforced Disappearance and the European Court of Human Rights," 737.

Electronic copy available at: https://ssrn.com/abstract=4430270

regimes, and extraordinary renditions.[78] States' positive obligation to the next-of-kin of disappeared persons, and–its more expanded form–the right to the truth, center on truth recovery in its narrow and broad senses. The former focuses on the minimalist conception of truth, namely specific information about the fate of disappeared persons mostly for those who are immediately concerned. The latter, on the other hand, deals with maximalist truth conception, namely establishing the truth for society at large, confronting the past, and constructing some semblance of collective memory.[79] While the cases on Kurdish and Chechen conflict are concerned more with the minimalist conception of truth, the cases concerning transitional justice and extraordinary renditions are more concerned with the maximalist conception of truth.

Concerning enforced disappearances, in particular, the abovementioned international legal framework has guided the Court in tackling this issue. However, the Court's mission in this regard was also supported by other Council of Europe bodies. For example, the Parliamentary Assembly of the Council of Europe (PACE) passed Resolution 1463 (2005) on Enforced Disappearances, highlighting that (i) "family members of the disappeared persons should be recognized as independent victims of the enforced disappearance and be granted a 'right to the truth', that is, a right to be informed of the fate of their disappeared relatives,"[80] (ii) enforced disappearance should be considered as "a continuing crime, as long as the perpetrators continue to conceal the fate of the disappeared person and the facts remain unclarified; consequently, non-application of statutory limitation periods to enforced disappearances."[81]

Similarly, the Committee of Ministers in a recommendation to the Member States submitted that "the term victim also includes, where appropriate, the immediate family or dependents of the direct victim."[82] The Committee, further, underlined that "the families of disappeared persons will

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[78] The majority of cases concerning enforced disappearances are brought against the backdrop of armed conflicts. For a detailed analysis on how the European Court balances human rights law and humanitarian law, see William Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya," *The European Journal of International Law* 16 (2005).
[79] Kovras, "Explaining Prolonged Silences in Transitional Justice: The Disappeared in Cyprus and Spain," 733.
[80] Parliamentary Assembly, *Resolution 1463 (2005) on Enforced Disappearances* (3 October 2005) §10.2.
[81] *Resolution 1463 (2005) on Enforced Disappearances* §10.3.3.
[82] Committee of Ministers, *Recommendation Rec(2006)8 of the Committee of Ministers to Member States on Assistance to Crime Victims*, (14 June 2006).

Electronic copy available at: https://ssrn.com/abstract=4430270

be recognized as 'victims' and consequently benefit from the types of assistance, protection, information and access to justice as well as compensation to be provided for in that text."[83] Therefore, the Court's vision with respect to the positive obligation to the family of the disappeared was encouraged by the legal and political developments taking place inside and outside of the Convention system.

i. The Conflict in the Kurdish Region of Turkey

The Court's jurisprudence on the positive obligation to the family of the disappeared first emerged in the context of the conflict in the Southeastern provinces of Turkey.[84] The core of the issue was the authorities' failure to conduct an effective investigation and inform the disappeared persons' relatives in due course, which had prevented the family members' access to justice.

This issue was first raised before the ECtHR in 1998, in *Kurt v. Turkey*—a case that arose in the context of the Kurdish conflict in Turkey.[85] The conflict between Turkish security forces and the PKK fighters had been ongoing ever since and took an even more violent turn in the 1990s.[86] In the course of this armed struggle, Turkish authorities committed serious human rights violations, including extrajudicial killings, evacuation of villages, and enforced disappearances.[87] In light of the lack of remedies offered at the national level under the state of emergency rule in the region, Kurdish lawyers, in cooperation with British lawyers (with experience in the Northern Ireland conflict), brought the violations committed in the region to the attention of the international

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[83] Committee of Ministers, Reply to Enforced Disappearances-Parliamentary Assembly Recommendation 1719 (2005) *CM/AS(2006)Rec1719 final* (23 June 2006).
[84] Tullio Scovazzi and Gabriella Citroni, *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention* (Leiden: Martinus Nijhoff Publishers, 2007), 188.
[85] For more on this conflict, see Murat Somer, "Turkey's Kurdish Conflict: Changing Context, and Domestic and Regional Implications," *Middle East Journal* 55 (2004); Nimet Beriker-Atiyas, "The Kurdish Conflict in Turkey: Issues, Parties and Prospects," *Security Dialogue* 28 (1997); Kemal Kirişci, and Gareth M. Winrow, *The Kurdish Question and Turkey: An Example of Trans-state Ethnic Conflict* (London, Portland: Frank Class, 1997); Kerim Yildiz and Susan Breau, *The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms* (London, New York, Routledge, 2010).
[86] Dilek Kurban, "Europe as an Agent of Change: The Role of the European Court of Human Rights and the EU in Turkey's Kurdish Policies," *SWP Research Paper*, RP9 (2014): 8-9.
[87] For an overview of the extent of violations see Dilek Kurban, *Reparations and Displacement in Turkey: Lessons Learned from the Compensation Law* (New York: International Center for Transitional Justice, 2012).

Electronic copy available at: https://ssrn.com/abstract=4430270

public.[88] They used the European Court as a forum in this regard.[89] As Basak Çalı argues, the Court also served as a body for the revelation of truth in the context of "the official narratives of denial and of national security" which relied on redacting information concerning the consequences of military operations in the region.[90]

Kurt v. Turkey was brought by Mrs. Kurt, who alleged that the state authorities had been implicated in his son's disappearance.[91] She was represented by Françoise Hampson and Aisling Reidy, lawyers affiliated with the Kurdish Human Rights Project (KHRP)–a London based NGO that engaged in strategic litigation to highlight human rights violations committed during the course of the Kurdish conflict in the 1990s and early the 2000s. Among others, the applicant urged the Court to consider this matter in line with the abovementioned jurisprudence of the IACtHR and the HR Committee and recognize her own victimhood under Article 3.[92] Invoking the abovementioned *Quinteros v. Uruguay* judgment of the HR Committee, the applicant argued that "the next-of-kin of disappeared persons must also be considered victims of, *inter alia*, ill-treatment."[93]

Transnational human rights groups had an important role in bringing Mrs. Kurt's victimhood and the violations denied by the Turkish government to light. In addition to the Kurdish Human Rights Project (KHRP) that provided legal representation to the applicant, a local NGO, Diyarbakir Human Rights Association (DHRA) provided initial help to the applicant and (possibly) referred her case to the KHRP—these two formed a strategic litigation network and brought many similar cases before the European Court.[94] When the national authorities dismissed her requests for further

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[88] Kurban, "Europe as an Agent of Change," 9.

[89] This collaboration caught the attention of the judges of the ECtHR. For example, Turkish judge, Gölcüklü criticized the fact that the applicant demanded the legal costs to be paid in their bank account in the United Kingdom in *Timurtaş v. Turkey.* He submitted the following: "Is it not astonishing to find that virtually all the applicants living in small villages or isolated hamlets in remote parts of south-east Anatolia–people of modest means–have bank accounts in a town of another European State?." *Timurtaş v. Turkey,* app. no. 23531/94, ECHR (13 June 2000) (Partly Dissenting Opinion of Judge Gölcüklü).

[90] Çalı, "The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform, 318.

[91] *Kurt v. Turkey,* § 14-18.

[92] Ibid., § 84.

[93] Ibid., §130.

[94] For more see, Rachel A. Cichowski, 'Civil Society and the European Court of Human Rights in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011).

Electronic copy available at: https://ssrn.com/abstract=4430270

information regarding the detention of her son, she sought help at the DHRA, where she submitted a statement explaining the circumstances surrounding the disappearance of her son.[95] This statement was later presented before the European Commission.[96] The Commission found that the statement "had evidential value in so far as it was corroborated by the applicant's detailed account to the delegates."[97] Hence, the DHRA served a significant function in establishing the facts surrounding the disappearance of the applicant's son. Finally, Amnesty International submitted an *amicus curiae* brief and furnished the Court with further observations in relation to the existing legal principles concerning enforced disappearances with reference to the abovementioned IACtHR and HR Committee judgments.[98]

Reviewing the Commission's report and the arguments presented by all parties, the European Court could not establish beyond reasonable doubt that the applicant's son had been killed by the state agents or had been a victim of maltreatment.[99] However, the Court established that the authorities had "failed to discharge their responsibility" on account of the "unacknowledged detention" of the applicant's son.[100] Moreover, it found Turkey in violation due to the authorities' failure to conduct effective investigation and provide the necessary information on the circumstances surrounding the disappearance of the applicant's son.[101] The Court argued that the applicant is "the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress."[102] Thereby, it introduced the positive obligation to the family of the disappeared, which was first developed by the IACtHR, into the Convention system, which was called as "Latin-Americanization of the European system."[103]

However, unlike the IACtHR and the HRC, the European Court refrained from framing this obligation under the theme of the right to the truth in *Kurt v. Turkey*. Instead, the ECtHR preferred

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[95] *Kurt v. Turkey,* §17.
[96] Ibid., §34.
[97] Ibid., §50.
[98] Ibid., §71.
[99] Ibid., §107-116.
[100] Ibid., §128.
[101] Ibid., § 133-134.
[102] Ibid., § 134.
[103] Christina M. Cerna, "Inter-American System for the Protection of Human Rights," *Florida Journal of International Law* 16 (2004): 202.

Electronic copy available at: https://ssrn.com/abstract=4430270

formulating it as a substantive violation generated by the state's omission. Accordingly, violations of this type occur due to the feeling of "anguish and distress" haunting the family members, who are barred from receiving information concerning their relatives. Therefore, it is a substantive violation resulting from procedural misconduct.

The Court further limited the application of the right to the truth in *Çakıcı v. Turkey,* which was decided a year after *Kurt v. Turkey.* The complaint in *Çakıcı* concern similar circumstances—unacknowledged detention and disappearance of a relative.[104] Similarly, the applicant's statement made to the Diyarbakir Human Rights Association (the DHRA) was used in the proceedings before the Commission.[105] Fifth, the applicant was represented by Françoise Hampson and Aisling Reidy, lawyers affiliated with the KHRP.

Despite such similarities in the way the case was constructed and brought before the Court, there was a difference in the manner the Court approached to the issue this time. In *Çakıcı*, the Court submitted that, "the Kurt case does not however establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3."[106] It, then, listed relevant factors, which determine if a family member can be considered as a victim of such violations: (i) "the proximity of family tie" with "the parent-child bond" having a certain weight; (ii) "the particular circumstances of the relationship;" (iii) "the extent to which the family member witnessed the events in question;" (iv) "the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries."[107] Accordingly, the victimhood of the next-of-kin depended on these "special factors, which [give] the suffering of the applicant a dimension and character distinct from the emotional distress, which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation."[108]

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[104] *Çakici v. Turkey,* application no 23657/96, ECHR (8 July 1999) § 68.
[105] Ibid., § 22.
[106] Ibid., § 98.
[107] Ibid., § 98.
[108] Ibid., § 98.

Electronic copy available at: https://ssrn.com/abstract=4430270

The Court, then, applied the aforementioned criteria to establish the victim status of Mr. Çakıcı. According to the Court, although the applicant had close family ties with the disappeared person, he was not present when his brother was taken away, and he did not bear the brunt of presenting petitions and making enquires to the local authorities.[109] Based on this, the Court found that the applicant himself was not a victim of inhuman or degrading treatment. With this case, the Court emphasized "the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention."[110]

With this ruling, the European Court set its own different approach to enforced disappearance. It was a contextually favorable moment to do so, considering "the pressure on Strasbourg to respond to the repeated and common violations arising from such internal armed conflicts."[111] Nevertheless, this decision also meant that the scope of the positive obligation to the family of the disappeared would be narrower, which effectively translated as taking a step back from introducing the right to the truth in the Convention system.

The Court applied the criteria developed in *Çakıcı* in the cases to follow and decided that the applicant did not qualify to be a victim as a next-of-kin of a disappeared person in eighteen cases brought against Turkey between 1998 and 2006.[112] Although these cases did not provide the

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[109] Ibid., § 99.
[110] *Ipek v. Turkey,* §181; *Timurtaş v. Turkey*, §95.
[111] Juliet Chevalier-Watts, "The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?," *Human Rights Review* 11 (2010): 484.
[112] *Çakıcı v. Turkey*; *Cemile Şarlı v. Turkey*, app. no. 24490/94, EComm.HR (21 October 1999); *Berktay v. Turkey*, app. no. 22493/93, ECHR (01 March 2001); *Tanlı v. Turkey,* app. no.26129/95, ECHR (10 April 2001); *Akdeniz and Others v. Turkey*, app. no. 23954/94, ECHR (3 May 2001); *Ülkü Ekinci v. Turkey*, app. no. *27602/95*, ECHR (16 July 2002); *Tekdağ v. Turkey*, app. no. *27699/95*, ECHR (14 June 2004); *Zengin v. Turkey*, app. no. 46928/99, ECHR (28 October 2004); *Gezici v. Turkey*, app. no. 34594/97, ECHR (17 Mars 2005); *Güngör v. Turkey*, app. no. 28290/95, ECHR (22 March 2005); *Yasin Ateş v. Turkey*, app. no. 30949/96 30949/96, ECHR (31 May 2005); *Toğcu v. Turkey*, app. no. 27601/95, ECHR (31 May 2005); *Koku v. Turkey*, app. no. 27305/95, ECHR (31 May 2005); *Çelikbilek v. Turkey*, app. no. 27693/95, ECHR (31 May 2005); *Hamiyet Kaplan and Others v. Turkey*, app. no. 36749/97, ECHR (13 September 2005); *Dündar v. Turkey*, app. no. 26972/95, ECHR (20 September 2005); *Nesibe Haran*, app. no. 28299/95, ECHR (06 October 2005); *Belkıza Kaya and Others v. Turkey*, app. no. 33420/96 and 36206/97, ECHR (22 November 2005).

Electronic copy available at: https://ssrn.com/abstract=4430270

grounds for expanding the scope of the norm, they contributed to the effort of changing Turkey's policies in the Southeast,[113] by highlighting the problems with the rule of law in Turkey.[114]

ii. The Chechen Conflict

This conflict, similar to the Kurdish conflict, involved the counter-insurgency operations of a strong state (Russia) against an armed group bidding for independence (the Chechen militias).[115] The Chechen conflict lasted over a decade and spurred a humanitarian catastrophe for the civilians,[116] as a result of which around 150,000 persons were internally displaced. [117] Russian security forces perpetrated wide-scale human rights violations, such as torture, rape, forced disappearances, mass arrest operations (also known as "sweep operations," or *zachistki*),[118] abductions, and extrajudicial killings.[119] The sweep operations would be conducted in the most brutal ways. The Russian forces would arbitrarily detain suspected individuals (mostly male Chechens) and subsequently torture or "forcibly disappear" them.[120] The Chechen militias also engaged in violations such as kidnapping for ransom and attacking civilian targets or suspected collaborators.[121] However, the asymmetrical nature of the conflict was reflected in the scale of violations committed by each side. As Human Rights Watch underlined, "the overwhelming majority of abuse has been committed by Russian forces."[122]

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[113] For a review of some of the measures taken by the government and further recommendations, see Human Rights Watch, *Time for Justice: Ending Impunity for Killings and Disappearances in 1990s Turkey* (2012).
[114] Çalı,"The Logics of Supranational Human Rights Litigation, Official Acknowledgement, and Human Rights Reform," 332; Kurban "Europe as an Agent of Change," 24; Christos Kassimeris and Line Tsoumpanou, "The Impact of the European Convention on the Protection of Human Tights," *The International Journal of Human Rights* 12 (2008): 336.
[115] Anna Matveeva, "Chechnya: Dynamics of War and Peace," *Problems of Post-Communism* 54 (2007): 4.
[116] For an interesting analysis on the psychological effects of the conflict and displacement on the survivors, see Kaz de Jong et al. "The Trauma of Ongoing Conflict and Displacement in Chechnya: Quantitative Assessment of Living Conditions, and Psychosocial and General Health Status Among War Displaced in Chechnya and Ingushetia," *Conflict and Health* 1 (2007).
[117] Matveeva, "Chechnya: Dynamics of War and Peace," 13.
[118] The practice of sweep operations continued, on a smaller scale under the pro-Russian Chechen government led by Ramzan Kadyrov. Domitilla Sagramoso, "Violence and Conflict in the Russian North Caucasus," 700.
[119] Kramer, "Guerrilla Warfare, Counterinsurgency and Terrorism in the North Caucasus," 214.
[120] Human Rights Watch, *"Who Will Tell Me What Happened to My Son?"* 7.
[121] Kramer, "Guerrilla Warfare, Counterinsurgency and Terrorism in the North Caucasus," 214.
[122] Human Rights Watch, *Memorandum on Accountability for Humanitarian Law Violations in Chechnya* (12 September 2001), available at https://www.hrw.org/news/2000/09/12/memorandum-accountability-humanitarian-law-violations-chechnya

Electronic copy available at: https://ssrn.com/abstract=4430270

During this conflict, the practice of enforced disappearances was widely used.[123] According to a report prepared by Dick Marty on behalf of the Committee on Legal Affairs and Human Rights of the PACE, the number of disappeared persons was estimated between 3,000 and 5,000.[124] A group of NGOs, in their submission to the Committee on Legal Affairs and Human Rights, proclaimed that "the scale of the disappearances constitutes a crime against humanity itself, not taking other grave human rights violations into account."[125] Torture and ill-treatment under custody were other tools frequently employed to tackle the Chechen insurgency. Amnesty International observed that the violent treatment used against the Chechens was particularly severe and brutal.[126] According to Amnesty, the fact that "this pattern of violation is so uniform and continues unabated is, in large part, due to the absence of prosecutions for these offences."[127]

The systematic human rights abuses committed by Russian forces in the course of this conflict were subject to criticism, particularly in the West. The Russian government's effort to frame the Chechen conflict under the 'war on terror' umbrella, following the 9/11 attacks, could not undercut this criticism.[128] This was because Russia had "limited success in convincing Western observers that it is not fighting the entire Chechen people, but terrorists."[129] The Russian government's determination to obstruct international human rights mechanisms and independent observers from scrutinizing the violations in the North Caucasus only fueled the skepticism in this regard.[130] For example, the government authorities had not collaborated with the UN Special

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[123] For an assessment of the impact of enforced disappearances on the families in the course of the Chechen Wars, see International Committee of the Red Cross (ICRC), *Families of Missing Persons: Responding to Their Needs* (August 2009).
[124] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Legal Remedies for Human Rights Violations in the Northern Caucasus,* (31 May 2010) §38.
[125] These NGOs are Demos Centre, European Human Rights Advocacy Centre, Memorial Human Rights Centre Stichting, and Russian Justice Initiative. Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Report on Legal Remedies for Human Rights Violations in the Northern Caucasus,* Submissions of NGOs on Legal Remedies for Grave human right violations to be created in the Northern Caucasus Region, (8 February 2008), §28.
[126] Amnesty International, *Failure to Protect or Punish: Human Rights Violations and Impunity in Chechnya - Memorandum by Amnesty International to the Parliamentary Assembly of the Council of Europe on the conflict in Chechnya* (January 2002): 6.
[127] Ibid.
[128] Ibid., 168.
[129] Ibid.
[130] Amnesty International, *Russian Federation- Rule without Law,* 5.

Electronic copy available at: https://ssrn.com/abstract=4430270

Rapporteur on torture to conduct a visit in the North Caucasus since 2000.[131] The Committee for the Prevention of Torture (CPT) of the Council of Europe was another institution that "complained of Russia's lack of co-operation with it."[132] Similarly, the Russian government rejected a UN Commission on Human Rights resolution[133] condemning the human rights abuses in Chechnya and urging effective investigation into these violations.[134] This resolution did not only call on the Russian authorities to carry out an investigation, but also asked them to cooperate with other intergovernmental and nongovernmental organizations conducting their own independent inquires.[135] The authorities disregarded these requests and refused to allow thematic rapporteurs in the conflict zone.[136] The Russian authorities, thus, continued to avoid establishing "a meaningful accountability process, required by the United Nations" to prevent impunity.[137]

The Council of Europe institutions were particularly active in their attempts to appeal to the Russian authorities to respect the rule of law when conducting counter-terrorism operations.[138] In a resolution, the PACE drew attention to the fact that "the Russian Federation has not acted in accordance with the Council of Europe's principles and values in the conduct of its military campaign in the Chechen Republic."[139] Rudolf Binding, a rapporteur for the Committee on Legal Affairs, reported the Russian authorities had been unconstructive, in a report prepared on behalf of the Committee.[140] Moreover, Binding submitted the following: "one does get the feeling that the

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[131] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Country Visits, available at http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Visits.aspx
[132] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *The Human Rights Situation in the Chechen Republic*, Doc. 9732 (13 March 2003), § 7.
[133] Office of the High Commissioner of Human Rights, *Commission on Human Rights Resolution 2000/58: Situation in the Republic of Chechnya of the Russian Federation* (25 April 2000).
[134] Human Rights Watch, *Memorandum on Accountability for Humanitarian Law Violations in Chechnya.*
[135] Ibid.
[136] Amnesty International was one of the organizations that were refused to enter into Chechnya. Amnesty International, *Russian Federation- Rule without Law,* 5
[137] Human Rights Watch, *Memorandum on Accountability for Humanitarian Law Violations in Chechnya.*
[138] The Parliamentary Assembly passed a series of resolutions and recommendations in relation to the conflict in Chechnya. See for example, Resolution 1201 (1999) of 4 November 1999, Recommendation 1444 (2000) of 27 January 2000, Recommendation 1456 (2000) of 6 April 2000, Resolution 1221 (2000) of 29 June 2000, Resolution 1227 (2000) of 28 September 2000, and Recommendation 1478 (2000) of 28 September 2000.
[139] Parliamentary Assembly, Resolution 1240 (2001), *Conflict in the Chechen Republic – Recent Developments* (25 January 2001).
[140] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *The Human Rights Situation in the Chechen Republic*, §55.

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Russian authorities are doing everything to hide the real situation in Chechnya from public view. The Chechen Republic has practically been closed off–there is nearly no access for journalists and NGOs."[141] This account reiterated by various international bodies indicated that Russia had low credibility in the eyes of the international community due to the manner in which it fought the Chechen Wars, its reluctance to provide redress to the victims, and its determination to conceal the scale of violations taking place from the international public.[142] Due to the ineffectiveness of the domestic remedy system, the European Court was used as a forum to seek justice and bring the human rights abuses committed by Russian forces to light. The Court not only provided a forum for the victims to seek justice but also contributed to "the international oversight of Chechnya."[143]

The expertise gained from the Kurdish conflict was instrumental for enabling the transnational human rights organizations to bring the cases before the Court and for the Court to tackle the intractable evidentiary problems embedded in the majority of the cases reviewed.[144] Transnational human rights organizations took the lead in highlighting human rights abuses committed in Chechnya. They brought the majority of cases lodged against Russia in relation to this conflict.[145] Leach affirms that of the 37 cases brought before the Court, between February 2005 (when the first judgments in relation to the Chechen conflict were issued) and July 2008, 35 were represented by human rights organizations.[146] As Freek van der Vet shows, some of these organizations "possessed valuable expertise from the Turkish cases."[147]

The accumulated experience helped bring the right to truth to the Convention system. For example, in *Musayev and Others v. Russia,* the Court signaled that it can go beyond its restricted approach. *Musayev and Others* was not a typical enforced disappearance case. It concerned the

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[141] Ibid. §55.
[142] For an interesting analysis on the domestic perception in relation to the Chechen conflict see, Theodore P. Gerber and Sarah E. Mendelson, "Russian Public Opinion on Human Rights and the War in Chechnya," *Post-Soviet Affairs* 18 (2002).
[143] Philip Leach, "The Chechen Conflict: Analyzing the Oversight of the European Court of Human Rights," *European Human Rights Law Review* 6 (2008): 733.
[144] Barrett, "Chechnya's Last Hope? 139.
[145] Freek van der Vet, "Seeking Life, Finding Justice: Russian NGO litigation and Chechen Disappearances before the European Court of Human Rights," *Human Rights Review* 13 (2012): 304.
[146] Leach, "The Chechen Conflict," 734-735.
[147] Van der Vet, "Seeking Life, Finding Justice," 310.

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extrajudicial killing of the applicants' relatives in the context of a sweep operation.[148] The applicants were represented by lawyers affiliated with Memorial and the European Human Rights Advocacy Centre (EHRAC), similar to many other applicants bringing their case before the Court in relation to the Chechen conflict.[149] The Court started off explaining that granting victim status to the next-of-kin is a practice applied in the context of enforced disappearances.[150] Hence, this principle did not concern the relatives of those who had been extra-judicially killed.[151] Then, the Court took an unexpected course and found the applicant a victim of inhuman or degrading treatment and extended the states positive obligation to inform the relatives of the disappeared persons to extrajudicial killings.[152]

This change approach could be due to the fact that the case was brought against Russia, a state with low credibility due to the way it conducted military operations in the North Caucasus and handled investigations at the national level. The Russian authorities' attempt to frame the conflict as a purely "counter-terrorism operation" did not appeal to the international community. This was mostly due to the scale of human rights abuses committed during the conflict, and the Russian authorities' unwillingness to cooperate with international organizations and human rights groups that sought to investigate these abuses.

However, the Court was not consistent about this. In *Tangiyeva v. Russia*,[153] decided only four months after, it took a step back. *Tangiyeva* was also represented by the lawyers affiliated with Memorial and the EHRAC. The applicant complained about three of his relatives' extrajudicial executions by the state authorities, and the state's failure to investigate her allegations.[154] This time, the Court submitted that although there was no doubt that the extrajudicial killing of her relatives caused "profound suffering," there were "no basis for finding a violation of Article 3 in this context."[155] Therefore, it backtracked from the reasoning reached in *Musayev and Others*, despite

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[148] *Musayev and Others v. Russia*, app. nos. 57941/00, 58699/00 and 60403/00, ECHR (26 July 2007), § 11-21.
[149] Ibid., § 2.
[150] Ibid., § 168.
[151] Ibid., § 168.
[152] Ibid., § 169.
[153] *Tangiyeva v. Russia,* app. no. 57935/00, ECHR (29 November 2007).
[154] Ibid., § 2-3.
[155] Ibid.,§ 105.

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the fact that both cases dealt with similar complaints. What is more, they were constructed and argued in a similar way by the same lawyers.

iii. The Right to the Truth in the Context of Transitional Justice

The positive obligation to the family of the disappeared began to include a maximalist conception of truth dimension, when brought into play in transitional justice cases that deal with the past.[156] In other words, the notion of families' right to justice started to gain an element of seeking to establish historical truth. This section explains this development in relation to three cases: (i) *Cyprus v. Turkey* (the Turkish intervention in Cyprus of 1974), (ii) *Association 21 December 1989 and Others v. Romania* (the crackdown on anti-regime protests of 1989), and (iii) *Janowiec and Others v. Russia* (the Katyn massacre of 1940).

Cyprus v. Turkey case emanated from the conflict in Cyprus in the late 1960s and 1970s.[157] The Cyprus conflict had two phases: first, the intercommunal violence between 1963 and 1974,[158] and second, the Turkish intervention in 1974 and subsequent Turkish occupation.[159] The intercommunal conflict broke out when the Greek Cypriots attempted to unify with Greece (*enosis*) and the Turkish Cypriot minority, who preferred partitioning the island (*taksim*), opposed to this.[160] Due to violent clashes, between 1967 and 1970, 25,000 Turkish Cypriots and 500 Greek Cypriots

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[156] For more on transitional justice, see Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003); Naomi Roht-Arriaza and Javier Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus* Justice (Cambridge: Cambridge University Press, 2006); Pablo de Greiff, "Theorizing Transitional Justice," in *Transitional Justice: Nomos LI*, ed. Melissa Williams, Rosemary Nagy, and Jon Elster (New York: New York University Press, 2012).
[157] Fiona B. Adamson, "Democratization and the Domestic Sources of Foreign Policy: Turkey in the 1974 Cyprus Crisis," *Political Science Quarterly*, 116 (2001); Ronald J. Fisher, "Cyprus: The Failure of Mediation and the Escalation of an Identity-Based Conflict to an Adversarial Impasse," *Journal of Peace Research* 38 (2001); Oliver P. Richmond, "Ethno-Nationalism, Sovereignty and Negotiating Positions in the Cyprus Conflict: Obstacles to a Settlement," *Middle Easter Studies* 35 (1999).
[158] For a review of the conflict, see Maria Hadjipavlou, "The Cyprus Conflict: Root Causes and Implications for Peacebuilding," *Journal of Peace Research* 44 (2007): 352-362; Glen D. Camp, "Greek-Turkish Conflict over Cyprus," *Political Science Quarterly* 95 (1980); Stephan Ryan, *Transformation of Violent Intercommunal Conflict* (Hampshire, Burlington, Ashgate, 2007).
[159] This intervention was considered as invasion by the Greeks and Greek Cypriots, and a peace operation by the Turks and Turkish Cypriots. Paul Sant Cassia, "Guarding Each Other's Dead, Mourning One's Own: The Problem of Missing Persons and Missing Pasts in Cyprus," *South European Society and Politics* 11 (2006):113.
[160] Peter Loizos, "Intercommunal Killings in Cyprus," *Man* 23 (1988): 640.

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were displaced, which led to further segregation of the island.[161] In 1974, Turkey undertook a military intervention, relying on the Treaty of Guarantee of 1960,[162] as a response to a Greece backed *coup d'état* in Cyprus which designated anti-Turkish Nikos Sampson as the President.[163] As a result of these two episodes, 2,000 Greek Cypriots and Turkish Cypriots disappeared.[164] The UN established the Committee of Missing Persons to investigate disappearance allegations in 1981.[165] In 1995, both sides presented their claim in relation to the number of disappeared persons before the Committee of Missing Persons. Accordingly, Greek Cypriots presented 1,493 files and Turkish Cypriots submitted 500 files.[166] While 99% of the disappeared Turkish Cypriots were civilians, 61.19% of the disappeared Greek Cypriots were military personnel.[167]

The majority of the disappearance cases on the Turkish side took place amidst intercommunal clashes, during which the Turkish Cypriots "bore the brunt of violence."[168] They raised this issue at the UN for the first time in 1964.[169] However, they did not follow up on these complaints,[170] and they could not seek justice under the Greek Cypriot regime "due to fear and official indifference."[171] Moreover, they interpreted disappearances as deaths, despite not having evidence in this regard.[172] Turkish Cypriots' interest in discovering the fate of their missing relatives revived in 1975 when the international community pressurized Turkey to account for missing Greek

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[161] Fischer, "Cyprus: The Failure of Mediation and the Escalation of an Identity-Based Conflict to an Adversarial Impasse," 310.
[162] Turkey justified the intervention based on the Treaty of Guarantee of 1960, according to which the United Kingdom, Greece and Turkey are the guarantors of the independence and territorial integrity of Cyprus. Article IV of this treaty gave the right to the guarantors to unilaterally intervene, if necessary for the purpose of "re-establishing the state of affairs created by… the Treaty." Although this treaty gave justification to the initial intervention, it constrained the subsequent Turkish military's presence on the island, which violates the territorial integrity of Cyprus. Camp, "Greek-Turkish Conflict over Cyprus," 47.
[163] Adamson, "Democratization and the Domestic Sources of Foreign Policy," 278; Paul Sant Cassia, "Piercing Transfigurations: Representations of Suffering in Cyprus, *Visual Anthropology* 13 (1999): 26.
[164] Kovras, "Explaining Prolonged Silences in Transitional Justice," 731.
[165] Westering, Conditionality and EU Membership," 109.
[166] Sant Cassia, "Piercing Transfigurations: Representations of Suffering in Cyprus, 26.
[167] Ibid., 26.
[168] Adamatia Pollis, "The Missing of Cyprus-a Distinctive Case," *Journal of Modern Greek Studies* 9 (1991): 46.
[169] Ibid., 46.
[170] Ibid., 50.
[171] Ibid., 27.
[172] Ibid., 41.

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Cypriots following the 1974 intervention, during the course of which the majority of the disappearance cases on the Greek Cypriot side occurred.[173]

Turkey's intervention on the island and the subsequent occupation spurred an international reaction. The UN Security Council passed a resolution on the same day and demanded the withdrawal of Turkish forces.[174] The declaration of independence of Northern Cyprus in 1983 did not abate the situation. The UN Security Council responded by passing Resolution 541 (1983), and declaring the independence claim of Northern Cyprus (TRNC), a state that only Turkey recognized, as legally invalid.[175] While the decades long negotiations could not bring solution to the Cyprus problem, the continuing presence of Turkish troops on the island granted the legal high ground to the government of Cyprus.[176] Moreover, the issue of the missing people of Cyprus became deeply entangled in the larger Cyprus problem. Adamantia Pollis argues that the missing people was perceived as a part of "the broader political struggle rather than as a human rights problem" and "the missing have become pawns in the Greco-Turkish conflict."[177] Pollis, further, highlights that Greek Cypriot "political elites invested political capital" in framing the missing as "the central symbol of [their] ongoing suffering," without expressing concern for the missing Turkish Cypriots.[178] The government of Cyprus brought the case concerning the disappearances of Greek Cypriots before the Court against this background.

This was the fourth interstate case lodged by Cyprus against Turkey. In this case, the Cypriot government specifically complained about continuous violations spurred by Turkish intervention on the island in 1974.[179] One of the specific complaints raised in this case was the Greek-Cypriot missing persons and families' right to access to justice.[180] The Court first established that the acts reported were attributable to the responding state. More specifically, it relied on *Loizidou v.*

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[173] Ibid., 50.
[174] Camp, "Greek-Turkish Conflict over Cyprus," 57
[175] UN Security Council, *Resolution 541 (1983)* (18 November 1983).
[176] For a review on the negotiations, see Camp, "Greek-Turkish Conflict over Cyprus," 58-60.
[177] Pollis, "The Missing of Cyprus- a Distinctive Case," 49.
[178] Ibid., 49.
[179] *Cyprus v. Turkey*, app. no. 25781/94, ECHR [GC] (10 May 2001) §3.
[180] Ibid., §3.

Electronic copy available at: https://ssrn.com/abstract=4430270

Turkey[181] to establish that Turkey had "effective overall control over northern Cyprus" and found Turkey responsible for the acts committed by not only the Turkish soldiers on the ground but also the local administration of Northern Cyprus.[182]

Both the Commission and the Court refused to engage with the task of establishing the number of missing persons or whether they were still alive. Instead, they limited their review to procedural steps taken by the Turkish government in clarifying the fate and whereabouts of the disappeared.[183] The Court drew attention to the fact that Turkish officials never looked into the disappearance allegations.[184] Furthermore, it underlined that delegating this task to the UN Committee on Missing Persons did not relieve the responding state from its procedural obligation.[185] Then, it arrived to the conclusion that state authorities' failure to conduct effective investigation clarifying the fate and whereabouts of missing Greek Cypriots, who "had disappeared in life-threatening circumstances,"[186] constituted a continuous violation under Article 2 (right to life).[187] In line with this reasoning, the Court found that disappearances constitute continuous violations,[188] and argued that the relatives of missing persons "were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time."[189]

More importantly, it highlighted that the mere fact that some of the relatives had not witnessed the detention of the disappeared, nor complained about the disappearance to the authorities, did not strip them of their victimhood status under Article 3.[190] Thus, the Court departed from the criteria for victimhood of the next-of-kin developed in *Çakıcı v. Turkey*. It justified this position by arguing the following: "The overall context must still be vivid in the minds of the relatives of persons whose fate has never been accounted for by the authorities. They endure the

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[181] *Loizidou v. Turkey,* app. no.15318/89, ECHR [GC] (18 December 1996).
[182] Ibid., § 77.
[183] Ibid., §121.
[184] Ibid., § 134.
[185] Ibid., § 135.
[186] Ibid., § 126.
[187] Ibid., § 136.
[188] Ibid., § 136., §150, §154.
[189] Ibid., § 157.
[190] Ibid., § 157.

Electronic copy available at: https://ssrn.com/abstract=4430270

agony of not knowing whether family members were killed in the conflict or are still in detention or, if detained, have since died."[191] Thereby, it relaxed the victimhood criteria and underlined the continuous nature of the inhuman and degrading treatment that the next-of-kin of the disappeared persons undergo, for this case.

However, these conclusions were mostly tailored solely for this case. For example, in *Akdeniz and Others v. Turkey,* a case decided only 21 days after, the Court went back to the strict application of *Çakıcı* criteria for establishing the victimhood of the next-of-kin. In *Akdeniz and Others,* a group of applicants of Kurdish origin complained about the disappearance of their relatives subsequent to their detention by Turkish forces in an operation conducted in their village.[192] In this case, the Court found that the applicants' suffering arising from the disappearance of their relatives did not amount to inhuman and degrading treatment.[193] This decision was based on the fact that (i) only one of the applicants was present at the time of the operation during which the disappeared persons were detained, (ii) not all of the applicants were active enough in inquiring about their relatives' disappearance.[194] These are the very conditions that the Court decided to be lenient about in *Cyprus v. Turkey*.

Secondly, although the Court emphasized that enforced disappearances are continuous violations in *Cyprus v. Turkey*, [195] it later on backtracked from this position in two admissibility decisions with respect to enforced disappearance complaints brought by Turkish Cypriots, namely *Karabardak and Others v. Cyprus*,[196] and *Baybora and Others v. Cyprus* in 2001. In both cases, the applicants complained about their relatives' abduction by the Greek-Cypriot militias and their subsequent disappearance in 1964. The Court dismissed them, finding the submission of their application before the Court to be 'too late.' The Court specifically argued that even if there were no effective remedy available to the applicants, "they must be considered to have been aware of

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[191] Ibid., § 157.
[192] *Akdeniz and Others v. Turkey,* §7.
[193] Ibid., §102.
[194] Ibid., §102.
[195] Petra Dijkstra et al., "Enforced Disappearances as Continuing Violations," *Amsterdam International Law Clinic* (2002): 19.
[196] *Karabardak and Others v. Cyprus,* app. no. 76575/01 (admissibility decision), ECHR (22 October 2002) and *Baybora and Others v. Cyprus,* app. no. 77116/01 (admissibility decision), ECHR (22 October 2002).

Electronic copy available at: https://ssrn.com/abstract=4430270

this long before 30 October 2001, the date on which they introduced their application."[197] The Court's reasoning in these cases was later criticized as being inconsistent by Judge Spielmann and Power.[198] They rightly stated that "a continuing violation such as occurs when a State fails to investigate or account for enforced disappearances does not cease by the passage of time to be a continuing violation."[199]

It appears that *Cyprus v. Turkey* was a *sui generis* ruling. The Court echoed the international community's position on this conflict, contributing to the efforts to expose the illegality of the situation and the associated human rights abuses. As Nikola Kyriakou argues, "the Greek-Cypriot side considers [this judgment] as the most important victory on the legal plane."[200] Yet, it also paved the way for developing a maximalist conception of truth recovery in the context of other transitional justice cases. The Court's emphasis on defining disappearances as continuous violations, if not immediately groundbreaking, served as a stepping stone for developing this notion further and investigating continuous violations for not only the next-of-kin of the disappeared persons, but also for the larger public in general.

Following the eastward expansion of the 1990s, cases related to the formerly communist countries in Central and Eastern Europe began to appear in the Court's docket.[201] The Court took up the challenge to rectify the abuses committed by the communist governments and to shed light

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[197] *Karabardak and Others v. Cyprus; Baybora and Others v. Cyprus.*
[198] Kyriakou offers a comprehensive analysis of the interplay between continuous violations and six-month rule in the context of disappearances in the Court's jurisprudence. Kyriakou, "Enforced Disappearances in Cyprus."
[199] *Varnava and Others v. Turkey*, app. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (Joint Concurring Opinion of Judges Spielmann and Power) ECHR [GC] (18 September 2009) §6.
[200] Kyriakou, "Enforced Disappearances in Cyprus," 5.
[201] For more on the transition of formerly communist countries in Eastern Europe, see Pedro C. Magalhães, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics* 32 (1999); Maryam Kamali, "Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa," *Columbia Journal of Transitional Law* 40 (2001); Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (New York: Cambridge University Press, 2010).
[201] For more on the transition of formerly communist countries in Eastern Europe, see Pedro C. Magalhães, "The Politics of Judicial Reform in Eastern Europe," *Comparative Politics* 32 (1999); Maryam Kamali, "Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa," *Columbia Journal of Transitional Law* 40 (2001); Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (New York: Cambridge University Press, 2010).

Electronic copy available at: https://ssrn.com/abstract=4430270

on historical events in the absence of a truth commission set for this purpose.[202] This effectively meant that the Court had to be involved in these countries' transition to democracy.[203] The Court's venture in this regard was motivated by PACE Resolution 1096 on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems.[204] The resolution, which was designed to assist formerly communist countries' transition to democracy, recommended establishing criminal responsibility for the crimes committed under the previous regimes, among others.[205]

The case of *Association 21 December 1989 and Others v. Romania* was brought against the backdrop of these developments.[206] This case deals with human rights abuses committed in the course of the Romanian Revolution of 1989.[207] Romania was the final country in the Soviet bloc to topple its government.[208] This event, however, came in form of a chaotic revolution. It started with a small-scale protest against the ousting of a dissident priest in Timişoara on 15 December 1989, which was brutally suppressed.[209] Ten days later, this isolated protest spurred a full-blown revolution across the country.[210] As a response, the government used excessive force to crush the protests. [211] These events destabilized the entire country, as a result of which Nicolae Ceaușescu, the leader Romanian Communist Party, was removed from power.[212] However, violence ensued due to clashes between units of the military supported by armed civilians and members of the secret

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[202] Onur Bakiner, "Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society," *The International Journal of Transitional Justice* (2013): 19.
[203] For a comprehensive analysis of the European Court's role in formerly communist countries transition to democracy, see James A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era* (Oxon, New York: Routledge, 2013); Lavinia Stan, *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past* (Oxon and New York: Routledge, 2009).
[204] Parliamentary Assembly, *Resolution 1096 on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems* (27 June 1996).
[205] James A. Sweeney, "Freedom of Religion and Democratic Transition," in *Transitional Jurisprudence and the European Court of Human Rights*, ed. Antoine Buyse and Michael Hamilton (New York: Cambridge University Press, 2011), 109.
[206] *Association 21 December 1989 and Others v. Romania,* app. no. 33810/07, ECHR (25 May 2011).
[207] Peter Siani-Davies, *The Romanian Revolution of December 1989* (Ithaca: Cornell University Press, 2005), 1.
[208] Timur Kuran, "Now Out of Never: The Element of Surprise in the East European Revolution of 1989," *World Politics* 44 (1991):12.
[209] Peter Siani-Davies provides an interesting discussion on whether the Romanian Revolution is truly a revolution. Peter Siani-Davies, "Romanian Revolution or Coup d'état?: A Theoretical View of the Events of December 1989," *Communist and Post-Communists Studies* 29 (1996).
[210] Siani-Davies, *The Romanian Revolution of December 1989,* 1.
[211] Richard Andrew Hall, "The Uses of Absurdity: The Staged War Theory and the Romanian Revolution of December 1989," *East European Politics and Societies* 13 (1999): 505.
[212] Siani-Davies, *The Romanian Revolution of December 1989,* 1.

Electronic copy available at: https://ssrn.com/abstract=4430270

service (*Securitate*), who remained loyal to Ceaușescu, broke out on the streets.[213] The strife between the revolutionaries and counterrevolutionary "loyalists" brought the country to the brink of chaos.[214] More than 1,200 people lost their lives in the course of the violent and chaotic episodes leading to the downfall of the government and its aftermath.[215] This revolution, which came to be known as "the most violent of the events that transformed Eastern Europe in 1989," was reminiscent of classical revolutions, staged for overthrowing *ancien régime*.[216]

In *Association 21 December 1989 and Others,* the applicants complained about the inefficacy of the investigation into the events of December 1989 and, particularly, the way the government suppressed the protests. The government objected to this and argued that the Court did not have jurisdiction to review a case concerning events that took place before Romania ratified the Convention on 20 June 1994 (*ratione temporis*).[217] In response, the Court argued that the procedural obligation under Article 2 "has evolved into a separate and autonomous duty."[218] It further submitted, "although [procedural obligation] is triggered by the acts concerning the substantive aspects of Article 2, it can give rise to a finding of a separate and independent 'interference.'"[219] Hence, in the Court's view, this obligation was 'detachable.'[220]

Reviewing the substance of the claims, the Court found that the government failed to protect the applicants' as well as the general public's interest by failing to provide them with key information until twenty years after the events.[221] It highlighted the significance of this endeavor arguing that "in the event of widespread use of lethal force against the civilian population during anti-Government demonstrations *preceding the transition from a totalitarian regime to a more democratic system,* as in the instant case, the Court cannot accept that an investigation has been

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[213] Hall, "The Uses of Absurdity," 505.
[214] Richard Andres Hall gives an account of multiple narratives about what really happened in December 1989 and who were responsible for the chaos on the streets. Hill, "The Uses of Absurdity."
[215] *Association 21 December 1989 and Others v. Romania,* § 13.
[216] Siani-Davies, *The Romanian Revolution of December 1989,* 2.
[217] Ibid., § 114.
[218] Ibid., § 116.
[219] Ibid., § 116.
[220] The detachable nature of procedural obligations was first established in *Šilih v. Slovenia,* app. no. 71463/01, ECHR [GC] (9 April 2009).
[221] Ibid.„§ 135.

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effective where it is terminated as a result of the statutory limitation of criminal liability, when it is the authorities themselves who have remained inactive.[222]

This reasoning stood out from among the previous judgments. In this case, for the first time, the Court directly referred to the existence of the right of victims and their families to know the truth, a standard included in PACE Resolution 1463 (2005) on Enforced Disappearances. Equally significant, the Court underlined the importance of establishing the historical facts surrounding the events in December 1989 and persecuting those who were responsible for the crimes committed. The Court thereby advocated for securing the right to the truth for society as a whole. This standing brought the Court's position one step closer to framing the positive obligation to the family of the disappeared in terms of the maximalist conception of truth.

This trend continued in *Janowiec and Others v. Russia*,[223] which was lodged by fifteen Polish nationals who lost their relatives during the Katyn massacre in 1940. This event specifically referred to the mass execution of 11,000 Polish civilians, including the members of counter-revolutionary and espionage organizations, landowners, industrialists, officials, and refugees imprisoned in Western Ukraine and Belarus, in addition to 14,700 Polish prisoners of war.[224] The executions were carried out by members of the NKVD (People's Commissariat for Internal Affairs) between April and May 1940, upon the orders of the Politburo.[225] It was the Germans who discovered the massacre in 1943, and subsequently blamed the Soviets, who blamed the Germans right back.[226] The Allied powers relying on Stalin's support in their fight against the Nazis did not confront the Soviet Union about Katyn despite having sources confirming Soviet involvement in the mass killings.[227] Multiple narratives concerning the real perpetrators and the motivations behind the massacre run throughout the Cold War.[228] Both the Soviet Union and its satellite regime in

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[222] (emphasis added) Ibid.*,* § 144.
[223] *Janowiec and Others v. Russia,* app. nos, 55508/07 and 29520/09, ECHR (16 April 2012).
[224] Ibid., §14.
[225] Ibid., §15.
[226] Milena Sterio, "Katyn Forest Massacre: Of Genocide, State Lies and Secrecy," *Case Western Reserve Journal of International Law* 44 (2011): 616.
[227] George Sanford, *Katyn–The Whole Truth about the Soviet Massacre* (Oxon, New York: Routledge, 2005), 1-2.
[228] George Sanford, "The Katyn Massacre and Polish-Soviet Relations, 1941-43," *Journal of Contemporary History* 41 (2006): 96.

Electronic copy available at: https://ssrn.com/abstract=4430270

Poland covered up the truth about the massacre up until the end of the Cold War.[229] When the Russian Duma finally acknowledged their involvement in the massacre in 2010, they blamed Stalin and the Politburo officials "for having personally ordered and approved the Katyn massacre."[230]

In *Janowiec and Others v. Russia*, the applicants brought a complaint regarding the Russian authorities' failure to conduct an effective investigation into the events leading to the unlawful execution of their relatives at Katyn massacre.[231] The government argued that this case was beyond the temporal jurisdiction of the Court (*ratione temporis*), as the events took place in 1940, even before the Convention was adopted.[232] In response, the applicants argued that the execution of prisoners of war constituted a war crime under international customary law.[233] Therefore, the Soviet Union and its legal successor, the Russian Federation had a duty to investigate this crime.[234] They also submitted that since the significant procedural steps of the investigation took place after Russia ratified the Convention on 5 May 1998, the Court had competence to examine the complaint under the procedural limb of Article 2.[235] Another suggestion the applicants made was that "the Katyn massacre could be treated as a 'disappearance case.'"[236] Since disappearances were determined to be continuous violations, the state would have an obligation to investigate regardless of when the crime was committed.[237] The Court, however, upheld the government's argument and decided that it did not have the competence to review the claims brought under Article 2.[238] It contended that although the responding state had an obligation to investigate "on account of political, legal or ethical considerations," they did not necessarily have "the procedural obligation to investigate which flows from the Convention."[239]

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[229] Sanford, *Katyn – The Whole Truth about the Soviet Massacre*, 3.
[230] Sterio, "Katyn Forest Massacre: Of Genocide, State Lies and Secrecy," 620.
[231] *Janowiec and Others v. Russia*, §112.
[232] Ibid., §113.
[233] Ibid., § 118.
[234] Ibid., §118-119.
[235] Ibid., §130.
[236] Ibid.,§121.
[237] Ibid.,§121.
[238] Ibid.,§ 142.
[239] Ibid.,, § 141. The Court also found Russia in violation as the Russian authorities refused to furnish the Court with essential information and domestic case files collected in the course of Katyn investigation, Ibid., § 109-111.

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Furthermore, the applicants complained about the authorities' unwillingness to provide them with information about the fate and whereabouts of their relatives, as well as their dismissive approach when handling their request for information, which led to aggravated suffering and despair.[240] The government of Poland, which intervened as a third party, supported the applicants' position and advanced that they suffered from "a feeling of constant uncertainty and stress" due to "the lack of access and contradictory information the applicants had received." [241]

The Court began determining "the proximity of the family ties" and whether the applicants' suffering reached the threshold to fall under Article 3.[242] The Court differentiated the applicants who were born at least a few years before their fathers' departure for the war and those who were born after their fathers left for the war.[243] It found that the suffering of the latter group did not pass the threshold to fall under Article 3, since they did not spend the formative years of their lives with their father and form a bond with them before they went missing.[244] Therefore, it decided to limit its review only to the claims of the former group.[245]

Assessing the way the Russian authorities handled these applicants' requests for information, the Court found that "the applicants suffered a double trauma: not only had their relatives perished in the war but they were not allowed, for political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years."[246] It also presented the different stages of the applicants' suffering by noting "the applicants have thus lived through a long period of uncertainty about the fate of their loved ones, followed by the Soviet-time epoch of deceit and distortion of historical facts, and then suffered frustration on account of an apparent lack of progress in the

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[240] More specifically the applicants argued that the government authorities' decision to categorize Katyn victims as "disappeared persons" in 2004 and unjustified denial to provide the victims' next-of-kin with information constituted inhuman and degrading treatment Ibid., §143.
[241] Ibid., §149.
[242] Ibid., § 153-154.
[243] Ibid., § 153-154.
[244] Ibid., § 154.
[245] Ibid., § 153.
[246] Ibid., §156.

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investigation"[247] This conclusion incorporated two concerns: attempting to establish historical facts and providing families' access to justice.

The *Janowiec* judgment could have been considered an important milestone for the right to the truth, not only for the immediate families of the victims, but also for the larger public. However, this judgment was reversed by the Grand Chamber during the following year. It was the applicants who referred the case to the Grand Chamber only to lose the ground they gained in the Chamber judgment.[248]

The applicants disagreed with the Court's decision to dismiss the claims of the applicants who were born after their fathers' departure for the war, arguing that they were all equally affected by the loss of their relatives, and urged the Grand Chamber to extend victimhood status to them all.[249] This time, in addition to the government of Poland, several human rights NGOs including (i) the Open Society Justice Initiative, (ii) Amnesty International, (iii) the Public International Law and Policy Group and (iv) Memorial, the European Human Rights Advocacy Centre and the Transitional Justice Network as a group, were granted leave to submit *amicus curiae* briefs.[250] They drew attention to the individual and collective dimensions of the right to the truth and invited the Court to consider them both in light of existing jurisprudence and treaty law.[251]

The Grand Chamber took an unexpected turn and set aside the arguments presented by the applicants and third parties. First, agreeing with the Chamber's decision, it found that the applicants' complaint of "prolonged denial of historical fact"[252] was beyond the jurisdiction of the Court.[253] Subsequently, it limited the objectives of an effective investigation to "the identification

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[247] Ibid., §157.
[248] *Janowiec and Others v. Russia,* app. nos. 55508/07 and 29520/09, ECHR [GC] (21 October 2013) §9.
[249] Ibid., § 173.
[250] Ibid., §11.
[251] Ibid., § 123-127.
[252] Ibid., § 162.
[253] In that instant, the Court chose not to apply the reasoning developed in *Varnava and Others v. Turkey*, which effectively differentiated the obligation to investigate suspicious deaths and disappearances, and the principle that disappearances are continuing violations established in *Cyprus v. Turkey*. Corina Heri, "Enforced Disappearances and the European Court of Human Rights' *ratione temporis* Jurisdiction: A Discussion of Temporal Elements in *Janowiec and Others v. Russia*," *Journal of International Criminal Justice* 12 (2014): 755-756.

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and punishment of those responsible or to an award of compensation to the injured party."[254] According to this reasoning, the objectives exclude "other types of inquiries that may be carried out for other purposes, such as establishing a historical truth."[255] Second, concerning Article 3 specifically, the Grand Chamber argued that the jurisdiction of the Court extended only to 5 May 1998, when the Convention entered into force in Russia. Instead of extending victimhood status to all of the applicants, the Court held that by that time there was "no lingering uncertainty as to the fate of the Polish prisoners of war," and the applicants' relatives' death was "publicly acknowledged." [256] Therefore, it pronounced that the applicants' suffering arising from the loss their relatives was below the threshold to fall under Article 3.[257]

In this case, the Court applied stricter criteria for establishing the victimhood of the next-of-kin of the disappeared, different from the one used in *Cyprus v. Turkey*, although both cases concerned historical violations. It effectively took a step back and limited the application of this obligation to the discovery of the whereabouts of the disappeared (minimalist truth conception), rather than establishing truth for society at large (maximalist truth conception). In so doing, it expressed that one cannot abstract an autonomous right to historical truth from procedural obligations. This judgment was a retreat from the reasoning used not only in the Chamber judgment of *Janowiec* but also A*ssociation of 21 December 1989* and *Cyprus.* Judges Kovler and Judkivska's concurring opinion in the Chamber judgment foreshadowed the position taken by the Grand Chamber. They submitted that "the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted 'as part of the process of *reconstructing* western Europe in the aftermath of the Second World War,' and not with the intention of delving into that black chapter."[258]

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[254] *Janowiec and Others v. Russia* [GC], § 143.
[255] Ibid., § 143.
[256] Ibid., § 186.
[257] Ibid., § 188.
[258] Ibid., (Joint Concurring Opinion of Judges Kovler and Yudkivska)

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iv. Extraordinary Renditions

Ostensibly, the *Janowiec [GC]* judgment seemed to have closed the gates for expanding states' positive obligations in the context of enforced disappearances–either by obliging them to inform the general public or lodging the right to truth as an autonomous right. However, before arriving at such a conclusion, one has to compare it with another Grand Chamber judgment on the right to the truth, namely *El-Masri v. The Former Yugoslav Republic of Macedonia [GC].*[259] This case, which concerned an extraordinary rendition of a German national, was decided just a couple of months after the Chamber Judgment of *Janowiec*. Extraordinary rendition is an "extra-judicial practice" that involves unlawful abduction, arrest and/or transfer of terrorist suspects, or their transportation to another country, where they are interrogated, often held incommunicado, detained, and tortured.[260]

El-Masri v. The Former Yugoslav Republic of Macedonia involved the extraordinary rendition of Khaled El-Masri by the Macedonian authorities upon the request of the United States Central Intelligence Agency (CIA). El-Masri's rendition story was an example of one of the darkest practices of the so-called 'war on terror,' namely the secret rendition program of the CIA that had been operating with the collusion of several European governments. Therefore, his case, which was represented by lawyers affiliated with the Open Society Justice Initiative, became a high-profile case and immediately attracted the attention of several other institutions.[261] The UN Office of the High Commissioner for Human Rights, Interights, Redress, the International Commission of Jurists, and Amnesty International all intervened in the written procedure as third parties.[262]

El-Masri's 'odyssey' was emblematic of the way the CIA conducted these secret rendition operations.[263] According to his account, on 31 December 2003, he traveled to Skopje, Macedonia,

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[259] *El-Masri v. The Former Yugoslav Republic of Macedonia,* app. no. 3963/09, ECHR [GC] (13 December 2012).
[260] European Parliament, *On the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners,* 2006/2200(INI) (18 January 2006), §36.
[261] *El-Masri v. The Former Yugoslav Republic of Macedonia,* § 2.
[262] Ibid., § 10.
[263] The term 'odyssey' to describe El-Masri's abduction and detention story was taken from the Marty Report prepared by the PACE. Parliamentary Assembly Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States,* Doc. 11302 rev. (11 June 2007) [Marty Report], § 273.

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where he was arrested, held incommunicado, questioned, and ill-treated.[264] Then, he was handed over to a CIA "rendition team" at Skopje Airport, and subsequently tortured.[265] The CIA agents transferred him to a secret detention facility in Afghanistan for the interrogation of high-level terrorist suspects, where he stayed for over four months (between 23 January 2004 and 29 May 2004).[266] He was kept in a dark and dirty cell without a bed, having no communication with the outside world.[267] Moreover, he was subjected to ill-treatment and force-feeding, and (mostly) denied access to required medical care.[268] Then, on 28 May 2004 he was transported to Albania, in the company of a German-speaking man who identified himself as "Sam," later identified as a German intelligence officer.[269] At the Albanian border, they released him, and on 29 May 2004, he finally returned to Germany.[270]

El-Masri brought his complaint before German authorities and the investigations conducted confirmed his account, except for the involvement of the German intelligence serviceman and the motives of El-Masri's visit to Skopje.[271] Moreover, the American Civil Liberties Union (ACLU) filed a complaint on behalf of El-Masri under Alien Tort Status in the United States. However, his case was dismissed by the District Court for the Eastern District of Virginia, which ruled, "the State's interest in preserving State secrets outweighed the applicant's individual interest in justice."[272] The applicant also lodged a criminal complaint in the Former Yugoslav Republic of Macedonia, yet his complaint was dismissed on the ground that it was unsubstantiated.[273] Finally, when El-Masri's case was brought before the ECtHR.

El-Masri, who had been abducted and secretly transported to places that he did not know, would naturally have little evidence to present to legal authorities. However, his case, which

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[264] *El-Masri v. The Former Yugoslav Republic of Macedonia,* § 17-19.
[265] Ibid., § 21.
[266] Ibid., § 21-24.
[267] Ibid., § 24.
[268] Ibid., § 25-28.
[269] Ibid., § 31.
[270] Ibid., § 33.
[271] Ibid., § 55-61.
[272] Ibid., § 63.
[273] He also brought a civil action and this case was pending at the time the Court reviewed El-Masri's case. Ibid., § 67-71.

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illustrated the European countries' collusion in rendition operations, attracted the attention of the UN, the Council of Europe, and the European Parliament. Both the Concluding Observations of the UN Human Rights Committee as well as the report prepared by the Commissioner for Human Rights of the Council of Europe on the Former Yugoslav Republic of Macedonia recommended "a new and comprehensive investigation" into El-Masri's allegations.[274] Both the Parliamentary Assembly of the Council of Europe (PACE) and the European Parliament instituted initiatives to investigate the CIA's extraordinary rendition program and the extent of European governments' participation, which resulted in two reports, namely the Marty Report and the Fava Inquiry.[275] The Court relied on information provided by these reports when establishing the truth about the circumstances of El-Masri's rendition.

First, the Marty Report prepared by Special Rapporteur Dick Marty, appointed by the Committee on Legal Affairs and Human Rights of the PACE, provided an overview of these operations in general and El-Masri's case in specific, confirming his story.[276] In particular, the report looked into how the extraordinary rendition program, implemented in the mid-1990s by the Clinton administration, had been used to capture and detain terrorist suspects at "black sites," beyond the reach of any legal system.[277] The report also identified several Council of Europe members, such as Poland, Romania, Turkey, Sweden, Italy and the United Kingdom, which participated at various stages of the rendition operations, including running secret detention centers, transferring detainees or providing logistical support.[278] These operations would be conducted under utmost secrecy and without public scrutiny.[279] The PACE Resolution 1507 (2006) pointed out this problem and submitted that "attempts to expose the true nature and extent of these unlawful

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[274] Ibid., § 38.
[275] Human Rights Committee, *Concluding Observations of the Human Rights Committee: The Former Yugoslav Republic of Macedonia,* CCPR/C/MKD/CO/2 (17 April 2008), § 14; Council of Europe Commissioner for Human Rights, Thomas Hammerberg, *Report on Visit to the Former Yugoslav Republic of Macedonia, 25-29 February*, CommDH(2008)21 (11 September 2008), § 74-76.
[276] *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States,* AS/Jur (2006) 16 Part II (7 June 2006).
[277] Ibid., §26-36.
[278] Ibid., §43.
[279] The Marty report also mentioned that US authorities put pressure on the media outlets, namely the Washington Post, and the ABC television channel, to deter them from publishing specific locations of secret prisons in Europe. *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States,* Doc. 11302 rev., §32.

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operations have invariably faced obstruction or dismissal from the United States and its European partners alike. The authorities of most Council of Europe Member States have denied their participation, in many cases without actually having carried out any inquiries or serious investigations."[280] Rapporteur Marty, in his subsequent report, encouraged the Council of Europe institutions to take a proactive stand concerning this issue. He underlined the Council's "unique responsibility" in discovering and publicizing the truth "in light of its unparalleled pedigree for protecting and promoting human rights on our continent."[281]

Second, the Fava Inquiry, a European Parliament initiative established in 2006 to investigate the CIA-administered prisons in Europe, presented similar findings on the European countries' involvement.[282] The European Parliament drew attention to the fact that extraordinary rendition and the secret detention of terrorist suspects constituted complex violations. These acts could give rise to not only violations of the right to liberty and security, or freedom from torture, but also the right to life, in extreme situations.[283] Moreover, the European Parliament advanced that secret detention of terrorist suspects amounted to enforced disappearance.[284] Consequently, the next-of-kin of the secretly detained individuals who were denied information regarding the fate and whereabouts of their relatives were also victims.[285] Moreover, criticizing European governments for turning a blind eye to extraordinary renditions operations, the Fava Inquiry pointed out that the CIA operated at least 1,245 flights in Europe between 2001 and 2005.[286] Finally, the Parliament recommended those European States involved in extraordinary rendition operations conduct investigations and make their results public.[287]

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[280] Parliamentary Assembly Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States,* Resolution 1507 (2006) (27 June 2006), § 11.
[281] *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States,* Doc. 11302 rev.. §32.
[282] The report specifically lists the countries that were involved in extraordinary rendition operations and the extent of their involvement. European Parliament, *On the Alleged Use of European Countries by the CIA*, §49-184.
[283] Ibid., §F.
[284] Ibid., §F.
[285] Ibid., § 37.
[286] Ibid., § 42.
[287] Ibid., § 185.

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In response to the cloud of secrecy surrounding the extraordinary rendition program, the European institutions advocated for "revealing the truth." Their attitude towards the extraordinary rendition program was just one component of the general criticisms directed to the 'war on terror' policies of the United States government. For example, the PACE pointed to the fact that due to the treatment of detainees in detention centers such as Abu Ghraib and Guantanamo Bay, the United States "paid a high price in terms of loss of international credibility."[288] A report prepared by Tony Lloyd on behalf of the Committee on Legal Affairs and Human Rights of the PACE identified the deteriorating human rights record of the United States as an indication of its faltering commitment to the modern system of international relations. Lloyd report specifically affirmed the following:

> Since the Second World War the US has led international efforts in creating the modern, multilateral rules-based system of international relations, and has been a driving force in establishing the current architecture of international institutions. As the rules of international law have become broader in scope and deeper in effect, the commitment to the modern system has faltered, and far-reaching questions have been asked as to whether the US remains well-served by its traditional approach.[289]

These reactions signaled that the Old World and the New World would part ways concerning the constitutive role of standards of human rights protection for the international system. The use of secret renditions in the fight against terrorism was one of the bones of contention.

The *El-Masri* judgment was an important part of this collaborative stand against the 'war on terror' measures of the United States. Third-party interveners joined this effort and advocated for framing this case within the right to the truth paradigm. The UN Office of the High Commissioner for Human Rights advanced that "the right to the truth was an autonomous right triggered by gross violations, as in the case of enforced disappearance."[290] Moreover, Interights encouraged the Court

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[288] Parliamentary Assembly, *The United States of America and international law,* Resolution 1539 (2007) (16 March 2007), §4.
[289] Parliamentary Assembly Committee on Legal Affairs and Human Rights, *The United States of America and international law*, Doc. 11181 (8 February 2007), §3.
[290] Ibid., § 175.

Electronic copy available at: https://ssrn.com/abstract=4430270

to identify extraordinary renditions as an "impermissible system of violations" and to establish "the State's responsibility under the Convention."[291] Redress brought an expert report prepared by a clinical psychologist explaining the positive impacts for victims of the public disclose of truth.[292] Finally, Amnesty International and the International Commission of Jurists proposed, "Articles 3 and 5, read in conjunction with Article 13, entailed a right to the truth concerning violations of Convention rights perpetrated in the context of 'secret detentions and renditions system.'"[293]

These arguments must have resonated well with the Court, since it showed a willingness to frame violations arising from extraordinary renditions from the perspective of a maximalist truth conception. The Court emphasized that this case was highly significant "not only for the applicant and his family but also for other victims of similar crimes and the general public, who had the right to know what had happened."[294] With this reasoning, the Court presented the positive obligation to the family of the disappeared from the maximalist truth perspective, including incorporating the general public's interest to know the truth. The Court had the complete support of not only the Council of Europe bodies, but also the EU and the UN institutions in this regard.

The apparent inconsistency between the *Janowiec* and *El-Masri* judgments, could be due to the Court's unwillingness to deal with the thorny issue of settling the historical truths related to atrocities committed during the course of the Second World War. Moreover, one needs to take the specific circumstances of the *Janowiec* case into consideration. The applicants complained about the violations that occurred even before the establishment of the European Convention system. Therefore, finding a violation in the Katyn massacre could have set a precedent inviting similar cases regarding historical violations before the Court. This would require the Court to assume a historical truth revelation body, and the existing structure of the Court is clearly not fit for such a task. *El-Masri*, however, dealt with a contemporary problem, the repercussions of which could be reversed by implementing stricter protection measures and allowing greater public scrutiny.

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[291] Ibid., § 176.
[292] Ibid., §177.
[293] Ibid., § 179.
[294] Ibid., § 191.

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c) *African System of Human and Peoples' Rights*

The African system of human rights is, in comparison to the Inter-American and the European systems, the one where the right to truth seems to be least developed. No specific framework to address enforced disappearance exists yet, and the jurisprudence both of the African Commission on Human and People's Rights and the Court has only exceptionally dealt with cases touching upon enforced disappearance and the right to truth. For example, In *Malawi African Association and Others v. Mauritania*, the Commission recommended the government to "arrange for the commencement of an independent inquiry in order to clarify the fate of persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned".[295] More recently, in *IHRDA and Others v DRC*, the Commission ordered as a measure of reparation to conduct an independent investigation to clarify the fate of the victims and ensure due reparation to their beneficiaries.[296] But neither the Commission nor the Court has gone much further in their jurisprudence.

That said, some minor developments in recent years have hinted at the increasing recognition of the right to truth. One of them is the Commission's General Comment 3 on the Right to Life, where it recognized that enforced disappearance is a gross violation of this right and that accountability plays an important role in this regard. It said, specifically, that "in certain circumstances, independent, impartial and properly constituted commissions of inquiry or truth commissions can play a role, as long as they do not grant or result in impunity for international crimes. Accountability also encompasses measures such as […] making the truth known […]".[297] Moreover, in 2018, the Commission adopted a resolution expanding the mandate of the Working

[295] Malawi African Association and Others v. Mauritania, No. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (ACommHPR 2000).
[296] Instituto de Direitos Humanos e Desenvolvimento na Africa e outros v. Democratic Republic of Congo, No. Comunicação 393/ 10 (ACommHPR 2016).
[297] ACHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life, Article 4', n.d., para. 17.

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Group on Arbitrary Killings to include enforced disappearance and to keep a database of reported cases.[298] This is expected to increase the attention on the issue in the years to come.

Other than this, two sets of principles adopted by the Commission have made references to the right to truth. The first ones are the *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*, adopted in 2003, which include within the legal concept of "effective remedy" the element of "access to the factual information concerning the violations". While not clearly referring to the right to truth, this formulation has clear implications on this right.[299] More importantly, however, the *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*, of 2015, deal expressly with the right to truth and establish that:

> *States shall not withhold information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to life, personal liberty, and security. Such information may not be withheld on national security grounds in any circumstances. State authorities shall also not withhold information for the purpose of precluding accountability of States or individuals, or to preclude victims from securing a remedy to gross human rights violations or serious violations of international humanitarian law.*

The inclusion of these considerations in the *Principles* evidences that there is an increasing awareness of the issue in Africa. Withal, the fact that they remain non-binding and that their subject matter concerns only counterterrorism makes it clear that the reception of the right to truth in the continent is only partial so far.

II. Analysis (SCR Framework)

The right to truth is built upon the states' positive obligation to inform the family of the disappeared persons. Initially, it had a narrow scope—concerning only the immediate relatives (minimalist truth conception). But over time, and in some geographies and in some contexts, it grew to have a larger scope—concerning the society at large (maximalist truth conception). The dominant paths are

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[298] REDRESS, 'The Forgotten Victims: Enforced Disappearance in Africa', 2021, 15, https://redress.org/publication/the-forgotten-victims-enforced-disappearance-in-africa/.
[299] REDRESS, 36.

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judicial and multilateral pathways. The bureaucratic pathway is also invoked to a certain extent with the work of the Working Group on Enforced Disappearances and the Special Rapporteur.

Selection

The main **change agents** are civil society organizations repeatedly bringing awareness around this issue on the global level and joining strategic litigation campaigns before regional courts and UN bodies. They use several strategies to successfully introduce a new right to truth and flesh out the contents of this new norm. European institutions such as PACE and the European Parliament also contributed to the formulation and solidification of the change attempt on the regional level.

The human rights institutions at the global level, such as Human Rights Committee or Human Rights Council as well as regional courts and institutions showed a high degree of **availability and receptiveness**. While the Inter-American Court and the UN Human Rights Committee were more receptive to helping construct this new right, the European Court and the African Court were less so. The European Court has been inconsistent and less receptive to the idea of maximalist truth conception. The African Court, on the other hand, has yet to have a chance to fully consider the matter.

While there is no critical juncture in this case, the context played a big role in bringing forward and formulating the right to truth. Civil society campaigns raised awareness around widely-practiced enforced disappearance practices in Latin America in the 1970s and 1980s, and in Europe in the 1990s and 2000s. These campaigns created an **opening** to discuss this phenomenon and the victims' relatives' rights in both political and judicial settings.

Construction

This is a case of **norm emergence**, whereby a new right is created based on the states' obligation to investigate and inform the relatives of the disappeared person. This obligation emanates from the prohibition of torture and inhuman or degrading treatment and the right to life. Hence, the norm builds upon such **stable understandings** as well as increased attention to the due diligence principle. Despite having such a stable basis, the new right to truth appears to be quite a hallow with multiple formulations of the right to truth co-existing—both minimalist and maximalist truth

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conceptions sometimes invoked by the same institution. While the UN institutions, the UN HRC, and the IACtHR have been willing to incrementally build a right to truth and invoke maximalist truth conception, the developments at the African Court appear to be in their infancy. As for the European Court, it shows the most complicated trajectory with twists and turns. On balance, the European Court favored the minimalist truth conception, especially in the context of counter-terrorism operations and some historical justice cases (with the most notable exception of the *Cyprus v. Turkey* case). This is despite the fact that a maximalist truth conception was highly and repeatedly advocated by civil society organizations that either formed strategic litigation networks or sent *amicus curiae* briefs. The Court came closer to the maximalist truth conception in the context of extraordinary rendition cases and only when such an approach was highly encouraged by other European institutions such as the PACE and the European Parliament.

The pace of change can be considered incremental since the formulation of the new right took a long time with the earliest claims about this phenomenon dating back to the 1980s. **The salience** of the issue fluctuated over time and across regions. While the salience of the issue was overall moderate, it increased in Latin America in the 1970s and 1980s and in Europe in the 1990s and especially in the 2000s, which reached the highest point in the context of European countries' involvement in the US's extraordinary rendition operations.

Reception

The new formulation of the right to truth is widely shared by both the UN and regional human rights institutions, albeit both in its minimalist and maximalist forms. In that regard, the burden of argument has shifted. Therefore, **the outcome** can be considered to be successful with the norm not contested, especially the version with the narrow scope (the minimalist truth conception). However, it is hard to assess state recognition. Perhaps the most straightforward metric is the ratification information of the ICPPED, which is currently composed of 68 states.[300] The self-made map below shows the geographic representation of state parties.

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[300] Albania, Argentina, Armenia, Austria, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Burkina Faso, Cambodia, CAR, Chile, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Dominica, Ecuador,

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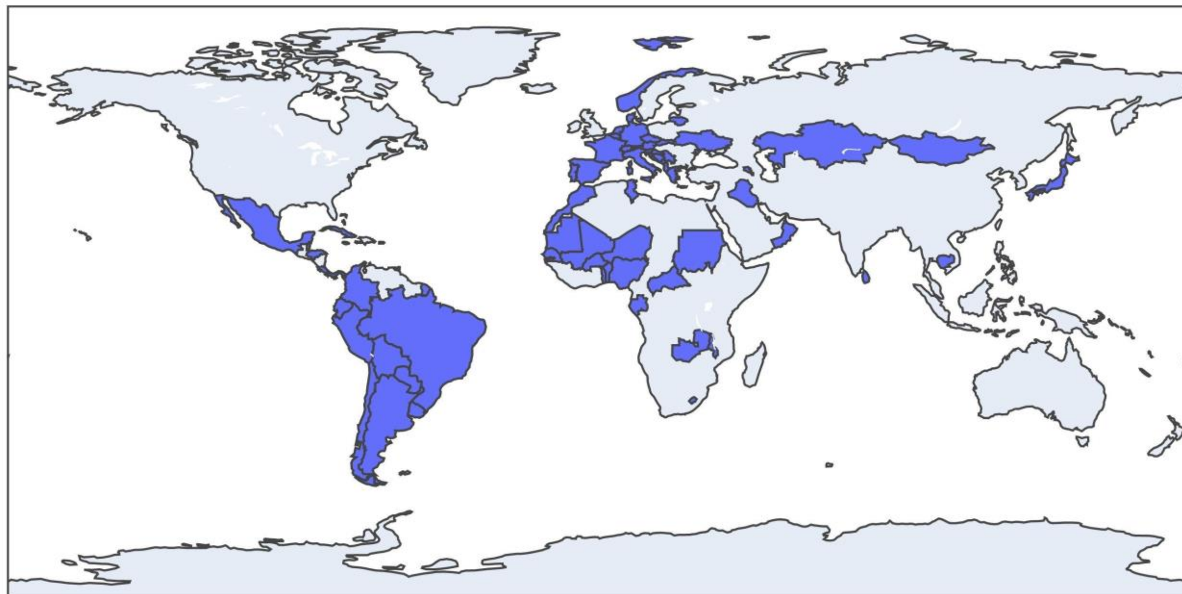
Figure 1: Geographic representation of the ICPPED member states



As seen here, the norm is most clearly consolidated in Latin America, with Europe and Africa coming the second and the third. The norm is least consolidated in Asia.

Particularities of the case

i. Civil society playing a leading role

In this case, we can clearly see civil society's leading role in raising awareness and legally constructing a new right through strategic litigation campaigns. In this regard, this is a typical and emblematic human rights case.

Fiji, France, Gabon, Gambia, Germany, Greece, Honduras, Iraq, Italy, Japan, Kazakhstan, Lesotho, Lithuania, Luxembourg, Malawi, Mali, Malta, Mauritania, Mexico, Mongolia, Montenegro, Morocco, Netherlands, Niger, Nigeria, Norway, Oman, Panama, Paraguay, Peru, Portugal, Samoa, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Switzerland, Togo, Tunisia, Ukraine, Uruguay, and Zambia.

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ii. Civil society promoting cross-fertilization across different courts

One key feature of this case is not only that civil society groups played an important role as change agents, but also, they promoted cross-fertilization across different courts. For example, the strategic litigation efforts in Europe relied on the jurisprudential developments in the Inter-American and UN system. By relying on the previous case law in their arguments, they helped diffuse this emerging right while helping cross-pollinate the case law across institutions and regions.

iii. Norm development through regional jurisprudence

This is a case where political developments set the broader contours of a right, the contents of the right and limits of its application are set through jurisprudential developments, mostly driven by regional courts.

iv. Uneven regional developments

This case epitomizes how regional developments may be uneven, even if there is an overall agreement over the existence of a right. While the UN Human Rights Committee and the IACtHR definitions were the most comprehensive ones, the ECtHR's approach often lagged behind. This reflects in the map below, which shows that the norm is most clearly consolidated in Latin America. Moreover, in Africa, the development of the norm has been much slower, even if many African states are members to the ICPPED.

v. Wide in rhetoric; narrow in application

While this new right has been widely discussed in both global and regional organizations, its application is limited to the cases of systemic enforced disappearances practices. The case law indicates that this practice was widely exercised in a limited number of countries and in select contexts such as wars, counterterrorism operations, or situations when the rule of law breaks down. This shows that the applicatory scope of this new right seems to be rather narrow.

vi. No vivid opposition but a meager support

While there is no visible opposition to the new right to the truth on the political level, we also see that there is also no overwhelming support either. The ICPPED, the treaty that formalized the right

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to truth, has only 68 state parties. The right to truth is discussed only with respect to certain authoritarian and repressive states and certain situation such as the extra-ordinary rendition. While it is widely referred to in rhetoric, its purchase appears to be limited.

vii. Legal technicism to circumvent politics

It is noteworthy that, at least in the Latin American context, the narrative of the right to truth emerged at a time when military dictatorships were still in power. Through seemingly depoliticized legalism, it helped attain justice without having to challenge the repressive political systems its agents were facing. In other contexts, however, the struggle against amnesties through the narrative of truth has had important political consequences and has been perceived as a political use of human rights discourse and law.

viii. Politics fueling judicial developments

In the European context, political developments did not run contrary to judicial developments. On the contrary, sometimes political bodies gave a push to the ECtHR to frame the new right in more audacious terms. European institutions' efforts gave the ECtHR judicial courage to adopt a maximalist truth conception on select cases with respect to certain issues. This in a way runs contrary to the developments in Latin America.

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Part III.

INTERNATIONAL HUMANITARIAN LAW

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Case Study 8

Direct Participation in Hostilities

(February - June 2019)

(Pilot case)

Dorothea Endres[1]

I. Methodological Considerations

Situated in the research project on paths of change in international law, the present paper aims at providing a pilot case study for the field of international humanitarian law. This paper aims at tracing how change in the law of direct participation of hostilities happened and to provide conclusions that are generalizable beyond this specific case. As a pilot case study, this case has also explorative value for the case studies that are intended to follow. The primary analytical method used will be process tracing.

1. *Process-tracing*

If international Law textbook authors account for change, they tell stories of how that change came about - based on the authors' implicit evaluation of different sources of authority for that change. For instance, while DINSTEINS primary source of refence for the legal change of DPH is the Israelian Supreme Court, SASSOLI refers for his story of that change extensively to the DPH guidelines and ends up with a fairly different story.[2] Typically, 'the story' is a sequence of actions of events in the world while 'the discourse' is the presentation or narration of such events.[3] The

[1] I would like to thank Abhimany George Jain and Linus Mührel for their inputs.
[2] See elaborations below at III. 1.2.
[3] Mathew Windsor, *Narrative Kill or Capture: Unreliable Narration in International Law*, 28 LEIDEN JOURNAL OF INTERNATIONAL LAW 743–769, 745 (2015).

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latter is meant to give shape and significance to those sequences. [4] Those two elements together constitute narratives that depend largely on the perspective taken by the respective narrator.

Attempting at a more objective establishment of how change happened, process tracing relies on causal mechanisms. Those causal mechanisms are considered to be ontological entities and processes that are unobservable.[5] However, theories about those causal mechanisms can generate observable and testable implications.[6] In order to avoid a "hopeless clogging of the narrative", it is necessary to make the hypotheses about underlying theorized causal mechanisms as explicit as possible.[7] Those theories can then be tested on several accounts: BENNETT and CHECKEL suggest four tests:[8] (1) Hoop test: evidence is certain but not unique, [9] (2) smoking gun test: evidence is unique but not certain, [10] (3) doubly decisive test: evidence is unique and certain, [11] and (4) straw-in-the-wind test: weak/circumstantial evidence.[12] However, the evidence available for the case to be analyzed is predominantly circumstantial evidence, that hardly goes beyond subjective narratives – the research is hence concerned to be as considerate as possible of this methodology in respecting the more general best standards established by BENNETT and CHECKEL. Those authors put forward a three-part standard for a good application of process tracing:[13]

1) *Metatheoretically, it has to be grounded in a philosophical base that is ontologically consistent with mechanism-based understandings of social reality and methodologically plural.*
2) *Contextually, it has to utilizes this pluralism to reconstruct (a) carefully hypothesized causal processes and (b) keep sight of broader structural discursive context*
3) *Methodologically, it will take equifinality seriously and consider alternative causal pathways.*

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[4] Peter Brooks, *Narrative Transactions – Does the Law Need a Narratology?*, 18 YALE JOURNAL OF LAW AND THE HUMANITIES 1–28, 24 (2006).
[5] Andrew Bennett & Jeffrey T. Checkel, *Process tracing: from philosophical roots to best practices*, *in* PROCESS TRACING: FROM METAPHOR TO ANALYTIC TOOL , 12 (Andrew Bennett & Jeffrey T. Checkel eds., 2014).
[6] *Id.* at 12.
[7] *Id.* at 9. [When I recall correctly our meeting on process tracing in February (only Nina and Ezgi present) we are however not looking into the dependent – independent variable elements of this method, because the cases considered are too complex]
[8] *Id.* at 17.
[9] Failing the test disqualifies evidence, passing the test does not greatly increase confidence in the explanation. For instance: was the accused in the state on the day of the murder?
[10] Passing the test affirms an explanation, but is not necessary to build confidence in explanation. For instance smoking gun in the hands of suspect.
[11] For instance: Bank camera catching the robbers face.
[12] A series of such tests can increase/decrease confidence in the explanation.
[13] Bennett and Checkel, *supra* note 4 at 21.

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Based on these standards, they establish best practices for good process tracing:[14]

1) *Cast the net widely for alternative explanations*
2) *Be equally tough on the alternative explanations*
3) *Consider the potential biases of evidentiary sources*
4) *Take into account whether the case is most or least likely for alternative explanations*
5) *Make a justifiable decision on when to start*
6) *Be relentless in gathering diverse and relevant evidence, but make a justifiable decision on when to stop*
7) *Combine process tracing with case comparisons when useful for the research goal and feasible*
8) *Be open to inductive insights*
9) *Use deduction to ask "if my explanation is true, what will be the specific process leading to the outcome?"*
10) *Remember that conclusive process tracing is good, but not all good process tracing is conclusive*

Those best practices lead to the following case-specific considerations: In order to cast the net widely for alternative explanations, the *Framing Paper*[15] establishes five different pathways which will meet equally tough analysis in the subsequent elaborations. This analysis will also include the likeliness for alternative explanations and will remain open to inductive and deductive insights. Potential biases of evidentiary sources, the decision when to start and when to end gathering evidence will be considered in II.0 separately. Potential combinations of process tracing with case comparisons will be considered in later stages of the research project. It is however crucial to note that one reason for choosing this specific case as pilot case is the fact that the legal change in the notion of DPH is intertwined with many of the other potential crucial IHL case studies (PMCs, unlawful combatant, internationalized non-international armed conflict, etc.). Moreover, the selected case may have several concurring and/or intersecting pathways of change that can be subject to a certain comparative analysis.

2. ***Framing the Case Study***

Case selection

The case of direct participation in hostilities has been chosen as pilot case for the following reasons: The change in the legal definition of 'direct participation in hostilities (DPH), is representative for

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[14] *Id.* at 21–31.
[15] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019.

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the field of International Humanitarian Law (IHL), because: (1) All hypothetically crucial actors are involved: ICRC, academics, state militaries, non-state military forces. (2) All consulted textbooks refer to the ICRC DPH-study as important element in the change of DPH, however they disagree on the extent of change. While on some elements there is barely disagreement others elements remain contested. This case consequently allows for tracing for successful and unsuccessful change. (3) The notion of DPH is at the core of the post-1985 IHL developments. Several other potential case studies relate back to this case and will benefit greatly from the structure established with the pilot case study (PMCs, unlawful combatant, internationalized non-international conflict are directly related; the customary law case is comparably similar in its process of change).

Starting point

The *Road Map* of the research project specifies that the primary interest is in informal change after 1985.[16] While the actual change occurred after this date, the impetus for this change predates the 1970ies. The process of a changing regulation of civilians affected by war could be traced back to the Code Liber.[17] For the present research the more immediate link with the current notion of "direct participation" is the criterion to exclude such a far reach into history.[18] Only post-WWII events seem directly linked. In particular, the drafting of Common Article 3 to the Geneva Conventions and the subsequent drafting of the Additional Protocls seem relevant in order to understand the potentially occurring change in DPH.

BENNETT and CHECKEL propose critical junctures or the entering of key actors as reasonable starting points for process tracing.[19] This case study is structured around the ICRC DPH-guidance, as there, experts and the ICRC assume a new role as key-actors. Additionally, the following critical junctures (points at which an institution or practice was contingent or open to alternative paths) have been established based on textbook-consultation: the adoption of the Geneva Conventions in

[16] NICO KRISCH and EZGI YLDIZ, PATHS Roadmap, September 2018. This date of reference has been extended later, however, it constituted the primary starting point for the present research.
[17] EMILY CRAWFORD, IDENTIFYING THE ENEMY 27 (2015).
[18] This involves in particular the exclusion of a more nuanced consideration of discussions and regulations regarding the "levee en masse" in the Hague Regulation of 1899 and 1907.
[19] Bennett and Checkel, *supra* note 4 at 26–27.

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1949, the Additional Protocols of 1977 and the ICRC Customary Law Study of 2006 and the structured contestation of the ICRC Guidance in the NYU-Symposium.

Relying on further research starting from those critical junctures, the following sequences seem crucial: (1) the adoption of the Geneva Conventions in 1949, (2) developments leading up to the Additional Protocols (3) Draft Additional Protocols in 1971, (4) the Additional Protocols of 1977, (5) ICRC Customary Law Study of 2006 (6) Developments in academia, state practice, court judgments attempting at defining DPH, (7) the process leading to the issuing of the Interpretive Guidance on DPH, (8) the DPH-Guidance, (9) the structured contestation of the ICRC Guidance in the NYU-Symposium (10) the Harvard Manual, and (11) the Tallinn Manual.

Structure of the analysis

In order to analyze how the notion of direct participation in hostilities changed, I will proceed in four steps: In a first step, I will provide the story typically told in textbooks as a starting point. In a second step, I will provide for a broader context in which the issue to be analyzed is situated. In a third step, I will provide for sequences, static 'screenshots' of the notion of DPH, established by different actors like courts or international organizations. In a fourth step, I will attempt to trace the pathways that interlink those sequences and thus, are pathways in which the notion of DPH changes.

3. Sources

This research relies on the primary sources publicly available, like the trajectory of the ICRC-DPH Guidance expert-meeting development, and the resources of the ICRC-customary law study.[20] Additionally, the necessary secondary literature has been consulted.

In researching the process of change, dealing with those resources led to the following challenges:

Firstly, the analysis of the expert process is dependent on the will of individuals to lay open their participation. Only some of the experts that opposed the guidelines declared also publicly their opposition. While 2/3 of the experts did not oppose the guidelines, none of those experts declared their public support. While it is clear that Nils Melzer pushed very far for his own agenda, relative

[20] ICRC, Proceedings of the Clarification Process on the Notion of Direct Participation in Hostilities, available online: https://www.icrc.org/en/doc/resources/documents/article/other/direct-participation-article-02070 9.htm.

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objective inferences about the specific scope of that agenda can only be derived from comparing the guidelines with his PHD – his response in the NYU-symposium was potentially driven by many strategic consideration linked to the expert process of which details are not available to the researcher.[21] Interviews are intended to make this gap smaller.

Secondly, The ICRC DPH study also relies on State practice registered by the ICRC, but not accessible to the public. This sequence is impossible to trace.

Thirdly, State practice is not available in a balanced way: strategic decisions are at the forefront for both, States publishing their State practice (Israel and US, not being parties to the APs do so in order to push the development of customary law to their liking) and not publishing their State practice (trad. Diplomatic reasons). The resources of the ICRC are crucial for the establishment of state practice: the customary law study and the ICRC library. For both cases, the collection of information through the ICRC is not traceable.

Fourthly, military manuals do not exist for all countries that apply IHL, and the researchers linguistic capacities limit their evaluation. Many countries are also reluctant to publish their military manuals (for the same reasons as for State practice more generally). While the ICRC library provides a unique remedy at that challenge, the ICRC's mechanisms of collection of those are not obvious. IHL faces increasingly an opposition between proponents of military necessity and proponents of the protection of civilians as guiding value of the field – in that sense, military manuals may represent less the "evidence in practice" than "evidence of one epistemic community". Also, those manuals are public statements, and teaching instructions that do not necessarily represent the intentions of conduct in real warfare.[22]

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[21] The only source for this allegation is however: W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities Study"*, 42 INTERNATIONAL LAW AND POLITICS 769–830 (2010).

[22] For a more detailed critique see: CHIARA GILLARD, PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES: THE INCIDENTAL HARM SIDE OF THE ASSESSMENT' 4 (2018), https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard.pdf. She elaborates: 'Military manuals proved of limited assistance because they largely replicate the language of Additional Protocol I or give examples of attacks that are so extreme in their violation of the rule of proportionality that they are of limited use in understanding how belligerents interpret the rule. Military doctrine is more useful, since it enters into details of how to comply with the rule. Frequently, however, it is set out in classified documents; it was thus only possible to consider the relevant military doctrine of a small number of states and intergovernmental organizations. It also proved extremely difficult to obtain details of actual practice: that is, attacks which belligerents consider as complying with or violating the rule of proportionality. Often this is classified information.'

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Fifthly, case-law has to be considered very carefully, because IHL has no court at the core of its field. The court's ruling on IHL are either international criminal courts, hence primarily concerned with individual criminal responsibility, or domestic courts that are primarily dealing with a national perspective on the international law in question.

Sixthly, secondary literature on DPH exists in abundance. Choice of contribution was made (1) based on impact factor/subjectively perceived most cited articles and (2) in an attempt to introduce non-European voices into the analysis. The commentaries on the Geneva Convention and on the Additional Protocols have fairly different histories of redaction, and their authority in stating change has to be treated accordingly. For a detailed analysis of those differences see LINUS MÜHERL's draft chapter.

Seventhly, the use of references (footnotes) can be indicative of attributed authority establishing change. However, it has to be carefully evaluated why certain authors cite certain sources. Strategic considerations as well as confirmation bias are very likely.

Eighthly, interviews are intended. Challenges specific to that source will be considered when establishing the structure for the conduct of the interviews.

Given that this paper is only a draft, no final decision to stop looking for evidence was necessary. Crucial primary sources and authoritative secondary sources have been consulted. However, research into non-European perspectives is still insufficient, and interviews are still intended to provide further insights.[23]

II. Summary and Sequences of the Legal Change

Summary

Increasing 'civilianization' of armed conflict makes the notion of direct participation in hostilities increasingly important:[24] Most importantly, civilians who participate directly in hostilities can be lawfully directly targeted in a military attack. However, neither the customary law, nor the treaties

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[23] Bennett and Checkel, *supra* note 4 at 28.

[24] MARCO SASSÒLI, UN DROIT DANS LA GUERRE? : [CAS, DOCUMENTS ET SUPPORTS D'ENSEIGNEMENT RELATIFS À LA PRATIQUE CONTEMPORAINE DU DROIT INTERNATIONAL HUMANITAIRE] / MARCO SASSÒLI, ANTOINE A. BOUVIER ET ANNE QUINTIN ; AVEC LA COLLAB. DE JULIANE GARCIA 310 (2012).

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define this concept.[25] As a response to increasing legal insecurity, the ICRC called up an expert meeting in order to establish guidelines on the direct participation in hostilities.[26] While this expert process failed, the ICRC issued an Interpretive Guidance in its own name, claiming to only provide the view of the ICRC on the interpretation of the existing legal regulation on the direct participation in hostilities.[27] However, they do much more than restating.

1) Some elements are framed differently than previous commentaries on IHL framed it. However, subsequent legal discourse on the matter does not enquire much about this divergence, and quotes the Guidelines as authoritative source. This is in particular the case for the three cumulative criteria establishing DPH.
2) Some elements are clearly new creations, and have been highly contested. This is the case for the doctrine of the continuous combatant status and the standard of graduated use of force.[28] Disagreement on those elements is also a primordial reason, why the experts participating in the redaction of the guidelines are not named as authors – many of them refused to put their names on the proposed document. Hence, it became the ICRC-view,[29] without explicit support of experts – on the contrary some of those experts provided much contestation, as the symposium of the NYU highlights.[30]

Conceptual starting points

In accordance with the *Framing Paper* this research is starting from the idea of legal change as modification of the burden of argument for a particular position on the content of the law: the shift

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[25] *Id.* at 311.
[26] *Id.* at 312.
[27] ICRC & NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 6 (2009).
[28] SASSÒLI, *supra* note 24 at 312.
[29] ICRC AND MELZER, *supra* note 27 at 6.
[30] Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements,*, 42 N.Y.U. J. INT'L L. & POL. 697–739 (2010); W. Hays Parks, *Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769–830 (2010); Bill Boothby, *And for Such Time as: The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741–768 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641–695 (2010); Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831–916 (2010).

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of the scope of possible interpretations or the shifting weight of particular positions in legal discourse.[31] It is without doubt that the legal requirements for DPH have been subject to much discussion and some shift of the scope of possible interpretations. A more profound analysis is however necessary to establish the extent of the shift that occurred.

III. Analysis of the pathways of change

1. (Typical) Story

1.1. General starting point

Increasing civilianisation of armed conflicts is the main reason for the increasing interest in the concept of "direct participation in hostilities".[32] Civilians, i.e. those who are not combatants under Article 4A of the third Geneva Convention of 1949,[33] or Art. 43 of Additional Protocol I of 1977,[34] lose their protection against any attack directly targeted when they participate directly in hostilities.[35] Additionally, the increase of private military companies in the last decades calls for increased scrutiny on that topic.[36] However, neither treaty law nor customary law define the concept.[37] After long consultations of experts the ICRC issued the "interpretive guidance", which aims at clarifying several notions.[38] The result however raised several controversies.[39]

1.2. Diverging accounts in textbooks

a) D'Aspremont and de Hemptinne

D'ASPREMONT and DE HEMPTINNE hold that the definition of the concept is far from unanimous and underline the vivid debates that accompanied the adoption of the interpretative guide.[40]

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[31] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019.
[32] SASSÒLI, *supra* note 24 at 310.
[33] Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, opened for signature 12 August 1949, entered into force 21 October 1950.
[34] Additional Protocol to the Geneva Convention of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, opened for signature 8 June 1977, entered into force 7 December 1987.
[35] CRAWFORD, *supra* note 16 at 11; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 175 (3 ed. 2016); SASSÒLI, *supra* note 24 at 311.
[36] JEAN D'ASPREMONT & JÉRÔME DE HEMPTINNE, DROIT INTERNATIONAL HUMANITAIRE : THÈMES CHOISIS 201 (2012).
[37] SASSÒLI, *supra* note 24 at 311.
[38] *Id.* at 311.
[39] D'ASPREMONT AND DE HEMPTINNE, *supra* note 36 at 201; SASSÒLI, *supra* note 24 at 194.
[40] D'ASPREMONT AND DE HEMPTINNE, *supra* note 36 at 201.

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D'ASPREMONT and DE HEMPTINNE identify two separate paths for the definition of the concept of DPH: (1) a casuistic and pragmatic one taken by the TPIY, the Israeli Supreme Court and several military manuals and (2) a theoretic and abstract one taken by the ICRC Interpretive Guide.[41] They lay out the grand line of the debate instigated by the Interpretative Guide: the narrow interpretation of the concept of DPH tips the balance between the military necessities and the humanitarian demands too much in favour of the latter one.[42] They conclude that the theoretical concept ought to be informed by the casuistic approach in order to be pertinent.[43]

b) Dinstein

While DINSTEIN highlights that the civilians' loss of protection as a consequence of direct participation in hostilities is clear and incontestably customary law, he holds that there is much disagreement about the scope of application of the norm.[44] He sees the ICRC Interpretive Guidance as a response to that, but underlines that on several critical issues the document solely reflects the institutional opinions of the ICRC, although it is an outcome of an 'expert process'.[45] DINSTEIN is of the opinion that a person directly participating in hostilities can be assimilated to a combatant, and be for that matter a 'unlawful combatant' and contrasts that to the view of the ICRC however holds that any person who is not a member of the armed forces remains that of a civilian.[46] This difference is most pertinent when the person is captured and detained without trial.[47] DINSTEIN holds that those DHP-persons lose the general protection of the GCs and only enjoy the minimal safeguards according to API 75 or customary law and contrasts that to the ICRCs view that the protection for civilian detainees of GCIV applies to DPH persons.[48]

He takes the Targeted Killings judgment of the Supreme Court of Israel as evidence that the phrase 'for such time' is part of customary law, and consequently, DPH exposes civilians to attack only 'for such time' as they do so.[49] He cites the ICRC that '[m]easures preparatory to the execution of

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[41] *Id.* at 202.
[42] *Id.* at 208–209.
[43] *Id.* at 209.
[44] DINSTEIN, *supra* note 35 at 175.
[45] *Id.* at 175.
[46] *Id.* at 175.
[47] *Id.* at 175.
[48] *Id.* at 175–176.
[49] *Id.* at 176.

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a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act" and holds then that it is "necessary to go as far as is reasonably required both 'upstream' and 'downstream' from the actual engagement. [50] To what extent this reasonableness departs from the ICRC perspective and sides with other disagreeing scholars, he does not elaborate.

He also disagrees with the 'revolving door' concept and cites as evidence the Israeli Targeted Killing Judgement that any 'rest between hostilities is nothing other than preparation for the next hostility'.[51] He also disagrees with the ICRC Interpretive Guidance that 'the decisive criterion for individual membership in an organized armed group' is 'continuous combat function', because this would exclude support staff from attack.[52]

c) Sassolì

SASSOLI allows for the continuous combatant solution to be an alternative indicated by the interpretive Guide, hence concedes that this is not the undisputable law.[53] As for the conditions that ought to be fulfilled in order to establish DPH, he cites the criteria of the ICRC's guide.[54]

2. ***The process of change beyond the typical story***

2.1. Developments beyond the relevant frame

Stories tracing the development of DPH more in detail usually start with writings of Hugo Grotius. For that period beyond the time frame relevant for the present case study see for instance: EMILY CRAWFORD or EMILY CAMINS.[55]

The development of the DPH concept is situated within the broader context of change in IHL norms. It is in particular important to understand how and why DPH was not dealt with in more detail in the drafting and negotiation of the Geneva Conventions and the Additional Protocols.

[50] *Id.* at 177.
[51] *Id.* at 177–178.
[52] *Id.* at 178.
[53] SASSÒLI, *supra* note 24 at 312.
[54] *Id.* at 312.
[55] Emiliy Camins, *The Past as Prologue: the development of the "direct participation" exception to civilian immunity*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 853–881, 856–870 (2008); CRAWFORD, *supra* note 16 at 26–35.

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Elements on the periphery of the change of DPH are the regulation of 'levée en masse' and the consideration of freedom fighters.[56]

2.2. The Emergence of DPH as an Exception to Civilian Immunity

In IHL, one of the fundamental guarantees that civilian status entails is civilians' immunity from direct attack.[57] While international law does not forbid civilians to participate in hostilities, it does not confer combatant-rights (combatant immunity and prisoner of war rights) to civilians participating in hostilities.[58] Additionally, civilians taking direct part in hostilities lose their civilian immunity.[59] Defining the specific scope of what constitutes direct participation is difficult, and has been subject to increasing interest in the last decade. The modern codification of DPH finds its first enunciation in the *Geneva Conventions* of 1949 in Common Article 3.

Geneva Conventions of 1949

Direct or incidental targeting of civilians was one of the principal causes of civilian suffering 1939-1949, and for that reason the ICRC attempted to improve civilian protection after the Second World War ended.[60] However, political circumstances prevented an update of the Hague Regulations governing the conduct of military operations: according to BEST, Germany and Japan were incapable to make their point, and American and UK bombing specialists had a high interest in having the issue not on the table.[61] Consequently only the 'Geneva law', i.e. the laws protecting those who have ceased to fight or have fallen into the power of the adversary, were subject of the 1949 Diplomatic Conference.[62]

While it was clear during the Diplomatic Conference that States were not willing to apply the Conventions tel quel to non-international armed conflicts, it was however recognized that some new regulation was necessary.[63] This led to the formulation of Common Art. 3 that provides for some fundamental principles of IHL which have to be guaranteed in non-international armed

[56] Parks, *supra* note 20 at 783.
[57] *Id.* at 48.
[58] *Id.* at 48–49.
[59] *Id.* at 48–49.
[60] GEOFFREY BEST, WAR AND LAW SINCE 1945 115 (1994).
[61] *Id.* at 115–116.
[62] Camins, *supra* note 55 at 872.
[63] CRAWFORD, *supra* note 16 at 37.

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conflicts.[64] In particular, “persons taking no *active* participation […] shall in all circumstances humanely,” which excludes the legitimacy of certain listed treatments.[65] The consideration of civilian participation in armed conflict did not go beyond that.[66]

Ideas that certain categories of civilians should be considered legitimate targets although those civilians are not directly participating in hostilities has been asserted throughout the early twentieth century.[67] This was dismissed with the Geneva Conventions of 1949 rejecting trends of total warfare during the Second World War.[68] However, the Conventions did not go so far as to include an explicit provision that prohibited targeting civilians, or a clarification when civilians could be legitimately targeted.[69]

Gathering momentum for the Additional Protocols of 1977:

In a new attempt to provide an updated regulation of the conduct of military operations, the ICRC went beyond the traditional scope of ‘Geneva Law’ and proposed in 1956 the *Draft Rules for the Limitation of the Dangers incurred by Civilian Population in Time of War*.[70] Governments had not enough interest to adopt them.[71] However, the document was an important impetus on the pressing need of an authoritative revision of the laws regarding the means of warfare.[72] Civilians are defined as persons who are neither (a) members of the armed forces, or of their auxiliary or complementary organizations; nor (b) persons who do not belong to the forces referred to above, but nevertheless

17, available online: https://www.unhcr.org/ news/press/2017/12/5a27a6594/unhcr-study-uncovers-shocking-sexual-violence-against-syrian-refugee-boys.html, p. 6.

[65] CRAWFORD, *supra* note 16 at 38.

[66] *Id.* at 38.

[67] Camins, *supra* note 55 at 871; CRAWFORD, *supra* note 16 at 56.

[68] CRAWFORD, *supra* note 16 at 56.

[69] *Id.* at 56.

[70] Draft Rules for the Limiation of the Dangers incurred by the Civilian Population in Time of War, approved by the International Conference of the Red Cross, 1956, available online: https://ihl-databases.icrc.org/ihl/INTRO/420?OpenDocument.

[71] Camins, *supra* note 55 at 873; ICRC, COMMENTARY TO THE ADDITIONAL PROTOCOLS 1832.

[72] ICRC, *supra* note 71 at 1832; BEST, *supra* note 60 at 254–255; Camins, *supra* note 55 at 873.

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take part in the fighting.[73] Consequently, individuals taking part in the fighting were never considered civilians, even if their activities were predominantly peaceful.[74]

Subsequently, the ICRC drafted a resolution that was finally adopted in 1965 at the twentieth International Red Cross Conference in Vienna.[75] The resolution on the 'protection of civilian population against the dangers of indiscriminate warfare' held that 'distinction must be made at all times between persons taking part in hostilities and members of the civilian population'.[76]

At the Tehran United Nations International Conference on Human Rights, the necessity to clarify the rules protecting civilians at times of war gained much momentum.[77] The conference adopted *Resolution 2444, 'Respect for Human Rights in Armed Conflict*', affirming the principle of distinction in the wording of the ICRC's 1965 Draft Resolution.[78]

Additional to the experiences of the Second World War regarding the need to protect civilian population for being attacked on the basis of globally supporting the war effort, changes in the international community and in the conduct of armed conflict immediately after the adoption of the Geneva Conventions of 1949 placed considerable pressure on the law:[79] Non-international armed conflicts became much more frequent.[80] Set in the context of decolonisation, those non-international armed conflicts were often wars of national liberation pursuing the international right to self-determination received increased attention from the international community, in from the particular UN.[81] This eventually led to the elevation of wars of national liberation to the stratum of

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[73] Art. 4 of the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, approved by the International Conference of the Red Cross, 1956, available online: https://ihl-databases.icrc.org/ihl/INTRO/420?OpenDocument.
[74] Camins, *supra* note 55 at 873.
[75] FREDERIC SIORDE, PROTECTION OF CIVILIAN POPULATIONS AGAINST THE DANGERS OF INDISCRIMINATE WARFARE (1967).
[76] ICRC, Protection of Civilian Population Against the Dangers of Indiscriminate Warfare, Res. XXVIII, adopted by the XXth International Conference of the Red Cross,
[77] Camins, *supra* note 55 at 874.
[78] UN GA, Respect for Human Rights in Armed Conflicts, GA Res. 2444, UN GAOR, 23rd session, Supp. No. 18 (A/7218) (1968), 1c.
[79] CRAWFORD, *supra* note 16 at 38–39.
[80] Camins, *supra* note 55 at 876; CRAWFORD, *supra* note 16 at 38.
[81] Camins, *supra* note 55 at 876; CRAWFORD, *supra* note 16 at 38–39.

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international armed conflicts.[82] Consequently, the Geneva Conventions had to be expanded, in order to integrate that new type of conflict.[83]

Draft Additional Protocols

In 1971 the ICRC began to host Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Principles in Armed Conflicts.[84] The conferences set on a conservative path agreeing on not revising but 'reaffirming' the Geneva Conventions.[85] The experts dismissed the proposition of the ICRC to address guerrilla warfare in a specific protocol.[86] In 1973, the ICRC distributed drafts of two protocols that formed the basis for the Additional Protocols of 1977.[87] The definition of 'civilian' as any person who is not a combatant within the meaning of Article 43 of Protocol I or Article 4A of the Third Geneva Convention made its way into the Additional Protocol I without changes. Draft Article 46 also contained already the prohibition of making the civilian population object of an attack in para.1, and in para.2 that 'civilians shall enjoy the protection afforded by this article unless and for such time as they take a direct part in hostilities'. This contrasts earlier formulations in explicitly expanding the scope of civilians protected against attack to those who are linked to hostilities, but are presently only engaged in peaceful activities.[88] This was an important shift in the balance between the principle of military necessity and the principle of humanity towards the latter one.[89] Draft Article 46(2) only faced minor changes and was widely accepted by the States. CAMINS argues that this broad acceptance is due to the malleability of the phrase 'direct participation'.[90] However, discussing this article, States did not settle on a precise definition of 'direct participation in hostilities'. The *Report of Committee III* states that several delegations were of the opinion that the term included

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[82] CRAWFORD, *supra* note 16 at 39.
[83] *Id.* at 39.
[84] Camins, *supra* note 55 at 875.
[85] ICRC, Report of the Work of the Conference of Government Experts, 1971, p. 18.
[86] Camins, *supra* note 55 at 875.

ICRC, First Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol I); ICRC Second Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol II).
[88] see: Camins, *supra* note 55 at 876.
[89] *Id.* at 876.
[90] *Id.* at 877–879.

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preparations for combat and return from combat'.[91] Subsequently, the committee does however not provide for any definition of 'hostilities' or 'military operations'.[92]

In order to accommodate the new type of conflict of national liberation movements, Additional Protocol I includes irregular and guerrilla fighter as combatants.[93] This caused much debate: One side made the argument that the attenuation of the principle of distinction leads to endangering civilians because the targeting force cannot distinguish between concealed guerrilla and civilian.[94] The other side highlighted that forcing guerrilla to distinguish themselves all the time reduces their life expectancy enormously.[95] Drafting the *Additional Protocol II* an extension of the combatant status to participants in non-international armed conflict was considered briefly.[96] It was however dismissed as too intrusive on States prerogative to deal with domestic conflicts.[97] Hence, those persons remain civilians who take direct part in hostilities.[98]

The Additional Protocols of 1977

The Additional Protocol I is the latest international treaty granting combatant status to non-state participants: it recognizes national liberation an guerrilla fighters.[99]

It was only with the adoption of the *Additional Protocols* in 1977 that the concept of DPH was finally explicitly codified:[100] Art. 51(3) of the *Additional Protocol I* holds that 'civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.' This article has not been subject to any reservations. The idea of DPH appears in several

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CICR, OFFICIAL RECORDS CV, CDDH/215/REV.1 274 at para. 53; CRAWFORD, *supra* note 16 at 53.
[92] see: NEW RULES FOR VICTIMS OF ARMED CONFLICTS - COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 302 (Michael Bothe, Karl Josef Partsch, & Waldemar A Solf eds., 2 ed. 2013).
[93] CRAWFORD, *supra* note 16 at 39.
[94] *Id.* at 44.
[95] *Id.* at 43.
[96] *Id.* at 46.
[97] *Id.* at 46.
[98] *Id.* at 46.
[99] *Id.* at 27.
[100] *Id.* at 52.

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norms throughout Additional Protocol I.[101] Art. 13(3) of Protocol II outlines in very similar wording that same concept.

The *ICRC commentary of 1973* elaborates on what was then draft article 46 that DPH 'covers acts of war intended by their nature or purpose to strike at the personnel and material of enemy armed forces'[102] The commentary then underlines the distinction between 'the direct part which civilians might take in hostilities…from the part in the *war effort* which they are called upon to carry out at highly different levels.'[103] The commentary does not elaborate further, and does not touch on questions of the duration of the loss of civilian immunity.[104]

2.3. ICRC Customary Law Study Rule No. 6

Based on those previous normative developments, it is unsurprising that the ICRC Customary Law Study stated that a precise definition of the term 'direct participation in hostilities' does not exist.[105] The ICRC Customary Law Study, first published in 2006 holds (also in the updated version) as Rule No. 6 that civilians are protected against attack, unless and for such time as they take a direct part in hostilities.[106] Regarding International armed conflicts,

> *the rule whereby civilians lose their protection against attack when and for such time as they take a direct part in hostilities is contained in Article 51(3) of Additional Protocol I, to which no reservations have been made.*
>
> *Numerous military manuals state that civilians are not protected against attack when they take a direct part in hostilities. The rule is supported by official statements and reported practice.* ***This practice includes that of States not, or not at the time, party to Additional Protocol I****. When the ICRC appealed to the parties to the conflict in the Middle East in October 1973, i.e., before the adoption of Additional Protocol I, to respect civilian immunity from attack, unless and for such time as they took a direct part in hostilities, the States concerned (Egypt, Iraq, Israel and Syria) replied favourably. [emphasis added]*

Regarding non-international armed conflicts, the Study holds:

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[101] In particular: Art. 81(1)-(2): 'refrains from any act of hostility¨; Art. 41(2): 'engaging in an hostile act', Arts 13(1) and 65(1): 'used to commit…acts harmful to the enemy'.
[102] ICRC, COMMENTARY ON THE DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949 58 (1973).
[103] *Id.* at 58.
[104] see: CRAWFORD, *supra* note 16 at 54.
[105] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL I, 22 (Jean-Marie Henckaerts, Louise Doswald-Beck, & ICRC eds., 2005).
[106] https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6.

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Pursuant to Article 13(3) of Additional Protocol II, civilians are immune from direct attack "unless and for such time as they take a direct part in hostilities". In addition, this rule is set forth in other instruments pertaining also to non-international armed conflicts.

The rule that civilians are not protected against attack when they take a direct part in hostilities is included in many military manuals which are applicable in or have been applied in non-international armed conflicts.

To the extent that members of armed opposition groups can be considered civilians (see commentary to Rule 5), this rule appears to create an imbalance between such groups and governmental armed forces. Application of this rule would imply that an attack on members of armed opposition groups is only lawful for "such time as they take a direct part in hostilities" while an attack on members of governmental armed forces would be lawful at any time. Such imbalance would not exist if members of armed opposition groups were, due to their membership, either considered to be continuously taking a direct part in hostilities or not considered to be civilians.

It is clear that the lawfulness of an attack on a civilian depends on what exactly constitutes direct participation in hostilities and, related thereto, when direct participation begins and when it ends. As explained below, the meaning of direct participation in hostilities has not yet been clarified. It should be noted, however, that whatever meaning is given to these terms, immunity from attack does not imply immunity from arrest and prosecution.

2.4. Developments leading up to the ICRC-DPH-Guidance

Commentaries and Academia

Since the adoption of the *Additional Protocols*, the regulation of irregular participants in armed conflicts has been left to States and non-State groups to be undertaken by themselves on an ad hoc basis.[107]

The *ICRC Commentary to the Additional Protocols* holds with regard to Art. 51(3) that:[108]

'it is clear that civilians who personally try to kill, injure or capture enemy persons or to damage material are directly participating in hostilities. This is also the case of a person acting as a member of a weapons crew, or one providing target information for weapons systems intended for immediate use against the enemy such as artillery spotters or members of ground observer teams.'

The Bothe Commentary to the Additional Protocols elaborates that: [109]

'it is clear that civilians who personally try to kill, injure or capture enemy persons or to damage material are directly participating in hostilities. This is also the case of a person acting as a member of a weapons

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[107] CRAWFORD, *supra* note 16 at 47.

[108] CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 618, at para. 4788 (1987).

[109] NEW RULES FOR VICTIMS OF ARMED CONFLICTS - COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, *supra* note 92 at 303.

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crew, or one providing target information for weapons systems intended for immediate use against the enemy such as ertillery spotters or members of ground observer teams.'

BOTHE ET AL. also include preparation for combat, 'like direct logistic support for units engaged directly in battle such as the delivery of ammunition to a firing position' but exclude providing indirect support (like 'workers in defense plants or those engaged in distribution or storage of military supplies in rear areas') from the scope of DPH – because the latter 'do not pose an immediate threat to the adversary'.[110] For the authors, that threat component seems to be decisive.[111] This focus leads to different issues for precise definition: a civilian returning from a battle does not necessarily pose any threat, but is according to BOTHE nevertheless a legitimate target of attack.[112]

During the 20th century, civilians became increasingly involved in armed conflict: both, as targets and in military and quasi-military endeavors.[113] This resulted in an increasing blur of the distinction between combatants and civilians in armed conflict. EMILY CAMINS holds that 'with no positive law protecting (or, indeed defining) civilians, their immunity from attack was precarious and vulnerable to arguments that military necessity permitted them to be targeted'.[114]

State practice

State practice following the adoption of the Convention did not provide much clarification on the concept of DPH.[115]

The 1956 US Field Manual states that 'persons who are not members of the armed forces…who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population,' and provides for an non-exhaustive list of acts that can be considered as direct participation in hostilities: sabotage, destruction of communication facilities, intentional misleading of troops by guides [and] liberation or prisoners ow war.[116] The 1958 *British Manual on Law of Armed Conflict* refers to direct

[110] *Id.* at 303.
[111] see CRAWFORD, *supra* note 16 at 55.
[112] see *Id.* at 55.
[113] *Id.* at 55.
[114] CICR, *supra* note 91 at 868.
[115] CRAWFORD, *supra* note 16 at 56.
[116] US Field Manual 27-10, The Law of Land Warfare (Washington DC, 18 July 1956) at § 60 an 81.

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participation in hostilities by civilians without further definition of that concept.[117] It further states that civilian DPH is a violation of the law of war, which is at odds with treaty law and general thinking of that time. This statement was not reiterated in the 2004 edition.[118] The 1967 *Nigerian Operational Code of Conduct*, issued in relation to the Biafran Civil War, states that 'youths and school children must not be attacked unless they are *engaged in open hostilities* against Federal Government Forces',[119] without providing further definition of what constitutes an engagement in open hostilities.[120] National legislations also contained broad definitions of who could be considered an 'enemy'.[121]

While the *Additional Protocols* codified the concept of DPH, they did not provide much clarification on its scope.[122] Many States incorporated the norm into their domestic legal order, but only few of them provided examples in order to clarify the scope.[123] The military manual of the Netherlands held that 'firing on hostile troops, throwing Molotov cocktails or blowing up a bridge over which enemy material is transported, and transporting equipment to battle positions' constitute DPH, and 'actions such as manufacturing and transporting military materiel in the rear area' does not.[124]

The British Military Manual of 2004 also excludes 'making a contribution to the war effort' from DPH.[125] The Ecuadorian military manual states that 'civilians serving as guards, intelligence agents or lookouts on behalf of military forces may be attacked.' Other manuals provide definitions providing for very little added value. The Canadian law of armed conflict manual for 2001 holds that 'force used during operations must be directed against opposing forces and military objectives'

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[117] British Manual of Military Law, London 1958, at 626.
[118] see CRAWFORD, *supra* note 16 at 57, FN 48.
[119] Operational Code of Conduct for the Nigerian Army July 1967, Aer. 3(c), reprinted in Anthony Kirk-Greene, Crisis and Conflict in Nigeria, A Documentary Sourcebook, Vol.I, Oxford, Oxford University Publishing, 1971 at 455.
[120] see: CRAWFORD, *supra* note 16 at 57.
[121] India: §3(x) Army Act (1950); Pakistan: Ch. 1 §8(8), Army Act (1952); Ghana: Art. 98 Armed Forces Act (1962); Malaysia: Armed Forces Pact (1972), Part 1 Section 2. [more state practice can be found in the Rule of Law in Armed Conflict Project (http://www.adh-geneve.ch/RULAC/ and http://www.rulac.org/) and STUART CASLEY MASLEN (ed.) The War Report: Armed Conflict in 2013.]
[122] ICRC, REPORT ON THE PRACTICE ON RULE 6 IN THE ICRC CIHL STUDY, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule6; CRAWFORD, *supra* note 16 at 57–58.
[123] CRAWFORD, *supra* note 16 at 58.
[124] Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27.412m at § 520.
[125] The British Military Manual of 2004.

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without providing any definition on 'opposing force', and goes on that civilians 'may not be attacked unless they participate directly in hostilities.'[126] The 2005 *Code of Conduct for Canadian Forces* defines 'opposing force' then very broadly as 'any individual or group of individuals who pose a threat to you or your mission'.[127]

In a report on human rights in Colombia, the Inter-American Commission on Human Rights stated in 1999 that direct or active participation should be distinguished from indirect participation. It reiterated the ICRC Commentary to the Protocols holding that direct participation to hostilities meant acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material. The Commission insisted that a direct causal relationship is necessary between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.[128]

In 2006, the ICRC study on the customary status of IHL took account of these definitional ambiguities and held that a precise definition of the term "direct participation in hostilities" does not exist.[129] According to EMILY CRAWFORD, 'it was with that fact in mind' that the ICRC initiated a study into the concept of direct participation in hostilities.[130] This resulted into the publication of the *Interpretive Guidance on Direct Participation in Hostilities* two years later.[131] This process will be elaborated in detail in IV. 2.5.

<u>Non-state actors' practice</u>

In particular regarding the law of non-international armed conflicts, States are only one side of the involved parties. Non-State armed groups are directly concerned with the definition of DPH. Non-state armed groups' contribution to the development of international humanitarian law is not easy

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[126] The Law of Armed Conflict at the Operational and Tactical Levels, at §3-4 and Annex B.
[127] Code of Conduct for Canadian Forces, Rule 1 at § 3-5 (cited in the Report on Rule 6 in the ICRC CIHL Study).
[128] Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V(II.102, Doc. 9 rev.1, 26 February 1999, Ch. 4, at 53 and 56.
[129] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL I, *supra* note 105 at 22.
[130] CRAWFORD, *supra* note 16 at 59.
[131] ICRC AND MELZER, *supra* note 27.

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to determine.[132] However, ad-hoc commitments of States and non-state armed groups are an important, but often overlooked source of development of IHL.[133]

Courts and Tribunals defining DPH

Parallel to that process of redaction of the Interpretive Guidance, several judicial bodies examined the question of direct participation in hostilities.

a) Israel

In 2002, the Public Committee Against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment handed in a petition that would eventually lead to the '*Targeted Killing'* judgment of the Israeli Supreme Court in 2008.[134] The petitioners challenged the legality of the Israeli government practice of 'targeted killing', i.e. the 'policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip.'[135] This policy started in February 2000 with the second intifada. [136] By 2008, 384 Palestinians were reported to have been killed.[137] 232 of them were specific targets of attack; the remaining 152 were designated as collateral casualties.[138] The petitioners argued that 'the policy of assassinations harms these civilians when they are not taking part directly in combat or hostilities, and as such, it is not legal and constitutes a prohibited strike against civilian targets that constitutes a war crime'.[139] Also, the high rates of casualties were presented as evidence for a violation of the principle of proportionality.[140] Since Israel is no party to the Additional Protocols, the legal basis of the argument had to be Art. 51(3) as customary international law. The petitioners argued for a narrow interpretation of DPH:[141]

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[132] SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 101–152 (2012).
[133] *Id.* at 101.
[134] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.).
[135] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §1.
[136] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §1.
[137] The Israeli Centre for Human Rights Information in the Occupied Territories, Fatalities Before Operation 'Cast Lead', available online: https://www.btselem.org/statistics/fatalities/before-cast-lead/by-date-of-event.
[138] The Israeli Centre for Human Rights Information in the Occupied Territories, Fatalities Before Operation 'Cast Lead', available online: https://www.btselem.org/statistics/fatalities/before-cast-lead/by-date-of-event.
[139] Reply Brief on Behalf of the Appllants (8July 2003), at 32.
[140] Reply Brief on Behalf of the Appellants (8 July 2003), at 206.
[141] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §7

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'a civilian participating in hostilities loses the protections granted to civilians only for such time that he is actually taking a direct part in the combat activities, such as when he shoots or positions a bomb. A civilian preparing to commit hostilities might be considered a person who is taking part in hostilities, if he is openly bearing arms. When he lays down his weapon or when he is not committing hostilities, he ceases to be a legitimate target for attack. Thus, a person who merely aids the planning of hostilities, or who sends others to commit hostilities might expose the civilian to arrest and trial, but it cannot turn him into a legitimate target for attack.'

Israel responded that it was involved in an armed conflict with terrorist organizations,[142] and argued in favour of a broad definition, and held in particular that the restrictions of 51(3) ('for such time') had not become customary international law by 2003.[143] Persons that 'plan, launch and commit attacks' should be included, 'even if such persons never actually use or carry the weapons utilized in the attacks themselves.'[144]

Based on its own case-law, the court acknowledged the existence of an armed conflict in Israel and affirmed that the law of armed conflict was the applicable law: the law of international armed conflicts, which includes the law relating to belligerent occupation.[145] Attempting to find a middle ground between the narrow and the broad interpretation, the court allowed for 'some margin of judgment' and identified certain categories of persons who could be considered as taking direct part in hostilities: persons collecting intelligence on the armed forces, persons transporting unlawful combatants to or from the place where hostilities are occurring, and persons who operate weapons that unlawful combatants use, or supervise their operation, or provide service to them.[146] Regarding persons acting as voluntary human shield and civilians transporting ammunition to places for use in hostilities the Court held that the 'direct character of the part taken should not be narrowed down merely to the person committing the physical act of attack, those who have sent him, as well, take 'a direct part'. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in hostilities.'[147] The Court excluded from the scope of DPH in particular selling food and medicine to unlawful combatants, providing general strategic analysis, logistical, and other general support,

[142] Supplemental Response on Behalf of the State Attorney's Office, at 127-137.
[143] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §12
[144] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §12
[145] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §18 and §20-21.
[146] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §31 and §35.
[147] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §37.

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including monetary aid, and distributing propaganda.[148] Regarding the time-frame of DPH, the court considered that there was no generally accepted interpretation.[149] However, the court held that a person who has ceased taking a direct part in hostilities regains his or her protection from targeting.[150] Also, the court highlighted the necessity to distinguish persons taking sporadic part in hostilities and persons who have actively joined a 'terrorist organization'.[151] For the latter, intervals in which those persons are resting cannot be considered as cessation of DPH.[152] The decision whether a civilian could be targeted for taking directly part in hostilities had to be considered on a case by case basis.[153]

b) US

In the US two cases of judicial examination of DPH are crucial: (1) In *Ali Saleh Kahlah Al Marri v Commander John Pucciarelli, U.S.N.,*[154][155] a Quatari citizen, legally resident in the US had been arrested in December 2001 on the grounds that he was closely associated with al Qaida, having engaged in preparation for acts of terrorism. Regarding the question of DPH, the US Court of Appeals for the Fourth Circuit held that:[156]

> *We recognize that some commentators have suggested that 'for such time as they take a direct part in hostilities', participants in non-international armed conflicts may, as a matter of customary international law, be placed in the formal legal category of 'enemy combatants'. (...) No precedent from the Supreme Court or this court endorses this view, and the Government itself has not advanced such an argument. This may be because even were a court to follow this approach in some cases, it would not assist the Government here. For the Government has proffered no evidence that al-Marri has taken a 'direct part in hostilities'. Moreover, the United States has elsewhere adopted a formal treaty understanding of the meaning of the term 'direct part in hostilities', which plainly excludes al-Marri.*

[148] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §35
[149] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §39
[150] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §39.
[151] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §39-40.
[152] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §39-40.
[153] HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel, PD62(1) 507 [2006] (Isr.), at §34, 39.
[154] *Ali Saleh Kahlah Al.Marri v Commander John Pucciarelli,* U.S.N. Consolidated Naval Brig, US State Court of Appeals for the Fourth Circuit Court, No. 06-7427, available online: https://www.scotusblog.com/wp-content/uploads/2008/07/almarrienbanc.pdf.

[156] *Ali Saleh Kahlah Al-Marri v Commander John Pucciarell*i, U.S.N., at 31 n 16.

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The 'formal treaty' referenced is the US message of transmittal regarding the Convention on the Rights of the Child. There, the US state that it:[157]

> *understands the phrase 'direct part in hostilities' to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy. The phrase 'direct participation in hostilities' does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward development.*

(2) In *United States of America v Salim Ahmed Hamdan,* the US Military Commission found that delivery of munitions did amount to DPH:[158]

> *The accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations. (…) Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban al Quaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of 'direct participation'.*

In the *Hamlily* case in 2009, in which the petitioners challenged the legality of their detention at Guantánamo by seeking writs of habeas corpus, the US District Court for the District of Columbia ruled that the US Government's detention policy is generally consistent with the authority conferred on the US President under the Authorization for Use of Military Force (AUMF), Public Law 107-40, 115 Stat. 224, 18 September 2001, and core law of war principles that govern non-international armed conflicts. The Court stated in relation to its interpretation of "direct participation in hostilities":

For purposes of these *habeas* proceedings, the Court interprets the phrase "committed a belligerent act" to cover any person who has directly participated in hostilities. That conclusion is consistent with the law of war. See [1977] Additional Protocol II, art. 13(3) (stating that civilians shall not be subject to military force "unless and for such time as they take a direct part in hostilities"); [1977] Additional Protocol I, art. 51(3) (same). As the Court has noted above … the precise scope of the phrase "direct participation in hostilities" remains unsettled and the International Committee of the

[157] Message from the President of the United States Transmitting Two Optional Protocols to the Convention on the Rigths of the Child, S. Treaty Doc. No. 106-37 (2000), available online: https://www.congress.gov/treaty-document/106th-congress/37/document-text.

[158] *United States of America v Salim Ahmed Hamndan, on Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiciton*, 10 December 2007, available online: http://www.mc.mil/Portals/0/pdfs/Hamdan/Hamdan%20 (AE084).pdf.

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Red Cross is coordinating an effort among experts "to clarify the precise meaning of the notion of 'direct participation in hostilities', which has never been defined in treaty law." ICRC, Report: Direct Participation in Hostilities. In these proceedings, the Court will rely on the settled aspects of the standard. "[L]ittle doubt exists that a civilian carrying out an attack would be directly participating in hostilities. In the same vein, legal experts seem to agree that civilians preparing or returning from combat operations are still considered to be directly participating in hostilities, although precise indication as to when preparation begins and return ends remains controversial." *Id*. But any further refinement of the concept of "direct participation" will await examination of particular cases.

c) Inter-American Court for Human Rights

In the case concerning the events at La Tablada in Argentina, the Inter-American Commission on Human Rights held that civilians who directly take part in fighting, whether single or as members of a group, thereby become legitimate military targets but only for such time as they actively participate in combat.[159]

d) ICTY/ICTR

ICTY and ICTR had to examine numerous cases involving DPH. The first one was the case of *Simic*, where the ICTY stated that 'the mere possession of weapons does not in itself create 'a reasonable doubt as to (…) civilian status.'[160] In the *Galic* case, the ICTY Trial Chamber held that '[t]o take a 'direct' part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or materiel of the enemy armed forces.'[161] In the cases *of Dragomir Milosevic* and *Kordic and Cerkez,* the ICTY reaffirmed this position.[162]

In the case Strugar, the ICTY went into more detail regarding the question of DPH. The Appeals Chamber reiterated the ICRC Commentary's finding that 'acts of war which by their nature or

[159] Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137: Argentina, OEA/ Ser/L/V/II.98, Doc. 38, December 6 rev., 1997, § 810.
[160] *Prosecutor v Simic et al*., Case No. IT-95-9-T, Judgement of the 10 October 2003, at 659.
[161] *Prosecutor v Galic*, Case No. IT-98-29, Judgment of 5 December 2003, at 48.
[162] *Prosecutor v Milosevic,* Case No. IT-02-54, Judgment 12 December 2007, at 947; *Kordic and Cerkez,* Case No. IT-95-14/2, Appeals Judgment of the 22 April 2008, at 51.

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purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces', and that the determination as to whether a civilian is taking direct part in hostilities:[163]

> *Must be undertaken on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence. As the temporal scope of an individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.*

Based on an extensive analysis of international and domestic cases, legislation, and other instruments, the ICTY offers a list of acts that could be considered as DPH.[164]

> *Examples of active or direct participation in hostilities include: bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces.*
>
> *Examples of indirect participation in hostilities include: participating in activities in support of the war or military effort of one of the parties to the conflict, selling goods to one of the parties to the conflict, expressing sympathy for the cause of one of the parties to the conflict, failing to act to prevent an incursion by one of the parties to the conflict, accompanying and supplying food to one of the parties to the conflict, gathering and transmitting military information, transporting arms and munitions, and providing supplies, and providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons.*

In the Tadic case however, the ICTY noted that it is 'unnecessary to define exactly the line dividng those taking an active part in hostilities and those who are not so involved'.[165]

The TPIR only briefly examined DPH in the case *Bagilishema*: it affirmed the ICTY position holding that 'to take a direct or active part in the hostilities covers acts which by their very nature or purpose are likely to cause harm to personnel and equipment of armed forces.'[166]

e) Special Court for Sierra Leone

In the cases *Fofana and Kondewa* and *Sesay*, the Special Court for Sierra Leone held – in accordance with the ICTY and Israel Supreme Court – that DPH has to be assessed on a case-to-

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[163] *Prosecutor v Strugar*, Case No. IT-01-42-A, Appeals Judgment, 17 July 2008, at 68, para. 178.
[164] *Prosecutor v Strugar,* Case No. IT-01-42-A, Appeals Judgment, 17 July 2008, at 67-68, para. 1787
[165] *Prosecutor v Tadic*, Case No. IT-94-1, Judgment of 11 November 1999, at para. 616.
[166] *Prosecutor v Bagilishema*, Cas No. ICTR-95-1A-T, Judgment, 7 June 2001, at 104.

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case basis.[167]In *Fofana and Kondewa* it held that 'acts which by their nature and purpose, are intended to cause actual harm to the enemy personnel and material' constitute DPH, and listed acts that could only be considered as indirect participation. In *Sesay*, it affirmed *Fofana and Kondewa* and continued that:[168]

> *The accepted view in international humanitarian law [is] that hostilities are acts which by their nature or purpose are intended to cause damage or actual harm the adversary party. We have endorsed the proposition that the concept of hostilities encompasses not only combat operations but also military activities linked to combat such as the use of children at military checkpoints or as spies (...) The Chamber is mindful that an overly expansive definition of active participation in hostilities would be inappropriate as its consequence would be that children associated with armed groups lose their protected status as persons hors de combat under the law of armed conflict.*

f) ICC

Before the ICC, two cases brought forth issues related to DPH. In *Abu Garda*, the Pre-Trial Chamber, stated that while 'neither treaty law nor customary law expressly define what constitutes direct participation in hostilities',[169] several sources had contributed to the clarification of the definition: ICTY in *Strugar*, State military manuals, soft law, decisions of international bodies, the commentaries to the Geneva Conventions and the Additional Protocols.[170] The Court provided a list of examples of acts that could constitute DPH:[171]

> *bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, and transporting weapons in proximity to combat operations.*

In *Lubanga,* the Court held that active participation in hostilities 'means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities.'[172] It stated that DPH, carried out by children,[173] includes 'scouting, spying,

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[167] *Prosecutor v Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment, 2 August 2007; *Prosecutor v Seasy et al.,* Case No. SCSL-05-15-R, Judgment, 2 March 2009.
[168] *Prosecutor v Seasy et al.,* Case No. SCSL-05-15-R, Judgment, 2 March 2009, at para. 1723.
[169] ICC-02/05-02/09-243-Red, 8 February 2010, at para. 80
[170] ICC-02/05-02/09-243-Red, 8 February 2010, at para. 81.
[171] ICC-02/05-02/09-243-Red, 8 February 2010, at para. 81.
[172] ICC-01/04-01/06-803, 29 February 2007, at para 261.
[173] Art. 8 (2) (b) (xxvi) and 8(2)(e)(vii) Rome Statute concerning the war crime of 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.'

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sabotage and the use of children as decoys, courtiers or at military check-points'.[174] The Court saw DPH in particular, where

> *[c]hildren are used to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (…) these activities are indeed related to hostilities in so far as i) the military commanders are in a position to take all the necessary decisions regarding the conduct of hostilities, ii) they have a direct impact on the level of logistic resources and on the organization of operations required by the other party to the conflict whose aim is to attack such military objectives.*[175]

Excluded from DPH is 'the activity in question is clearly unrelated to hostilities [such as] food deliveries to an airbase or the use of domestic staff in married officers' quarters.'[176]

It seems that the ICC distinguishes between 'active' and 'direct' participation: the former relating to combat-related activities connected to the conflict and the latter relating to front-line combat activities.[177]

2.5. ICRC's Interpretive Guidance on DPH

Expert group on DPH

Parallel to the case-law developments the ICRC and the TMC Asser Institute undertook also attempted to provide foe a definition of DPH. Under their auspices five informal expert meetings took place in Geneva: Around fifty legal experts from the military, government, and academia, international and non-governmental organizations participated – all in their personal capacity.[178] The expert meetings increasingly became oppositional, to the extent that eventually, nearly a third of the experts involved requested to have their names removed from the final document because they did not want to seem in support of the Interpretive Guidance's propositions.[179] The greatest disagreement revolved around the graduated use of force standard and the continuous combatant function.

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[174] ICC-01/04-01/06-803, 29 February 2007, at para 261.
[175] ICC-01/04-01/06-803, 29 February 2007, at para 263.
[176] ICC-01/04-01/06-803, 29 February 2007, at para 262.
[177] CRAWFORD, *supra* note 16 at 71.
[178] ICRC, OVERVIEW OF THE ICRC'S EXPERT PROCESS (2003-2008) 3.
[179] Michael N Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATINAL SECURITY JOURNAL 5–44, 6 (2010).

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Because of substantive disagreement among the experts on crucial legal questions, the ICRC decided to keep the experts' names confidential and to publish the Interpretive Guidance not as expert guidance, but as representing the ICRC's position on what constitutes direct participation in hostilities.[180]

DPH Interpretive Guidance

ICRC- DPH-Guidance is situated in the aftermath of 9/11.[181] In fact, the ICRCs' decision to define the phrase was 'influenced by the significant publicity surrounding the use of air power to conduct targeted killings in Yemen, the Occupied Territories and Iraq'.[182]

The document consists of 10 commented recommendations that are structured around 3 questions:

1) Who is a civilian for the purposes of the principle of distinction?
2) What conduct amounts to DPH?
3) What modalities govern the loss of protection against direct attack?

While the ICRC Interpretive Guidance explicitly holds that it is not changing law but clarifying its interpretation,[183] there is barely any disagreement on the fact that this is only partly true. In fact, some elements of the Guidance contribute to clarifications of the law, indeed. However, other elements exceed a restatement of the law and introduce new elements. This is in particular true for the continuous combatant function. More generally, based on the intensity of met opposition, the outcome of the Guidance can be divided in two parts: On the one side, some elements are framed differently than previous commentaries on IHL framed it. However, subsequent legal discourse on the matter does not enquire much about this divergence, and quotes the Guidelines as authoritative source.

This is particularly the case for the three cumulative requirements constituting DPH: (i) There must be a "threshold of harm" that is objectively likely to result from the act, either by adversely impacting the military operations or capacity of the opposing party, or by causing the loss of life or property of protected civilian persons or objects; and (ii) The act must cause the expected harm

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[180] ICRC, OVERVIEW OF THE ICRC'S EXPERT PROCESS (2003-2008) 3–4; Jakob Kellenberger, *Forweword*, 6 (ICRC ed., 2009); Melzer, *supra* note 30 at 835.
[181] Watkin, *supra* note 30 at 641–642.
[182] *Id.* at 642.
[183] ICRC AND MELZER, *supra* note 27 at 6.

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directly, in one step, for example, as an integral part of a specific and coordinated combat operation (as opposed to harm caused in unspecified future operations); and (iii) The act must have a "belligerent nexus" – i.e., it must be specifically designed to support the military operations of one party to the detriment of another.

On the other side, some elements are clearly new creations, and have been highly contested. For instance the doctrine of the continuous combatant status.[184] Those are the reasons, why the experts participating in the redaction of the guidelines are not named as authors – many of them refused to put their names on the proposed document. Hence, it became the ICRC-view,[185] without explicit support of experts – on the contrary they provided much contestation, as the symposium of the NYU highlights.[186]

Firstly, the continuous combatant function met fierce opposition, in particular regarding the personal dimension. The DPH Guidance establishes that in non-international armed conflicts, persons integrated into organized armed groups can be considered as directly participating in hostilities for the time that they are members of that armed group. Disagreement on that concept is noted in the footnotes of the Guidance.

Secondly, Recommendation IX of the Guidance caused fundamental disagreements. This recommendation establishes a graduated use of force standard:

> *[T]he kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.*

HAY PARKS, one of the experts involved, highlighted that the ICRC had included that section 'without consultation with participating experts or its co-sponsor, the TMC Asser Institute. [187] NILS MELZER contests this allegation.[188] Regarding its content, the section was criticized for establishing the principle of humanity above all else, including military necessity.[189] It was perceived to

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[184] SASSÒLI, *supra* note 24 at 312.
[185] ICRC AND MELZER, *supra* note 27 at 6.
[186] Schmitt, *supra* note 30; Parks, *supra* note 30; Boothby, *supra* note 30; Watkin, *supra* note 30; Melzer, *supra* note 30.
[187] Parks, *supra* note 20 at 783.
[188] Melzer, *supra* note 30 at 894.
[189] Parks, *supra* note 20 at 785.

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establish the unrealistic expectation that combatant capture rather than kill, and a legal obligation for combatants to use less than lethal force in a combat zone – an idea that found no basis in State practice.[190] The ICRC's response was that the section was not intended for use in large-scale confrontation, but referred to situations,

> *where armed forces were confronted with individuals within their territorial control who did not benefit from civilian protection against direct attack although they did not pose an immediate threat at the time and could be captured without additional risk.*[191]

Indeed, the ICRC saw that as a 'counter-balance' to the concept of continuous combat function.[192] Melzer further points out that several experts 'argued that Section IX was not sufficiently restrictive but should be complemented by human rights standards on the use of force.'[193]

Further elements facing disagreement were: the question of vvoluntary human shielding and the question of hostage taking: Discussion notes of the Fifth Informal Expert Meeting show that some experts opposed the ICRC position that voluntary human shields do not lose their status as civilians immune from direct attack.[194] Discussion notes also reveal that arguments were made that hostage taking should be expressly included in the notion of DPH.[195] However, those disagreements will not be considered further, because the popularity of those cases was minor to the three core points elaborated above.

Contestation of the Guidance

While none of the 2/3 of experts that did not request to have their names removed pronounced public support of the Guidance, proponents of the opposing minority published their opinions, in particular in a Symposium of the NYU Journal on International Law and Politics.[196] Generally, the

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[190] CRAWFORD, *supra* note 16 at 83.
[191] ICRC, Summary Report, Fourth Expert Meeting on the Notion of Direct Participation in Hostilities, 27–28 November 2006, at 76.
[192] ICRC, Summary Report, Fourth Expert Meeting on the Notion of Direct Participation in Hostilities, 27–28 November 2006, at 76.
[193] Melzer, *supra* note 30 at 895–896.
[194] NILS MELZER, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 1024–1025.
[195] ICRC, Discussion Notes, Working sessions I-VII, Fifth Informal Meeting on the Notion of Direct Participation in Hostilities Under IHL, Geneva 5-6 February 2008, at 25.
[196] [While also other voices raised, I will limit the current papers' analysis to the voices of the symposium because they were considered the 'loudest'.]

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criticism revolved around four elements: the continuous combatant concept, the constitutive elements of DPH, the time dimension of DPH and the graduated use of force standard.

a) Criticism of the continuous combatant concept

KENNETH WATKIN argued that the definition of membership in an armed group was not grounded in existing treaty or customary law.[197] He pointed out that even the ICRC's own commentary considered a much broader range of activities as constituting DPH – in particular logistical support.[198] More generally, he held that the Guidance failed to reflect 'the realities of how warfare is conducted.'[199] He further found the concept lacking any basis in customary or treaty law, and consequently saw the continuous combatant function only as a de lege lata idea.[200]

MICHAEL SCHMITT criticized the ICRC for ignoring the fact that membership structures can not only be based on functional but also on formal criteria.[201]

KENNETH WATKIN and MICHAEL N. SCHMITT both condemned the complexity of the approach, in particular the fact that this third category between combatant and civilian was only established for NIACs, while for IACs the same person had to be considered as civilian.[202] They also underlined that the exclusion of members of armed groups that do not have continuous combat function from the scope of legitimate targets of attack would distort the balance between military necessity and humanitarian considerations.[203]

b) Criticism of the constitutive elements of DPH

The belligerent nexus was not questioned. Regarding the threshold of harm, MICHAEL N. SCHMITT criticized that the determining criteria should be the nature, not the quantity of harm, and that preparatory actions should not remain protected by civilian immunity.[204] MICHAEL N. SCHMITT

[197] Watkin, *supra* note 30 at 643.
[198] *Id.* at 683–684.
[199] *Id.* at 644.
[200] *Id.* at 643–644.
[201] Schmitt, *supra* note 178 at 132–133.
[202] *Id.* at 18–19.; Watkin, *supra* note 30 at 650–651.
[203] Schmitt, *supra* note 178 at 23; Watkin, *supra* note 30 at 675.
[204] Schmitt, *supra* note 30 at 716.

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criticised also the direct causation element for being too narrow: only one causal step would exclude the acts aiming at the maintenance of the capacity to harm the enemy.[205]

c) Criticism on the time dimension of DPH

WILLIAN BOOTHBY put forward that the interpretation of the scope of DPH regarding its duration was too narrow.[206] He held that the 'revolving door' formulation has no basis in customary international law, and consequently, the ICRC interpretation excessively narrowed the notion of DPH.[207] Also, the US, Israeli Supreme Court, ICRC commentary and academia had allegedly rejected that concept.[208]

d) Criticism on the graduated use of force standard

HAY PARKS criticised Section IX for giving humanitarian concerns priority over military necessity requiring to capture instead to kill.[209]

In general, critique came predominately from the military fraction of IHL lawyers.[210] However, some critical elements were put forward by human rights lawyers, as well.[211]

Acceptance of the Guidance

This being said, the ICRC-Guidance met also supportive voices.[212] Other elements of the Guidance hardly met any contestation: the time dimension of the continuous combatant function or the concept of civilians in IACs were largely accepted. Also the three constitutive elements for DPH were taken up without much criticism. It is important to note that supportive voices tended to take

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[205] *Id.* at 725–728.
[206] Boothby, *supra* note 30 at 743.
[207] *Id.* at 743.
[208] *Id.* at 756–757.; Watkin, *supra* note 30 at 688.
[209] Parks, *supra* note 20 at 785.
[210] See for instance: Françoise J. Hampson, *Direct Participation in Hostilities and the Interoperability fo the Law of Armed Conflict and Human Rights*, 87 INTERNATIONAL LAW STUDIES 187–213 (2011).
[211] See for instance: Robert Cryer, *The International Committe of the Red Cross' 'Interpretive Guidance on the Notion of Direct Participation in Hostilities*, *in* HUMANIZING THE LAWS OF WAR (Robert Geiss, Andrea Zimmermann, & Stefanie Haumer eds., 2017); Dapo Akande, *Clearing the Fog of War?*, 59 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 180–192 (2010).
[212] Alam Aftab, *ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Overview*, 9 *in* ISIL YEAR BOOK OF INTERNATIONAL HUMANITARIAN AND REFUGEE LAW 47–77 (2009); Akande, *supra* note 210; Cryer, *supra* note 210; Dieter Fleck, *Direct Participation in Hostilities by Nonstate Actors and the Challenge of Compliance with International Humanitarian Law*, 4 PUBLIC DIPLOMACY MAGAZIN 40–51 (2010); Shannon Bosch, *A legal analysis of how the International Committee of the Red Cross's interpretation of the revolving door phenomenon applies in the case of Africa's child soldiers*, 24 3–22 (2015).

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the DPH Guidance more as the starting-point for a potential future consensus rather than an established consensus.[213] The DPH Guidance consequently provided a new focal point around which disagreement could evolve into more agreement.

2.6. Harvard Manual

In 2009, the Program on Humanitarian Policy and Conflict Research at Harvard University, under the guidance of YORAM DINSTEIN issued the *Manual on International Law Applicable to Air and Missile Warfare* as the product of a six-year research project undertaken by an international group of experts in order to provide an 'authoritative restatement' on the applicable law to air and missile warfare.[214] Art. 29 reiterates that 'civilians lose their protection from attack if and for such time as they take a direct part in hostilities'. Art. 29 provides an exemplary list of acts that can amount to DPH:

> *(i) defending of military objectives against enemy attacks, (ii) issuing orders and directives to forces engaged in hostilities; making decisions on operational/tactical deployments; and participating in targeting decision-making, (iii) engaging in electronic warfare or computer network attacks targeting military objectives, combatants or civilians directly participating in hostilities, or which is intended to cause death or injury to civilians or damage to or destruction of civilian objects, (iv) participation in target acquisition, (v)engaging in mission planning of an air or missile attack, (vi) operating or controlling weapons systems or weapons in air or missile combat operations, including remote control of UAVs and UCAVs, (vii) employing military communications networks and facilities to support specific air or missile combat operations, (viii) refueling, be it on the ground or in the air, of a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations, (ix) loading ordnance or mission-essential equipment onto a military aircraft which is about to combat operations, (x) servicing or repairing of a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations, (xi) loading mission control data to military aircraft/missile software systems, (xii) combat, training of aircrews, air technicians and others for specific requirements of a particular air or missile combat operation.*

[213] Cryer, *supra* note 210 at 116–117; Fleck, *supra* note 211 at 48–49.
[214] Claude Bruderlein & Program on Humanitarian Policy and Conflict Research at Harvard University, *Foreword*, *in* MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE , iii (2009).

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The scope of the Harvard Manual wider that IRCR Guidance, but draws on terminology and definition used by ICRC Guidance, [215] for instance: 'Threshold of harm',[216] 'direct causation',[217] and 'belligerent nexus'[218]. Nevertheless, the Manual also highlights that the 'three criteria established by the ICRC Interpretive Guidance (…) were not unanimously accepted by the group of experts'.[219]

2.7. Tallinn Manual

In 2013 the NATO Cooperative Cyber Defence Centre of Excellence invited an international group of experts at to produce clarifications on the law applicable to cyber warfare. This resulted in the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, with MICHAEL N. SCHMITT as general editor.[220] Rule 29 of the Tallinn Manual does not define the civilian population but states that 'civilians are not prohibited from directly participating in cyber operations amounting to hostilities but forfeit their protection from attacks for such time as they so participate'. The Tallinn Manual also holds that the principle of distinction shall apply to cyber-attacks and that the civilian population should not be subject to cyber-attacks.[221]

2.8. DPH now

It is contested how far change caused by the ICRC-Guidance is manifest. However, it is undeniable that the DPH-Guidance influences the scope of acceptable interpretations of DPH. This will be elaborated in detail below. Based on the framing paper, several pathways of change taken by the ICRC Guidance will be explored.[222]

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[215] CRAWFORD, *supra* note 16 at 89.
[216] PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH & AT HARVARD UNIVERSITY, COMMENTARY ON THE HUMANITARIAN POLICY AND CONFLICT RESEARCH MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 120 (2009), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwi_xpLtib_iAhXEzqQKHfkGDo4QFjAAegQIARAC&url=https%3A%2F%2Fwww.researchgate.net%2Fprofile%2FClaude_Bruderlein%2Fpublication%2F264036862_Manual_on_International_Law_Applicable_to_Air_and_Missile_Warfare%2Flinks%2F59a911d50f7e9b27900e2f0e%2FManual-on-International-Law-Applicable-to-Air-and-Missile-Warfare.pdf&usg=AOvVaw367grEb1oYs7aR6Ozsffvm.
[217] *Id.* at 120.
[218] *Id.* at 120.
[219] *Id.* at 121.
[220] TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, (Michael N Schmitt ed., 2013).
[221] *Id.* at 90 and 95, Rule 29 and 31.
[222] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019, p. 4.

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3. Pathways of change

3.1. The state action path

The State action path leads to legal change when States modify their behavior and make corresponding unilateral statements or bilateral agreements. The authority lies on State authority, and the mechanism consists in pushing existing boundaries, and then building consensus around the new practice.[223]

Regarding the DPH Guidance, States accepted some elements of the DPH Guidance which provided a pathway for change. The State's contestation of other elements drew on the failed expert process and successfully blocked change that would have been more far-reaching. While state practice regarding the DPH Guidance is not uniform, some trends are noticeable. The different degree of acceptance and contestation of DPH-Guidance-elements had direct implication on the scope of accepted interpretation of DPH. It is however striking that the States that publish their practice most abundantly (Israel and the US) are involved in ongoing asymmetric conflicts, and refuse to ratify the Additional Protocols. In that sense they attempt to push for a development of customary law distinct from the AP norms.[224] Furthermore, non-western state practice with regards to DPH is very rarely made available to the public.[225] For details regarding the analyzed State practice see the annex.

In sum, the continuous combatant function in its personal dimension is explicitly rejected by Israel and the US. The US also rejects the graduated use of force standard, and bases its deviations from the guidance also on the NYU-Symposium contestations. Israel moves from a national-jurisdiction centered definition of DPH and gradually introduces arguments based on the DPH-Guidance. The temporal dimension of the continuous combatant concept seems to find support in the US government and in the *German Military Manual*. The *Colombian Military Manual* seems to back

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[223] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019, p. 4.

[224] Yahli Shereshevsky, *Back in the Game: International Humanitarian Law-Making by States*, forthcoming BERKLEY JOURNAL OF INTERNATIONAL LAW (2019). It is an unresolved dogmatic dispute to what extent treaty-bound States can contribute to the establishment of customary law that is established based on or in reference to a norm in the treaty they ratified.

[225] AGNIESZKA JACHEC-NEALE, THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICE 5–6 (2015); See also: B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AMERICAN JOURNAL OF INTERNATIONAL LAW 1–46, 20–27; PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ABITRARY EXECUTIONS, UN DOC A/HRC/14/24/ADD.6 19 (2010).

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away from its original endorsement of the graduated use of force standard. The UK even revised its Military Manual in order to avoid the appearance to be endorsing the graduated use of force standard. The three constitutive elements of DPH are widely and without criticism referenced as standard to establish DPH.

Increasing relevance of non-state armed groups demands for new diplomatic responses. Most recent developments on the definition of DPH can be found in ad-hoc commitments of States and non-state armed groups regarding the laws of war.[226] Those commitments take different forms: unilateral declarations, bilateral agreements or trilateral agreements with the involvement of the UN or NGOs.[227] Traditionally, those agreements are overlooked in the development of the law of non-international armed conflicts.[228] However, all analyzed commitments only state respect for the Geneva Conventions and/or the APs, without providing more precise definitions. Interviews with Geneva-Call will hopefully help to ascertain the extent to which the DPH-Guidance play a role in drafting non-state armed groups deeds of commitments.

3.2. The multilateral path

Change is generated as a result of secondary law-making or diplomatic statements issued by many states within the framework of an international organization. The authority relies on collective will, and the mechanism is the creation of soft law materials, the contribution to the formation of opinio iuris.[229]

The Customary Law Study does reference several statements made within International Organizations in order to support the claim that Rule 6 (on DPH) is customary IHL.

3.3. The organizational path

Change results from regulation, statements or operational procedures produced within international organizations. The authority is derived from bureaucratic expertise, and the mechanism is the initiation of 'trivial/procedural looking' change via technical adjustments.[230]

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[226] SIVAKUMARAN, *supra* note 132 at 101.
[227] For a list of available ad hoc committments see: *Id.* at 141–152.
[228] *Id.* at 107.
[229] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019, p. 4
[230] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019, p. 4

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The shift to the ICRC being central to the development of IHL, also in areas of modes and means of warfare happened after the second world war (see 'Geneva Conventions of 1949', at p. 259) is crucial for the organizational path of change for the DPH-definition. With the Geneva Conventions, the ICRC obtained the mandate to …. The Hague Conferences had been convened by Russia in their own interest, and never established institutions.[231] The unique position of the ICRC made the path of expanding the Geneva Law more appealing than revising the Hague Law. Subsequently, as has been elaborated in IV. 2.2, 2.3 and 2.4, the ICRC used its mandate to cement its own position.[232]

The ICRC putting forward the DPH Guidance as its own view did provide momentum for change although a successful expert-process might have provided a more direct pathway for change. Deciding to publish the Guidance as its own view on DPH, the ICRC drew on its own authority in order to establish a clear definition of DPH. The Guidance states that it reflects the institutional view of the ICRC and has been adopted by the ICRC Assembly before its publication. Insisting on the neutrality and impartiality of the ICRC, the Guidance refers to the ICRCs mandate to:

> *undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law; and to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;*[233]

Among others, MICHAEL SCHMITT referenced the lack of success of the previous ICRC interpretive guidance project in the use of force in order to underline that 'States involved in 21st century warfare are unlikely to view the document favorably, let alone use it to provide direction to their forces in the field'.[234]

3.4. The judicial path

The judicial path leads to change when the results of decisions and findings of international and/or national courts and quasi-judicial bodies are recognized as authoritative. It is judicial authority, and

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[231] See: Betsy Baker, *Hague Peace Conferences (1899 and 1907)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2015).
[232] See for instance the ICRC putting forward the Draft for the APs, elaborated at p.12.
[233] Art. 5(2)(c) and (g) Statutes of the Movement.
[234] Schmitt, *supra* note 30 at 699.

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the mechanism is based on broad interpretation, the channeling of views expressed in other instruments, state practice and giving legal basis to a decision.[235]

Judicial pathways of change were parallel to the establishment of the DPH-Guidance and hence intersected with this Guidance in a reciprocal manner.

a) ICTY/ICTR

When the DPH Guidance was published in 2009, the vast majority of ICTY and ICTR judgments had already been issued.[236] It is not overly surprising that only one ICTY judgment and no ICTR judgment invoke the ICRC Guidance: the Court had already years of established case law and its competence did concern DPH questions only at the periphery.

In that sense it is actually most noteworthy that an ICTY judgment refers to the ICRC Guidance: the Dordevic Trial Chamber had to deal with the legality of targeting civilians. The judgment refers to the ICRC Guidance as 'authoritative' body introducing the continuous combatant function. The chamber considered this concept as 'relevant to determining the legality of targeting a particular individual in certain circumstances. However, in the *Dordevic Case* further investigation into DPH was not deemed necessary.[237]

This reference is however interesting, as the DPH-Guidance is issued after the acts before the court had been committed, and after the Statute based on which the incriminations were specified had been promulgated. Given that no specific elaborations regarding ex-post-facto law were advanced, the DPH Guidance seem not to be invoked as a law. (Alternatively, the omission of specific elaborations can also be based on strategic considerations.) However, the ICTY refers to the one concept that has been introduced beyond the scope of pure clarification and restatement of law: the continuous combatant function. While the tribunal does not base its own ruling on that document, it still confers notable authority to the legal concept of the continuous combatant function.

b) ICC

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[235] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019, 4.
[236] Only 28 more ICTR judgments and 30 more ICTY judgments remained after the date of publication of the ICRC Guidance.
[237] ICTY, Prosecutor v Dordevic (Judgment) Case No. IT-05-87/1-T (23 February 2011), para. 2054.

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The ICC dealt with the DPH Guidance in the *Lubanga Case*. The defense invoked the Guidance in order to establish that children were not used to participate 'actively' in hostilities.[238] The Trial Chamber did not take up this reference, and elaborated instead on the distinction between 'active' and 'direct' participation.[239] So, without direct reference to the Guidance, the judgment deviated from the Guidance that treats those two words as synonyms.[240] The Appeals Chamber then did reference the Guidance when stating that 'active' in CA3 is synonymous to 'direct' in the PAs.[241] However, it stated then that 'active' in Art. 8 (2) (e) (vii) Rome Statute is not synonymous to 'direct' in the PAs, because the two provisions have different purposes.[242] In the *Katanga case*, the ICC decided similarly.[243]

This highlights that courts are only to be found at the periphery of IHL: the ICC and the ICTY are primarily concerned with the investigation on individual criminal responsibility, and only in that framework they are interested in related questions of IHL, like the direct participation concept.

c) Domestic courts

The impact of domestic courts has already been elaborated as part of State-action. However, those judgments could also be considered as part of the judicial pathway. SHERESHEVSKY elaborates on international lawmaking in domestic contexts, in particular with reference to the Israel Supreme Court judgement on targeted killing.[244]

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[238] ICC, Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, Cas No. ICC-01/01-01/06, ICL 910 (14 March 2012), para. 581-582 and 585.
[239] ICC, Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, Cas No. ICC-01/01-01/06, ICL 910 (14 March 2012), para. 627-628.
[240] ICRC AND MELZER, *supra* note 21 at 12, 43; Carsten Stahn, *Between "Constructive Engagement", "Collusion" and "Critical Distance"*, *in* HUMANIZING THE LAWS OF WAR, 208–209 (Robert Geiss, Andrea Zimmermann, & Stefanie Haumer eds.,).
[241] ICC, Situation in the Democratic Republic of the Congo, Prosecutor v. Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, Case No. ICC-01/04-01/06 A5 ICL 1653 (1 December 2011), para. 318 and 324.
[242] ICC, Situation in the Democratic Republic of the Congo, Prosecutor v. Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, Case No. ICC-01/04-01/06 A5 ICL 1653 (1 December 2011), para. 324.
[243] ICC, Prosecutor v Katanga (Judgment pursuant to article 74 of the Statute) Case No. ICC-01/04-01/07-3436 (7 March 2014), para. 790.
[244] Yahli Shereshevsky, *Targeting the Targeted Killings Case – International Lawmaking in Domestic Contexts*, 18 HEBREW UNIVERSITY OF JERUSALEM LEGAL STUDIES RESEARCH PAPER SERIES 1–52 (2017).

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d) Guidance

The influence of the judgments on the Interpretive Guidance is particularly evident in the choice or examples provided.[245]

3.5. The epistemic community / individual expert path

The change on the epistemic community/ individual expert path is based on statements by recognized authorities in a given fields. Those authorities are often embedded within the framework of an institution or they channel their views by means of an organization. The authority is knowledge-based, and the mechanism is solution-oriented intervention bringing technical expertise.[246]

Expert knowledge was crucial for the extent of successful change of the DPH notion as well as for the failure of a more substantial change. Individual expertise is at the core of the development of the DPH-notion: While the expert process did not develop as intended, the DPH Guidance claims nevertheless to draw on the knowledge obtained during the five expert meetings.[247] However, the majority of the footnotes referencing the expert process links the Guidance to disagreements of those experts rather than to supportive voices.

To what extent the expert process influenced the outcome of the DPH can only be established by reference to the subsequent contestations, in particular through deliberate academic publications. This path has however only been taken by the opposing experts. Why the 2/3 of experts that did not oppose the guidance did not overtly present support remains subject to speculation. It is however striking that mainly experts that are closer to the military fraction of IHL-lawyers have made their dissent and reasons therefore public. [WILLIAM FENRICK declared that he did not request to be removed from the final document, despite disagreeing on elements of it.]

The contestations by the military experts seem to have direct implications on the acceptance of the DPH Guidance's statements: The personal dimension of the 'Continuous Combatant Function' and the concept of 'Graduated Use of Force in Direct Attack' were rejected on the grounds that experts

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[245] ICRC AND MELZER, *supra* note 27.
[246] KRISCH NICO and YILDIZ EZGI, *Framing Paper,* Draft of the 21 February 2019, p. 4.
[247] ICRC AND MELZER, *supra* note 27 at 9.

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contested it. On the other side, the parts of the Guidance that were less criticized seem to have made their way into general acceptance as law: the time dimension of the continuous combatant function, and the three criteria establishing DPH are restated without much further consideration.

NILS MELZER was in charge of the *ICRC Guidance Process* while being employed in the ICRC legal division. He was in particular able to draw on the ICRC archive State-practice which is not available to the public. Furthermore, the close similarities in particular of the more contested elements with elaborations in Melzers' PhD is striking.[248] This similarity has been highlighted by several authors in order to delegitimize the ICRC's claim that the Guidance is a restatement of law.

In the process developing the *Harvard Manual* (2010) and the *Tallinn Manual* (2013), partly the same experts were involved.[249] However, the approval of some of the Guidance's positions varies between the two manuals. For instance, the *Harvard Manual* states that the three constitutive elements of DPH had not been unanimously accepted, while the *Tallinn Manual* makes the allegation that this had indeed been the case.[250] To what extent this difference is due to the different actors participating or changing external factors in the three years between the publication of the *Harvard Manual* and the publication of the *Tallinn Manual* remains subject to speculation.

4. Type of change

4.1. Norm emergence / norm death

When the Additional Protocols can be considered as the emergence of the regulation of means of warfare (traditionally subject of the Hague Law) in the Geneva Law, the DPH-guidance aims at solidifying that emergence by providing clarifications regarding the definition of DPH. To what extent this sidelining of 'the Hague Law' can be considered as assistance in norm suicide is hard to quantify or qualify.

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[248] NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008).

[249] Program on Humanitarian Policy and Conflict Research at Harvard University (n 384) 18–19; Schmitt (ed.), Tallinn Manual on the International Law Applicable to Cyber Warfare (n 384) 6–7.

[250] Program on Humanitarian Policy and Conflict Research at Harvard University (n 384) 121 (A number of members of the Group of Experts stated that these criteria do not reflect de lega lata and impose inappropriate constraints on the scope of DPH.); Schmitt (ed), Tallinn Manual on the International Law Applicable to Cyber Warfare (n 384) 102.

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4.2. Norm adjustment

As has been elaborated in IV. 2.2, at p. 263, drafting the Additional Protocols States could not agree on a more precise definition. In that sense, the continuing attempts to provide for a definition of DPH is the attempt to tackle this lack of agreement. However, the change in the conduct of warfare was the primary reason for the increasing necessity to define DPH, to adjust IHL to new social circumstances.[251]

4.3. Paradigm shift

It is important to recall that the ICRC initiated the Additional Protocols shift of balance in favor or the principle of humanity at the expense of the principle of military necessity. The DPH Guidance then attempts to push further into that direction. In that sense, the opposition of the military IHL fraction can be considered to block an attempted paradigm shift, while favoring more precise definitions within the existing paradigm. One can also discern the continuing shift from the Hague Law to Geneva Law, as has been elaborated in IV, 3.3.

5. ***Pace and mode of change***

As has been demonstrated, the present case is concerned with incremental change, driven by intersecting and competing pathways of change: the DPH Guidance and several court judgements were written at the same time, customary law based on treaty law is pushed by the US and Israel's publications of their state practice and IHL lawyers valuing military necessity increasingly oppose IHL lawyers giving preference to humanitarian values. Those intersecting pathways increasingly revolve around the structure set out by the DPH Guidance, without necessarily adopting the content put forth by the author.

6. ***Salience***

The definition of DPH seems of fairly low interest to the general public.

[251] See elaborations on the DPH-Guidance being situated in the post 9/11 context at IV, 2.5, at p. 21.

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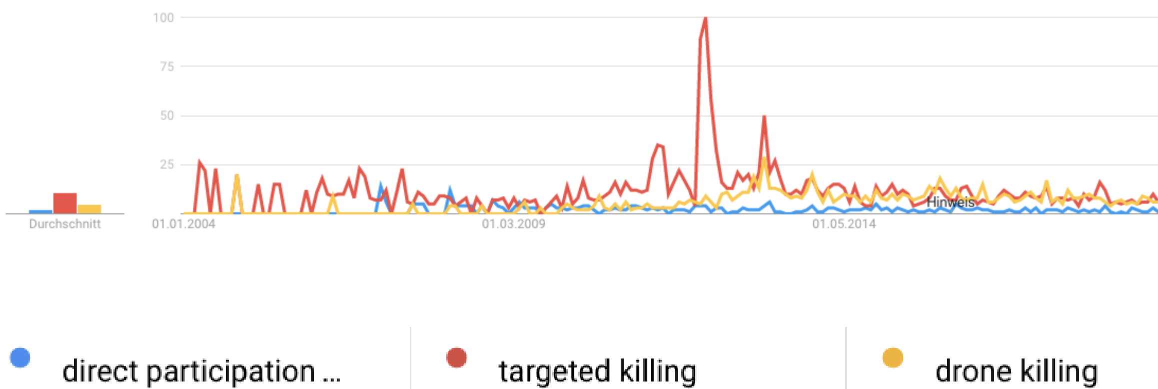

The Kunduz case in Germany raised punctually high interest. However, this was fairly unrelated to interest in the topic of targeted killing. [The second increase of interest coincides with the US air strike hitting a hospital in Kunduz.]

However, the issue of DPH is at the core of contemporary IHL debates. According to a rero-subject research, within the period from 1949-2019, roughly half of the publications on the subject of IHL also related to the subject of DPH.

Although IHL has no court at its core, numerous judgements deal with the definition of DPH. Arguably, one reason for the increasing acceptance of the DPH-Guidance, in particular its less contested elements, may be the lack of alternative documents for reference. Increasingly, DPH is assessed with reference to the DPH-Guidance, although not necessarily in approval of the DPH-Guidance's' content.

7. ***Institutional availability***

The field of IHL is unique in its structure with an international organization at its core that is pledged to neutrality and confidentiality towards its member states, while at the same time

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mandated to promote humanitarian concerns in warfare. At the same time there is no court that would be primarily concerned with IHL. International Criminal Courts are interested in individual criminal responsibility, and only assessing this question they address IHL at their periphery. Furthermore, State interest in publishing or not publishing their practice is fundamentally driven by strategic concerns.

The present case is representative of those characteristics: the ICRC plays a crucial role in promoting a clearer definition of DPH, while meeting State resistance where it seems to go too far towards the protection of humanitarian concerns at the expense of the principle of military necessity. Several judgments deal with the question of DPH – always within the frame of assessing individual criminal responsibilities. Furthermore, an objective evaluation of State practice is impossible because Israel and the US very proactively make their practice available while other States do not – both based on strategic considerations.

8. ***Conditions of change***

8.1. Stability of interpretation

As has been demonstrated in IV, 2.2, 2.3 and 2.4, there was no definition of DPH prior to the Guidance.[252] Changing social environment increased the necessity of a stable definition. As ALSTON holds in his report in 2010:[253]

> *The greatest source of the lack of clarity with respected to targeted killings in the context of armed conflict is who qualifies as a lawful target, and where and when the person may be targeted.*

8.2. Factors

As has been elaborated in IV, 2.4 and 2.5, the most important factors for the change analyzed were the increasing civilianization of war, the low possibilities of successfully drafting a new

[252] ICRC, *supra* note 122.
[253] ALSTON, *supra* note 224 at 19, para. 57.

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convention, the composition of the expert panel and the broad formulation in the existing treaties (GCs and APs).

8.3.Actors

As has been elaborated in IV. 2, several actors have been crucial in pushing the analyzed change: States' decision to publish their state practice or not, non-state armed groups committing to respect IHL, the ICRC pushing for a shift towards humanitarian considerations, the members of the ICRC expert group opposing the Guidance, or not openly supporting the Guidance.

IV. Conclusion

While it remains challenging to trace the precise scope of change, it has been established that the DPH Guidance did influence the scope of possible interpretations of DPH considerably: the continuous combatant function it in its personal dimension made into the IHL acquis and reference to the three elements in order to examine whether DPH is given has become accepted common practice. However, in particular the tension between military necessity and humanitarian concerns has been if anything increased. If the DPH Guidance attempted to push for a more humanitarian focus of IHL, that shift has been fiercely opposed by military IHL lawyers and at the same time has not been backed up enough by other IHL lawyers.

Looking back at the starting point of diverging accounts of legal change in the consulted textbooks, the hypothesis can be confirmed that those authors relied on diverging implicit evaluations on authorities for establishing change.

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Annex: Analyzed State Practice regarding the DPH-Guidance

a) Explicit contestations:

The *US Department of Defense Law of War Manual* holds that the 'US has not accepted significant parts of the ICRC's interpretive guidance as accurately reflecting customary international law'.[254] This is only based on an article by STEPHEN POMPER, then Assistant Legal Adviser in the Department of State, written in his personal capacity,[255] as well as a concurring opinion of Judge Williams in Al-Bihani v Obama.[256] MAJOR RYAN T. KREBSBACH, Judge Advocate in the U.S. Marine Corps, elaborates his personal opinion that

> *The United States supports the customary international law principle that a civilian forfeits immunity from attack when directly participating in hostilities. The DoD approach in the Law of War Manual, however, is more expansive than the ICRC's approach. According to the Manual, a civilian forfeits immunity not only by participating in actual combat but, among other things, by engaging in combat sustaining activities as well. This broader definition would include as targetable not only those members of a non-State armed group equivalent of combat arms elements, but rather all members of a non-State armed group, including those who serve in combat service and combat service support roles.*[257]

This exemplifies how in order to establish the US approach, the center-point of argument is the ICRC-Guidance from which deviation ought to be justified.

When explaining the principle of necessity, the *US Department of Defense Law of War Manual* refers to the Guidance as representative of the legal opinion that military necessity imposes restraints on the use of force in direct attack, on which the Guidance builds the graduated use of

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[254] Office of General Counsel Department of Defense, Department of Defense Law of War Manual, Washington June 2015,(update of 2016) 5.9.1.2.

[255] Stephen Pomper, 'Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice' (2012) 88 International Law Studies 181–193 p.181 (But noting on p. 186 to which the DoD Manual refers that the US government in its habeas filings made clear that it did not regard the Guidance as an authoritative statement of the law without, however, providing a reference for this). See also Stephen Pomper, 'Remarks by Stephen Pomper' (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) 307–310 (although speaking in his personal capacity, he tries to accurately reflect the US government perspective on the at this time still unpublished Guidance).

[256] *Al-Bihani v Obama*, 590 F 3d 866 (US Court of Appeals, DC Cir 2010) concurring opinion by Judge Williams, p. 6.

[257] Ryan T. Krebsbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 125–157, 126 (2017).

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force standard.[258] The *US Department of Defense Law of War Manual*, however, rejects this interpretation as not reflecting customary or treaty law applicable to the US.

Other explanations of the *US Department of Defense Law of War Manual* can be seen as implicit reactions to the Guidance. For instance, the DoD Manual objects to the 'revolving door protection' by, *inter alia*, referring to KENNETH WATKIN's critique on the Guidance in the NYU Journal of International Law and Politics.[259] Moreover, in a footnote on the US statement of understanding regarding the meaning of the phrase 'direct part in hostilities' in Art. 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict[260], the *US Department of Defense Law of War Manual* clarifies that this statement was only made in the context of the Protocol and may not be adopted to other treaties.[261] While the Guidance itself does not refer to the US statement of understanding, NILS MELZER in his response to the critique on the Guidance quotes this statement as support for the Guidance's restrictive interpretation of the term 'participation'.[262]

In particular the US and Israel reject the Continuous Combatant Function in the personal dimension.[263] With regard to the continuous combatant concept, but in its personnel dimension, the Israeli government, in its report on the 2014 Gaza Conflict, which, *inter alia*, presents Israel's legal positions on the conduct of hostilities, including the targeting of armed group members, explicitly rejects the continuous combatant concept of the Guidance. Israel argues that there is no requirement of continuous combatants under customary international law for members of armed

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[258] Office of General Counsel Department of Defence, 'Department of Defence Law of War Manual' (Washington June 2015 (updated May 2016)) 2.2.3.1

[259] ibid 5.9.4.2 referring to Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 New York University Journal of International Law and Politics (3) 641–695. Contrary to the Guidance, the DoD Manual holds the view that civilians, who have taken a direct part in hostilities must permanently cease their participation to be protected from attacks, see para. 5.9.4.1.

[260] 2201 UNTS 311, 312.

[261] Office of General Counsel Department of Defence, 'Department of Defence Law of War Manual' (Washington June 2015 (updated May 2016)) 4.20.5.2 (fn. 443).

[262] Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law and Politics (3) 831–916 p.888.

[263] *Al-Bihani v Obama,* 590 F 3d 866 (US Court of Appeals, DC Cir 2010) concurring opinion by Judge Williams, pp. 4-6; State of Israel, 'The 2014 Gaza Conflict' (May 2015) <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> accessed 12 March 2019 264–266.

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groups to be legally subject to attack.[264] Instead of the continuous combatant concept, the report adopts the position that 'members of organised armed groups may be attacked at any time by the sole virtue of their membership'.[265]

In sum, the continuous combatant function in its personal dimension is explicitly rejected by Israel and the US. The US also rejects the graduated use of force standard, and bases its deviations from the guidance also on the NYU-Symposium contestations.

b) Implicit contestation

While the first edition of the Colombian Operational Law Manual published in 2009 also incorporated the graduated use of force standard,[266] this was not repeated in the 2015 edition.[267] Yet, the 2009 edition did not cite the Guidance for the graduated use of force standard, but NILS MELZER's book on targeted killing.[268]

Peru's IHL and Human Rights Manual (2010) states:

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[264] State of Israel, 'The 2014 Gaza Conflict: Factual and Legal Aspects' (May 2015) pp.264–266 <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> accessed 12 March 2019 see especially fn. 222. In accordance with the report of the Israeli government on the 2014 Gaza Conflict, Schmitt and Merriam document the practice of the Israel Defense Forces, which follow the Guidance's approach to organised armed groups, including the assumption that groups may consist of both military and non-military wings, but not the CCF concept. The authors cite an Israeli Military Advocate General officers stating that the CCF concept causes a legal imbalance and that it has no basis in treaty law binding upon Israel or customary international law, see Michael N Schmitt and John J Merriam, 'The Tyranny of Context: Israeli Targeting Practices in Legal Perspective' (2015) 37 University of Pennsylvania Journal of International Law (1) 53–139 pp.112–113

[265] State of Israel, 'The 2014 Gaza Conflict: Factual and Legal Aspects' (May 2015) para 264 <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> accessed 12 March 2019. But see Ryan Goodman, 'Resource: The Israeli Government's Legal Position on Who Is a "Combatant" in the Gaza Conflict [Updated]' (Just Security 2014) <www.justsecurity.org/13895/resource-israeligovernments-legal-position-combatant-gaza-conflict/> accessed 13 March 2019 (according to whom this position is however 'at least stated at that high level of abstraction', consistent with the […] Guidance.')

[266] Comando General de las Fuerzas Militares, 'Manual De Derecho Operacional: Manual FF.MM 3-41 Público' (Bogotá, D.C. - Colombia 2009) p.88 <https://usnwc.libguides.com/ld.php?content_id=2998179> accessed 11 March 2019 ('El concepto de necesidad militar contiene en sí un importante elemento de *restricción*: sólo se empleará la fuerza necesaria para cumplir con los propósitos militares; cualquier uso de la fuerza que sobrepase ese objetivo va en contravía de la necesidad militar'). See also Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law and Politics (3) 831–916 p.910

[267] For further discussion, see Ka L Yip, 'The ICRC's interpretive guidance on the notion of direct participation in hostilities: sociological and democratic legitimacy in domestic legal orders' (2017) 8 Transnational Legal Theory (2) 224–246 p.230

[268] Comando General de las Fuerzas Militares, 'Manual De Derecho Operacional: Manual FF.MM 3-41 Público' (Bogotá, D.C. - Colombia 2009) p.88 <https://usnwc.libguides.com/ld.php?content_id=2998179> accessed 11 March 2019 (fn. 205) referring to Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) p.286

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"Civilians may not directly participate in hostilities. Civilians may not be attacked unless they directly participate in hostilities." Peru, Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas, Resolución Ministerial No. 049-2010/DE/VPD, Lima, 21 May 2010, p. 419.

It is important to not here that this law, although promulgated after the DPH-guidance was released, does not refer to the temporal dimension of DPH.

In 2009, in a report on Israeli operations in Gaza between 27 December 2008 and 18 January 2009 (the "Gaza Operation", also known as "Operation Cast Lead"), Israel's Ministry of Foreign Affairs stated:[269]

96. It is important to make clear what this principle [the Principle of Distinction] does not require. First, by definition, the principle of distinction does not forbid the targeting of … civilians who take a direct part in the hostilities. (…)

98. Direct participation in hostilities ***has been interpreted by Israel's High Court of Justice*** *as involving all persons that perform the function of combatants, including "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it," as well as "a person who collected intelligence on the army, whether on issues regarding the hostilities … or beyond those issues … ; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. [emphasis added]*

Here, the Israeli government establishes its own definition of DPH without consideration of international law. Point of reference is a national judgement. This will however change with partial and implicit endorsement in the Turkel commission.

In times of hostilities, the *Biri-Ma-Geydo* (Spared from the Spear), i.e. Somalia's own "Geneva Conventions"[,] which existed long before the adoption of the Hague and Geneva Conventions, mitigated and regulated the conduct of clan hostilities and the treatment of immune groups. In 1998, an ICRC publication entitled 'Spared from the Spear' recorded traditional Somali practice in warfare as follows: '[T]he man who, although belonging to one of the two groups involved in the conflict, did not himself take part in the fighting and did not carry any weapons … [was] generally spared.' In 2011, in its comments on the concluding observations of the Human Rights Council concerning Somalia's report, the Transitional Federal Government of Somalia referred to 'Spared

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[269] Israeli Ministry of Foreign Affairs, "The Operation in Gaza, Factual and Legal Aspects", Report, Israeli Ministry of Foreign Affairs, July 2009, available at http://www.mfa.gov.il.

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from the Spear' as its 'own Geneva Conventions' – without referencing the DPH Guidance. [The extent to which this can be considered as contestation needs to be further researched]

c) Implicit endorsement

The two reports of the Turkel Commission, installed by the Israeli government, demonstrate a rather ambivalent position towards the Guidance. The first report cites the Guidance's three constitutive elements to qualify an act as DPH; but at the same time notes that the Guidance 'has generated considerable controversy, and the participants were not able to reach a broad consensus regarding the definition of direct participation in hostilities' and that it will therefore be used cautiously in the report.[270] Alongside the diverse critique in the 2010 NYU Journal of International Law and Politics, it refers to a report by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions[271] in order to demonstrate a lack of international consensus on the Guidance.[272] Nevertheless, after concluding that activists who took part in the violence directly participated in hostilities based on the criteria established in the *Targeted Killings* case of the Israeli Supreme Court[273], the report additionally notes that 'the Commission would have reached the same conclusion by applying the standards set out in the ICRC *DPH Interpretive Guidance*'.[274] Moreover, a reference is made to the Guidance on the legal consequences for targeting civilians if the threshold of an armed conflict is not reached.[275]

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[270] The Public Commission to Examine the Maritime Incident of 31 May 2010 - The Turkel Commission, 'Report Part One' (January 2010) pp.235–236 <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> accessed 28 February 2019 para. 194.
[271] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Study on Targeted Killings' (28 May 2010) UN Doc A/HRC/14/24/Add.6, p. 20, para. 62.
[272] The Public Commission to Examine the Maritime Incident of 31 May 2010 - The Turkel Commission, 'Report Part One' (January 2010) pp.235–236 <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> accessed 28 February 2019 (fn. 819) .
[273] Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel* (Judgment) Case No. HCJ 769/02 (13 December 2006).
[274] The Public Commission to Examine the Maritime Incident of 31 May 2010 - The Turkel Commission, 'Report Part One' (January 2010) p.240 <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> accessed 28 February 2019 para. 201.
[275] ibid p.238 para. 197 (fn. 833).

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The second report of the Turkel Commission refers only once to the Guidance, for general information on DPH in the context of targeting, and points to both the critique on the Guidance and the response by NILS MELZER.[276]

Without referencing the Guidance, the *US Department of Defense Law of War Manual* also corresponds to some of the Guidance's explanations: the circumstances of the individual case determine whether an act constitutes DPH.[277] To what extent this can be seen as an implicit endorsement depends on the degree in which it deviates from former formulations.

The *US Department of Defense Law of War Manual* also corresponds to the Guidance in some of its explanations without making a reference to it. For instance, the view that it depends on the circumstances of the individual case whether an act constitutes DPH, corresponds to the Guidance's concept of DPH.[278] The *US Department of Defense Law of War Manual*, however, does not refer to the Guidance, but to the summary report on the third expert meeting on the notion of DPH underlying the Guidance.[279]

The *German Military Manual* provides a note on the Guidance stating that:

> *This study is legally non-binding and contains recommendations and approaches that are helpful, in particular, in identifying by legal means persons in non-international armed conflicts that may lawfully be engaged in combat.*[280]

[276] The Public Commission to Examine the Maritime Incident of 31 May 2010 - The Turkel Commission, 'Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law' (February 2013) p.60 <https://www.gov.il/BlobFolder /generalpage/alternatefiles/he/turkel_eng_b1-474_0.pdf> accessed 4 February 2019 (fn. 26).
[277] Cf. Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (Geneva 2009) pp.41–42.
[278] Cf. Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (Geneva 2009) pp.41–42.
[279] Office of General Counsel Department of Defence, 'Department of Defence Law of War Manual' (Washington June 2015 (updated May 2016)) 5.9.3.
[280] Bundesministerium der Verteidigung (Germany), 'Law of Armed Conflict - Manual -: Joint Service Regulation (ZDv) 15/2' (Berlin 1 May 2013) para 131.

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Although in its instructions the Manual does not make explicit references to the Guidance, it seems that it adopts some of the Guidance's explanations, including the CCF concept in its temporal dimension.[281]

d) Explicit endorsements:

The US government's legal advisers referred to the Guidance in the 2010 Memorandum for the Attorney General on the lethal operations against Shaykh Anwar al-Aulaqi in Yemen.[282] The Memo cites the Guidance on two instances, both with regard to the continuous combatant concept in its temporal dimension. First, it uses the Guidance to neglect the view that in non-international armed conflicts civilians may only become subject to attack when directly participating in hostilities since according to the Guidance, 'a member of a non-state armed group can be subject to targeting by virtue of having assumed a "continuous combat function" on behalf of that group'.[283] Second, the Memo quotes from the Guidance that the language of CA 3 makes clear that members of non-state armed groups 'are considered as "taking no active part in hostilities" only once they have disengaged from their fighting function … or are placed hors de combat; mere suspension of combat is insufficient'.[284]

With regard to the practice of the UK, it is of interest, that in 2010, shortly after the publication of the Guidance, the UK Ministry of Defense amended the 2004 MoD's text on military necessity. This text was quoted by the Guidance as support of state practice for the reading of the principle of military necessity as implementing restrictions on the use of force in direct attack.[285] According to the amended version: Military necessity is now defined as:

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[281] ibid para 1308 ('persons may be attacked by military means […] who, as a result of their role and function within the enemy forces, are continuously participating in hostilities (continuous combat function) and thus are a legitimate military target, even outside of their participation in specific acts of hostility.').

[282] US Department of Justice, Office of Legal Counsel, Memorandum for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi, Washington, 16 July 2010, https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04 /02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf (last visit 12.03.2019).

[283] Ibid., pp. 21-22 (fn. 28).

[284] Ibid., pp. 37-38 quoting Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (Geneva 2009) p.28.

[285] Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (Geneva 2009) p.79 quoting UK Ministry of Defence, *The Manual on the Law of Armed Conflict* (Oxford University Press 2005) 2.2 ('Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the

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'the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war' [...] Put another way, a state engaged in an armed conflict may use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial [...] submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[286]

Although the second part of the amended version resembles the prior version, according to Ka Lok Yip, this amendment was established in order to avoid the conclusion that the UK adopts the GUF standard as proposed by the Guidance in Part IX.[287] In *Serdar Mohammed*, the UK Secretary of State quoted the Guidance in the submission that international law authorises states to target non-state actors participating in NIACs.[288]

Conversely, the second edition of the Colombian Operational Law Manual from 2015 makes several explicit references to the Guidance. The Manual quotes from Part IX of the Guidance in the MoD's interpretation of the principle of military necessity, which was amended in 2010, as stated above.[289] Moreover, the Manual refers to the Guidance for the combatant privilege[290] and the definition of civilian,[291] and adopts the CCF concept from the Guidance in both its temporal and its personnel dimensions,[292] as well as the three constitutive elements for DPH.[293]

In the case of *Al-Bihani v Obama*, relying on the Guidance's continuous combatant concept in its personnel dimension, Al-Bihani submitted that he was not a member of a non-state OAG but a civilian and could thus not permissibly be detained by US forces.[294] In his concurring opinion, to

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legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.').

[286] UK Ministry of Defence, Joint Services Publication 383 – The Manual of the Law of Armed Conflict Amendment 3 (September 2010), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27871/20100929JSP383Amendment3NoterUpChs14Sep10.pdf (last visit 11.03.2019) p. 5.

[287] Ka L Yip, 'The ICRC's interpretive guidance on the notion of direct participation in hostilities: sociological and democratic legitimacy in domestic legal orders' (2017) 8 Transnational Legal Theory (2) 224–246 pp.230–231

[288] Serdar Mohammed v. Ministry of Defence [2015] EWCA Civ 843, paras. 205 and 237.

[289] Comando General de las Fuerzas Militares, 'Manual De Derecho Operacional Para Las Fuerzas Militares' (Bogotá, D.C. - Colombia 2015) p.28 <https://www.esmic.edu.co/recursos_user///Manual%20de%20derecho%20operacional%20FF.%20MM.pdf> accessed 17 January 2019

[290] Ibid p.29.

[291] Ibid p.35.

[292] Ibid pp.36–37.

[293] iIbid pp.37–38.

[294] *Al-Bihani v Obama*, 590 F 3d 866 (US Court of Appeals, DC Cir 2010) concurring opinion by Judge Williams, p. 4.

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which the US Department of Defense Law of War Manual refers, Judge Williams, however, rejected Al-Bihani's submission holding that the Authorization for Use of Military Force[295] allowed the detention of Al-Bihani regardless of whether he was a member of the OAG or only supported this group.[296] With regard to the Guidance he stated that:

> *The ICRC document does not alter this analysis. The work itself explicitly disclaims that it should be read to have the force of law. '[W]hile reflecting the ICRC's views,' the authors write, 'the Interpretive Guidance is not and cannot be a text of a legally binding nature.' [...] Even to the extent that Al Bihani's reading of the Guidance is correct, then, the best he can do is suggest that we should follow it on the basis of its persuasive force. As against the binding language of the AUMF and its necessary implications, however, that force is insubstantial.*[297]

In 2010, the German Federal Prosecutor had to investigate the bombing of two fuel tankers in Kunduz Province in Northern Afghanistan. Those tankers had been stolen by the Taliban in 2009, and become stuck in a sandbank trying to cross the Kunduz River, near the German-administered International Security Assistance Force (ISAF) Provincial Reconstruction Team. The German Commander of the PRT ordered an airstrike on the tankers because he was concerned that the tankers would ultimately be used in an attack on the Provincial Reconstruction Team. At the time of the airstrike, numerous civilians were attempting to siphon fuel from the tankers – so, a considerable amount of civilians were killed in that attack.

In 2010, in reply to a Minor Interpellation in the Bundestag (Lower House of Parliament) titled "Compensation for the victims of the Kunduz bombardment in the night of 4 September 2009", Germany's Federal Government wrote:

> *5. Based on which criteria and evidence does the Federal Government conclude that a person is to be considered an "enemy fighter" and in which way is the principle of the [1977] Additional Protocol I to the Geneva Conventions, which states that in case of doubt a person is to be considered a civilian, taken into consideration?*
>
> *In the context of a non-international armed conflict, international humanitarian law permits governmental troops and troops supporting them to use direct military force against civilians directly participating in*

[295] United States Congress, S.J.Res. 23, Pub.L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (reprinted at 50 U.S.C. § 1541 note), https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf.

[296] *Al-Bihani v Obama*, 590 F 3d 866 (US Court of Appeals, DC Cir 2010) concurring opinion by Judge Williams, pp. 4-5.

[297] *Al-Bihani v Obama*, 590 F 3d 866 (US Court of Appeals, DC Cir 2010) concurring opinion by Judge Williams, p.6 [the parentheses are original].

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concrete hostilities … . Whether a person fulfils these conditions ***depends on the circumstances of the individual case****.*

In 2010, in reply to a Minor Interpellation in the Bundestag (Lower House of Parliament) titled "Killing of German nationals by a US drone attack – Intervention of the German judiciary", the Federal Government wrote:

15. How does the Federal Government evaluate the legality of acts of targeted killing of persons within the context of international and non-international armed conflicts …?

International humanitarian law distinguishes in international and non-international armed conflicts between, on the one hand, armed forces opposing one another (international armed conflict) or armed forces and opposed organized armed groups (non-international [armed conflict]) and, on the other hand, civilians.

… [C]ivilians may in principle not be directly attacked and only lose protection from attack if and for such time as they directly participate in hostilities.

Investigating whether the German Commander should be charged, the Prosecutor ultimately decided to dismiss the case. However, the Prosecutor elaborated on the scope of DPH:[298]

The notion of hostilities is not defined in the international conventions, but taken as a given. International State practice, jurisprudence and literature have, however, largely clarified its meaning (…) Hostilities are thus not only understood in the narrow sense as armed acts of destroying personnel and equipment of the adverse forces (…) Rather the term also comprises all acts which negatively affect the military capacities and operations of a party to the conflict, with a direct causal link between the act and the disadvantage cause and an objective link between the damage caused to the adversary and the advantage for the opposing party being required. (…) Consequently, acts of sabotage, the disruption of the enemy's logistics and communications are covered (…) whereas the general disruption of the civilian infrastructure of the country in which the armed conflict is taking place, even if negatively affecting the enemy forces, is not. (…) The direct participation in hostilities as understood under the international law of armed conflict is independent of the individual will of the person concerned because the temporary loss of protection as a civilian is the consequence of the person objectively constituting a military threat.

The Prosecutor concluded that the act of taking the fuel tankers that had been destined for ISAF, caused damage to the military capability of the ISAF, and hence was a sufficient belligerent act to provide for the belligerent nexus between the damage caused to one party and the advantage gained by the other party. However, the prosecutor did not find evidence satisfying the element of proximity: 'In the present case, the fuel was intended for the ISAF forces, but was still in the

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[298] Generalbundesanwalt beim Bundesgerichtshof, offene Version, Karlsruhe, 16.04.2010, 3 BJs6/10-4, betr. Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte, available online: https://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf; (tr. in RULAC).

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possession of a private logistics company and was located far away from the point of destination and causation:

> *'the situation corresponds to a general strengthening of the resources of one party without direct relation to the hostilities, as is the case with supporting the Taliban by financial donations (...) or by smuggling weapons and ammunition across the border (...) If the strengthening of military capacities directly resulted in concrete military operations, for example by transporting weapons directly to an area where thy will be used, (...) the assessment would be different.*

Two German criminal proceedings referred to the Guidance.[299] In the *Mir Ali* case, as well as in the *Kunduz* case, the German Federal Prosecutor cited the Guidance's continuous combatant concept in its personal and temporal dimensions to support the conclusion that there were no breaches of IHL which led to the terminating of criminal investigations.[300] Additionally, in both cases, the German Federal Prosecutor also referred to the graduated use of force standard, stating, however, that at the same time, this standard did not impose additional limits on the use of force.[301]

In a judgment on the use of lethal force during demonstrations near the Gaza border in 2018, the Israeli Supreme Court adopted the Guidance's three constitutive elements for DPH, according to which it classified the demonstrators as direct participants in the armed conflict between Israel and Hamas.[302]

In 2010, in its Report on IHL and Current Armed Conflicts, Switzerland's Federal Council stated:

> *International humanitarian law establishes criteria for the granting of combatant status. It is primarily for members of the armed forces of a party to the conflict but also for members of other militias. For this,*

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[299] See on this also Ka L Yip, 'The ICRC's interpretive guidance on the notion of direct participation in hostilities: sociological and democratic legitimacy in domestic legal orders' (2017) 8 Transnational Legal Theory (2) 224–246 226-227, 230.

[300] Der Generalbundesanwalt beim Bundesgerichtshof, Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan. – Verfügung des Generalbundesanwalts vom 20. Juni 2013, Case No 3 BJs 7/12-4 (23 July 2013) pp. 23-25 (for an English translation see 157 ILR 722, pp. 746-749); Der Generalbundesanwalt beim Bundesgerichtshof, Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte – Einstellung des Verfahrens gemäß § 170 Abs. 2 Satz 1 StPO, 3 BJs 6/10-4 (16 April 2010) pp. 47-48, 60.

[301] Der Generalbundesanwalt beim Bundesgerichtshof, Drohneneinsatz vom 4. Oktober 2010 in Mir Ali/Pakistan – Verfügung des Generalbundesanwalts vom 20. Juni 2013, 3 BJs 7/12-4 (23 July 2013) pp. 25-26 (157 ILR 722, 749); Der Generalbundesanwalt beim Bundesgerichtshof, Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W. wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte – Einstellung des Verfahrens gemäß § 170 Abs. 2 Satz 1 StPO, 3 BJs 6/10-4 (16 April 2010) p. 60

[302] The Supreme Court sitting as the High Court of Justice, *Yesh Din et al v the IDF Chief of Staff et al.* (Judgment) HCJ 3003/18 and HCJ 3250/18 (30 April 2018) para. 45.

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combatants must carry their arms openly, be recognisable (generally by a uniform), be under a responsible command and act in conformity with international humanitarian law in their operations.

The report further notes:

A problem arises as to the application of the principle of distinction with regard to the revolving door phenomenon: If a combatant lays down his arms and returns to civilian life for a more or less long period, the question arises whether he or she can be killed in the context of a prolonged armed conflict. The rule under art. 51, para. 3 of [the 1977] Additional Protocol I and art. 13 of [the 1977] Additional Protocol II constitutes a veritable hinge between the status of protected and non-protected persons. According to these provisions, civilian persons benefit from the right to be protected against the dangers arising from military operations "unless they take a direct part in hostilities". For governmental troops, it is tempting to completely deny the status of civilian to insurgents or to interpret these provisions in a broad manner by considering that direct participation starts with the preparation of combat actions, which results in the loss of protection. In order to avoid any ambiguity, the ICRC recently published a study on the concept of "direct participation in hostilities", which indicates that members of organized armed groups assuming a … "continuous combat function" … lose their protection for the duration of their activities. According to this principle, the head of an organized armed group surprised while shopping in a supermarket during an armed conflict can be targeted. [footnotes in original omitted; emphasis in original]

Switzerland's Regulation on Legal Bases for Conduct during an Engagement (2005) states:

[1] Combatants are members of the armed forces of a party to the conflict, with the exception of medical and religious personnel. In war, they may engage in harmful acts as long as they comply with the rules of the law of armed conflict. Any persons who ***engage in harmful acts or openly bear weapons*** *may also be fought against.*

The Regulation also notes that, in application of the principle of distinction, a "ten-year-old child [who] releases a hand-grenade" can be shot at, giving "[s]elf-defence, military objective" as explanation. Similarly, it notes that, in application of the principle of distinction, a "[p]erson in civilian clothing armed with a submachine gun" can be shot at, explaining: "Persons carrying weapons are military objectives. Civilians may not participate in hostilities." The Regulation further states that civilians "are especially protected by the law of armed conflict, insofar as they do not participate in combat and are not in the immediate proximity of military objectives".

The UK Government Strategy on the Protection of Civilians in Armed Conflict (2010) states:

During armed conflict, civilians and combatants 'hors de combat' are entitled to specific protection under international humanitarian law (IHL) providing that they are not, or are no longer, taking a direct part in hostilities. (emphasis in original)

Further evidence of State practice is available in the ICRC customary law study. This study is continuously updated by the ICRC. However, not so many changes seem to have appeared since the DPH-Guidance was published. Since the ICRCs strategic interest to highlight its own impact is arguably high, this can be considered as fairly strong evidence that no further impact of the DPH-

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Guidance has been downplayed. However, the ICRC customary law study does not account of approving silence or implicit acceptance. Additionally, much of the State practice available to the ICRC remains confidential.

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Case Study 9

The Norm Regulating the IHRL-LOAC/IHL-Relation

(July – December 2019)

Dorothea Endres[1]

1. Typical story

Regarding the development of the norm regulating the relation between international human rights law and international humanitarian law, there is widespread agreement on the basic change:[2] IHL used to be considered applicable only in war-time, IHRL used to be considered only in peace-time. This changed because both bodies of law moved closer together. In case of clashing regulations, the solution was then to be found through the application of 'lex specialis'. This rule regularly traced back to the ICJ Nuclear Weapons case.[3]

Accounts diverge then, as to the further development and the more specific scope and form of 'lex specialis': SOLIS (2010) holds that lex specialis is the rule to resort to, in the sense that IHL is the lex specialis displacing IHRL.[4] SASSOLI (2011) holds that it has to be established on a case-by-case

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[1] I am grateful to Abhimanyu George Jain for his comments.

[2] See however: J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013) pp. 36–38 holding that the relevant UN initiatives had little reach and predominantely focused on nuclear weapons. Substantive analysis of the relevant documents did not further evidence in support for this opinion.

[3] Crowe and Weston-Scheuber, *Principles of International Humanitarian Law*, pp. 36–38; R. Hyde and R. Kolb, *An introduction to the international law of armed conflicts* (Hart, 2008) pp. 269–75; D. Jinks, P. Gaeta, and A. Clapham, 'International Human Rights Law in Time of Armed Conflict' The Oxford Handbook of International Law in Armed Conflict, (2014), pp. 656–74 pp. 662–65; R. Kolb, 'Human Rights and Humanitarian Law' Max Planck Encyclopedia of International Law, (Oxford: Oxford University Press, 2013); M. Sassòli, *Un droit dans la guerre? : [cas, documents et supports d'enseignement relatifs à la pratique contemporaine du droit international humanitaire] / Marco Sassòli, Antoine A. Bouvier et Anne Quintin ; avec la collab. de Juliane Garcia* (Comité International de la Croix-Rouge [CICR], 2012) chap. 14; M. Sassòli, *International Humanitarian Law - Rules, Controversies, and Solutionas to Problems Arising in Warfare* (Edward Elgar, 2019) pp. 423–42; D. Scalia and M.-L. Herbert-Dolbec, 'The Intricate Relationship between International Human Rights Law and International Humanitarian Law in the European Court for Human Rights Case Law: An Analysis of the Specific Case of Detention in Non-International Armed Conflicts' in D. Djukić, N. Pons (eds.), The Companion ro International Humanitarian Law, (2017), pp. 115–34; G. D. Solis, *The law of armed conflict : international humanitarian law in war* (Cambridge : Cambridge University Press, 2010) pp. 24–26.

[4] Solis, *The law of armed conflict : international humanitarian law in war*, pp. 24–25.

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basis which body of law provides the lex specialis.[5] More recent textbooks tend to move further away from the lex specialis approach and to focus even more on the interoperability of the specific norms. SASSOLI (2019), for instance, situates 'lex specialis' still as the starting point, and holds on to the structure established in his 2010 textbook, but elaborates now extensively on contestations and emphasizes that the lex specialis principle 'determines which rule prevails over another in a particular situation.'[6] SCALIA and HERBERT-DOLBEC (2017) provide a succinct picture: they identify three stages: 1. Separation 2. Lex specialis 3. Complementarity; whereby they see the majoritarian view subscribing to complementarity.[7]

In sum, authors identify a clear change from separation to lex specialis, and a not so clear further change moving away from lex specialis. Research on this story supports these findings – however, the role of the Teheran Conference and human rights arguments pushing for the humanization of LOAC are additional elements that are only highlighted in publications specifically on the topic of the norm regulating the relation between LOAC and IHRL (see 4.2.1) .

2. Evolution of the norm

The norm of interest is the one regulating the interaction between IHL and IHRL. Much in conformity with the typical story, we can identify three key-phases:

1. Separation
2. Rapprochement – lex specialis[8]
3. Convergence – interoperability

Given that two fields of law are concerned with this norm, a multitude of actors with different priorities takes part in this legal change. It is consequently crucial to remain focused on the norm

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[5] Sassòli, *Un droit dans la guerre? : [cas, documents et supports d'enseignement relatifs à la pratique contemporaine du droit international humanitaire] / Marco Sassòli, Antoine A. Bouvier et Anne Quintin ; avec la collab. de Juliane Garcia*, p. 12 (ch. 14).

[6] M. Sassòli, A. Bouvier, and A. Quintin, 'International Humanitarian Law and Internationa Human Rights Law' How Does Law Protect in War?: Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law, (Geneva: International Committee of the Red Cross, 2011), p. chapter 14 para. 9.44.

[7] Scalia and Herbert-Dolbec, 'The Intricate Relationship between International Human Rights Law and International Humanitarian Law in the European Court for Human Rights Case Law: An Analysis of the Specific Case of Detention in Non-International Armed Conflicts', pp. 115–16.

[8] The full formulation of the 'lex specialis' norm is: lex specialis derogat legi generali, and holds that the law more specifically tailored for a situation derogates more general laws.

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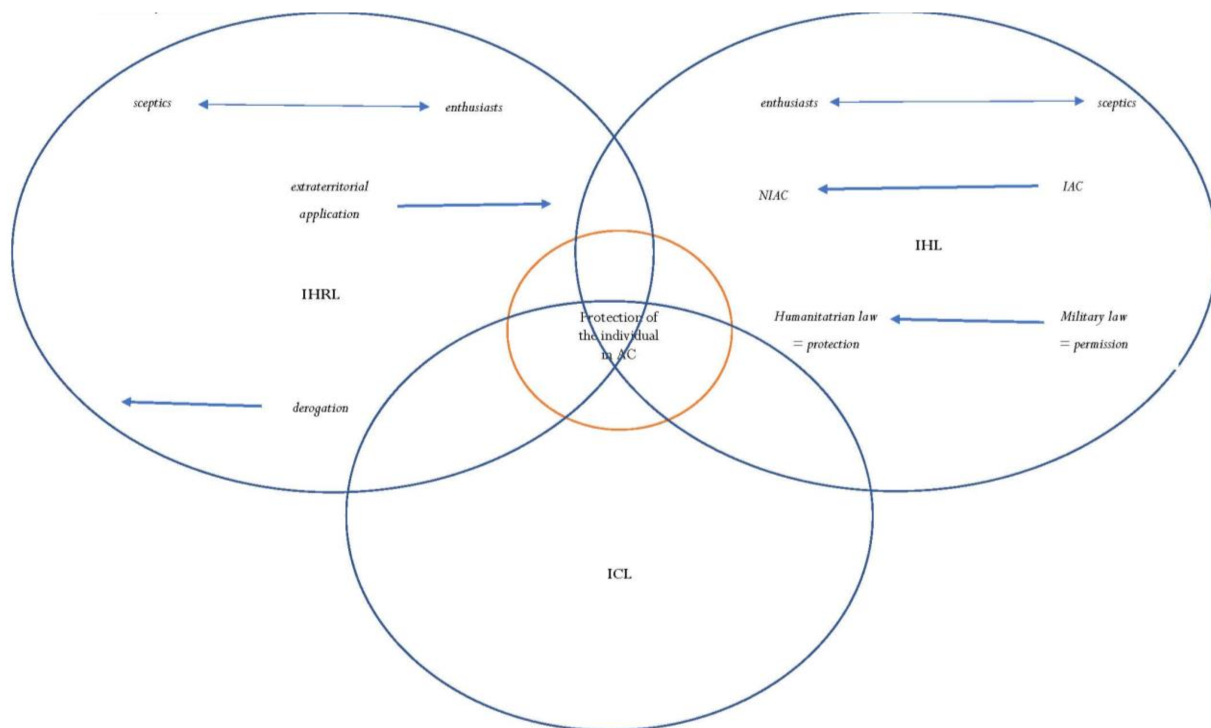
connecting the two fields only, and only on the periphery to take account of the norms allowing the two fields to push towards each other:

Human Rights Law through the ideological expansion after the end of the cold war, the limitations on derogations and most importantly through extraterritorial applications and 'living instrument'/evolutionary interpretations. IHL through the shift from IAC to NIAC, and, most importantly the push away from the military necessity principle to 'humanization' of warfare. Additionally, the development of ICL brings the individual's responsibility in armed conflict to the forefront. All those fields ultimately aim at the protection of the individual in armed conflicts. The following graphic visualizes the tools and dynamics at play:



In aiming at the protection of individuals IHRL and IHL often converge – those cases are of limited interest for the present case study. The norm regulating the relation between IHL and IHRL becomes then most important when a certain situation faces conflicting regulations through IHL

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and IHRL: this is particularly striking regarding the right to life of combatants and the detention of prisoners of wars.[9]

3. Key elements of the change in the norm regulating the relation between HR and IHL

Tools:

- *Derogations*
- *Extraterritorial application of IHRL*

1945/49 HR and IHL codifications	1968 Teheran Conference selection Subsequent UN Res. etc: construction 1996I CJ Nuclear Weapons: consolidation (more than only reception)	2005 IACtHR/ 1992 Kälin on Kuweit (precursor) 2005 ICJ, Armed Activities in Congo: selection (less than explicit selection though); Subsequent HR bodies' work: construction 2018 HRC GC 36 /2016 Akande practioners' guide: consolidation/reception

[9] Sassòli, *International Humanitarian Law - Rules, Controversies, and Solutionas to Problems Arising in Warfare*, pp. 525–26.

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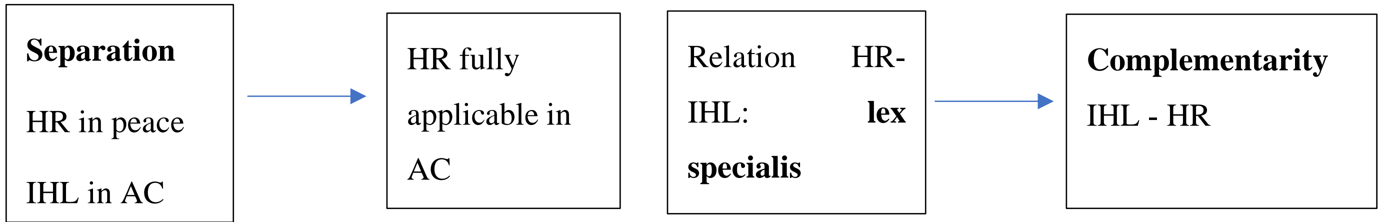

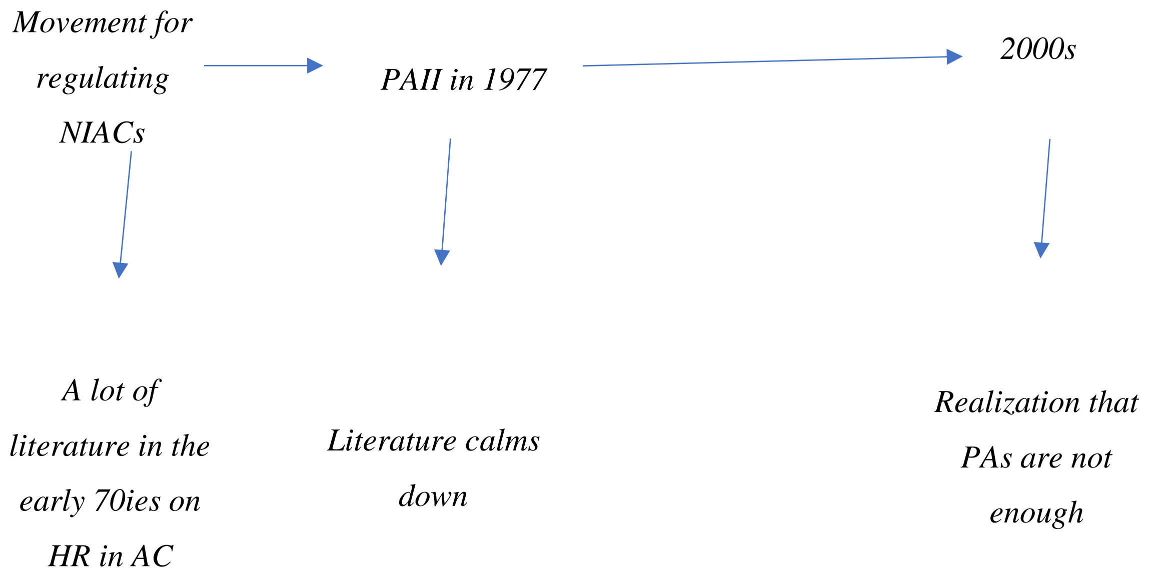

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4. Chronological Development[10]

4.1. First Phase: Formative stage of IHRL and modern IHL 1945-1950s

Modern International Human Rights Law (IHRL) only became codified after 1945 – in response to the atrocities witnessed during the Second World War (WWII). While there was little debate that the 1930ies were a period of war, there was also no contestation that human rights are meant to apply in peace-time, while the Law or Armed Conflicts (LOAC) regulates times of war:[11] Delegates at the to the conferences for the adoption of the UDHR (1948) and the Geneva Conventions (GCs) (1949) respectively paid no attention to the other field.[12]

There were several reasons for this separation: Firstly, LOAC was still understood as military law (predominantly named 'Law of War') – the GCs still had to change this body of law into International Humanitarian Law (IHL).[13] Secondly, IHRL yet had to evolve from a political-legal phenomenon into a body recognized as positive law.[14] Thirdly, the previous evolution of the two branches had been historically completely distinct: rules of warfare and rules on the protection of human dignity.[15] Fourthly, ideological obstacles emerged from the role of the respective guardians distrusting the law sponsored by the other side: the ICRC: feared politicization of LOAC and the UN thought that the regulation of war implied that it failed its primary task, i.e. to keep peace.[16] Fifthly, the two bodies of law were directed towards different state-organs: HRL applies to all state organs while LOAC applies to the military forces.[17]

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[10] Please note that timeline and code-book contain much additional information, that for the sake of clarity have not been integrated in the flow text. I will be happy to make a more comprehensive flow text with a less clear story should this be more useful.
[11] For the change in terminology from Law of War to International Humanitarian Law see: A. Alexander, 'A History of International Humanitarian Law' (2015) 26 *European Journal Of International Law* 109–138 Elements of this development will become relevant for the elaborations in phase 2.
[12] Kolb, 'Human Rights and Humanitarian Law', para. 4.
[13] Kolb, 'Human Rights and Humanitarian Law', para. 6.
[14] Kolb, 'Human Rights and Humanitarian Law', para. 7.
[15] Kolb, 'Human Rights and Humanitarian Law', paras 8–9; Kolb also puts forward that the latter was a product of enlightenment, and predominantly confined to Western municipal law while rules regulating warfare were more ancient and universal – while not subject for this paper this claim may be mainly based on the authors subjectivities and research interests. See for a criticals analysis of IHL histories: Alexander, 'A History of International Humanitarian Law', 113; See also: F. Forrest Martin, S. J. Schnably, R. J. Wilson, J. S. Simon, and M. V. Tushnet, *International Human Rights & Humanitarian Law - Treaties, Cases and Analysis* (Cambridge University Press, 2006) pp. 2–3.
[16] Kolb, 'Human Rights and Humanitarian Law', paras 10–11.
[17] Kolb, 'Human Rights and Humanitarian Law', para. 14.

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So, IHRL and LOAC were predominantly conceived as mutually exclusive blocks: IHRL applying in peace-time and LOAC in war time.[18]

4.2. ***Second Phase: Rapprochement – 'lex specialis' 1950ies -1990ies***

4.2.1. Recognition of HR applicability in AC

Relevant factors

Several factors were crucial for the progressive erosion of the clear separation between IHRL and LOAC.

Firstly, the GCs 49 caused an intellectual and practical shift: The Hague Conventions had been drafted in the 19th century logic: limited contacts of foreign military forces with adverse civilians, and consequently had little regulation in this regard. The regulations focus on the permission of military action. Conversely, the GCs concentrate on the humanitarian protection of 'protected persons', and consequently focus on a much wider spectrum of persons than personnel of state military forces.[19]

Secondly, types of war changed: international armed conflicts (IACs) decreased and the world saw an extreme increase of non-international armed conflicts (NIACs): In particular civil wars in the wake of decolonization were 'total wars' in the sense of all parts of society being driven into their dynamic. So, in order to protect civilian, norms for NIACs had to be developed. This would ultimately result in the Second Additional Protocol to the Geneva Conventions (AP II) in 1977.[20]

Thirdly, the doctrine of non-derogeable HR in emergency cases was developed. Thus, a core-set of human rights remained applicable in AC.[21]

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[18] Kolb, 'Human Rights and Humanitarian Law', paras 12–13; See also: V. Gowlland-Debbas and G. Gaggioli, 'The Relationship Between International Human Rights and Humanitarian Law' in R. Kolb, G. Gaggioli (eds.), Research Handbook on Human Rights and Humanitarian Law, (Northampton: Edward Elgar, 2013), pp. 77–103.
[19] Kolb, 'Human Rights and Humanitarian Law', para. 19; R. Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) p. 2.
[20] Kolb, 'Human Rights and Humanitarian Law', para. 20..
[21] F. J. Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *International Review of the Red Cross* 549–72 at 562–66.

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Fourthly, the doctrine of extraterritorial application of HR was developed. Thus, even beyond a nation states' territory, in armed conflicts, this nation state remains bound by certain human rights.[22]

Fifthly, the emergence of ICL and the codification of individual responsibility on the international level for the commission of war-crimes was a relevant factor. This became crucial in the 1990ies, in particular with the ICTY Tadic decision recognizing war crimes also in NIACs.[23]

Humanization of LoAC

The term 'International Humanitarian Law' has not in common use before the 1960ies. The change in terminology from Law of War/Law of Armed Conflict (the latter term emerged in the 1960ies in order to include NIACs) to International Humanitarian Law is indicative of a crucial paradigm shift in the field: the shift in emphasis from the regulation and permission of military activities to the humanitarian character.[24] For the first part of the 20th century, humanitarian principles had been perceived as one (weaker) thread of the laws of war – based on the common distinction between The Hague Law and Geneva Law.[25] The early attempts of the ICRC in the 1950ies to provide rules protecting civilians in times of war (Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, 1955) did frustrate because the distinction between The Hague Law and Geneva Law persisted: national red cross societies and private experts were concerned that this draft went beyond the ICRC concerns and encroached upon 'Hague Law territory'. In the second draft, 1956, the ICRC was careful to take this feed-back into account, and hence named its commission at the New Delhi Conference 'international humanitarian law commission'.[26]

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[22] Provost, *International Human Rights and Humanitarian Law*, pp. 19–24; Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', 566–71.

[23] Provost, *International Human Rights and Humanitarian Law*, p. 241.

[24] Alexander, 'A History of International Humanitarian Law', 110 and 114.

[25] For a detailed elaboration on this see: Alexander, 'A History of International Humanitarian Law', 115–18.

[26] Kunz, 'The 1956 Draft Rules of the International Committee of the Red Cross at the New Delhi Confernece' (1959) 3 *American Journal of International Law* 132 at 134–35; see: Alexander, 'A History of International Humanitarian Law', 117.

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Similarly, in the 1960ies, JEAN PICTET will use the term in his writings in order to describe a part of the laws of war, conjoined with human rights law.[27]

In this period, the terminology of human rights entered the LOAC-discourse as it was used interchangeably with or at least not clearly distinguished from humanitarian law, in order to make another argument: the push away from the regulation of war, and means of warfare towards the humanization of war, the focus on the protection of individuals at times of armed conflict. The shift from LOAC to IHL can be considered be complete (the degree of ongoing debate as evidenced by the military necessity v. humanitarian principle or proportionality problematics goes beyond the scope of the present case-study) with the 1974 assembly of the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts.*[28] The subsequent descriptions of the developments in the 1960ies and 1970ies have to be read against the background of this general paradigm shift in IHL that ultimately resulted in the APs in 1977.

HR into LoAC

As already mentioned, in the 1960ies, JEAN PICTET used the term in his writings in order to describe a part of the laws of war, conjoined with human rights law.[29] For the introduction of HR into the domain of AC, however, one other person was of utmost importance: SEÁN MACBRIDE.[30] SEÁN MACBRIDE was the Secretary-General of the International Commission of Jurists, international and local politician, member of the Irish Republican Army, and co-founder of Amnesty-International.[31] His personal experiences in the Irish Rebellions against the British may have forged his profound interest and commitment to prisoners' rights, human rights abuses and depredations of armed conflict.[32] He put much energy and effort into the lobbying for the expansion for the human rights

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[27] J. S. Pictet, 'The Development of International Humanitarian Law' in W. Jenks, O. Schachter, R. Ago (eds.), International Law in a Changing World, (163AD), pp. 114–25; J. S. Pictet, *Humanitarian Law and the Protection of War Victims* (1975) p. 16; J. S. Pictet, 'The Principles of International Humanitarian Law' (1966) 6 *International Review of the Red Cross* 455 at 457.
[28] Alexander, 'A History of International Humanitarian Law', 118.
[29] Pictet, 'The Development of International Humanitarian Law'; Pictet, *Humanitarian Law and the Protection of War Victims*, p. 16; Pictet, 'The Principles of International Humanitarian Law', 457.
[30] Alexander, 'A History of International Humanitarian Law', 118–19.
[31] Cockburn, 'In Memory of Sean MacBride: The Man Who Smelled a Rat' (1989) 16 *Social Justice* 8 at 8..
[32] Alexander, 'A History of International Humanitarian Law', 118 MacBride was imprisoned several times by the British, as was his mother, Maud Gonne. Mac Brides' father, John MacBride, was executed by the British after the 1916 uprising. .

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regime and greater regulation of armed conflicts – speaking in various human rights fora (mainly NGO conferences).[33]

In 1968, the UN-declared human rights year ended with the Teheran Conference. HR in AC was not on the agenda of the conference. That this conference became the entry-door for human rights into the legal regime governing AC is the result of MACBRIDES's preparatory work and his lobbying (in private capacity) at the Conference with his draft resolution.[34] MACBRIDE himself explains:

> *"I prepared a draft resolution which ultimately, with some minor amendments, was proposed by India and co-sponsored by Czechoslovakia, Jamaica, Uganda and the United Arab Republic. (…) My task was greatly facilitated by reason of the fact that the leaders of the Indian, Czechoslovak, Jamaican and UAR government delegations were old friends of mine."*[35]

This resulted in the Resolution XXIII on human rights in armed conflicts.[36] KEITH SUTER suggests that this Resolution appealed to a broad range of governments, which, having had little time to consider its implications, thought it was likely to be soon forgotten.[37] Only the South Vietnamese delegation and the Swiss delegation abstained from the vote, the Swiss for fear that the Resolution 'forced the hand' of the ICRC.[38]

While it was MACBRIDE's enthusiasm that initiated the first official connection between HR and LOAC, the resolution, once passed, instigated much interest and discussion in the subsequent years in the UNGA.[39] DRAPER suggests:

> *"The junction of human rights and the humanitarian law of war was timeous and pro table to the majority of states in the UN, i.e. Arab states in their perennial confrontation with Israel, the states supporting the disintegration of vestigial colonialism, and a large group of states sup- porting the racial confrontations in southern Africa and elsewhere. The Western states seem to have been slow to appreciate that humanitarian*

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[33] Alexander, 'A History of International Humanitarian Law', 118–19.
[34] Alexander, 'A History of International Humanitarian Law', 119.
[35] Cit. in: K. Suter, *An International Law of Guerrilla Warfare* (St. Martin's Press, 1984) pp. 28–29.
[36] In the resolutions' call for the protection of humanitarian principles during armed conflict and the creation of additional or revised conventions the trajectory that will lead up to the APs in 1977 is very obvious.
[37] Suter, *An International Law of Guerrilla Warfare*, p. 34.
[38] Suter, *An International Law of Guerrilla Warfare*, p. 31; Alexander, 'A History of International Humanitarian Law', 119.
[39] Alexander, 'A History of International Humanitarian Law', 119–20.

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law-making might afford a useful opportunity to offset military reverses, and that human rights could be impressed for that purpose."[40]

In 1969, in the 24th UNGA Session, the SG presented his report on 'Respect for Human Rights in Armed Conflict'. UNGA passed Resolution 2597 (XXIV) requesting a second report from the SG paying special attention to the need for protection of the rights of civilians and combatants in conflicts that arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination.

In 1970, in the 25th UNGA Session, the SG presented his second, more definitive report. The subject was discussed for four weeks in this session. Many states had agendas to push: The USA wanted to increase the protection of prisoners of war; the Soviet Union, with some Third World nations, wanted to condemn 'aggressive war' and protect freedom fighters; France wanted to protect journalists.[41] In this 25th session, UNGA passed three resolution with respect to LOAC and HR: Resolution 2674 (XXV) holding that extra instruments are necessary in order to provide for the protection of the civilian population and freedom fighters against colonial and foreign domination as well as against racist regimes. Resolution 2675 (XXV) stating that fundamental human rights still apply in armed conflicts and that civilians should not be the object of military operations or reprisals provided basic principles for the protection of civilian populations in armed conflict. Resolution 2677 welcoming the decision of the ICRC to convene a forthcoming 'conference on the reaffirmation and development of international humanitarian law.'[42] At the 26th session, two more resolutions followed in similar terms.

Humanitarian not HR Law

[40] Draper, 'Humanitarian Law and Human Rights' (1979) 979 *Acta Juridica* 193 at 194–95; see also: Suter, *An International Law of Guerrilla Warfare*, p. 101.
[41] See: Hewitt, 'Respect for Human Rights in Armed Conflicts' (1971) 4 *New York University Journal of International Law and Politics* 41 at 60–62; Alexander, 'A History of International Humanitarian Law', 120.
[42] Only Res. 2677 referred to IHL, all others remained in the terminology of HR-LOAC. Alexander sees this as indicative of the UN being uniquely concerned with the introduction of HR into the sphere of AC, while 'humanitarian law' was not a term present in their vocabulary. Alexander, 'A History of International Humanitarian Law', 121.

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With the *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, in 1971, the ICRC got involved in the discussion that enmeshed HR and IHL. On this occasion UN SG and ICRC both underlined the collaboration between the two institutions.[43] The ICRC then declared that it would expand its horizon and not only look at persons hors combat, but at all laws 'concerning the protection of the human being or the essential assets of humanity.'[44] This move allowed for an expansion of the 'IHL'-notion beyond Geneva Law to treaty or customary law that were based on humanitarian reasoning.[45] The ICRC was however very explicit that HR were not within its field of action. Thus, it used the impetus provided by the use of HR terminology, but redirected it to the push in emphasis on the humanitarian side of the LOAC to an extent that LOAC should become an element of IHL – or a synonym (depending on the author): Within days, during the 1971 Conference, IHL became the predominant technical term side-lining 'LOAC' – and 'HR in AC'.[46] However, the exact rules of that body of law remained contested to a much larger extent – a discussion that goes beyond the scope of this case study. Ultimately, the APs (1977) would be seen as the framework and embodiment of this new approach to ius in bello: IHL.[47]

In that sense, in the 1970ies, the term (not so much a norm) unifying LOAC and HR was 'IHL'. In particular with the adoption of the APs, the concerns re the protection of humans in ACs seemed to be addressed sufficiently (in the sense that the debate focused on the APs being too humanitarian or not)[48] – and it took more than a decade for the issue (HR in AC and its relation to LOAC/IHL) to make it on the international agenda again: Many of the states engaged in contemporary conflicts were no signatories to the APs: amongst others India, Iraq, Israel, Pakistan, Soviet Union, US did not sign the APs. While a decade later ICRCs strategy to remedy this problem was to find much of

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[43] ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, vol. 1 (1971), at 11.
[44] ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, vol. 1 (1971), at 9-10.
[45] ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, vol. 1 (1971), at 25.
[46] Alexander, 'A History of International Humanitarian Law', 123.
[47] Alexander, 'A History of International Humanitarian Law', 124–26; Provost, *International Human Rights and Humanitarian Law*, p. 4.
[48] See for a succinct analysis: Alexander, 'A History of International Humanitarian Law', 124–30.

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the APs content to be customary law, in the 90ies, states increasingly took up the idea of HR in AC: this becomes obvious in the ICJ Nuclear Weapons Case.

4.2.2. Labelling of the norm regulating the interrelation HRL and IHL as lex specialis

In September 1993, the WHO filed a request for advisory opinion on the ICJ, re the Legality of the Use by a State of Nuclear Weapons in Armed Conflict. The WHO request was ultimately dismissed as being outside the WHO's competence. Although the written proceedings did not entirely overlap with the other case, the court heard the oral proceedings at the same time.[49] Consequently, state submissions often merged. The Court also issued the final decision on both cases on the same date: 8 July 1996.[50]

35 states provided written statements for the first round on this case. Only 5 of them mentioned human rights, none of them mentioned 'lex specialis'. In the second round, 8 states participated (India, Nauru and Malaysia (identical submission), Costa Rica, Solomon Islands, Russia, US, UK), – all of them had been present in the first round, too. In this second round, only India did not mention human rights. However, only the UK – very briefly – mentioned 'lex specialis'. In the first round, the UK had not even touched upon the HR issue. The UK document submitted in the second round of the WHO case was at the same time the submission for the first round of the UNGA case.

In this submission, the UK extensively discussed human rights (and environmental law).[51] The main argument was that the issue was not the abstract compatibility of nuclear weapons with these legal regimes, but 'whether any of the rules of the law of human rights or the law on environmental protection can be construed, in accordance with the general principles stated above, as prohibiting the use or threat of use of nuclear weapons when carried out by way of legitimate self-defence.'[52] In that regard, the UK noted the explicit reference of Article 15(2) ECHR to derogations from the right to life for deaths resulting from lawful acts of war, and argued that:

> *"Although the International Covenant on Civil and Political Rights contains no provision equivalent to Article 15(2) of the European Convention, Article 6(1) prohibits only the 'arbitrary' deprivation of life. If the Covenant is applicable at all to the taking of life in the context of an armed conflict, it is necessary to*

[49] See: M. Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law' (2016) at 6.
[50] ICJ, *ICJ, Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (1996).
[51] Written Statement of the United Kingdom, 16 June 1995, paras. 3.84 ff.
[52] Written Statement of the United Kingdom, 16 June 1995, para. 3.98 (emphasis in original).

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> *determine what the term 'arbitrary' means in that context. Since the taking of life is an inescapable feature of the conduct of armed conflict and since it has never seriously been suggested that the Covenant outlaws the use of force by way of national self- defence, the reference to 'arbitrary' deprivation of life must contain the means for distinguishing between those acts of taking life in armed conflict which are compatible with Article 6 of the Covenant and those which are not. The only sensible construction which can be placed on the term 'arbitrary' in this context is that it refers to whether or not the deliberate taking of life is unlawful under that part of international law which was specifically designed to regulate the conduct of hostilities, that is the laws of armed conflict. On that basis, the use of a weapon to take life in armed conflict could only amount to an arbitrary deprivation of life, for the purposes of Article 6 of the Covenant, if it was contrary to the laws of armed conflict but not otherwise."*[53]

After a brief consideration of the travaux of the Covenant and the work of the Human Rights Committee, the UK concluded its submissions on human rights holding that:

> *"The protection given by the law of human rights does nor, therefore, lead to a different conclusion regarding the legality of the use of nuclear weapons from that provided by the law of armed conflict. Since the law of human rights is concerned primarily with the protection of human rights in peacetime, whereas the law of armed conflict is a lex specialis designed to regulate the conduct of hostilities, it is entirely appropriate that the human rights agreements should, in effect, refer to the law of armed conflict in order to determine whether or not any particular instance of the deprivation of life in wartime is arbitrary. The same principle applies, a fortiori, in respect of the protection of other human rights."*[54]

Interestingly, this submission – the (probably) first appearance of 'lex specialis' re IHL/IHRL in international law does not invoke authority of any kind. Nevertheless, as will be elaborated below, the ICJ's wording very much reproduces the UK submission.

On 6 January 1995, the Secretary General of the United Nations informed the ICJ that the UNGA had decided to "to request the International Court of Justice urgently to render its advisory opinion on the following question: is the threat or use of nuclear weapons in any circumstance permitted under international law?".[55] In the debate leading up to this resolution, HR were only mentioned 3 times. No reference was made to their relation to IHL.[56]

In the pleadings, in the first round, 29 states produced written statements, 11 of them referenced human rights law. Only Solomon Islands and Egypt submitted statements in the second round.

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[53] Written Statement of the United Kingdom, 16 June 1995, para. 3.101.
[54] Written Statement of the United Kingdom, 16 June 1995, para. 3.108.
[55] UN SG, 'Request for Advisory Opinion transmitted to the Court under the United Nations General Assembly resolution 49/75 K of 15 December 1994 Legality of the Threat or Use of Nuclear Weapons' (1994).
[56] UN SG, 'Request for Advisory Opinion transmitted to the Court under the United Nations General Assembly resolution 49/75 K of 15 December 1994 Legality of the Threat or Use of Nuclear Weapons'.

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Here, too, the UK submission was the only one putting forward 'lex specialis'. In the combined oral round (on both cases), 21 states participated, 12 of them referenced human rights law. However, not even the UK referenced 'lex specialis'.[57]

Thus, only one state-submission referenced 'lex specialis' – without citing any authoritative support. And yet, this is the starting point of a successful legal change regarding the norm regulating the relation between IHL and IHRL.

On 8 July 1996, the ICJ issued its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.[58] The bench consisted of the President BEDJAOUI, Vice-president SCHWEBEL, Judges ODA, GUILLAUME, SHAHABUDDEEN, WEERAMANTRY, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, RANJEVA, BRAVO, HIGGINS.

President BEDJAOUI, Judges HERCZEGH, SHI, VERESHCHETIN, BRAVO issued individual declarations. Judges GUILLAUME, RANJEVA, FLEISCHHAUER issued separate opinions. Vice-President SCHWEBEL, Judges ODA, SHAHABUDDEEN, WEERAMANTRY, KOROMA, HIGGINS issued dissenting opinions.

Of all the declarations, separate opinions, dissenting opinions, only Judge WEERAMANTRY referenced the 'lex specialis' – but in a different context: citing OSCAR SCHACHER, he points to the law relevant to nuclear weapons as

> *"(…) 2 The jus ad bellum - the law governing the right of States to go to war. This law is expressed in the United Nations Charter and related customary law. 3 The lex specialis the international legal obligations that relate specifically to nuclear arms and weapons of mass destruction."*[59]

The Bench for *the Advisory Opinion on Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (requested by WHO) was identical. However, only Judges RANJEVA and BRAVO issued a declaration, Judge ODA issued a separate opinion, and Judges SHAHABUDDEEN, WEERAMANTRY, KOROMA issued a dissenting opinion. Of those, none references the 'lex specialis'

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[57] For a detailed analysis see: Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', 10–12.

[58] ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) (emphasis added).

[59] ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), Dissent Judge Weeramantry, p.443.

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- not even Judge WEERAMANTRY. MILANOVIC holds that this ICJ advisory opinion is the start of the use of 'lex specialis'.[60]

In short, the main argument was use of nuclear weapons violates the right to life und the ICCPR and the counterargument was that the Covenants only apply in peace-times. The Court accepted the continuing applicability of the Covenant in time of AC. And elaborated on the relation between HRL and IHL:

> *"In principle, the right not arbitrarily to be deprived of one's live applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicably* ***lex specialis****, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."* [61]

In this paragraph resonates succinctly the wording of the first UK submission.[62] For this cases-study, it is crucial to highlight that the entry door for 'lex specialis' was the arbitrariness standard in Art. 6 ICCPR. Art. 2 ECHR does not have the same door, which is one of many reasons why regional developments took different paths.

Based on this advisory opinion, the 'lex specialis' norm became mainstreamed into international law – and the ICJ Nuclear Weapons Case remains the a widely cited authoritative reference point for the norm regulating the relation between IHRL and IHL.

4.2.3. Lex specialis taken up – and taking several shapes and forms

The aftermath of the ICJ judgment saw a quick and fairly uncontested adoption of the 'lex specialis' norm by a wide range of actors.[63] However, the specific scope and form of 'lex specialis' varied widely. While we can distinguish 3 different ways in which the norm was used, we can also trace an incremental (incomplete) change in the discourse from a predominance of the first to a predominance of the second and third category: 'lex specialis' as norm excluding IHRL changed

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[60] Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', 5.
[61] ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, para. 25..
[62] See: Milanovic, 'The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law', 10.
[63] See: J. D'Aspremont and E. Tranchez, 'The quest for a non-conflictual coexistence of internatnional human rights lawe and humanitarian law: which role for the lex spcialis principle' in R. Kolb, G. Gaggioli (eds.), Research Handbook on Human Rights and Humanitarian Law, (Northampton: Edward Elgar, 2013), pp. 223–50 p. 225.

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to a norm regulating the complementary application and became increasingly used as an interpretive tool in order to avoid a conflict between the two bodies of law.

Those various diverging interpretations of the norm were facilitated by the fact the 'lex specialis' was detached from its normal normative context – neither lex superior nor lex posterior played any role.

Total displacement: IHL applies to the complete exclusion of IHRL

In this form, 'lex specialis' is basically a restatement of the classical divide between law of war and law of peace. The Bush administration during the 'war on terror' did rely on this meaning of 'lex specialis', and combined it with a rejection of the extraterritorial application of IHRL treaties.[64] This softened at the end of the Bush administration, and more so with the Obama administration (see subsequent section). Israel and Russia also sometimes similar position, but inconsistently and sporadically.[65]

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[64] See, e.g., Response of the US to the request for Precautionary Measures on behalf of the detainees in Guantanamo Bay, Cuba, 15 April 2002, reprinted in 41 ILM 1015 (2002), available at http://www.derechos.org/nizkor/excep/usresp1.html: 'international human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more specific laws of armed conflict ... It is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in armed conflict. To the extent the ICJ's decision in the Nuclear Weapons Case implies otherwise, the United States reserves its judgment;' Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.112, 10 October 2007: 'The United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Covenant, is the applicable legal framework governing these detentions.' See also the Opening Remarks by John Bellinger, Legal Adviser, US Department of State,before the UN Committee Against Torture, 5 May 2006, available at http://www.state.gov/g/drl/rls/68557.htm; Opening Statement of Matthew Waxman, Head of US Delegation before the UN Human Rights Committee, 17 July 2006, available at http://2001-2009.state.gov/g/drl/rls/70392.htm.

[65] For Israel: See, e.g., Second Period Report of Israel, UN Doc. CCPR/C/ISR/2001/2, 4 December 2001, para. 8: 'Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.' See also Comments by the Government of Israel on the concluding observations of the Human Rights Committee, UN Doc. CCPR/CO/78/ISR/Add.1, 24 January 2007, para. 15; Fourth Periodic Report of Israel, UN Doc. CCPR/C/ISR/4, 12 December 2013, para. 47: 'The relationship between different legal spheres, primarily the Law of Armed Conflict and Human Rights Law remains a subject of serious academic and practical debate. For its part, Israel recognizes that there is a profound connection between human rights and the Law of Armed Conflict, and that there may well be a convergence between these two bodies-of-law in some respects. However, in the current state of international law and state-practice worldwide, it is Israel's view that these two systems-of-law, which are codified in separate instruments, remain distinct and apply in different circumstances.'; for

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In general, this view has been abandoned after WWII, and stands in quite clear contradiction to derogations clauses to including 'war' as a reason: if IHRL would in fact cease to apply in wartime, those derogations would not be necessary. ILC Draft Articles are also evidence that this approach is outdated: Art. 3, ILC Draft Articles on the Effects of Armed Conflict on Treaties, relying on work of the Institut de Droit International from the 1980ies, confirm that the "existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties: treaties: (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not. Also, Art. 7 and Annex: include human rights treaties in an indicative list of treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict.[66]

Partial displacement: 'both spheres of law are complementary, not mutually exclusive'

In this sense, 'lex specialis' has been used, for instance, by the Obama administration.[67] When the specific norms of IHRL and IHL are in conflict, i.e. they would govern the same situation differently, in particular regarding killing (additional restrictions on IHL targeting rules) and detention (judicial review of detention), then IHL would displace or qualify the conflicting rule of IHRL to the extent strictly required to resolve the conflict.[68]

Interpretive tool/rule of norm conflict avoidance

This view is based on Art. 31 (3) (c) VCLT holding that in interpreting treaties we should consider other relevant rules of international law applicable between the parties. In that sense, IHL needs to

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Russia: See, e.g., the European Court's summary of Russia's arguments in Georgia v. Russia (II) (dec.), App. No. 38263/08, 13 December 2011, para. 69: 'the Convention did not apply to a situation of international armed conflict where a State Party's forces were engaged in national defence, including in respect of any required operations abroad. In such circumstances the conduct of the State Party's forces was governed exclusively by international humanitarian law.'

[66] UN Doc. A/66/10, para. 100.

[67] See, e.g., HRC, Fourth Periodic Report of the United States, UN Doc. CCPR/C/USA/4, 22 May 2012, paras. 506 and 507.

[68] See: D'Aspremont and Tranchez, 'The quest for a non-conflictual coexistence of internatnional human rights lawe and humanitarian law: which role for the lex spcialis principle', pp. 225–27 Their main argument is however based on an appreciation ov 'lex specilis' going far beyond the scope of the inter-relation between HRL and IHRL.

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be considered, but it is not necessarily dispositive for the interpretation of IHRL; IHL is one of many factors determining IHRL – or vice versa.

This view has been taken in the Israeli targeted killing case, when the court held that an exhaustion of non-lethal means is required (capture instead of kill) because of the control Israel has over the territory.[69]

The ICJ Nuclear Weapons case can be read as applying this logic, too, when it starts from the right to life in Art. 6 Covenant providing for the arbitrariness standard and then finds that there is no violation of this arbitrariness standard as long as there is compliance with IHL.

This reading of the 'lex specialis' rule draws already very close to the third phase of the norm change: the complementarity of the IHRL and IHL fields, with a need to establish the precise interoperability of norms with regard to specific norms and situations.

4.3. ***Third Phase: Progressive merger – complementarity / interoperability 2000s -today***

4.3.1. *Relevant factors*

Today, the close ties between the IHL and IHRL are universally recognized.[70] Several factors were crucial for the development of the norm in the 2000s.

Firstly, increasingly, the international community criticized gaps in the protection, and a logical response to that criticism seems to span IHRL and IHL together in order to reinforce the protection.[71]

Secondly, rules regulating NIACs were increasingly upgraded to the level of rules regulating IACs: UN SC called on all parties to respect IHL and HRL without any qualification and preferred assuring a unique standard of protection. Also with the Tadic judgment endorsing the idea or war crimes in NIACs.[72]

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[69] Israeli Supreme Court, *Targeted Killing* (2006).
[70] Kolb, 'Human Rights and Humanitarian Law', in *Max Planck Encyclopedia of International Law* (2013), at 27.
[71] Gowlland-Debbas and Gaggioli, 'The Relationship Between International Human Rights and Humanitarian Law', pp. 549–57.
[72] Provost, *International Human Rights and Humanitarian Law*, pp. 241–44; Sassòli, *International Humanitarian Law - Rules, Controversies, and Solutions to Problems Arising in Warfare*, chap. 9.

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Thirdly, the protection of fundamental rights became an absolute during the 1990ies – possibilities for derogations were increasingly limited.[73] Additionally, this absolute forced its way into IHL - through ICL.[74]

Fourthly, the scope of application of HRL broadened by doctrine of extraterritorial application. This was important to get it closer to IHL.[75]

4.3.2. Incresing detachement from lex specialis

Already in 1992, SR KÄLIN held in his report regarding Kuweit 1992 that IHL and HRL are so interwoven that they can no longer be disentangled.[76] This finding can be seen as a precursor for the development of the norm regulating the relation between IHRL and IHL in the 2000s.

In 2004, the ICJ issued its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[77] While the 'lex specialis' principle remained part of the argument, the emphasis shifted to the complementarity of IHL and IHRL norms:

> *"the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law."*[78]

In the same year, on 25 May 2004, the HRC held in its General Comment 31 that:

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[73] D. Murray, *Practitioners Guide to Human Rights Law in Armed Conflict* (Oxford University Press) pp. 104–6.
[74] Provost, *International Human Rights and Humanitarian Law*, p. 241.
[75] Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', 566–71.
[76] UN Commission on Human Rights Special Rapporteur W Kälin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation* (1992).
[77] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory(Advisory Opinion)* (2004).
[78] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory(Advisory Opinion)*, p. 106.

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> *"While in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."* [79]

Much like in the ICJ Wall Opinion, the 'lex specialis' norm resonates in the first part of the sentence, but clearly the emphasis is on the complementarity of the two bodies of norms.

Similarly, but from the 'other side', the ICRC customary law study continues to reference 'lex specialis', but emphasizes the relevance of HR for the interpretation of IHL norms – and in that sense, complementarity.[80]

4.3.3. Abandonment of lex specialis

In 2005, the ICJ decided the *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v Uganda*).[81] In this decision, the ICJ subscribes to complementarity: Citing the Nuclear Weapons and Wall Opinions – however and most importantly without reference to 'lex specialis', the court concludes that "that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration", [82] and lists the norms relevant for the case in question.[83]

Similarly, in 2018, the HRC General Comment 36 abandons the 'lex specialis' approach and looks at interoperability of specific norms in specific situations:

> *"Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant. States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in*

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[79] UN HRC, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) para. 11.
[80] ICRC, *IHL Database on Customary Law, Introduction to Fundamental Guarantees*; See: H. Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *Journal of Conflict and Security Law* 265–91.
[81] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005).
[82] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, p. 216.
[83] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, p. 216.

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> *deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used, and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards."*[84]

However, the military camp of the LOAC field remains skeptical concerning the approach.[85]

An eclectic review of state positions demonstrates, how this change has ambiguous reception: the two states most directly concerned with the problematic, US and Israel (most other states engaged in ACs prefer to not declare them as such, and to remain entirely within the field of human rights) display inconsistent positions depending on the State organ involved: The Israeli Periodic Report to the HRC emphasizes a subscription to the separation of IHL and IHRL, the Israeli Supreme Court, years before that report, took a very progressive position, merging IHL and IHRL. While the US military manual insists on the separation between LOAC and IHRL (with some concession to cases of collaboration with European (NATO) partners having a different perspective), the US periodic report – written years prior to the manual – subscribes to the complementarity of IHL and IHRL.[86]

4.3.4. Active Hostilities v Security Operations Framework

Recent academic publications attempt to elaborate on new terms defining the relationship between IHL and IHRL.[87] The most comprehensive one, well based on recent legal practice is provided by AKANDE and MURRAY.[88] There main point, much like SASSÒLI's,[89] is that specific IHL and IHRL rules clashing in specific contexts ought to be reconciled: either IHRL is the starting point, and IHL informs the regulation as secondary body of law (security operations framework, applying in

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[84] UN HRC, *General Comment 36, right to life* (2019) para. 64.
[85] See for instance: G. D. Solis, *The law of armed conflict : international humanitarian law in war* , 2 ed. (Cambridge University Press, 2016) pp. 26–28 See also US DoD, 2016, pp. 22-23 (see in annex).
[86] See annex for State Positions' details.
[87] See for instance: D'Aspremont and Tranchez, 'The quest for a non-conflictual coexistence of internatnional human rights lawe and humanitarian law: which role for the lex spcialis principle'; A. Clapham, 'Human Rights in Armed Conflict: Metaphor, Maxims, and the Move to Interoperablility' (2018) 1 *HR&ILD* 9–22; D. Murray and D. Akande, *Practioners' Guide to International Human Rights Law in International Humanitarian Law* (Oxford University Press, 2016); Sassòli, *International Humanitarian Law - Rules, Controversies, and Solutionas to Problems Arising in Warfare*, paras 9-04-9.53.
[88] Murray and Akande, *Practioners' Guide to International Human Rights Law in International Humanitarian Law*.
[89] Sassòli, *International Humanitarian Law - Rules, Controversies, and Solutionas to Problems Arising in Warfare*, paras 9.48-9.50.

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particular in situations concerned with law enforcement etc.) or IHL is the starting point, and IHRL informs the regulation as secondary body of law (active hostilities framework, applying in particular in AC of a certain intensity).[90] Within those two frameworks, the core issue is then the precise interoperability of specific norms in specific contexts.[91]

5. Analysis

5.1. SCR Framework[92]

a. Selection

Selection happened primarily at the Teheran Conference.

Stability: (1) Prior to the Teheran Conference, the norm regulating the relation between LOAC and IHRL was separation: LOAC was supposed to regulate times of war and IHRL was supposed to regulate in times or peace. (2) Legal factors creating legal uncertainty or competition were particularly the increasing codification and expansion of HR and the shift from IACs to NIACs: this cause HR and IHL to increasingly clash, and this development destabilized the prior norm that provided for separation of the two fields. (3) See the extent to which there is consensus (ideal case- do not code state positions here) around the interpretation of the norm prior to point A. See submissions to the Nuclear Weapon case are evidence of the emerging consensus around the lex-specialis norm: increasingly, state submissions referenced HR but only after the ICJ decision, the norm regulating the relation between the two fields was clearly referenced.

Opening: Increasing civil wars, Human Rights Year ending with the Teheran Conference were critical events leading up to the change.

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[90] Murray and Akande, *Practioners' Guide to International Human Rights Law in International Humanitarian Law*, pp. 88–92.

[91] Murray and Akande, *Practioners' Guide to International Human Rights Law in International Humanitarian Law*, para. 4.26; see however: Sassòli, *International Humanitarian Law - Rules, Controversies, and Solutionas to Problems Arising in Warfare*, paras 9.48-9.51; Clapham, 'Human Rights in Armed Conflict: Metaphor, Maxims, and the Move to Interoperablility', 14–17.

[92] For space-reasons, the analysis will focus on phase 2 only. If considered useful, I am happy to expand the analysis. The code-book contains the relevant information for all 3 phases.

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Critical junctures varied for different groups of states: Decolonization was relevant for Non-western States, the Israel Conflict was relevant for the Arab States, and Ignorance (not exactly a critical juncture, but the best term to depict the situation) was relevant for Western States: at the Teheran conference and its aftermath, they did not realize to what extent IHL/IHRL claims can be used by the weaker conflict parties in order to reinforce their positions.

Pathways:

1. ***State action pathway***: The conduct of conflict parties in the diverse civil wars creates the reasons demanding for legal change (see elaborations on factors).
2. ***Multilateral pathway***: see: 4.2.1. Relevant for the activation of this pathway was the lobbying of MacBrian in his private capacity (private authority pathway) at the Teheran Conference 1968. This led to several UNGA Resolutions; and UN SG Reports (bureaucratic pathway) and ultimately resulted in the adoption of the APs in 1977.
3. ***Bureaucratic pathway***: several UN SG Reports were produced on request of the UNGA and resulted in UNGA Resolutions (multilateral pathway). Furthermore several HRC General Comments were relevant for the modulation of the norm.
4. ***Judicial pathway***: the core of this pathway lies in the three ICJ decisions (see 4.2.3 and 4.2.3). Furthermore, regional human rights courts are relevant: while the ECHR would only apply IHL if brought forward by a party to conflict (as has will be clarified in phase 3: ECtHR, Hassan v. UK, 16 September 2014), IACtHR has been much more active on the pathway – however its decisions have not much been taken up on the international level.[93] Furthermore, the development of human rights law pushing towards the realm of AC has much been a result of the jurisprudence of the regional HR Courts, developing and elaborating the doctrines of extraterritorial application, limitation of derogations, the interpretation of HR-instruments as living instruments.
5. ***Private authority pathway***: SEAN MAC BRIDE lobbied his Draft Resolution in private capacity at the Teheran conference which was the crucial element for the selection of the particular mode and path of change. However, he also used his social capital as Secretary-

[93] For a succinct analysis of the jurisprudence of the two courts see: Gowlland-Debbas and Gaggioli, 'The Relationship Between International Human Rights and Humanitarian Law', pp. 89–93.

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General of the International Commission of Jurists (ICJ), international and local politician, erstwhile chief of staff of the Irish Republican Army, and co-founder of Amnesty International. Furthermore, a review of literature on the topic reveals very little academic literature on 'lex specialis' before the *ICJ Nuclear Weapon Opinion* and a striking increase of academic literature in the early 1970ies that then very suddenly calms down with the adoption of the APs in 77 (see bibliography). Another interesting element on this pathway is the *Turku Declaration*, (Declaration of Minimum Humanitarian Standards (2 December 1990)), adopted by an expert meeting in Finland that was proposed as a model to be taken in consideration by the UN and other IOs regarding fair trial, limitations on means and methods of combat. The exact impact this declaration had on the bureaucratic pathway is hard to pin down, but the declaration points into the same direction later developments on the other pathways (judicial and bureaucratic in particular) took. Furthermore, in phase 3, the last point is to be found on the individual experts path: the Practitioners' Guide, published in 2016 Murray and Akande provides the clearest picture of the current stage of the norm on the cumulatively applicability of IHL and IHRL.

Institutional availability: The end of the Cold War made the UN institutions more available for HR concerns, given that ideological fights on the matter became less intense. This made the UN GA, SG, SC very available fora for the change in question. The core institution for the change was however the ICJ with the Nuclear Weapons Case. HR Courts were relevant to a much lesser extent: they focus on extraterritorial application of HR and limitations of derogations, i.e., pre-conditions for the rapprochement.[94] IACtHR applies IHL proprio motu, so there are some important cases. ECtHR only applies IHL when brought forward by party, hence there is only a limited number of cases. See however GAGGIOLI et al. (more focused on the overlap of HR and IHL than on the norm solving clashes) underlining that the availability of HR treaty bodies which may be seized important because they don't depend on case-by-case consent, also lack of success of IHL specific mechanisms and reluctance of States to pursue grave breaches bf domestic courts.[95] ICTY was not

[94] See: Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body'.
[95] Gowlland-Debbas and Gaggioli, 'The Relationship Between International Human Rights and Humanitarian Law', p. 93.

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exactly an institution available for the change in question, but became with the Tadic opinion an instance of support. In this legal change, there is surprisingly little agency of the ICRC - its availability may be limited through ideological constraints because HR are perceived as dangerous re politicization of IHL.

Salience: On first sight, civil wars could indicate high salience. However, the topic was not on the agenda of the Teheran conference. Nevertheless, once brought on the table, several nations found it politically useful to jump on it though, and the topic remained on the agenda of discussion for GA for several years. Consequently, salience went from low to high within the selection part of phase 2.

Actors (especially change agents): SEAN MACBRIDE'S lobbying for his draft resolution makes him the crucial change agent of this part of change.

b. Construction

Construction happened primarily through the UNGA Resolutions and the ICJ Advisory Opinion. The norm 'clear separation' was replaced with the norm 'lex specialis'. One could argue that the norm 'clear separation' was not really a norm, because the two fields of law ignored each other quite extensively, so there was no need to 'separate' from the other field. In this case, we would be facing a ***norm emergence*** of 'lex specialis'. In my opinion, it is however more accurate to speak of a ***norm adjustment***: from separation to 'lex specialis'.

This norm change rides on several ***paradigm shifts***: In IHL, humanitarian element pulling more towards the protection of individuals, (bf. GCs 49 Military element was very dominant). In IHRL the emergence/ normative consolidation of the codified body of law gaining ideological traction in the 1990ies which leads to an extreme expansion, in particular through the use of the doctrine of extraterritorial application. In ICL, the emergence of war crimes in NIACs shifting the IHL focus from IAC to NIAC, and expanding IHL rules for NIACs (PA II and customary law).

Conditions for change (stability, previous norm availability): The concept of 'lex specialis' taken from domestic law/Roman law, but taken out of context: it is no longer embedded as the exception to lex posterior/lex superior, but alone-standing category which makes it fairly malleable. HR were used as a tool to promote increased protection in new types of war. The expansion of HR facilitated this approach (increasing extraterritorial application, living instrument interpretations, increasing

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limitations regarding possible derogations). The lack of clear regulations for new types of war, in particular NIACs, transnational conflicts and terrorism.

The crucial ***actor*** in the construction phase is the ICJ, and the UK delegation to the Nuclear Weapons Case Pleadings referencing 'lex specialis' in their submission (see 4.2.2).

Support and opposition: Only one country, UK, referred to 'lex specialis' in the Nuclear Weapons Case. Nevertheless, it was mainstreamed in the aftermath: little opposition (silence). Support came indirectly from the ICTY with CASSE's Tadic judgment with the recognition that war crimes in NIACs. This pushed HR through ICL into IHL. Furthermore, HR bodies provided some indirect support through their jurisprudence consolidating the applicability of HR in AC using the non-derogability argument.

c. Reception

For the reception phase, predominantly the state level was relevant.

Crucial ***actors*** for the reception are states taking up the norm in different ways: military manuals, periodic reports reference the 'lex specialis' principle extensively.

Outcome of change (disturbance- full acceptance): ***successful:*** today, the close ties between the IHL and IHRL are universally recognized, the separation of LOAC and IHRL is not an option in contemporary discourse – the minimum to be invoked is 'lex specialis'. The exact scope and form of 'lex specialis' is however somewhat subject to diverging opinion.

Pace and mode of change: this phase witnesses two fairly ***sudden*** change points: the combination of HR and LOAC at the Teheran Conference, and the emergence of the 'lex specialis' norm. The precise scope and form of the 'lex specialis' norm is then subject to a much more ***incremental*** change.

5.2. Particularities of the case

For the analysis of legal change this case is particular because the reason for the change happening is the 'rapprochement' of two separate legal bodies. Consequently, much more actors and two different logics are involved in the development of the norm. However, the expansion of human rights into other parts of international law is by far not a particularity but more a widespread phenomenon of contemporary international law.

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Compared to many other norm changes in IHL since the 1950ies, the role of the ICRC is a lot less dominant – and the ICJ seems to be at the core of the legal change. Upon further reflection, this is not overly surprising, since IHL and HR bodies pursue more their own agenda and not primarily a reconciliation of the two fields.

Particular Conditions Relevant for the Legal Change in Question

Several factors were relevant for the legal change. The most important ones have been highlighted in section 4.2. and 4.3.

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Annex: State positions

State	*Year*	*Document*	*Content/quote*	00=no reference to HR 0=no reference to connecting norm 1=separation 2=lex specialis 3=interoperability
Argentinia	2010	Manual de Derecho Internacional de los Conflictos Armados	No reference to lex specialis. Conclusion : Puede decirse que el Derecho Internacional Humanitario es un derecho de excepción, de emergencia, que tiene que in- tervenir en caso de ruptura del orden y la paz internacional (y también interno en el caso del con icto no internacional) y que si bien en tales circunstancias también se aplica el nú- cleo duro de los Derechos Humanos, este derecho tiene apli- cación sobre todo en tiempo de paz. (google translate: It can be said that International Humanitarian Law is a right of exception, of emergency, which must intervene in the event of a breach of order and international peace (and also internal in the case of the non-international con ict) and that although in such circumstances also apply the hard core of Human Rights, this right applies especially in peacetime.)	1 Some concession to 2
Israel	12 December 2013 (date of considerati	4th periodic report to HRC	46. The applicability of the Convention to the West Bank has been the subject of considerable debate in recent years. In its Periodic Reports, Israel did not refer to the implementation of the	1 No reference to targeting case!

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	on by HRC; submitted 14th October)		Convention in these areas for several reasons, ranging from legal considerations to the practical reality. 47. The relationship between different legal spheres, primarily the Law of Armed Conflict and Human Rights Law remains a subject of serious academic and practical debate. For its part, Israel recognizes that there is a profound connection between human rights and the Law of Armed Conflict, and that there may well be a convergence between these two bodies-of-law in some respects. However, in the current state of international law and state-practice worldwide, it is Israel's view that these two systems-of-law, which are codified in separate instruments, remain distinct and apply in different circumstances. 48. Moreover, in line with basic principles of treaty interpretation, Israel believes that the Convention, which is territorially bound, does not apply, nor was it intended to apply, to areas beyond a state's national territory.	
Israel	Filed 2002, decided 2005	Targeted killing case	Very progressive convergence IHL and IHRL: principle of proportionality applied in its HR dimension	3
Israel	4 December 2001	Second Period Report of Israel, UN Doc. CCPR/C/ISR/2001/2,	para. 8: 'Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.'	1
Italy	1991	Anuale di diritto umanitario, Vol. I et II	No reference to HR at all.	00

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Canada	2001	LoAC manual	p. 2-2: 8. Humanitarian Principle. Military necessity must always be compatible with respect for the human person. Even in an armed conflict, there are certain basic human rights that must be respected.	0
Colombia	2009	Manual De Derecho Operacional 1st edn.	p. 91: summary on the chapter on the relation of IHRL-IHL (google translate) The ICJ establishes that the human rights obligations derived from the International Covenant are still valid in times of hostilities, but that as regards the right to life, it can only be established if their deprivation is arbitrary or not with reference to the law of those with armed conflicts. That is, both legal regimes coexist and complement each other in times of hostility, with IHL making a special law to determine cases of possible violation of the right to life. The general framework is then a human rights framework: to enforce the law, which is based on a Constitution built on fundamental rights.	3
France	2012	Manuel de Droit des Conflits Armés	France: p. 40: Plusieurs conventions internationales visent à protéger les droits de l'homme, au niveau universel comme au niveau régional, avec par exemple le pacte international relatif aux droits civils et politiques (PIDCP) de 1966, ou la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales de 1950 . Voici l'énoncé des droits et libertés reconnus à toutes les personnes relevant de la juridiction des États parties à la Convention européenne de sauvegarde des droits de l'homme et d es libertés fondamentales, signée à Rome le 4 novembre 1950 : Article 2 : droit à la vie ; Article 3 : interdiction de la torture ; Article 4 : interdiction de l'esclavage et du travail forcé ; Article 5 : droit à la liberté et à la sûreté ; Article 6 : droit à un procès équitable ; Article 7 : pas de peine sans loi ; Article 8 : droit à la vie ; Article 9 : liberté de pensée, de conscience et de religion ; Article 10 : liberté d'expression ; Article 11: liberté	3

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			de réunion et d'association ; Article 12 : droit au mariage ; Article 13 : droit à un recours effectif ; Article 14 : interdiction de discrimination. L'exercice de certains droits peut être suspendu en situation de danger public menaçant la nation. D'autres sont fondamentaux et ne peuvent pas faire l'objet de dérogation. Ils continuent à s'appliquer malgré la survenance d'un conflit armé. C'est le cas du droit à la vie, de l'interdiction de la torture, des peines et traitements inhumains, de l'interdiction de l'esclavage et de la servitude, ai nsi que du principe de légalité et de non - rétroactivité de la loi. En situation de conflit armé, l'article 3 commun aux quatre conventions de Genève du 12 août 1949, de même que les protocoles du 8 juin 1977, additionnels à ces mêmes conventions, ont fait nettement ressortir l'existence d'un noyau dur commun au droit international humanitaire et les droits de l'homme. Cette convergence s'exprime plus précisément à travers trois grands principes communs : le principe d'inviolabilité qui garantit à tout homm e le droit au respect de sa vie, de son intégrité physique et morale ; le principe de non - discrimination par lequel les individus doivent être traités sans aucune distinction de race, de couleur, de sexe, de langue, de religion ou croyance, de nationalité, d'opinions politiques, de fortune ou de naissance ; le principe de sûreté qui garantit à tout individu qu'il ne peut être tenu responsable d'un acte qu'il n'a pas commis, et qui prévoit que chacun doit pouvoir bénéficier des garanties judiciaires fondamentales	
Germany	1992	Military manual (en)	No reference of HR at all.	00
Germany	2013	Manual on Law of Armed Conflict (en)	105. The question of the relationship between LOAC and the international protection of human rights in armed conflicts has not been finally settled. Opinions on this matter range from the complete separation of these two branches of law and thus the exclusive applicability of LOAC in armed conflicts, to convergence. Both LOAC and human rights law seek to protect the individual, yet under different circumstances and in different ways. While LOAC	3

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			centres on the situation of armed conflicts, the international protection of human rights first and foremost aims at protecting the individual from government abuse in times of peace. Human rights and LOAC thus complement each other in many ways. The rules of LOAC are more specific, however, and for soldiers take priority in armed conflicts (lex specialis principle). This is also supported by the relevant opinions of the International Court of Justice (ICJ). Human rights standards that are applicable in an individual mission according to specific multinational or national contexts will be specified for each mission so that legal certainty is ensured for all soldiers of the Bundeswehr.	
Norway	2013	Manual of the Law of Armed Conflict	1.54 In some cases, the law of armed conflict and human rights law will impose different requirements. Since human rights are primarily drafted for peacetime, some of the rules are not practicable during armed conflict. For example, the European Convention on Human Rights does not permit security detention, although the law of armed conflict unquestionably permits it. In such cases, the rules of the law of armed conflict will apply because they were developed specifically for application during armed conflict (the lex specialis principle: special rules take precedence over more general rules). The relationship between the law of armed conflict and human rights law is evolving. Norwegian forces must therefore refer to national guidelines issued for each specific operation.	2 Some concession to 3?
New Zealand	2019	Manual of Armed Forces Law	3.2.10 Because LOAC is the law that specically addresses the situation of armed con ict, it must be taken to prevail when its provisions are clearly applicable to an issue (known as the lex specialis rule).[14] See Nuclear Weapons Opinion In the case of inconsistency between LOAC and IHRL, provisions relating to persons deprived of liberty, for example, the rules of Geneva Convention III prevail in respect of prisoners of war (PWs). since that treaty is speci cally addressed to their situation. This may produce very different results relating to how long a person may be held without trial,but not to the standards of humane treatment to which they are entitled. Where overlapping provisions all bind New Zealand, this manual recognises the	**2**

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			need for compliance with those other standards as well as LOAC. While the distinction between LOAC and IHRL is still important, it is not wise to ignore the signi cance of IHRL since one act or omission can transgress both areas of law and international courts have displayed willingness to borrow concepts from each.[15] 3.2.11 IHRL standards continue to protect persons under the control of a New Zealand force and in respect of the population in occupied territory.[16] For example, where an IHRL obligation has penal consequences in New Zealand law (eg the prohibition of torture[17]), it will apply to members of the New Zealand Defence Force (NZDF) who are overseas by virtue of the Armed Forces Discipline Act 1971 (AFDA) s 74(1). 3.2.12 Although a State may derogate from some IHRL obligations in case of armed con ict or emergency, the most important rights, including those prohibiting arbitrary deprivation of life, enslavement or torture are ‘non-derogable’ and cannot be ignored even in times of emergency or war.[18] Footnotes: 15 See for example, the Galic´ Trial where breaches of LOAC relating to deliberate and indiscriminate attacks were subsumed within the crime against humanity of murder. War crimes are derived from LOAC, while crimes against humanity are generally derived from IHRL. 16 See Bankovic´, Al Skeini and Al-Jedda Appeal. In the Wall on Palestinian Territory Advisory Opinion the ICJ decided that Israeli occupying forces must apply the ICCPR in occupied areas (see [111–112]). For occupation see Chapter 9. 17 See crimes of torture act 1989.	

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			18 ICCPR art 4(1): "In time of public emergency which threatens the life of the nation and the existence of which is of cially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Art 4(2) states: "No derogation from Arts 6 [inherent right to life], 7 [prohibition of torture or cruel, inhuman, or degrading treatment], 8 (paragraphs 1 and 2) [prohibition of slavery or servitude], 11 [no imprisonment for inability to ful 1 a contractual obligation], 15 [no retrospective offences/penalties], 16 [right to recognition as a person before the law] and 18 [right to freedom of thought, conscience and religion] may be made under this provision."	
Russia			The European Court's summary of Russia's arguments in Georgia v. Russia (II) (dec.), App. No. 38263/08, 13 December 2011, para. 69: 'the Convention did not apply to a situation of international armed conflict where a State Party's forces were engaged in national defence, including in respect of any required operations abroad. In such circumstances the conduct of the State Party's forces was governed exclusively by international humanitarian law	1
US	2016	DoD, Law of War Manual	p. 22: governments must refrain from subjecting individuals to arbitrary detention, to arbitrary deprivation of life, or to cruel, inhuman, or degrading treatment or punishment.[85] As a general matter, human rights treaties have been described as primarily applicable to the relationship between a State and individuals in peacetime.[86] Some human rights treaties also provide for derogation from certain provisions in emergency situations.[87] Law of war treaties have been described as chiefly concerned with the conditions particular to armed conflict and the relationship between a State and nationals of the enemy State.[88]	1

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			Footnotes: 85 International Covenant on Civil and Political Rights, art. 9(1), Dec. 19, 1966, 999 UNTS 171, 175 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”); International Covenant on Civil and Political Rights, art. 6(1), Dec. 19, 1966, 999 UNTS 171, 174 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 UNTS 171, 175 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”). 86 See, e.g., JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 15 (1975) (“Admittedly, human rights embody more general principles while the law of armed conflicts is of a specific and exceptional nature, coming as it does into operation at the very time when the exercise of human rights is prevented or restricted by war. But the two legal systems are fundamentally different, for humanitarian law is valid only in the case of an armed conflict while human rights are essentially applicable in peacetime, and contain derogation clauses in case of conflict. Moreover, human rights govern relations between the State and its own nationals, the law of war those between the State and enemy nationals.”). 87 See, e.g., International Covenant on Civil and Political Rights, art. 4(1), Dec. 19, 1966, 999 UNTS 171, 174 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”).	

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			[88] Christopher Greenwood, Historical Development and Legal Basis, in DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 9 (¶102) (1999) ("Human rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based upon power rather than law."). p. 23 (footnotes omitted): Relationship Between Human Rights Treaties and the Law of War. In some circumstances, the rules in the law of war and the rules in human rights treaties may appear to conflict; these apparent conflicts may be resolved by the principle that the law of war is the lex specialis during situations of armed conflict, and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. For example, the right to challenge the lawfulness of an arrest before a court provided in Article 9 of the International Covenant on Civil and Political Rights (ICCPR) would appear to conflict with the authority under the law of war to detain certain persons without judicial process or criminal charge. However, the United States has understood Article 9 of the ICCPR not to affect a State's authorities under the law of war, including a State's authority in both international and non-international armed conflicts to detain enemy combatants until the end of hostilities. Some international courts or commissions have interpreted the rights conveyed by human rights treaties in light of the rules of the law of war, as the applicable lex specialis, when assessing situations in armed conflict. On the other hand, during armed conflict, human rights treaties would clearly be controlling with respect to matters that are within their scope of application and that are not addressed by the law of war. For example, a time of war does not suspend the operation of the ICCPR with respect to matters within its scope of application. Therefore, as an illustration, participation in	

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			a war would in no way excuse a State Party to the ICCPR from respecting and ensuring the right and opportunity of every citizen to vote and to be elected at genuine periodic elections. 1.6.3.2 Different Views on the Applicability of Human Rights Treaties. In conducting operations with coalition partners, it may be important to consider that some States may have different perspectives on the applicability of human rights treaties. Such differences may result from different legal interpretations or from the fact that the other State is a Party to different human rights treaties than the United States. For example, the European Court of Human Rights – as well as some European States – have construed certain obligations under the European Convention on Human Rights (ECHR) as applicable to their military forces abroad during occupation. The United States has long interpreted the ICCPR not to apply abroad.	
US	2011	4th report to HRC	"indeed, a time of war does not suspend the operation of the Covenant (i.e. the International Covenant on Civil and Political Rights) to matters within its scope of application (…) In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and reinforcing."	3

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Case Study 10

The Rules of Cyber Warfare

(January – May 2020)

Nina Kiderlin

1. Type of Change

This is an example of norm emergence and adjustment. The legal arguments focus on demonstrating how current legal rules apply to cyber operations and are therefore "just" norm adjustments, but as cyber operations are still a relatively new phenomenon I argue that it could also be viewed as an instance of norm emergence. The change is ongoing and partially successful as it is a necessary element of the legal discussion on the issue, but there is still much room for clarification and improvement.

2. Typical Story

In 1977 (time of the adoption API, APII) cyber warfare did not exist and the notion of attack had to be progressively interpreted in order to relate to and include cyberspace as well. In the last decade it has been identified as one of the main emerging challenges within IHL.

Only few states have acknowledged using cyber operations in armed conflict, but an increasing number of states are developing military cyber capacities. Cyber operations in recent years have demonstrated that they have the potential to affect crucial civilian infrastructure and possibly result in human harm. The field of cyberspace regulation attempts is becoming increasingly crowded with different initiatives. This case study focuses on the Tallinn processes (as they concentrate on the IHL aspect) and the UN led processes underway until 2021: the "Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security" and the "Group of

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Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security". Both groups study how international law applies to the use of information and communications technologies by States.

The *Tallinn Manual* is a non-binding study on how international law (*jus ad bellum*, IHL) applies to cyber warfare. Between 2009 and 2012, the *Tallinn Manual* was written at the invitation of the Tallinn-based NATO Cooperative Cyber Defence Centre of Excellence by an international group of approximately twenty experts (legal, cyber, security). It was the first effort to analyse this topic comprehensively and authoritatively and to bring some degree of clarity to the associated complex legal issues. It aims to adapt existing law to new circumstances, not developing a brand-new legal paradigm.

The authors of the *Tallinn Manual* include legal scholars and practitioners with experience in cyber issues who were consulted throughout the duration of the project by information technology specialists. Three organisations were represented by observers throughout the drafting process: NATO, ICRC, and US Cyber Command. After its official publication in 2013, the issue of international law and how that governs cyber warfare was discussed widely among international media with references to the manual. It has been anticipated that the manual will have an effect on how states and organisations will formulate their approaches and positions in those matters (Koh 2012; Schmitt 2012[1]). The manual is divided into sections referred to as "black letter rules" and accompanying commentary. The rules are restatements and interpretation of international law in the cyber context, as understood and agreed to by the authors through consensus. The Manual focuses on operations, which qualify as 'armed attacks' (a crucial issue throughout all discussions on the topic is when a cyber-operation can be classed as an attack) which would allow for self-defence and those taking place during armed conflict. The approach of creating a non-binding manual is similar to the processes around the emergence of the *San Remo Manual* (Armed Conflicts at Sea), and the *HPCR Manual* (Air and Missile Warfare). The *Manual* is hosted by a NATO-accredited cyber defence hub, which also offers trainings on cyber operations and other online resources.

[1] Koh, H. (2012) International Law in Cyberspace; Schmitt, M. (2012) 'Attack' as a Term of Art in International Law: The Cyber Operations Context

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In 2017, an updated version, *Tallinn Manual 2.0*, was published- broadening the process and focusing on cyber operations, as opposed to cyber conflict (the first manual utilised the conflict language), which do not rise to the threshold of an 'armed attack'. The *2.0 Manual* expands the scope to include state practice around issues such as sovereignty, laws of the sea/communication, air law, human rights, and telecommunications law. The *2.0 Manual* project is directed by Prof. Schmitt (US Naval War College), who was also a main author of the *1.0 Manual* and is supported by a team of legal and IT experts and it is meant to only represent their views, and not those of NATO, sponsoring nations or organisations.

A review of state practice[2] in response to the Tallinn Manual has found that there is an uneven display of interest in promoting legal certainty in cyberspace, but that a growing need for coordinated response for cyber operations may induce states to follow the Manual more closely. Efrony and Shany argue that recent developments and the elaboration of international law doctrines applicable to cyber operations by some government officials suggest that under certain conditions states may be incentivized to apply international law to cyber operations and to reduce legal ambiguity.

The UN Working Groups have worked on the issue of applicability of international law in cyberspace since the early 2000s. Their membership differs whilst their mandate is quasi overlapping. Their agenda ranged from whether international law in general is applicable to cyberspace to the more specifics such as whether IHL applies and how to address countermeasures and self-defense in cyber space. The OEWG's mandate was renewed for 2021- 2025 in order to "to continue, as a priority, to further develop the rules, norms and principles of responsible behaviour of States and the ways for their implementation and, if necessary, to introduce changes to them or elaborate additional rules of behaviour".[3] Their outputs are non-binding but have certain normative strength due to UN GA Resolutions.

The ICRC argues that IHL limits cyber operations during armed conflict, just as it does with any other weapon and any use of cyber operations remains governed by the Charter of the

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[2] Efrony, D.; Shany, Y. (2018) "A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice", *The American Society of International Law*
[3] UNGA (2021) A/RES/75/240

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United Nations and relevant customary international law. They lobby for the international community to affirm the applicability of IHL to cyber operations. The ICRC states that during armed conflict, the employment of cyber tools that spread and cause damage indiscriminately is prohibited. In November 2019, the ICRC published a position paper calling on States to take clear positions about their commitment to interpret IHL as including cyber operations to preserve civilian infrastructure and to protect civilian data. They also state that the ICRC would welcome intergovernmental discussion on the issue to determine whether the current IHL framework covers cyber operations sufficiently or whether new rules are needed. This is particularly interesting in the context of the development of the Tallinn Manual, which is not mentioned in the ICRC paper. The ICRC submitted the position paper to the aforementioned UN working groups.[4]

Status of change: Ongoing

Below the two change processes are described after each other as to not create too much confusion.

3. Opening, Disturbance and Background

In 2007 NATO carried out an internal assessment of cybersecurity and infrastructure defense following a cyberattack against different Estonian government and private institutions, such as the parliament, banks, newspapers, and ministries. The attack followed political differences between Estonia and Russia and was a so called "Distributed Denial of Service" (DDOS"), which is a malicious attempt to disrupt the normal traffic on the targeted network or server by overwhelming it with a flood of internet traffic. This was the original disturbance leading to the subsequent launch of the NATO cyber defense policy and the creation of the "Cooperative Cyber Defence Centre of Excellence" (CCDCOE). One can assume that NATO and its allies wanted to get ahead in an increasingly crowded field of initiatives and create a rulebook which would at least to some extent benefit its own interests. This is possibly more the case for the *Tallinn Manual 1.0* as the lack of diversity and the focus on NATO member

[4] ICRC (2021) Substantive Report [First Draft] of the 'Open-ended working group on developments in the field of information and telecommunications in the context of international security' (OEWG) Comments by the International Committee of the Red Cross (ICRC), 3 March 2021

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states was at least somewhat addressed in the *Tallinn Manual 2.0* which branched out to include non-NATO member states experts in the drafting and consultation. It is until today the most common criticism of China (even though Chinese scholars have been part of the expert group in the *Tallinn Manual 2.0*) that the research and drafting process is dominated by the US, which stands accused by China to try and advance their domestic policy through fora such as the CCDCOE. Experts working on the drafting process argued against that, stating that the most important reason to draft the rules would be to deter States from committing/taking part in hostile cyber operations, following the logic that if there is no expectation of impunity actors would be at least somewhat deterred from engaging in such cyber operations.

Following its creation the CCDCOE hosted a multi-year process for experts to address the Laws of War and their applicability in cyberspace, which resulted in the first *Tallinn Manual*. The CCDCOE is a military think tank and is not directly within NATO's command structure. It does not have a practical/military capacity and solely conducts research and training exercises. Countries which are part of the CCDCOE send one or two experts from to conduct research in residence there with the goal that these researches bring back a deeper knowledge of cyber issues.

Tallinn 2.0 concentrates on much broader questions of cyber operations during and outside of armed conflict. It was written under the leadership of Prof. Schmitt, faculty member at the Naval War College and renowned cyber expert, together with an International Group of Experts (IGE). One of the key criticisms of the group which wrote the first Tallinn Manual was the lack of diversity. This was addressed in the second team which included experts from Thailand, Japan, China, and Belarus. The second team also broadened the scope of expertise by inviting scholars from the fields of space law, telecommunications law, and human rights. In the years post *Tallinn Manual 2.0* a few States have publicly voiced their positions regarding cyber operations, often referring explicitly to the Manual. These statements are discussed in the "actor" section further below. There seems to not have been much pushback from States or other actors about the drafting of the Manuals. Russia was more or less the only country with considerable cyber capabilities that was not part of either drafting process, which is remarkable considering the weight that is ascribed to the *Tallinn Manual*.

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Tallinn 2.0 is divided into four parts. The first covering general international law and cyberspace, the second concentrating on specialized regimes of international law and cyberspace, the third and fourth part draw heavily on *Tallinn 1.0*, focusing on international peace and security, and the laws of war applicable to cyberspace respectively.

4. Make-up of the Tallinn Manual 2.0

The Manual 2.0 consists of two types of work. Firstly, "Black Letter Rules" requiring unanimity and which aim to reflect the existing law, not the ideal version of the law according to the authors. Due to the unanimity requirement most of the rules are drafted in quite broad language. The second part of the *Manual 2.0* is its commentary. The rules which are set out in the first part are defined with regards to their terminology and the legal rationale behind including them is explained. Furthermore, the sometimes diverging opinions on application and interpretation of the rules by members of the IGE are discussed. Whilst all IGE members had to agree on the text of each rule, they did sometimes have varying interpretations of their meaning in particular circumstances. The commentary gives insight into that by creating the following, nuanced categories: "1) split opinion (roughly equal division); 2) a majority/minority division (clear division); 3) a "few" held the view (one or two members); 4), the experts "acknowledge" a reasonable position (usually a State position supported by none of the experts); or 5) the law is clearly unsettled".[5]

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[5] As an example, this is taken from the commentary on Rule 4 (violations of sovereignty by extraterritorial usurpation of inherently governmental functions: 19. Although the International Group of Experts agreed that a violation of sovereignty generally requires that the cyber operation in question occur or otherwise manifest on cyber infrastructure in the sovereign territory of the affected State, it was divided over whether a cyber operation purportedly violating sovereignty through interference with or usurpation of an inherently governmental function need do so. The majority of the Experts adopted the position that in this particular case sovereignty is violated irrespective of where the cyber operation occurs or manifests. For them the determinative factor is whether the activities interfered with qualify as inherently governmental functions. For example, Estonia has announced the establishment of so-called 'digital embassies' that allow the State to back up critical governmental data in other States (see also discussion in Rule 39). Interference with such data in a way that affects the performance by Estonia of its inherently governmental functions would, by the majority view, amount to a violation of this Rule. They acknowledged that the cyber operation in question might also violate the sovereignty of the State where the infrastructure is located on the basis that it occurs on the sovereign territory of the latter. 20. A few of the Experts, by contrast, were of the view that such operations must occur or manifest on a State's territory or sovereign platform (Rule 5) to constitute a violation. They reasoned that

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As demonstrated in the example in the footnote, the *Manual 2.0* drafters did take care to include all reasonable positions. It adds nuance to claims that the *Manual 2.0* actually defines what the law is. Evidently, whilst the first part of the text (the black letter rules) can be read as an assessment of the current state of the law, the second part (commentary) adds the divergent opinions and gives an overview over the cacophony of voices. For the reader of the *Manual 2.0*, may they be individuals, academics, policy makers, or States, the commentary provides guidance on where clarification of the law might be needed, and which clarifications or ambiguities might serve their interests. Particularly if some States will use the commentary to provide more clarification on their own position and policies, other states might be less comfortable in the "grey-zone".

It is also important to emphasize that many of the IGE understood the drafting as a norm identification process and aimed at producing a document which might aid States and legal advisors in making informed decisions in regards to cyber policy.

5. Self-Defense in the Tallinn Manual

Whilst in and of itself the right to self-defense exists in cyberspace in accordance with Article 51 of the UN Charter and customary international law (necessity and proportionality) there are a number of unsettled issues around the matter. These revolve mainly around thresholds of intensity at which a cyber use of force qualifies as an armed attack. The IGE adopted the approach of "accumulation of effects"- individual attacks not reaching the threshold of an armed attack may be combined if they are launched by the same or different actors in unison. The majority of the IGE agreed that cyberattacks can be perpetrated by non-State actors and that this can trigger rights of self-defense against non-State actors. The "unwilling or unable"

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otherwise, the sovereignty, which is by definition exclusive, of at least two States would be implicated by the act, that of the State exercising the inherently governmental function and that of the State where the cyber infrastructure is located.

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approach to self-defense is accepted by the majority of IGE members in the *Tallinn Manual 2.0*.

6. UN Working Groups

Another parallel process that also aims to address norms in cyberspace is the UN Group of Governmental Experts (UN GGE) on Advancing responsible State behavior in cyberspace in the context of international security (formerly on Developments in the Field of Information and Telecommunications in the Context of International Security). In 2001 Russia proposed the establishment of the GGE, demonstrating an early interest in cyber relations.[6] Since 2004, six working groups have been established. In 2018 the Open-Ended Working Group on Developments in the Field of ICTs in the Context of International Security (OEWG), another UN-mandated working group, was established to exist in parallel. The most recent members of the UN GGE are Australia, Brazil, China, Estonia, France, Germany, India, Indonesia, Japan, Jordan, Kazakhstan, Kenya, Mauritius, Mexico, Morocco, Netherlands, Norway, Romania, Russian Federation, Singapore, South Africa, Switzerland, United Kingdom, United States, and Uruguay. Russia chaired the GGE after its inception from 2004-2005, and it was followed by Australia, Brazil, and Germany- notably apart from Germany all these chairs are non-NATO countries. The seats in the UN GGE are allocated by geographical grouping in addition to the P5.

The OEWG was established in 2018 in order to continue the development of rules and norms of cyberspace behaviour, as well as options for implementation. The OEWG is open to all member states, and the group holds consultative meetings with other interested stakeholders, such as businesses, NGOs, and academic experts.

Both working groups have broadly established that International Law applies to cyberspace and this view is expressed in UNGA resolutions, particularly with regards to communication technology, and states not conducting internationally wrongful acts themselves, or through

[6] Flonk et al. (2020) "Authority conflicts in internet governance: Liberals vs. sovereigntists?"

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proxies. Within the working groups it is however unclear how principles of IHL apply- they were agreed upon in the GGE report 2015[7], but they were not re-iterated in the resolution establishing the OEWG. China, Cuba, and Russia objected to IHL being specifically mentioned in the GGE report, therefore it ultimately only refers to principles of "humanity, necessity, proportionality and distinction"[8]. This clearly distinguishes it from the Tallinn Manual which explicitly addresses how IHL is applicable to cyberspace.

Discussions over the right to self-defense have been floated as the reason why the GGE did not reach a consensus report in 2017.[9] The then chair, Karsten Geier, discussed this issue at a conference the week after the GGE failed to reach consensus. He emphasised that the group found consensus in other areas, and that states felt that there was space for discussion on the issue of self-defense. Interestingly one of the points made by him was that there was debate about whether the UN was the right forum to continue this debate[10]. Self-defense, in particular against non-state actors, was also a contentious issue in the *Tallinn Manual,* ultimately the IGE agreed though that hostile cyber-attacks can trigger self-defense mechanisms under certain circumstances.

The two UN groups engaged with topics of cybersecurity, the Open-Ended Working Group (OEWG) and the Governmental Group of Experts (CGE), both finished their mission in spring 2021 and have published their final reports. The OEWG had their mandate renewed for 2021- 2025 at the UNGA[11].

The GGE was founded in 2004 and since then six working groups have operated under the mandate to examine the impact of developments in information telecommunications on national security and military affairs. Their reports are not binding but adopted by the UN

[7] UN GA (2015) A/70/174
[8] Ibid.
[9]Digital Watch (2017) Digital Policy Trends in June, Issue 22- June 2017, accessible at: https://dig.watch/newsletter/june2017#Trends
[10] Ibid.
[11] UN GA (2021) A/RE/75/240

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General Assembly so have some normative meaning[12]. In 2013 the GGE recognized that international law applies to cyberspace and in 2015 it introduced voluntary norms of responsible state behaviour- two major achievements. In 2017, the 5th GGE could not find consensus regarding the concrete application of particularly IHL, the right to self-defense, and countermeasures. Resulting from the disagreement the group did not produce a report.

The 2016- 2017 GGE was working on finding consensus on IHL in cyberspace. However, this failed as there was disagreement over explicitly acknowledging the applicability of IHL. Concretely there was debate about whether the terms "self-defense" and "international humanitarian law" should appear in the text. Cuba objected to the inclusion of direct references to IHL in the final report inter alia based on concerns that it might "legitimize a scenario of ad military actions in the context of information and communications technologies" and therefore justify military action including self-defense[13]. This view was supported by Russia and China as well as other states with similar political views (which were later expressed in the OEWG).[14] In 2015, they had supported a GGE report that implicitly endorsed the IHL principles of proportionality, distinction, necessity, and humanity, however without any direct mention of IHL[15].

Following the failure to reach consensus on "self-defense" in the 2017 report the US pushed for the establishment of the sixth GGE. The General Assembly did so in 2018[16]. Brazil chaired the sixth GGE consisting of all permanent member of the UNSC. Other members were selected based on equitable geographical distribution. During the period of 2019-2021, the GGE had expert members from 25 states.[17] The sixth GGE released their report in 2021, crucially affirming that IHL does apply to cyber operations during armed conflict including

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[12] Ponta, A. (2021) "Responsible State Behavior in Cyberspace: Two New Reports from Parallel UN Processes", ASIL Insights, 25 (14).
[13] Hitchens, T. ; Goren, N. (2017) "International Cybersecurity Information Sharing Agreements", Report Center for International & Security Studies at Maryland
[14] UN GA (2021) /AC.290/2021/CRP.3*
[15] A/70/174 UNGA "Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security", 22 July 2015
[16] UN GA A/RES/73/266
[17] Australia, Brazil, China, Estonia, France, Germany, India, Indonesia, Japan, Jordan, Kazakhstan, Kenya, Mauritius, Mexico, Morocco, Netherlands, Norway, Romania, Russia, Singapore, South Africa, Switzerland, United Kingdom, United States, Uruguay

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the IHL principles.[18] However, they recognize that there has to be future discussion on qualification of the meaning of key terms in cyber space. As some of the states involved in the GGE were the subject of cyber-attacks, reaching this partial consensus can be seen as encouraging. However, again no consensus was reached over issues related to "self-defense".

After investment from Russia, at the same time as the US lobbying for a 6th GGE (2017), the General Assembly also established the OEWG, open to all UN members and focused on addressing the similar issues.[19] Whilst the GGE is a closed-door deliberation, the OEWG is public and all sates can submit contributions publically. In the last period, 68 UN member states and inter-governmental organisations participated in the process[20]. Their mandate was renewed until 2025.[21] The OEWG 2021 final report did not make any concrete reference to self-defense as it is structured around the areas they found consensus in.[22] It affirms that international law applies to cyberspace, however does not refer to IHL due to concerns from Cuba, China, and Belarus.[23] The Chair responded to an ICRC submission on the matter by explaining that there were certain questions about applicability of the IHL principles still open. [24] The output of the OEWG is divided in the Final Report and the Chair's summery, the latter being the document discussing issues that the group could not find any consensus over such as IHL, attribution etc. [25] Self-defence is mentioned in the Chair's summery (point 18) as one of the areas in which some states have questions on definition and applicability.[26]

7. State Positions

There are multiple states which have released either documents stating (parts of) their cyberspace policy, or had officials giving speeches with regards to the matter. Some key

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[18] UN GA (2021) A/76/135
[19] A/70/174 UNGA "Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security", 22 July 2015
[20] OEWG (2021) Final Report https://www.un.org/disarmament/open-ended-working-group/
[21] See note 26.
[22] UN GA (2021) /AC.290/2021/CRP.3*
[23] UN GA (2021) /AC.290/2021/CRP.3*
[24] ICRC (2019) Position Paper to the OEWG (2019) https://unoda-web.s3.amazonaws.com/wp-content/uploads/2020/01/icrc_ihl-and-cyber-operations-during-armed-conflicts.pdf
[25] UN GA (2021) /AC.290/2021/CRP.3*
[26] Ibid.

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states have become more publicly engaged in the matter in the past years, particularly after the publication of the *Tallinn Manual 2.0*. These individual statements are of particular importance, as the GGE did not manage to issue a consensus report in 2016-2017. Some state positions were clarified in the GGE/OEWG reports in 2021. Most States have just affirmed the applicability of the UN charter, but some have put forward more substantial statements, addressing grey zones and offering their interpretations of how international law applies to cyberspace in a more specific manner. As much as possible I focus on the same issues in the state positions, they overlap considerably with those identified as points of debate in the wider Manual.

Russia

I am aware that for example Russia is not discussed below in detail- I found it near impossible to find even reasonably independent information on Russia's legal stance regarding cyber operations. It would have been interesting to see how Russia views Tallinn in general but also due to its NATO host, but most of the work I could find on Russia turned out to be more or less obviously conducted by US think tanks and underlying political interests can be easily read into these papers. One point that comes up a lot in different outlets is that military theorists in Russia in general do not make us of the "cyber" or "cyber warfare" language.

However, Russia has been very active in the UN GGE. Particularly with regards to discussions around self-defense, Russia has argued in that forum that traditional use of force is not a legitimate response to cyber-attacks, especially not if they are not approved by the UN Security Council[27]. Russia also stated that they would prefer if sources of cyber-threats are not identified by third-states independently without clear evidence, particularly if this could lead to counter-strikes. Russia views collective attribution of cyber attacks (which has been favoured by most NATO states) very critically, arguing that it is a pseudo-legal concept,

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[27] UN GA (2015) A/70/174

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and demands that attribution should only be public evidence based. Russia also opposes any notion of due diligence, sticking strictly to what has been agreed by the GGE (requesting on a voluntary basis that countries do not allow for their territory to be used for internationally wrongful acts, and to mitigate cyber-attacks against other countries from their own territory)[28]. This is very clearly in opposition to most European States which have argued (as detailed below) that due diligence should be a binding obligation, in line with the ICJ.

China

The issue is similar with regards to China. In 2017 the government refused to clarify if it believes that/how international law applies to cyber operations. There seems to be quite a big skepticism about initiatives which are attempting to regulate or build consensus around cyber operations and the rules which govern them. This is despite Chinese scholars participating in the *Tallinn Manual 2.0*, but there seems to be a big trust issue regarding the strong US involvement in primarily the *Tallinn Manual 1.0* and some commentators have written that they believe the US is just using the Tallinn process to legalise their own cyber strategies. China is also opposed to a wider definition of what constitutes a cyberattack and subsequent self-defense. China wants to protect its own interests here against a perceived or real US dominance about what the law governing cyber operations should look like. As there is no clear government statement, one has to rely on Chinese commentators writing what the government view might be, all of this is not hugely reliable, but I would argue that China is slightly more opposed to the Tallinn Manual 2.0, despite the participation of Chinese scholars in the IGE drafting.

Other Non-NATO states

Cuba has stated in the UN GGE that it believes that cyber-attacks are not equivalent to armed attacks, and henceforth the right to self-defense should not apply (contrary to the *Tallinn Manual*). Cuba worries that asymmetric advantages that states might have in cyberspace, and that they do not have in non-cyberspace, could be undermined if self-defense was endorsed[29].

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[28] Ibid.

[29] Sukumar, A. M. 2017. “The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?” *Lawfare*, accessible at: https://www.lawfareblog.com/un-gge-failed-international-lawcyberspace- doomed-well

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Belarus has chosen a similar position.[30] India would welcome an affirmation of self-defense, mainly to have this option in response to Pakistan.[31] India has not publically voiced any opinion on the *Tallinn Manual*, even though it would support India's viewpoint.

Netherlands

The Netherlands despite being a smaller State clearly had an interest in the topic of international law and cyber, visible through their support of the Manual drafting by hosting the Hague Process as a forum for capacity-building around the issue. Another reason often cited as to why the Netherlands take a keen interest in the issue is that they were the site of a Russian Military cyber operation in April 2018 which targeted the Organisation for the Prohibition of Chemical Weapons. The Netherlands are also very active in the work of the UN Group of Governmental Experts on Advancing responsible State Behaviour in Cyberspace and the UN Open Ended Working Group. She is also a leading actor in the Global Commission on the Stability of Cyberspace, and the EU Cyber Diplomacy Toolbox, making the country a prime example of how actors try to engage with and influence different processes in different fora related to international law and cyberspace.

Additionally to the 2018 speech, in 2019 the Dutch Ministry of Foreign Affairs detailed their views on the application of relevant existing international law in cyberspace, going into great detail on a granular level. The letter speaks to a variety of issues, including obligations of states regarding sovereignty, non-intervention, use of force, due diligence, international humanitarian law, international human rights law, as well as attribution of cyber operations and addresses which responses international law holds to hostile cyber operations.

On the issue of self-defense the Netherlands state that if a State is the victim of a cyber "armed attack" it can respond with cyber or kinetic measures at the level of a use of force. In defining what an "armed attack" is, the Dutch letter relies on the Nicaragua judgement- therefore not every cyber operation amounts to an armed attack allowing for self-defense.

[30] UN GA (2021) A/AC.290/2021/CRP.2
[31] Sukumar, A. M. 2017. "The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?" *Lawfare*, accessible at: https://www.lawfareblog.com/un-gge-failed-international-lawcyberspace- doomed-well

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The letter does not pick up on the quote from the 2018 speech which specifically mentioned attacks against the financial system as armed attacks. It is therefore somewhat unclear if this kind of attack would result in a response based on the plea of necessity or if it would be treated as an attack triggering self-defense responses.

United Kingdom

The then UK Attorney General, Jeremy Wright, outlined the United Kingdom's position on attribution, use of force, intervention, countermeasures and self-defense in a Chatham House speech in May 2018. He does not specifically mention *Tallinn*, but does refer to the UN Working Groups. As outlined below some of their positions do not align with it (sovereignty), others however do seem to support certain norms set out in the *Tallinn Manual* (prohibition of the use of force). As a NATO member and through their member in the IGE the UK was obviously very much aware of the drafting process, and it is somewhat surprising that they do not reference the *Tallinn Manual* directly, whilst other States do.

With regards to the use of force, the UK generally confirms the prohibition's applicability to cyberspace, but does not go into further details on thresholds[32]. Relating to the right to self-defense the UK states that a cyber use of force amounts to an armed attack if there is "imminent threat of, death and destruction on an equivalent scale to an armed attack"[33]. This includes nuclear reactors, and hostile cyber operations to disable air traffic control systems resulting in lethal effects. It is unclear if the UK would treat loss of functionality of cyber infrastructure as the equivalent of physical damage, as the *Tallinn Manual 2.0* suggests.

The UK's Attorney General outlines that in his view States do not have an absolute duty to notify the State against which countermeasures are being taken. The UK argues this is impractical in the context of cyber countermeasures as it could deprive them completely of

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[32] Attorney General Jeremy Wright QC MP, 23 May 2018, Speech "Cyber and International Law in the 21st Century" available at: https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century

[33] See note 16

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their effectiveness. This opinion is shared later by France, but goes against the International Law Commission's suggestion in the Articles on State Responsibility.

France

In September 2019 the French Ministry of the Armies[34] published a wide ranging statement on the application of international law in cyberspace. Academic observers have deemed the statement, "Droit International Appliqué aux Opérations dans le Cyberspace", the most significant to date by any State[35]. This is mainly due to the fact that France has clarified and taken a position on a number of unsettled issues. The French statement makes frequent reference to the *Tallinn Manual 2.0*. France, together with the Netherlands, Finland, and Estonia, endorsed the status of due diligence as a legal rule applicable in cyber space. The *Tallinn Manual 2.0* envisages that the due diligence obligation[36] requires States to ensure that there are no State or non-State hostile cyber operations against another State that cause serious adverse consequences with regard to a right of the target State taking place from their territory. The *Tallinn Manual 2.0* also states that this obligation extends to remotely conducted cyber operations that use the cyber infrastructure of the State the attacker controls. France is very clear in their statement that interpreting due diligence as an obligation also allows them a greater level of protection, as should a State fail to end a harmful operation, France would have the option to take countermeasures on the basis of that breach, which may be a cyber actions against the cyber infrastructure that is used to conduct the attack in the first place. France states that a failure to comply with the obligation, including the non-termination of operations by States of non-State actors violating the sovereignty of another State if they are conducted from or through the territorial State is an internationally wrongful act and can be responded to with countermeasures. France cites the *Tallinn Manual 2.0* as stating that a breach of due diligence entitles a victim State to take self-defense measures

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[34] Ministry of Defense

[35] Schmitt, M. (2019) "France's Major Statement on International Law and Cyber: An Assessment", *Just Security*, https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment/

[36] ICJ (1949) Corfu Judgement

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against a hostile actor who conducts the cyber-attack from a territorial State to which the attack may not be attributed[37].

The French statement also goes into detail with regards to when the use of cyber force amounts to an armed attack, resulting in a right to self-defense. Notably the French position is contrary to the US view and goes well beyond to the one set forth by the UK. France argues that an armed attack includes cyber operations causing substantial loss of life or significant physical or economic damage, for example attacks on critical infrastructure with substantial consequences, those paralyzing whole economic sectors, and those causing technological or ecological disasters. One should pay particular attention to the fact that physical damage or injury is not required (possibly signaling that France focuses on the severity of consequences of the attack and their character). France differentiates between use of force that qualifies as an armed attack and use of force which does not, only if the threshold of an armed attack is reached self-defense is possible. This is contrary to the US position on the matter. France follows the Nicaragua judgement that armed attacks are the "most grave" form of the use of force and defines use of force not rising to the threshold as limited, reversible cyber operations which do not reach the required level of gravity. Contrary to the view adopted by the majority of the IGE in the *Tallinn Manual 2.0* (and the US opinion), France rejects that cyberattacks can be perpetrated by non-State actors unless attributable to another State unless attributable to another State as they were conducted on the instruction or direction of the State, drawing on the law of State responsibility and not the Nicaragua judgement. France rejects the right of self-defense to non-State actors, following the ICJ Armed Activities judgement[38]. France argues in favour of the approach of "accumulation of effects"- individual attacks not reaching the threshold of an armed attack may be combined if they are launched

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[37] This is a somewhat questionable interpretation as it conflates or confuses due diligence with the "unwilling or unable" test of self-defense. The differentiation is important, as due diligence foresees a response solely if the territorial State is "unwilling"- feasibility is a condition for breach. The unwilling or unable test though derives from balancing sovereignty and self-defense, competing rights. Hence, the line for self-defense may be drawn differently in the unwilling or unable doctrine and under due diligence. Whilst a breach of the due diligence obligation may result in countermeasures or other remedies through the law on State responsibility, it may not result in the use of force, which still requires an armed attack or UN Security Council authorization.

[38] International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgement of 19 December 2005

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by the same or different actors in unison. This is again in accordance with the *Tallinn Manual 2.0*. France acknowledges the right of anticipatory self-defense of an imminent armed attack, but firmly rejects preventive self-defense. The "unwilling or unable" approach to self-defense accepted by the majority of IGE members in the *Tallinn Manual 2.0* is rejected by France, noticeably in contrast to the US position. The French paper explicitly highlights the disagreement with the *Tallinn Manual 2.0*, but not with individual other States.

Whilst France is explicitly in favour of a right to take countermeasures to respond to a hostile cyber operation violating international law (e.g. a hackback), she is rejecting the Estonian position that collective countermeasures (countermeasures taken by one state on behalf of another) are permissible. This is somewhat surprising with regards to the strong position France holds within NATO, France would have the capability to engage in countermeasures when other (weaker) partners could not.

United States

The United Sates have issued multiple statements about cyber operations and applicability of international law. Regarding the use of force in 2012 (about six months prior to the publication of the Tallinn Manual 1.0) then-State Department Legal Adviser Harald Koh stated that the United States used a factors-based approach in assessing which operations amount to a use of force[39].

In 2017 the US argued in the UN GGE against the establishment of the OEWG and suggested instead that the focus should not be on creating new norms but strengthening adherence to current ones. They also stated that options outside the UN should be explored, particularly bilateral agreements or coalitions of like-minded countries[40]. It is a bit difficult to determine whether these statements should be read as a clear rejection of the UN processes relating to

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[39] Koh, H., "International Law in Cyberspace" 18 September 2012, Speech "In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors: including the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues."

[40] See note 17, Thomas Bossert, US Assistant to the President for Homeland Security and Counterterrorism

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cyber and potentially more support for efforts akin to *Tallinn*, or whether this has to be interpreted within the wider context of the US pulling out of UN institutions.

Germany

Germany believes that "malicious cyber operations can constitute an armed attack whenever they are comparable to traditional kinetic armed attack in scale and effects", which is in accord to many other states (Australia, France, New Zealand, Netherlands[41] etc.). Germany states that non-state actors can launch armed attacks through cyber means and that the victim in those instances has the right to self-defense. Germany accepts that an armed attack is the most grave form of use of force, rejecting the US position that the threshold for armed attack and use of force is identical. Germany's position follows para 191 of the ICJ's opinion in Paramilitary Activities[42], but it seems so far unclear how this is exactly translated into the cyber context[43].

8. Opening, Factors, Critical Juncture

A key factor was the increasing development of cyber capabilities in the 2000s which led to potentially radically different forms of attacks and conflicts. Cyber became an increasingly salient issue, possibly affecting peace and security. Clearly the attack on Estonia by Russia triggered the evaluation of cyber rules within NATO which led to the establishment of the Tallinn Manual drafting group. The room for rule-making became increasingly crowded with smaller and larger initiatives and whilst the process is an academic project it also provides for NATO to have their name associated with one of the important Manuals and literatures on cyber operations and international law and possibly be able to push the agenda of their member states through it and not being dependent on other initiatives and fora. The hostile operation against Estonia can be seen as the critical juncture which catalyzed a lot of the

[41]https://www.government.nl/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace
[42] https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf
[43] Schmitt, M. (2021) "Germany's Positions on International Law in Cyberspace Part II", *Just Security*, https://www.justsecurity.org/75278/germanys-positions-on-international-law-in-cyberspace-part-ii/

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considerations around cyber developments in NATO. It is of note that the states very active in the UN Groups are those form whom going through NATO is not an option (including politically).

9. Institutional availability and Pathways

The CCDCOE and the UN Working Groups had to be founded in order to draft the Tallinn Manual and their respective reports. Therefore, specific institutional availability was non-existent at the beginning but throughout the process became higher through the establishment of additional processes and channels, such as the Hague Process and the subsequent founding of th OWEG. Overall, the Tallinn Manual traveled on the private authority/multi-stakeholder pathway through NATO and the IGE, whilst the UN Working Groups operated multilaterally through the UN Institutions. Following the drafting some states have made unilateral statements, voicing changes in behavior, adaption or diversion from the Manual or the UN reports. States had input into the drafting of the Manual through the Hague Process, and of course it is very unclear if the whole Tallinn process would have ever taken place without the response of NATO to the cyberattack on Estonia and NATO evaluating their cyber framework and deeming it non-sufficient. With respect to the UN Working Groups varying member states had direct input into the GGE, whilst the OEWG was open to all member states and inter-organizational dialogue

With regards to the private authority/multi-stakeholder pathway, a large part of the authority of the *Tallinn Manual* is most certainly derived from the level of experts involved in the drafting procedure. The Manual is marketed as an academic study and therefore this would be the most obvious pathway for it to travel on, but it is important to also include the other relevant pathways, as States were not just silent observers, but in some form or another contributors during and after the drafting process. The pathway for the chosen action was possibly the private authority/multi-stakeholder one as it allowed states to influence the process without being directly associated with it and giving it enough third party credibility for other actors (such as the ICRC) to take up parts of the Manual in their own work, without aligning themselves directly with certain states. Having the UN Working Groups in parallel allows for an interesting ideas about which states chose which forums for which goals-especially considering the strong involvement of the US in the GGE and Russia in the

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OEWG. As discussed, neither of the processes is binding but the UN Working Groups at least have the instrument of UN GA Resolutions at the normative disposal.

10. Salience

The issue rose to the UN GA, so has attracted sufficient high level interest. Self-defence is a very debated topic in both working groups, considering the lack of consensus they have been able to establish around it in the last decades.

11. Stability, Previous norm availability

Before the Tallinn Manual 1.0 and 2.0 were drafted there was no comprehensive text discussing the interplay between cyber operations and international law and the legal rules applicable to cyber space. There were no explicit norms available as the phenomenon of cyber operations was new, but it is clear that the drafters could rely on other international law norms related to armed conflict, such as the Additional Protocols and the Geneva Conventions. The same is the case for the UN Working Groups.

12. Reception

After the *Tallinn Manual 2.0* more states have publically engaged with the issue of cyber operations and have explicitly referenced the Manual in their efforts to justify their own legal positions. One can argue that this is positive reception and has led to a partially successful change. It is difficult to identify actual state practice, as much of it is not made public, but the statements that states have made have been overall positive. There are very few (particularly NATO) states in vocal public opposition. However, it has to be noted that the reference to the *Tallinn Manual* is very selective- some states chose to actively refer to it in their statements, particularly when it supports their own position. In cases where the *Manual* does not support their view (e.g. partially the UK), states chose to not refer to it, therefore the impression of little active opposition is created, but it is unclear if this is actually the case.

A similar statement can be made regarding academics, particularly after the *Tallinn Manual 1.0* was published there was quite a lot of skepticism, but that has improved after the *Tallinn Manual 2.0* was drafted. As mentioned above quite a few of the academic opinions on the

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issue are written by members of the IGE and therefore it is to be expected that they are more positive about the effort.

It is also important to note which states utilise and reference which process of norm creation/stabilisation in cyberspace. There seems to be a preference of NATO states to at least refer to the rules put forth in the *Tallinn Manual*, as long as the rules support a state's position. It is striking though that other countries, such as India, do not refer to the Manual even if it would support and possibly advance their position. This could possibly indicate that these states do not feel any sense of ownership of the *Tallinn Manual*, and believe that their interests are served better through UN channels, whilst some NATO states feel they have a stronger claim to push their own narrative and interests by referencing the *Manual* directly. Other countries, particularly those aligned closer to Russia, have voiced their opinions more in the UN GGE, indicating that they do not accept the authority of the *Tallinn Manual* and prefer to participate in norm establishment through other fora. States are clearly selective in the way they choose which forum to go through and which forum to reference when it comes to strengthening their own position. This is presumably a very strategic choice, and for some states the *Tallinn Manual* is a strong reference point and possibly authority in the field, even though it is "only" an academic case study in a field that does provide other options for norm changes. This might be due to processes such as the Hague process in which States had the opportunity to bring up their concerns and could possibly influence the drafting process in a more covert, but direct manner than in other fora. Due to this an academic study might have been a preferred pathway for change in this instance as it gave states the opportunity to influence a set of possible norms, whilst also providing enough distance to possibly reject and debate some of the outcomes. It is also important to note that an academic study has gathered enough state support and authority to be a reference point not only for states, but also other dominant actors in IHL, such as the ICRC.

With regards to the UN Working Groups, there is debate about whether the lack of consensus on questions of IHL is synonymous with failure of the process or whether the process should be viewed positively due to creating inter-institutional dialogue and in some areas affirming

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the GGE's work.[44][45] Due to the wide-ranging involvement of different stakeholders the OEWG could be an interesting group to watch in the years to come with regards to creating space for dialogue and discussing issues of IHL applicability in cyberspace.

[44] Gold, J. (2021) "Unexpectedly all UN countries agreed on a cybersecurity report. So what?", Council of Foreign Relations https://www.cfr.org/blog/unexpectedly-all-un-countries-agreed-cybersecurity-report-so-what
[45] Lewis, J.; Painter. C. (2021) "Inside Cyber Diplomacy: Behind the Scenes : Australia's Approach to UN Negotiations", Center for Strategic and International Studies, https://www.csis.org/podcasts/inside-cyber-diplomacy/behind-scenes-australias-approach-un-negotiations

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Part IV.

INTERNATIONAL CRIMINAL LAW

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Case Study 11

War Crimes in Non-International Armed Conflict

(June – October 2020)

Nina Kiderlin

Synopsis

Under international law war crimes in non-international armed conflict did not exist for the most part of the 20th century. The Geneva Conventions envisioned them to only apply to international armed conflicts. This remained the same for much of the following decades, throughout Additional Protocol II, even though by this point non-international armed conflicts had become the most prevalent type of conflict.

In the 1970s and 1980s some legal scholars kept the debate around the applicability of war crimes in non-international alive through their academic writings, but it no longer seemed to be a priority of States to address the issue. There was no institution and no political will to push for change.

This all changed with the establishment of the ICTY in 1993 and the election of Antonio Cassese as its President. Cassese had written about the establishment of war crimes in non-international armed conflict in the decades before as an academic. When the Court was presented with the *Tadic* case, Cassese recognized this as an opportunity to push for and create change. In the Appeal Chamber judgement he argued that customary international law supported his view that war crimes did indeed already apply to non-international armed conflicts. This was a controversial decision, the custom the judgement was based on was shaky at best, but nevertheless the judgement fell on fertile ground. The Great Powers, still under the influence of the recently ended Cold War, accepted this norm shift as they initially still saw it as applicable only to the confined context of the former Yugoslavia and even if it were to expand beyond that, they deemed the risk of it applying to their own nationals as low and did not oppose the judgement. Many scholars welcomed the shift, but there were also

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some critics who argued there would have been other, possibly more legally sound, ways to establish a similar outcome. Nevertheless, the judgement re-shaped international criminal law with respect to non-international armed conflict. The general shift in opinion is evident by today no-one seriously challenging the norm that war crimes to apply to non-international armed conflicts. It became a codified norm to an extent in the Rome Statue- the Statute did make the differentiation between international and non-international armed conflict, but did codify war crimes in either context.

I. Chronology

First phase: Limited debate (1949-1977)

War crimes in non-international armed conflicts were not envisioned in the 1945 Geneva Convention. The distinction between international and non-international armed conflict that is enshrined in International Humanitarian Law originated from political considerations[1]. States were very reluctant to recognize rebel movements or to legitimize warfare by any other than their own military[2]. Common Article 3 of the 1949 Geneva Convention was the first international legal regulation specifically targeting non-international armed conflict[3]. It is important to note however that Common Article 3 does not lay out rules of combat.

The 1949 Geneva Conventions established mandatory prosecution of "grave breeches" of the Geneva Conventions[4] as well as Additional Protocol I[5]. Grave breaches are a certain number of violations and establish the principle of compulsory universal jurisdiction over persons who have committed these crimes. Common Article 3 and Additional Protocol II did not fall under the grave breaches provision and it was therefore assumed that only grave breaches

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[1] Hoffmann, T. (2010) "The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflict" in Stahn, C.; van den Herik, L. (eds) *Future Perspective on International Criminal Justice*, Cambridge: Cambridge University Press., pp.58-80.
[2] Moir, L. (1998) "The Historical Development of the Application of Humanitarian Law in Non- international Armed Conflicts to 1949", *The International and Comparative Law Quarterly*, 47, 2, pp.337-361.
[3] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.
[4] First Geneva Convention Art 51; Third Geneva Convention Art 130; Fourth Geneva Convention Art 147
[5] Additional Protocol I, Arts 11(4), 85, 86.

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entail criminal responsibility, whilst serious violations of humanitarian law do not[6]. War crimes were only thought to exist in the context of international armed conflicts and this opinion was expressed widely in academic writings[7] and by international organisations, including the ICRC[8].

Originally the ICRC aimed for having the same laws apply to international and non-international armed conflict through the Geneva Conventions[9]. Some Scandinavian countries[10] as well as Mexico, and some socialist States[11] were in complete favour of this approach, some states fundamentally opposed[12] granting any rights or obligations to non-state actors in conflicts, and a larger group of states led by France held an intermediary[13] position of generally accepting the ICRC proposal whilst also asking that it should only apply to organized groups, accepting international legal norms and in control of partial territory. Common Article 3 ended up being a compromise between the groups, focused on humanitarian principles and not legal norms, an outcome particularly dissatisfying the Soviet delegation as they had argued strongly for all Geneva Conventions to be extended to non-international armed conflict[14].

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[6] Platter, D. (1990) « The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts, *International Review of the Red Cross*, 72.

[7] Bothe, M. (1995)'War Crimes in Non-International Armed Conflicts in Y. Dinstein and M. Tabory (eds.), *War Crimes in International Law*; Graditzky, T. (1998)'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts', *International Review of the Red Cross,* 80; Oeter, S. (1993) 'Kriegsverbrechen in den Konflikten um das Erbe Jugoslawiens: ein Beitrag zu den Fragen den Kollektiven und Individuellen Verantworlichkeit fur Verletzungen des Humanitaren Volkerrechts', *Zeitschrift für Öffentliches Recht,* 53.

[8] DDM/JUR442 b, 25 March 1993, para 4 "According to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict"

[9] Moir, L. (1998) "The Historical Development of the Application of Humanitarian Law in Non-international Armed Conflicts to 1949", *The International and Comparative Law Quarterly*, 47, 2, pp.337-361; Cassese, A. (1986) *La guerre civile et le droit international*, 90 Revenue Générale de Droit International Public, 553.

[10] Norway, Denmark

[11] Soviet Union, Russia, Hungary, Romania, Belarus, Bulgaria

[12] United Kingdom, Greece, Australia

[13] United States, Italy, China, France, Spain

[14] CDDH/SR. 56, para. 21; the Soviet delegate calling it a "convention in miniature".

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The next big legal norm clarification came with the adoption of the Additional Protocol II in 1977[15]. It is again important to note that in the run-up to the 1974-77 Diplomatic Conference of Geneva non-international armed conflicts as well as hybrid conflicts (Vietnam, Lebanon, Cyprus etc.) increased steadily and got a lot of media attention. Since the 1950s there has been a steady increase in length and number of non-international armed conflicts, an increase of internal and external parties involved in these conflicts, as well as an increased number of civilian casualties through non-international armed conflicts[16]. The recognition of this trend is not recent, it was indeed already made in the 20th century, with particular concern for Third World countries[17].

Again states split into three groups: some Western and some Third World States argued for extensively broadening Article 3[18], a second group of Western and to some extent socialist States[19] were in favour of broadening Article 3 whilst also adding precision to the definition of a non-international armed conflict, whilst a third group including many Third World countries[20] completely opposed the widening of Article 3 as they worried this would lead to superpowers intervening in their internal affairs. The strong opposition of Third World Countries led Cassese to believe that AP II would not mark any great progress in customary international law[21].

AP II was meant to specify provisions laid out in Common Article 3, however it still left many issues unaddressed, particularly methods of warfare as well as a complete lack of criminal enforcement mechanisms equivalent to the grave breaches provision. Neither common Article 3, nor Additional Protocol II give any indication of how breaches of its

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[15] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

[16] Peace Research Institute Oslo, PRIO (2016) "Conflict Trends: Trends in Armed Conflict 1946-2014" Conflict Trends Project.

[17] Cassese, A. (1986) *La guerre civile et le droit international*, 90 Revenue Générale de Droit International Public, 553.

[18] Austria, Italy, Belgium, Switzerland, Egypt, Syria

[19] France, United States, Federal Republic of Germany, Soviet Union

[20] Nigeria, India (CDDH/SR. 56, para. 51.) , Pakistan, Indonesia (CDDH/SR. 56, para. 21), Mexico (CDDH/SR. 56, para. 28), Uganda (CDDH/SR. 56, p. 251), Sudan (CDDH/SR. 56, para. 37).

[21] Cassese, A. (1984) "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law', (1984) 3 *UCLA Pacific Basin Law Journal* 55, pp. 104-5.

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provisions should be treated, in the absence thereof there was an assumption that these are matters to be regulated by national law[22]. Article 6 of the Additional Protocol II refers to national penal prosecutions and amnesties after the end of hostilities. However, it only articulates the rights and duties applicable during national prosecutions.

From the *travaux preparatoires* it becomes clear that this was not intended to give incentives to authorities to grant amnesties to persons who have committed war crimes, but it targets those whose only crime was to have participated in the conflict[23]. Due to this absence of any equivalent to the grave breaches provisions it was considered that war crimes cold only be committed during an international armed conflict. Strictly speaking, as there was no international enforcement mechanism envisaged for crimes committed in non-international armed conflicts, these were not war crimes or unlawful acts in an international sense but rather crimes under national law [24]. Traditionally at the time, it was argued that treaty norms posed obligations solely on State actors, not individuals[25]. None of the law textbooks at the time made any reference to even a remote possibility of war crimes being committed in non-international armed conflict[26].

Cassese argued that AP II actually took a step back from Common Article 3 in terms of enforcement, as whilst the ICRC is envisioned to have an intervening power in Common Article 3, this is no longer mentioned in AP II[27]. Furthermore as the ICRC and other

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[22] Asser Institute: Centre for International Law (2014) *International Humanitarian Law Applicable in Non-International Armed Conflicts*

[23] Rodenhäuser, T. (2018) Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law, Oxford: Oxford University Press.

[24] Schabas, W. A. (2001) *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, 141.

[25] Schabas, W.A. (2003) "Punishment of Non-State Actors in Non-international Armed Conflict" , *Fordham International Law Journal*, 907.

[26] Bassiouni, M. ; Nanda, V. (eds.) (1973) *A Treatise on International Criminal Law: Crime and Punishment,* Thomas; Bassiouni, M. (1987) *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Dordrecht: Martinus Nijhoff Publishers; Levine, H. (1992) *Terrorism in War - The Law of War Crimes*, Oceana Publications; Sunga, L. (1992*) Individual Responsibility in International Law for Serious Human Rights Violations*, Dordrecht: Martinus Nijhoff Publishers.

[27] Cassese, A. (1986) « La guerre civile et le droit international », *Revenue Générale de Droit International Public*, 553.

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Contracting Parties cannot evoke implementation of AP II and it does not have an execution mechanism, rendering it toothless.

Second phase: Academic debate (1977-1993)

The issue lay (politically) dormant for a couple of decades following Additional Protocol II and only gained more traction in the 1990s, to then rapidly and radically change the legal normative landscape around war crimes in non-international armed conflicts.

In the 1980s the issue of civil wars and how crimes committed during those should be treated under international law became an issue of academic debate[28].

In 1986 Antonio Cassese explained his views on the subject matter in "La guerre civile et le droit international"[29]. In the seminal text Cassese expresses explicit concern about the lack of ("rarity") international legal norms applicable to non-international armed conflict. He therefore argues that interest groups that are not judicial strictly speaking should become more vocal about the issue, put pressure on relevant parties to uphold the few existing norms, and apply to the morale of actors in instances where there were no legal norms[30]. Cassese recognizes of course that international law is first and foremost made by States, listing why States have had historically no interest in the regulation of non-international armed conflict. Further clarifying his understanding of international law he states that he views his role as a lawyer to harmonise the contradictions diplomats cause through their conventions and treaties. Honing in on the lack of norm clarification with regards to crimes committed during a non-international armed conflict, he argues that States have a distinct interest in the conflict being asymmetrical so they are able to fight non-state actors as common criminals without

[28] Bassiouni, M. (1987) *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Dordrecht: Martinus Nijhoff Publishers; Levine, H. (1992) *Terrorism in War - The Law of War Crimes*, Oceana Publications; Sunga, L. (1992*) Individual Responsibility in International Law for Serious Human Rights Violations*, Dordrecht: Martinus Nijhoff Publishers; Cassese, A. (1986) « La guerre civile et le droit international », *Revenue Générale de Droit International Public*, 553.

[29] Ibid.

[30] Ibid, at 578. (*Face à cette situation, comme toutes les fois où le droit est peu efficace, il faut avoir recours à ces forces extrajuridiques que sont l'opinion publique, les groupes de pression, les organisations non gouvernementales. Toutes ces forces ont le devoir moral de "subroger" le droit, de rendre vives et opérantes les rares normes existantes et même de faire valoir des instances morales là où le droit est muet.)*

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the boundaries they would have to act within in international armed conflict[31]. He argues that nothing in Common Article 3 formally excludes Parties from holding others accountable for committing most serious offences committed against persons or property protected by the Conventions (grave breeches). This was not a generally recognized possibility at the time[32]. This seminal work builds on arguments around certain customary rules regulation non-international armed conflict existing and originating in the Spanish Civil War[33]. Overall the opinion up until the 1990s was that most norms which are applicable to international armed conflicts- including criminal prosecution of crimes committed during the conflict as war crimes- did not exist in non-international armed conflicts[34].

Third phase: ICTY, ILC, Rome Statute Consolidation (1993-2000)

The Security Council established the international Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and Antonio Cassese was elected as the first judge and president of the Tribunal. The issue of whether war crimes could indeed occur and be prosecuted in a potentially non-international conflict suddenly gained practical urgency.

At first glance the ICTY Statute seemed to follow the logic of the previous centuries- war crimes were not applicable in non-international armed conflicts, and any possible criminality of breaches of rules of non-international armed conflict should be based on crimes against humanity or state responsibility, but not customary international law[35].

The Commission of Experts, established to examine the situation on the ground in 1992, did not acknowledge the existence of war crimes in non-international armed conflicts[36]. They stated that "The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common Article 3 of the Geneva Conventions, Additional Protocol II and Article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find

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[31] Ibid.
[32] Ibid
[33] Cassese, A. (1975) *Current Problems of International Law*
[34] Cassese, A. (1986) *International Law in a Divided World*, Oxford: Clarendon Press.
[35] See note 5
[36] UN Doc. S/1994/674, para. 53.

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its root in these provisions…There does not appear to be a customary international law applicable to non-international armed conflicts which includes the concept of war crimes"[37]. The report by the Secretary General on the draft statute for the ICTY only refers to international armed conflict in relation to grave breaches as defined by the Geneva Conventions[38]. The ICRC agreed on this view[39]. The United States had argued for a more specific reference to the Additional Protocols but this was rejected due to similar doubts about the customary character of the protocols[40]. The Secretary-General for the establishment of the ICTR echoed these concerns, adding to the uncertainty on the matter of considering AP II custom[41]. Nevertheless, the 1994 Statute of the ICTR included jurisdictional provisions (article 4) relating to acts committed in non-international armed conflicts. The establishment of the ad hoc Tribunal in 1994 acted as another catalyzer for change[42].

The UN Commission of Experts which established the ICTY's legal framework argued that due to the (political) complexity of the conflict the situation should be defined as one single international armed conflict[43]. Their position was positively received by most members of the international community and their doctrine[44].

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[37] Ibid.

[38] UN Doc. S/25704, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)* , 3 May 1993, p. 13, para. 47.

[39] UN Doc. A/CONF.169/NGO/ICRC/1, Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, *Statement of the International Committee of the Red Cross* , 30 April 1995 (Topic IV), p. 4.

[40] Scharf, M. (1997) *Balkan Justice: The Story Behind the International Criminal Tribunal for the Former Yugoslavia.*

[41] UN. Doc. S/1995/134, at para. 12. „Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not been universally recognized as part of customary humanitarian law, and for the first time criminalizes common Article 3"

[42] Council Decision 94/697/CFSP concerning the common position adopted on the basis of Article J.2 of the Treaty on European Union on the objectives and priorities of the European Union *vis-à-vis* Rwanda, *op. cit.* , No. 10, 24 October 1994, p. 48.

[43] 'The character and complexity of the conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia'. UN Doc. S/25274 (1992), para. 45.

[44] O' Brien, J. (1993) "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", 87 AJIL, at 647-8; T. Meron (1995)'The Normative Impact on International Law of the International Tribunal for Former Yugoslavia',in Y. Dinstein and M. Tabory (eds.), *War Crimes in International Law.*

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Somewhat demonstrating openness to another interpretation, multiple members of the UN Security Council stated that Article 3 of the ICTY Statute could be interpreted in a way to allow for adjudication of crimes committed in non-international armed conflicts without referring to customary international law[45]. The United States stated that the "'law or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions[46]"- similar statements were made by France, the UK, Spain, and Hungary[47]. All the statements indicated that the States were in favour of applying the jurisdiction of the tribunal to non-international armed conflict as well.[48]

In 1995 the ICTY Appeals Chamber delivered a landmark ruling on the *Tadic* appeal on jurisdiction, finding inter alia that Security Council resolutions are subject to judicial review, that the ICTY was lawfully established, that the conflicts in the former Yugoslavia were international and non-international, and that the concept of war crimes applies equally to both types of conflict[49]. Up until this point, the only official indication that there might be viability in the concept of war crimes in non-international armed conflicts was an *amicus curiae* brief submitted by the US in connection with the *Tadic* case. They asserted that the grave breaches provisions also apply to non-international armed conflict[50].

The Appels Chamber in the *Tadic* case recognized that grave breaches do not extend to non-international armed conflict, even though Judge Abi Saab issued a separate opinion arguing

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[45] Meron, T. (2005) "Revival of Customary Humanitarian Law", *AJIL*, 99.

[46] Statement by Mrs Albright (United States) during the 3217th meeting of the Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 15.

[47] Statement by Mr Mérimée (France) at the same meeting, *ibid.,* p. 11.; Statement by Sir David Hannay (United Kingdom), *ibid.* , pp. 17-18.; Statement by Mr Erdos (Hungary), *ibid.* , p. 20.; Statement by Mr Yañez-Barnuevo (Spain), *ibid.* , pp. 39-40.

[48] O' Brien, J. (1993) "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", 87 *AJIL*, pp. 646.

[49] Sassoli, M.; Oslon, L. (2000) "The judgement of the ICTY Appeals Chamber on the merits in the Tadic case", *ICRC Review*, 82, pp. 733- 769.

[50] *Submission of the Government of the United States of America concerning Certain Arguments made by Counsel for the Accused in the Case of* The Prosecutor of the Tribunal *v.* Dusan Tadic (Case No. IT-94-I-T), 17 July 1995, pp. 35-36; Graditzky, T. (1998) "Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts", *ICRC Review*, 322.

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that the grave breaches provision can be applied to non-international armed conflict as they could already more securely be interpreted as custom[51]. His opinion broadly aligned with the US amicus curiae brief.

The Appeals Chamber in the *Tadic* Appeals Decision on Jurisdiction of the ICTY found that common Article 3 and the core of Additional Protocol II are customary in nature and that they indeed give rise to individual criminal responsibility.

The *Tadic* case presented an opportunity for Cassese to outline and lay down the ICTY's view of international criminal law. The judgement which was drafted by Cassese himself stunned the international legal community at the time[52][53]. It argued that Article 3 of the ICTY, which dealt with addresses the violations of the laws of war[54], was to be interpreted as a residual clause designed to "ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal"[55]. Furthermore the judgement stated that a broad scope of humanitarian norms applicable to non-international armed conflicts, violations of those triggering individual criminal responsibility under customary international law existed. The judgement clarified that norms regarding war crimes did apply in non-international conflict. It is imperative to note that the judgement concluded that customary international law criminalized war crimes committed in non-international armed conflicts[56]. This finding that can be called revolutionary as it was completely contrary to the prevailing opinion that Common Article 3 and AP II constituted an uncertain basis for individual criminal responsibility in non-international armed conflict[57].

Due to the limited official state support in the matter, the *Tadic* Chamber based their findings on the applicability of war crimes in non-international conflict on a very short examination

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[51] Separate Opinion Judge Abi-Saab on the defence motion for interlocutory appeal on jurisdiction
[52] Schabas, W. (2001) *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, 42.
[53] Meron, T. (2003) "Casseses Tadić and the Law of Non-International Armed Conflicts", in L. C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese.*
[54] ICTY Statue
[55] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995.
[56] Ibid, para 94.
[57] Meron, T. (1995) "International Criminalization of Internal Atrocities", 89 *AJIL.*

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of state practice[58]. They relied heavily on the Nuremberg Trials as a precedent of criminalizing breaches of humanitarian law without treaty provisions and took a somewhat relaxed approach to listing a very wide range of customary norms which extended beyond existing treaty rules. In the judgement the chamber began their list in support of the existence of war crimes in non-international armed conflict with the Spanish Civil War (1936-1939), and included UN Security Council and General Assembly resolutions, special agreements concluded under Common Article 3, military manuals, and unilateral declarations by states involved in civil wars[59]. On the basis of this the Appeal Chamber later found that the distinction between international and non-international armed conflict had become gradually more blurred and the "essence" of the rules regulation international armed conflicts had therefore become applicable to non-international armed conflicts[60]. This is particularly interesting as they concentrated mainly on *opinio juris* in order to proof the customary nature of the matter. It is unclear how much importance should be given to resolutions of international organisations, and the examples cited as state practice are shaky at best[61]- for example the customary nature of prohibition of perfidy was based on one Nigerian judicial decision for which the basis was the Nigerian Criminal Code[62]. It is unclear if the list of state practice given in the *Tadic* judgement satisfies the requirement set out in the *North Sea Continental Shelf Case*[63], which required "extensive and virtually uniform" state practice[64]. The Appeals Chamber referred to the 1990 Yugoslav Criminal Code which criminalized certain war crimes without referring to the classification of conflict and which together with Article 210 of the Yugoslav Constitution made AP II directly applicable to national courts[65].

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[58] Tadic, paras. 128-136.
[59] Tadic, paras. 96-127.
[60] Ibid para 97, para 126.
[61] Greenwood, C. (1995), 'Scope of Application in Armed Conflicts', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*.
[62] Tadic, para 125.
[63] *North Sea Continental Shelf Cases* (*Denmark and the Netherlands v. Germany*), Judgment, 20 February 1969, ICJ Rep. 43, para. 74.
[64] Hoffmann, T. (2010) "The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflict" in Stahn, C.; van den Herik, L. (eds) *Future Perspective on International Criminal Justice*, Cambridge: Cambridge University Press., pp.58-80.
[65] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para 132.

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This was by no means a straightforward decision as many members of the international community did not favour classifying the conflict non-international, but would have preferred it to be classified as an international armed conflict. Whilst the judgement continues some of Cassese's previous thoughts on international law and particularly the importance of the Spanish Civil War, other aspects were very novel. There are multiple possible explanations as to why the judgement so radically departed from previous legal opinion and state practice. A common critique was that the finding that the conflict was non-international did not in fact make for an easier prosecution strategy in general than if the conflict had been classified as international[66]. Labelling the situation as a non-international armed conflict actually resulted in a non-applicability of the grave breeches provision in Article 2 of the ICTY Statute. Therefore some legal scholars have argued that this indicates that the judges used the case as an opportunity to push for radical progressive legal development[67]. Cassese has indicated that this has been the case for him personally to some extent in interviews and speeches[68]- "said to my colleagues, should we stick to the traditional concept that war crimes can only be committed in international armed conflict? This to me is crazy! ...So I said 'why don't we jettison this stupid distinction'"[69]. However not all his colleagues were quite so enthusiastic about this approach. Judge Li issued a dissent arguing that the judgement assumed unwarranted legislative power which it had never been given in the first place[70].

It was however not immediately clear if Cassese's efforts would be successful in changing state practice. Overall the judgement resonated positively with the academic legal community[71], and this positive reception also included those who had previously expressed

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[66] M. Sassoli and L. M. Olson, 'International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15 1999', (2000) 94 AJIL 576.
[67] Greenwood, "obviously *obiter dicta*, as they were not necessary for the determination for the ruling on the issues"; Meron, T. "a vehicle for progressive development"
[68] Hoffmann, T. (2010) "The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflict" in Stahn, C.; van den Herik, L. (eds) *Future Perspective on International Criminal Justice*, Cambridge: Cambridge University Press., pp.58-80.
[69] Ibid.
[70] *Prosecutor v. Tadić*, Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 13.
[71] Aldrich, G. (1996) "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia" *AJIL*, 90; Maresca, L. (1996) "The Prosecutor v. Tadic", *Leiden Journal of International Law,* 9; Mullerson, R. (1997) "International Humanitarian Law in Internal Conflicts",2 *Journal of Armed Conflict Law,* 2; Kress, C. (2000) "War Crimes Committed in Non-International Armed Conflict and the Emerging System of International

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the opposite view[72]. The enthusiasm for the new set of norms academically speaking was dampened slightly by the struggles to actually explain the origin of the new customary rules on prosecution of war crimes in non-international armed conflicts[73].

The ILC had the opportunity to address the issue through the ICC Statute drafting and therefore defining the scope of jurisdiction of the future court. The ILC excluded AP II in their list of treaties that would govern the jurisdiction of the court as it did not meet the criteria established by the ILC. The ILC did not give a clear indication if non-international armed conflicts should be covered, even though the text might imply it[74]. Another ILC draft of interest is the draft code on crimes against the peace and security of mankind. In it the ILC adopted a draft which did deal with war crimes in internal conflict[75].

The perception that the judgement was a watershed moment in the establishment of war crimes in non-international armed conflict is also reflected in subsequent writings on customary practices of war crimes prosecution in non-international armed conflict, e.g. by Lamb, who concluded the judgement was nascent and at the same time writing about previously unexpressed custom, a contradiction in and of itself[76].

The Rome Diplomatic Conference which convened for the adoption of the Rome Statute in 1998 was an initial test for the *Tadic* judgement to review how States viewed the norm that

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Criminal Justice", *Israel Yearbook on Human Rights* 30; Arnold, R. (2002) "The Development of the Notion of War Crimes in Non-International Conflicts through the Jurisprudence of the UN Ad Hoc Tribunals", *Humanitäres Völkerrecht* 15.

For criticism of the judgment see Rowe, P. (1996) "The Tadic case: Jurisdiction" *International and Comparative Law Quarterly* 45; von Heinegg, W. (2002) "Criminal International Law and Customary International Law" , in A. Zimmermann (ed.*) International Criminal Law and the Current Development of Public International Law -Proceedings of an International Symposium of the Kiel Walther Schücking Institute of International Law,* Kiel: Veröffentlichungen des Walther Schücking Instituts für Internationales Recht an der Universität Kiel, V 144; Haye, E. *War Crimes in Internal Armed Conflicts* (2008).

[72] Zimmermann, A. (1990) in M. Bothe, T. Kurzidem and P. Macalister (eds.), *National Implementation of International Humanitarian Law* , 105 and A. Zimmermann, (1999) "Preliminary Remarks on para. 2 (c)-(f) and para. 3: War Crimes Committed in an Armed Conflict Not of an International Character", in O. Triffterer, Ambos, K. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck.

[73] Condorelli, L. (1991) "La Coutume" in Bedjaoui, M. (ed) *Droit International: Bilan et Perspectives*, Paris: Perdone, pp. 187-221, referring to it as "high speed custom"

[74] United Nations, *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)* , UN Doc. A/49/10, p. 78

[75] UN Doc. A/CN.4/L.532, 8 July 1996.

[76]Lamb, S. (2002) "Nullum Crimen, Nulla Poena Sine Lege Principle in International Criminal Law", in Cassese, A.; Gaeta, P. and Jones, *The Rome Statute of the International Criminal Court: A Commentary*

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war crimes could indeed occur and be prosecuted in non-international armed conflict. In the negotiations for the Rome Statute it transpired that including non-international armed conflicts in war crimes provisions was still a controversial issue[77]. One possible explanation for the difficulty of negotiation on this norm was that it had not found its way into other fora such as the ILC before. The issue of war crimes in non-international armed conflict had not featured in either the ILC drafting of a Code of Crimes on the Peace and Security of Mankind in 1991 or the ILC drafting of a Statute for an International Criminal Court in 1993. The 1993 Draft did not include any provisions which concerned non-international armed conflicts and did not include AP II as it did not contain any provisions relating to grave breaches[78]. In the 1991 ILC Draft Code of the Crimes on Peace and Security of Mankind a prosecution of war crimes in non-international armed conflict was envisioned through Common Article 3, but not AP II[79] and in the 1995 Draft the discussion of extending war crimes to non-international armed conflicts had disappeared entirely (possibly to the general controversy of the topic at the time)[80]. This completely changed by 1996 (post the *Tadic* judgement), when the Draft Codes of Crimes on the Peace and Security of Mankind included acts committed in non-international armed conflict as war crimes[81]. The commentary emphasized that this had become general principle.

However there was resistance to this position from some states- China, India, Turkey, and Sudan argued against the acceptance of stating that acts committed in non-international armed conflict should be treated as war crimes. They were faced with a group of like-minded countries (around 60 states) which all argued that this was one of their six elementary principles which led to the acceptance of the norm in the Draft Codes of Crimes on the Peace

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[77] Robinson, D.; von Hebel, H. (1999) "War Crimes in Internal Armed Conflicts: Article 8 of the ICC Statute", *Yearbook of International Humanitarian Law,* 2.
[78] Report of the Working Group on the Draft Statute for an International Criminal Court, UN Doc A/CN.4/L.488 (1993), p. 22.
[79] Report of the International Law Commission on the Work of Its Forty-Third Session, 29 April-19 July 1991, UN Doc. A/46/10 (1991), p. 105.
[80] Greenwood, C. (1996) "International Humanitarian Law and the Tadic Case", EJIL, 7.
[81] Report of the International Law Commission on the Work of Its Forty-Eigth Session, 6 May-26 July 1996, UN Doc. A/51/10 (1996), at 118-19.

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and Security of Mankind as the provisions in the Rome Statute Article 8.2.d[82]. Multiple legal scholars have recognized the major influence the *Tadic* judgement had on the Rome Statute[83], particularly in the definition of non-international armed conflict (Article 2 f) which is almost identical with the *Tadic* definition[84]. Nevertheless, Article 8 of the Rome Statute continues to make the distinction between international and non-international armed conflict with regards to (war) crimes committed in either conflict. This was criticized harshly by Cassese[85]. Regardless, the Article 8 of the Rome Statute succeeded in retroactively approving the *Tadic* judgement's novel views on war crimes in non-international conflict as custom[86].

Another document demonstrating the significant shift of the norm of accepting war crimes in non-international armed conflict is the 2000 Secretary-Generals Report on the Establishment of the Sierra Leone Special Court in which his legal assessment is diametrically opposed to the legal assessment of the ICTY Statute. The Sierra Leone report states that individual criminal responsibility of violations of Common Article 3 and Article 4 of AP II committed in a non-international armed conflict have "long been considered customary law", particularly since the ICTY and ICTR[87]. Notably there are just five years between *Tadic* and this report, hence the reference to a "long" tradition of custom demonstrates the complete change in the position of the Secretary-General. In a general overview of State practice it has been found that most States have adopted the *Tadic* findings[88], including the UK military manual which explicitly refers to the *Tadic* judgement in regards to war crimes committed in non-international armed conflict[89]. In the textbooks for IHL and international criminal law

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[82] Graditzky, T. (1995) "War Crime Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court" *U.C. Davis Journal of International Law and Policy,* 5.

[83] Fischer, H. (1999)"Prosecutor v. Tadić, Jurisdiction, Appeals Chamber" , in A. Klip, G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunal,* Vol. I; Condorelli, L. (1991) "La Coutume" in Bedjaoui, M. (ed.) *Droit International: Bilan et Perspectives*, Paris: Perdone, pp. 187-221; Cryer, R. (2005) *Prosecuting International Crimes – Selectivity and International Criminal Law Regime*.

[84] Graditzky, T. (1995) "War Crime Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court" *U.C. Davis Journal of International Law and Policy,* 5.

[85] A. Cassese, (1999) "The Statute of the International Criminal Court: Some Preliminary Reflections", *EJIL*, 10.

[86]von Hebel, H.; Robinson, D. (1999) "Crimes Within the Jurisdiction of the Court", in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* 90.

[87] UN Doc. S/2000/915, para. 14

[88] La Haye, E. (2008) *War Crimes in Internal Armed Conflicts*, Cambridge: Cambridge University Press.

[89] UK Ministry of Defence, *Manual on the Law of Armed Conflicts*, para. 15.32.

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the *Tadic* Appeals Chamber judgement has become the authoritative source referred to when war crimes in non-international armed conflict are discussed[90]. Further solidifying the norm in international law is the ICRC Customary Law Study, which makes heavy use of the *Tadic* rulings[91]. In 1998 the ICRC had still been of the opinion that the ICTY statutes were neither in favour nor against criminalization of crimes in non-international armed conflicts[92].

II. Analysis

a) Trajectory of the case

This is a case of norm emergence. Prior to 1995 it was very unlikely that outside a community of progressive legal scholars anyone would have argued that there is a legal basis for including war crimes in legal frameworks governing non-international armed conflict. After the *Tadic* judgements in the ICTY this view became the prevailing view in academic writing and State actors accepted the new interpretation by codifying it in the Rome Statute.

Selection Stage

The Selection stage which would be the negotiations around the Geneva Conventions and Additional Protocols in the 1940s and then again in the 1970s was mainly characterized by the State action pathway with involvement of the ICRC as a non-state actor. The change attempt here failed of extending the same provisions (including the norm on war crimes) that apply to international armed conflicts to non-international armed conflicts. Whilst there was some discussion on the issue, there was no majority or coalition of many or powerful states who were interested in extending rights and obligations to non-state armed actors in non-international conflict[93].

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[90] Rogers, A. (2004) *Law on the Battlefield*; Fleck, D. (ed) (2008) *The Handbook of International Humanitarian Law*; Cassese, A. (2003) *International Criminal Law*, Werle, G. (2005) *Principles of International Humanitarian Law*.

[91] Cryer, R. (2006) "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", *Journal of Conflict & Security Law*, 11.

[92] Graditzky, T. (1998) "Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts", *ICRC Review*, 322.

[93] Moir, L. (1998) "The Historical Development of the Application of Humanitarian Law in Non-international Armed Conflicts to 1949", *The International and Comparative Law Quarterly*, 47, 2, pp.337-361.

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Actors and agency

The main actor in favour of applying the same laws to international and non-international armed conflict through the Geneva Conventions was the ICRC. The orgainsation argued that the Geneva Conventions and the post-World War II moment presented a unique opportunity to extend international (humanitarian) law in that direction and thought States might be inclined to do so in the wake of multiple large scale conflicts at the beginning of the 20th century[94]. Some Scandinavian countries[95] as well as Mexico, and some socialist States[96] favoured of this approach, but other states fundamentally opposed[97] to granting any rights or obligations to non-state actors in conflicts. A third group of states led by France held an intermediary[98] position of generally accepting the ICRC proposal whilst also asking that it should only apply to organized groups, accepting international legal norms and in control of partial territory. Ultimately there was no agreement to follow the ICRC's line of argument, States did not want to interfere in other states internal (political) affairs and the States in favour of the ICRC's approach were not powerful enough to push for effective change. This resulted in Common Article 3 as a compromise.

Institutional availability

The ICRC's attempt to push for broadening the rules of humanitarian law was done through the forum of the Geneva Convention drafting, which could have provided a forum to make these changes. But it is important to note that the Geneva Conventions were drafted under the heavy influence of the Second World War and therefore applying war crimes to non-international armed conflict would have not necessarily been a priority[99]. There were not really any other institutions self-evidently available at the time.

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[94] Moir, L. (1998) "The Historical Development of the Application of Humanitarian Law in Non-international Armed Conflicts to 1949", *The International and Comparative Law Quarterly*, 47, 2, pp.337-361; Cassese, A. (1986) *La guerre civile et le droit international*, 90 Revenue Générale de Droit International Public, 553.
[95] Norway, Denmark
[96] Soviet Union, Russia, Hungary, Romania, Belarus, Bulgaria
[97] United Kingdom, Greece, Australia
[98] United States, Italy, China, France, Spain
[99] See Note 95

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Construction Stage (second phase of the chronology)

The construction stage, which would be the lead-up to the ICTY in the late 1980s and early 1990s was mainly conducted through the private authority pathway, particularly legal academic writing. Legislation on non-international armed conflict was scarce and the particular norm of war crimes in non-international armed conflict at issue here was not considered to be a viable norm to implement and accept. Academic writing on the issue was the only possible way to discuss and entertain the possibility of extending war crimes to non-international armed conflicts, particularly past the 1970s when AP II did not yield any changes in that area.

Actors and Agency

In the selection stage the main actors pushing for at least not forgetting about the issue (as long as real change did not seem possible) were mainly academics. They had the agency to write about issues that would have otherwise left the arena of international law discussions. States did not feature in this period as outspoken actors and were silent on the issue. As discussed above that might be because they had very little interest in affording any rights to non-state armed groups in non-international armed conflicts. They additionally did not want to interfere with the internal issues and sovereignty of other states, fearing that this might lead to others interfering in their own potential conflicts at a later time. Civil wars were still considered a matter of domestic security[100]. After war crimes in non-international armed conflict had not succeeded in becoming a codified norm in either the Geneva Conventions nor in Additional Protocol II academics and individuals were the only actors who were left to champion the issue. As far as we can tell other actors (e.g. the ICRC) did not have too much of a public interest in pushing for accepting and possibly codifying the norm at the time either.

Stability and previous norm availability

[100] Moir, L. (1998) "The Historical Development of the Application of Humanitarian Law in Non-international Armed Conflicts to 1949", *The International and Comparative Law Quarterly*, 47, 2, pp.337-361.

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There is no direct previous norm available, as war crimes did not apply to non-international armed conflicts. Therefore this case is one of norm emergence and not solely norm adjustment. The decision to extend war crimes to non-international armed conflict was very much driven through the unique circumstances that the international community found itself confronted with after the Yugoslav war. Scholars and to an extent the ICRC of course had an interest in keeping some discussion around the issue alive in the decades between the Geneva Convention drafting and the establishment of the ICTY, but it is not clear if they would have ever been successful in creating this norm without the ICTY providing (particularly Cassese) with an opportunity to take on the issue.

Pace and mode of change

Whilst for many decades (and the better half of the 20th century) the issue of war crimes being applicable to non-international armed conflict seemed to be a topic more or less solely for academic debate, but these academic discussions kept the idea of the norm alive in the international legal circles.

The ultimate actual change attempt in the ICTY did occur quite sudden and particularly due to the Appeals Chamber referring to the customary nature of the norm was relatively unexpected. After this the acceptance and consolidation of the norm moved along speedily. In the Rome Statute, a mere five years after the judgement, a version of the norm envisioned by Cassese and the Appeals Chamber was adopted. The creation of the ICTY following the Yugoslav atrocities is the disturbance that ultimately brought about the new norm.

Salience, Support, and Opposition

The norm had varying levels of saliency throughout the selection and construction stages. Around the time of the Geneva Convention drafting there was clear support and opposition from States, including most of the P5. The United Kingdom was the most notable country to strongly oppose including non-international armed conflicts under the war crimes provision. France led a coalition of States holding an intermediary[101] position, including the United States and China, of generally accepting the ICRC proposal whilst also asking that it should

[101] United States, Italy, China, France, Spain

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only apply to organized groups, accepting international legal norms and in control of partial territory. Some Scandinavian countries[102] as well as Mexico, and Russia and other socialist States[103] were the most vocal supporters of the norm. The ICRC also supported the norm, but ultimately did not succeed in garnering wide enough State support at the time.

Reception Stage (third phase of the chronology)

Opening/ Possible Critical Juncture

The creation of the ICTY in response to the conflict in the former Yugoslavia presented a unique opportunity to bring the topic of war crimes in non-international armed conflict back on the international agenda. The creation of the international tribunal was very much in the context of the recent end of the Cold War and the temporary opening this presented for joint international community action. This could be one of the reasons why States on the Security Council were supportive of the ICTY addressing international and non-international armed conflict.

It is important to keep in mind that the *Tadic* judgement was issued under very unique circumstances presenting a possible critical juncture- the recent collapse of the Cold War system and even temporary harmony between the Great Powers presented an opportunity to prosecute serious violations of IHL. Great Powers supported the ICTY and even tolerated the wide jurisdictional scope as it was ultimately a tribunal confined to the specific Yugoslav context and unlikely to prosecute any nationals of Great Powers[104]. Another reason for the success of the norm has been referred to as the "atrocity factor"- the nature of the crimes committed rendered criticism almost impossible, and triggered an argumentation that relied as much on moral principles as it did on legal ones[105]. Another contributing factor to the norm change success could have been the underdevelopment of international criminal law in the

[102] Norway, Denmark
[103] Soviet Union, Russia, Hungary, Romania, Belarus, Bulgaria
[104] Cryer, R. (2005) *Prosecuting International Crimes – Selectivity and International Criminal Law Regime*.
[105]Gradoni, L. (2004) "Nullum Crimen Sine Consuetudine: A Few Observations on How the International Criminal Tribunal for the Former Yugoslavia has been Identifying Custom"

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early 1990s, which allowed for judicial decisions to carry more weight and advance the codification of norms in this branch of international law[106].

Actors and agency

The ICTY presented a sudden widening of the available pathways, moving the issue into the judicial pathway. The persona of Cassese himself was of course also instrumental in shaping the norm of war crimes applicability in non-international armed conflict- as a scholar and a judicial actor he could create a mutually re-enforcing cycle of his judgements supporting his scholarship and vice versa. Cassese understood the opportunity presenting itself to him with the *Tadic* case- he viewed it as a unique possibility to create lasting legal change in an issue area Great Powers and other States had not been willing to make progress on in the last decades. He tasked some of his PhD students with ascertaining the positions of States (both officially and the unofficial positions) in order to predict if there was any support for his interpretation of war crimes and non-international armed conflict and how much opposition there would be[107]. Cassese had been adamant that he wanted to make the change to the then dominant opinion that war crimes did not apply to non-international armed conflicts and that the most one could ask for was that grave breaches provisions should be extended. Cassese wanted to push States to comply with IHL and he argued that international criminal law provided this option[108].

The ICRC was predominantly preoccupied with protecting their own work in the framework of the ICTY- there were concerns around admitting confidential ICRC information as well as calling ICRC staff members as witnesses[109]. In their comments on the proposal to establish the ICTY the ICRC did state that war crimes are limited to international armed conflict[110]. The ICRC was not in formal agreement with the *Tadic* Appeals Chamber arguments, but Cassese had consulted with them privately before and convinced them to an extent that this

[106] Schabas, W. (2003) „Interpreting the Statues oft he AdHoc Tribunals", in L. C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese;* Swart, M. (2006) *Judicial Lawmaking*.
[107] Interview P. Gaeta
[108] Ibid.
[109] Roberts, A. (2000) „Humanitarian issues and agencies as triggers for international military action", *ICRC Review*, 82, pp.673- 698.
[110] Preliminary Remarks of the ICRC, 25 March 1993- not published but accessible via the ICRC archive.

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case presented a "golden opportunity" to encourage compliance with IHL argue that war crimes could indeed take place in non-international armed conflicts and should be criminalized accordingly[111]. This position underwent considerable change post the *Tadic* judgement and in the run-up the the Rome Statute drafting the ICRC called for the future ICC should have jurisdiction over war crimes committed in non-international armed conflict[112].

The ICRC had long held the view that conflicts can entail both international and non-international hostilities[113].

In the run-up to the Rome Statue negotiation it became clear that some States clearly still had issues with recognising the applicability of war crimes in non-international armed conflict. China, India, Turkey, and Sudan were not willing to accept the norm[114], possibly as they were concerned about the internal political issues and did not want to risk any interference from third states into internal conflicts at any time in the future. However the strong opposition to this group by France and around 60 other like-minded countries which all argued in favour of the norm and ultimately it was accepted in Article 8 of the Rome Statue[115]. Ultimately the multilateral pathway was used to solidify and codify the norm after the change was initiated by the judicial pathway.

Institutional availability

The creation of the ICTY suddenly led to another possible institutional forum of change. It is not clear if the norm change would have materialized without the establishment of the court. Possibly the ICTR could have taken over some of its function, but the ICTC was naturally more focused on another set of crimes. Furthermore, the *Tadic* judgement influenced the ICTR heavily as it established war crimes in non-international armed conflict

[111] Interview P. Gaeta
[112] Statement to the 6th Committee of the UN General Assembly, 1 November 1995.
[113] ICRC Annual Report (1988) Angola example, pp-16.
[114]Hoffmann, T. (2010) "The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflict" in Stahn, C.; van den Herik, L. (eds) *Future Perspective on International Criminal Justice*, Cambridge: Cambridge University Press, pp.58-80.
[115] Cryer, R. (2005) *Prosecuting International Crimes – Selectivity and International Criminal Law Regime*

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at an earlier time than the atrocities the ICTR dealt with. The decisive judicial pathway only opened up through the ICTY.

Outcome of change

The change was surprising but successful. The change ultimately codified in the Rome Statute is a sign for fast paced acceptance. The acceptance in the Rome Statute also indicates wide State approval on the issue, at the very least there has lately not been vocal opposition on the issue specifically.

International Law textbooks have also embraced the norm and whilst some raise concerns about the impact that the ICTY and ICTR had in criminalizing IHL norms through ICL[116], most view this as successful change. The ICTY *Tadic* judgement is viewed as an authoritative source with regards to norms in non-international armed conflict.

The Secretary-General in 2000 also supported the norm change in his Report on the Establishment of the Sierra Leone Special Court. In it he states that the applicability of war crimes to non-international armed conflict had been customary law for a long time.

Some States have explicitly accepted the norm, including the UK which has included it in its military manual, others have not spoken strongly against it, indicating at the very least that they are not fundamentally opposed to it. The ICRC Customary Law Study also included the norm.

Overall these different developments indicate that the outcome of the change process was successful.

Salience

Clearly for Cassese himself as one of the key change-makers the salience was high. It was also a salient issue for States discussing it at the Rome Conference, it was very much debated how and if to include the norm into the Rome Statute. The salience increased around the

[116] Paola Gaeta, *The Interplay Between the Geneva Conventions and International Criminal Law*, *in* The 1949 Geneva Conventions: A Commentary 737–754 (2015).

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Tadic Appeals Chamber judgement after it had been a topic of little interest to parties outside the academic community for decades previously.

b) Particular features of the case

Many pathways were at some point concerned with the norm development to varying degrees (pushing for it or hindering it). The first failed attempt at change during the negotiations of the Geneva Conventions traveled on the state pathway. Ultimately only a new institution could create the change in very specific circumstances, intermingling the judicial and the private authority pathway. It is unclear if the change had happened, or even seriously been attempted, if the ICTY had not been created with Cassese as its president. The multilateral action pathway was then used to codify the norm in the Rome Statute.

Another clear particularity of this case is the dominant figure of Antonio Cassese. Without his personal convictions on the topic and his leading role in the ICTY it can be doubted if this change had occurred in the same way, or at such a sudden pace. He was already one of the most vocal supporters of war crimes applying to non-international armed conflicts in the decades before the ICTY creation. It might be reasonable to expect that a similar outcome would have not been possible in the absence of Cassese's initiative as a legal scholar as well as his authority as a judge.

The norm change is also situated within wider developments of ICL and IHL in the 1990s. It was of a trend in the 1990s that judgements coming out of the ad hoc courts were then codified in the Rome Statute, moving from the Statutes of the ICTY and ICTRY to the Rome Statute. This is particularly the case for the individualization of IHL norms into ICL crimes through the ICTY/ICTR jurisprudence.

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Case Study 12

Universal Jurisdiction in modern ICL

(November 2020 – March 2021)

Nina Kiderlin & Pedro Martínez Esponda

I. Introduction

This case study focuses on the development of universal jurisdiction in modern international criminal law (ICL). It tracks the transformation of this form of jurisdiction from a pragmatic way of addressing crimes beyond the jurisdiction of any state under classic international law – piracy, namely – to a form of jurisdiction in current ICL that allocates universal prosecutorial power on account of the gravity of the crimes in question and the ethical importance of ending impunity for their breach.[1] This trajectory, however, has not been straightforward. From the vague norm of universality regarding piracy before and during the 20th century, universal jurisdiction has gone through various stages of reception. This includes a push for broad universality (including in absentia cases or cases without any connection to the investigating State) in the late 1980s and 1990s, to the 'reduced' form of this norm which is successful today, namely that the investigating/prosecuting State has to have some form of connection to the crime and that the alleged perpetrator has to be present.[2] This case is therefore one of norm adjustment.

[1] Kaleck, W.; Kroker, P. (2018) "Syrian Torture Investigation in Germany and Beyond", *Journal of International Criminal Law*, 16, pp. 165-191.
[2] Reydams, L. (2004) *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford: Oxford University Press.

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The concept of universal jurisdiction allows states to prosecute specific crimes regardless of their place of commission and the nationality of the perpetrator or the victims[3]. It applies conventionally to specific international crimes such as war crimes and torture. In addition, it is often considered to apply customarily to these crimes, as well as to crimes against humanity and genocide. Less acknowledged crimes are also sometimes considered as falling under universal jurisdiction, such as terrorism and hijacking – the last of which also has conventional basis. As it applies to war crimes as well as crimes against humanity, the consensus is that the principle concerns international and non-international armed conflict.[4] These crimes are universal in nature and therefore if the state of commission is unwilling or unable to prosecute, any other country or competent international authority can prosecute by acting as an agent or trustee of the international community. Universal jurisdiction thus works as a fallback mechanism should none of the primary jurisdictions be willing or able to prosecute. In this sense, universal jurisdiction is understood as operating under a logic of subsidiarity.

Whilst doubts on the scope and preconditions for the universal jurisdiction rule persist nowadays, the right to prosecute via some form of universal jurisdiction under ICL is seldom contested.[5] Most current universal jurisdiction laws throughout the world exclude the possibility of *in absentia* trials, given the important difficulties they give rise to in terms of fair trial standards.[6] A moderated approach is therefore used, allowing preliminary investigations or collecting evidence for an extradition request *in absentia*, but requiring that the offender be present for trial.

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[3] Cassese, A.; Cryer, R.; Dé, U.; Jessberger, F.; Zappala, S. (eds.) (2015) *International Criminal Law*, London: Taylor Francis; Werle, G.; Jessberger, F. (2014) *Principles of International Criminal Law*, Oxford: Oxford University Press; Reydams, L. (2004) *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford: Oxford University Press.

[4] Werle, G.; Jessberger, F. (2002) "International Criminal Justice is Coming Home: Germany", *Criminal Law Forum*, 13, at pp. 191-223.

[5] Cassese, A.; Cryer, R.; Dé, U.; Jessberger, F.; Zappala, S. (eds.) (2015) *International Criminal Law*, London: Taylor Francis.

[6] Bassiouni, M. (ed) (1998) 'Extraterritorial Jurisdiction' in *International Criminal Law* (2nd edn) II; Cassese, A.; Cryer, R.; Dé, U.; Jessberger, F.; Zappala, S. (eds.) (2015) *International Criminal Law*, London: Taylor Francis.

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In its current state, universal jurisdiction is defended by its advocates as a mechanism that creates a comprehensive, global network of criminal jurisdiction, significantly improving the chances to reduce impunity for international crimes. It is said to place third party states in the position of a "stand-by judiciary",[7] not meant to overwrite national jurisdictions, but instead capable of filling loopholes in the prosecution of the most serious crimes. Against this idea, the key, prevailing counter argument is that it constitutes a break of state sovereignty and that it subjects critically important political decision-making to the discretion of judges, who are neither capable nor legitimized to perform that task.[8] Another issue is that some perceive universal jurisdiction as a form of victor's justice, only available for the winners of global politics but not for the rest.[9]

II. Chronology

First phase (pre-1990's): Setting the foundations

Throughout the nineteenth century and the first decades of the twentieth century, it was state practice to preserve the connection between territorial sovereignty and criminal jurisdiction.[10] Only exceptionally did states veer off this line and include extraterritorial criminal jurisdiction under an active personality principle (a state using its power to prescribe conduct for its own citizens abroad)[11]. An addition to this came around the 1920s, when the principle of passive personality – granting jurisdiction over crimes committed abroad against

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[7] Werle, G.; Jessberger, F. (2002) "International Criminal Justice is Coming Home: Germany", *Criminal Law Forum*, 13, at pp. 191-223.
[8] Ibid.
[9] Bassiouni, C. (2001) *Universal Jurisdiction; The Princeton Principles of Universal Jurisdiction*, Princeton. University Program in Law and Public Affairs; Langer, M. (2001) "The Diplomacy of Universal Jurisdiction, The Role of Political Branches in the Transitional Prosecution of International Crimes", *American Journal of International Law*, 105; Kamminga, M. (2001) "Lessons Learned from the Exercise of Universal Jurisdiction in Trespect of Gross Human Rights Offenses", *Human Rights Quarterly*, 23; Henzelin, M. (2000) *Le Principe de l'universalite en droit penal*; Macedo, S. (ed.) (2003) *Universal Jurisdiction*, Philadelphia: University of Pennsylvania Press.
[10] L Oppenheim, *International Law: A Treatise*, vol 1 (Longmans, Green, and Co 1905) 195, 196 <https://heinonline.org/HOL/P?h=hein.hoil/inltreat0001&i=194> accessed 10 June 2020.
[11] « Harvard Research in International Law : Jurisdiction with Respect to Crime" (1935) *American Journal of International Law*, 29.

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nationals of the prosecuting states[12] – began to slowly develop, especially after the *Lotus* case before the PCIJ in 1927.[13] Overall, though, the territorial principle remained the cornerstone of criminal jurisdiction in international law.[14] This is confirmed by the *Island of Palmas* award of 1928, where arbitrator Max Huber made his famous *dictum* in the sense that "the development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established [the] principle of the exclusive competence of the state in regard to its own territory".[15]

A recurrent gap in this paradigm, however, existed with regard to crimes committed in geographical spaces beyond the reach of any state jurisdiction – most notably piracy. The solution given by the international lawyers as early as the sixteenth and seventeenth century was universal jurisdiction: allowing any state to prosecute pirates regardless of territorial or nationality concerns. Alberico Gentili and Hugo Grotious were originally behind this idea, which cemented throughout the centuries and was largely uncontroversial by the beginning of the twentieth century.[16] Under this concept, jurisdiction was vested on a state not on account of any functional link with the crime or the criminal, but by reason of prosecutorial expediency: any state should be able to prosecute pirates wherever, whenever, and regardless of their nationality or that of their victims. Before World War II, this pragmatic rationale of universal jurisdiction began to be considered for crimes other than piracy deemed "harmful to the interests common to all states", such as drug traffic, the sabotage of submarine cables, or slave trade. The success of these initiatives, though, was very limited, and thus universal jurisdiction stayed largely confined to piracy. The International Congress of Penal Law of 1933, for example, called upon states to utilise universal jurisdiction for these crimes, without success.[17]

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[12] Bassiouni, M. (ed) (1998) 'Extraterritorial Jurisdiction' in *International Criminal Law* (2nd edn) II.
[13] Macedo, S. (ed.) (2003) *Universal Jurisdiction*, Philadelphia: University of Pennsylvania Press.
[14] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law. Vol. 1, [1]: Peace. Introduction and Part 1* (9th edn, Oxford University Press 2008) 456.
[15] *Island of Palmas case (Netherlands, USA)* [1928] Max Huber (sole arbitrator) Reports of International Arbitral Awards. VOLUME II pp. 829-871 838.
[16] Mark Chadwick, *Piracy and the Origins of Universal Jurisdiction: On Stranger Tides?* (Brill Nijhoff 2018) 83–122.
[17] 'Third International Congress of Penal Law (Palermo, 3-8 April 1933)' (2015) 86 Revue internationale de droit pénal.

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A new jurisdictional challenge presented itself after World War II: trying the Nazis and their collaborators for the atrocities committed during the third Reich. Taking the idea of articles 227-230 of the Versailles Treaty of 1919, the victors of 1945 created two international military tribunals in Nuremberg and in Tokyo. Their jurisdiction was based on the idea of the gravity of the crimes committed, rather than their links to the prosecuting states.[18] Robert H. Jackson, chief prosecutor of the Nuremberg Trials, stated in this sense that the tribunal was meant to enforce the universal principles of right and wrong and therefore could prosecute acts without a focus on a particular geographical location. This presupposed that there was a universal rule of law not restricted to national borders and operated under the assumption that even though the acts prosecuted were legal under domestic Nazi law, they were illegal and prosecutable through international jurisdiction. While the idea of universal jurisdiction as used for piracy was not necessary here – given that the tribunals were conceived as international in nature, not representing one state but rather the international community – this approach would prove crucial for the later development of universal jurisdiction in ICL.[19]

The next central development for universal jurisdiction was the adoption of the Geneva Conventions of 1949. Without much debate around it, and without explicitly calling it such, these conventions established jurisdiction for grave breaches through articles 49 GC I, 50 GC II, 129 GC III and 146 GCC IV. They state that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed [grave breaches of the 1949 Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting

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[18] Hovell, D. (2018) "The Authority of Universal Jurisdiction", *European Journal of International Law*, 29 (2), pp.427-456.

[19] Philippe, X. (2006) "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?" *ICRC Review*, 88 (862), pp.375-398; King Jr., H. (2002) "The Legacy of Nuremberg", *Case Western Reserve Journal of International Law*, 34(3), pp. 335-356.

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Party concerned, provided such High Contracting Party has made out a *prima facie* case".[20] Surprisingly, though, these provisions did not at the time trigger criminal prosecutions under universal jurisdiction.

A last key element setting the ground for the later development of universal jurisdiction was the *Eichmann* case of 1961. Adolf Eichmann had been one of the main perpetrators of the Holocaust in Nazi Germany and had managed to flee and hide in Argentina in the aftermath of the war. In 1960, the Israeli secret service managed to kidnap Eichmann in Buenos Aires and fly him over to Jerusalem to stand in trial. Charged for genocide, crimes against humanity, and several other grave crimes, it was the first time universal jurisdiction was used in trial for crimes other than piracy. Yet, the analogy of piracy was a strong element in the accusation of the Israeli prosecutors, who justified using universal jurisdiction under the argument that "the substantive basis underlying the exercise of universal jurisdiction in respect of the crime of piracy also justifies its exercise in regard to the crimes with which we are dealing in this case".[21] Eichmann was thus claimed to be an "outlaw, an enemy of all mankind", whose crimes "[shook] the stability of the international community to its very foundations", breaching the "universal moral values and humanitarian principles […] adopted by civilized nations".[22] Despite the controversial means of arrest, no state objected his conviction to death by hanging in 1961.[23] Thus the *Eichmann* case was the first case where jurisdiction was successfully grounded on the gravity of the crimes in question, and not any of the traditional elements of criminal jurisdiction.

Second phase (1990s – 2005 circa): Success and backlash

After *Eichmann*, there were virtually no universal jurisdiction cases at least for two decades. A technical explanation for this is that there were at the time virtually no domestic laws

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[20] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.
[21] Chadwick (n 16) 1.
[22] ibid 3.
[23] ibid 12.

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allowing for universal jurisdiction.[24] Behind this, however, hides the fact that the politics of the Cold War did not leave much space for this type of jurisdictional exercise. Both the general public and the politicians of the time thought and spoke of justice along the lines of the ideological rift between West and East, not through narratives of fight against impunity and purportedly "depoliticized" human rights violations.[25]

This changed during the 1990s and early 2000s. In these years, there was a noticeable uptick in prosecutions utilising universal jurisdiction. A number of factors explain this. First of all, human rights became after the end of the Cold War the lingua franca of international justice. This was visible in every realm of international relations. Not surprisingly, then, when the Bosnian and Rwandan genocides took place, there was a widespread clamour, specially among Western constituencies, for an end to impunity somewhat similar to the one which had inspired the international military tribunals of the 1940s. This led, not only to the creation of the *ad hoc* tribunals by the UN Security Council – which did not use universal jurisdiction – but also to the awakening of initiatives among civil society groups and politicians to bring justice for past and present grave human rights violations everywhere in the world. The adoption of the Convention against Torture (CAT) in 1984, which provides universal jurisdiction as a subsidiary means of prosecuting torture subject to the presence of the perpetrator in the territory of a state party, certainly contributed as well.

In this context, many European countries, most notably Germany, Belgium, Spain and Austria, passed laws which enabled the exercise of universal jurisdiction for international crimes.[26] They varied in scope and basis. Some of them for instance merely implemented CAT, while others went much further. But in general they shared the principle that criminal jurisdiction could be exercised against foreigners for crimes committed abroad and against foreigners, as long as the crimes in question were international crimes. This was reinforced after 1998, when several domestic international criminal codes started being adopted,

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[24] Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 The American journal of international law 1, 3.
[25] Stefan-Ludwig Hoffmann, 'Genealogies of Human Rights' in Stefan-Ludwig Hoffmann (ed), *Human rights in the twentieth century* (Cambridge University Press 2011).
[26] Chadwick (n 16) 13, 14.

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complementing the newly enacted Rome Statute.[27] Cases thus started to flow in Europe, brought by victims associations and receptive prosecutors.[28] They targeted officials in countries as diverse as DRC, Chad, Liberia, Chile, Argentina, Guatemala, Russia, Uzbekistan, Afghanistan, Iraq, China, Israel, and the United States.[29] The most renowned of these – though paradoxically not fully a case of universal jurisdiction[30] – was *Pinochet*. Because it targeted a former head of state, the case was widely followed by international media, and while the main discussion in it concerned the issue of immunity, it evidenced the potential reach of domestic prosecution of international crimes. This certainly amplified the mediatic, political, and academic impact of the growing use of universal jurisdiction in Europe.

During these years of expansion, another influential initiative took place: the Princeton Principles on Universal Jurisdiction of 2000. At the base, this academic project aimed to establish guidelines regarding how to operationalise universal jurisdiction in international law and achieve a greater understanding of the norm as an accountability tool[31]. They specify the crimes universal jurisdiction applies to, affirm that states have an obligation to prosecute or extradite individuals accused of them, and clarify that no statute of limitations applies on these crimes[32]. The principles were agreed upon by a groups of legal scholars, experts, justices, and former politicians,[33] coming from a range of geographical backgrounds (US, UK, Canada, China, Australia, Netherlands, Japan, and Turkey). Furthermore, the principles were circulated through the UN General Assembly and translated in the five UN languages

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[27] The evolution of these can be consulted in the section on state positions below.
[28] Langer (n 24) 4.
[29] Chadwick (n 16) 13.
[30] Cherif M Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law' in Stephen Macedo (ed), *Universal jurisdiction: national courts and the prosecution of serious crimes under international law* (Univof Pennsylvania Pr 2004) 56.
[31] Macedo, S. (ed.) (2003) *Universal Jurisdiction*, Philadelphia: University of Pennsylvania Press.
[32] Macedo, S. (ed.) (2003) *Universal Jurisdiction*, Philadelphia: University of Pennsylvania Press.
[33] A. Arena, L. Axworthy, G. Bass, M. C. Bassiouni, N. Browne-Wilkinson, A. Butler, H. Corell, P. Cumaraswamy, E. Dankwa, R. Falk, T. Farer, C. Flinterman, M. Gao, M. Kamminga, Justice M. Kirby, B. Lockwood, S. Macedo, S. Marks, M. O'Boyle, D. Orentlicher, S. Oxman, V. Popovski, M. Posner, Y. Sandoz, J. Shestack, S. Schwebel, K. Shibahara, A. Slaughter, T. Tarhanli, W. Xiumei.

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in 2001. At this point, they were endorsed by Mary Robinson, then UN High Commissioner for Human Rights, who advocated for a wide distribution of the principles.

The expansion of universal jurisdiction also manifested in a resolution of the Institut de droit international (IDI) of 2005, adopted during its session of Krakow. Under the rapporteurship of Christian Tomuschat, the IDI had set out to work on this topic with the purpose of clarifying the existing *lex lata* amid the confusion created by the lack of authoritative materials universal jurisdiction and the underlying political tensions it carried.[34] Thus, the IDI defined the concept of universal jurisdiction and supported its basis on customary international law by saying that "Universal jurisdiction may be exercised over crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict".[35] The resolution limited the exercise of universal jurisdiction to the principle of subsidiarity, the observance of human rights, and the presence of the accused for the trial, though not for allowing investigative measures. Overall, both the Princeton Principles and the IDI resolution are reflective of the relatively broad and vocal support that universal jurisdiction enjoyed among academics at the time.[36]

Backlash to this expansion started taking place around 2002. A first sign of timid reversal was the *Arrest Warrant* case of the ICJ. The case concerned an arrest warrant issued by Belgium citing universal jurisdiction against the incumbent minister of foreign affairs of the DRC for war crimes and crimes against humanity. In its decision, the Court explicitly declined dealing with the issue of universal jurisdiction, choosing to focus only on the matter of the jurisdictional immunities, and ultimately ruling in favour of the DRC based on a restrictive interpretation of immunity *ratione materiae*. This left the matter disappointingly

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[34] Claus Kreß, 'Universal Jurisdiction Over International Crimes and the Institut De Droit International' (2006) 4 Journal of International Criminal Justice 562.
[35] Institut de droit international, 'Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes, Adopted in Krakow, 2005' para 3(a).
[36] Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10 Chinese Journal of International Law 503, 85.

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untouched. Judges Higgins, Kooijmans, and Buergenthal, however, offered an influential Joint Separate Opinion which dealt, among several things, with universal jurisdiction. First, they acknowledged that certain treaties, like the Geneva Conventions or CAT, provided the basis for what they called "obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere" – a qualified universal jurisdiction of sorts.[37] But in addition to that, they discussed whether this form of jurisdiction had a basis on customary international law, analysing domestic legislation and judicial practice. Their conclusion on this point was that "no general rule of positive international law can as yet be asserted" and that "the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy".[38] This assertion provided strong legal ammunition to the push against universal jurisdiction that was to follow.

The judgement and joint separate opinion came at the same time as Belgium and Spain were weakening their domestic legal universal jurisdiction laws, largely under the pressure of big powers. This was perhaps the clearest backlash faced by universal jurisdiction in these years, some academics even calling it a "death knell" for the norm[39]. Belgium narrowed its national legislation (further explained below under state positions) in direct response to US pressure, who threatened to move the NATO headquarters away from Brussels.[40] Spain also found herself under increasing political pressure after investigations conducted against *inter alia* the USA and China[41]. It ultimately amended its universal jurisdiction law from near absolute universal jurisdiction to limit it to cases only with strong ties to the country in 2004 and

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[37] ICJ, *Joint Separate Opinion by Judges Higgins, Kooijmans, and Buergenthal (Arrest Warrant Case)*, 2002, at 41.
[38] Ibid, at 44, 52, 54.
[39] Cassese, A. (2003) "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", *Journal of International Criminal Justice*, 1, 3, pp. 589-495; Abi-Saab, G. 82003) "The Proper Role of Universal Jurisdiction", *Journal of International Criminal Justice*, 1, pp.596-601; Fletcher, G. (2003) "Against Universal Jurisdiction", *Journal of International Criminal Justice*, 1, pp.580-584.
[40] Moniteur Belge, 7 August 2003; International Herald Tribune, 23 June 2003
[41] Langer, M. (2011) "The Diplomacy of Universal Jurisdiction: The Political branches and the Transnational Prosecution of International Crimes", *American Journal of International Law*, pp. 1-35; Langer, M. (2015) "Universal Jurisdiction is Not Disappearing: The Shift from Global Enforcer to No Safe Heaven Universal Jurisdiction", *Journal of International Criminal Law*, 13, pp. 245-256.

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2014[42] (more details below in the state position section). The argument used by the big powers against universal jurisdiction was usually that this concept had no basis on international law, that it attempted against national sovereignty, and that it risked creating a "tyranny of the judiciary" that obstructed political decision making in areas as delicate as international peace and security.[43]

Other noteworthy challenges to universal jurisdiction happened in the early 2000s. One of them was the decision of a US Court of Appeals in 2003 in *US v. Yousef and others* that terrorism should not be subject to universal jurisdiction, based mainly on the argument that terrorism was not well defined as a crime, limiting the reach of universal jurisdiction.[44] Another emblematic case are two complaints made against Donald Rumsfeld in Germany in 2004 and 2006. In December 2004 Iraqi torture victims complained against Rumsfeld but following intense political pressure the German deferral prosecutor dismissed the case based on subsidiarity.[45] The German prosecutor argued that the US whilst not investigating Rumsfeld personally did conduct an investigation of the "complex" as a whole and therefore the complaint in Germany was inadmissible.[46] In 2005 Secretary Rumsfeld threatened to not attend the Munich Security Conference citing worries regarding a potential arrest in Germany, adding to the political pressure to drop any future investigation in Germany[47]. After the case was dismissed, he attended the Conference. In 2006 another complaint was brought against Rumsfeld and other alleged "architects" of the Guantanamo torture program, which was dismissed following political pressure and the prosecutor argued that it was highly unlikely that the alleged perpetrators were to come to Germany and as Germany law does not provide for in absentia trials the cases had no realistic chance of succeeding[48]. Other cases

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[42] O'Sullivan, A. (2017) *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony*, Routledge.
[43] Henry Kissinger, 'The Pitfalls of Universal Jurisdiction' [2001] *Foreign Affairs* <https://www.foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction>.
[44] *US v. Ramzi Ahmed Yousef and others*, US Court of Appeals for the Second Circuit, 4 April 2003.
[45] Federal prosecutor (2005) "Regarding the Decision of the Federal Prosecutor in the Case against Donald Rumsfeld and Others" *Juristenzeitung*, 311.
[46] Ibid.
[47] Deutsche Welle (2005) "Rumsfeld to Bypass Munich Conference", *Deutsche Welle* 21 January 2005.
[48] Ambos, K. (2009) "Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the Torture Memos be Held Criminally Responsible on the Basis of Universal Jurisdiction", *Case Western Reserve Journal*

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brought by activist lawyers against Chinese and US officials in several European countries suffered the same fate.[49]

Third phase (2005 – present): Moderation and expansion

Rather than fully blocking the development of universal jurisdiction, the backlash described above had the effect of pushing it to less open and more peripherical channels. Two trends are clearly visible since around 2010. The first is that prosecutors, governments, and legislatives started being much more cautious when approaching the topic, both by establishing legal constraints to the exercise of universal jurisdiction and by being more strategic in their prosecutorial policies. They have done this mainly by prohibiting *in absentia* trials and by ensuring transnational complementarity, immunity *ratione personae,* and the prohibition of transnational double jeopardy.[50] The second trend is the launching of inconclusive debates in international fora where disagreement was the rule rather than the exception, and where the unambiguous positions of the 1990s and 2000s became unsustainable. The result is that, today, while the defence of an unqualified version universal jurisdiction is not feasible anymore, the exercise of qualified universal jurisdiction seems silently accepted among most constituencies, although the practice remains limited to some Western European states prosecuting individuals in contexts of low political stakes.[51] Silence and ambiguity, by and at large, seem to govern the discussions on the topic. Unsurprisingly, universal jurisdiction has not yet been endorsed by most authoritative institutions in the field.

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of International Law, 42 (1), pp. 405-448; Decision of the Federal Prosecutor's Office to Dismiss the Complaint Against Rumsfeld et al. (5 April 2007).

[49] Kaleck, W. (2009) "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", *Michigan Journal of International Law*, 30 (3), pp. 927-980.

[50] Langer (n 24) 5.

[51] Baumruk, P. (2013) "Universal Jurisdiction: As a Tool Against Impunity" In: *Czech Yearbook of Public and Private International Law*, 4; Del Chicca, M. (2012) "Universal jurisdiction as obligation to prosecute or extradite" Journal of Maritime Affairs, 11, pp. 83-93; Kaleck, W. (2009) "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008" Michigan Journal of International Law, 30(3), pp. 927-980; Greve, H. (2015) "State Sovereignty and International Criminal Law", Nordic Journal of Human Rights, 33 (1), pp. 104-107, Stingen, J. (2010) "The Right or Non-Right of States to Prosecute Core International Crimes under the Title of "Universal Jurisdiction", Baltic Yearbook of International Law, 10.

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Regarding the first trend, it is noteworthy that the number of universal jurisdiction cases has in fact augmented since 2008. According to Máximo Langer and Mackenzie Eason, since that year 34 trials based on universal jurisdiction have been completed, which is more than the global total of cases before 2008.[52] Langer and Eason also argue that the practice has now extended beyond Europe, as countries in other regions have attempted these prosecutions, such as Argentina, South Africa, and quite successfully, Senegal.[53] Howell argues however that this number has to be taken with caution – especially when assessing the customary basis of universal jurisdiction – as most of them have been conducted under the obligation to prosecute in the Geneva Conventions and CAT.[54] Moreover, it is unquestionable that, even if there have been some efforts to prosecute under universal jurisdiction outside Europe, the large majority of completed cases remains Western European.[55]

The main driver of the recent practice has been the Syrian conflict.[56] Countries like Sweden, France, Germany, Austria, Spain, Switzerland, and the US[57] have initiated proceedings against individuals accused of war crimes, crimes against humanity and torture.[58] Syria signed the Rome Statute but never ratified it, meaning that ICC was never open for prosecution, all the more given China and Russia's vetoes of a UNSC referral to the ICC.[59] Therefore, domestic prosecution has been the only viable option. This has been made easier due to the influx of Syrian refugees in many European countries, among them suspected people who have committed international crimes.[60] The latest case which led to conviction in Germany was hailed a milestone as it convicted not a low-ranking soldier, as had often

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[52] Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 European journal of international law 779, 788.
[53] ibid 799, 800.
[54] Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 EJIL 434.
[55] Langer and Eason (n 52) 794.
[56] Jessberger, F. (2017) "Syria, International Criminal Justice, and the International, Impartial and Independent Mechanism", *Journal of International Criminal Justice*, 15, pp. 209-20; Wenaweser, C.; Cockayne, J. (2017) "Justice for Syria*?", Journal of International Criminal Justice*, 15, pp. 212-230; Elliott, I. (2017) " IIM: 'A Meaningful Step towards Accountability?'", *Journal of International Criminal Justice*, 15, pp. 239-256.
[57] HRW (2017) *These were the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts*, Trial International (2017) "Make your way for Justice #3: Universal Jurisdiction Annual Review 2017".
[58] Kaleck, W.; Kroker, P. (2018) "Syrian Torture Investigation in Germany and Beyond", *Journal of International Criminal Justice*, 16, pp. 165-191.
[59] Security Council (2011), Resolution 1970, 26 February 2011; S/2014/348, 22 May 2014.
[60] See note 28.

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previously occurred, but indeed a former government official who had revealed much about the inner workings of the Syrian government's detention centres.[61] An overview of currently ongoing prosecutions is provided annually by a number of NGOs, most comprehensively by TRIAL International.[62]

A crucial point to note in this development is the fact that NGOs have become increasingly involved in cases of universal jurisdiction. Either in bringing forward complaints, advocating for greater use, supporting victims, or providing research and information on the topic, their work has given great impulse to the trajectory of universal jurisdiction.[63]

The second trend, concerning the unsuccessful launch of international conversations and debates, has been mainly marked by the inclusion of universal jurisdiction in the agenda of the UN General Assembly's Sixth Committee in 2009. This was done at the request of the group of African states, who perceived there to be an unbalanced targeting of Africans by courts exercising universal jurisdiction in Europe. The Committee, however, has failed to reach any agreement regarding the definition or scope of the rule.[64] The contributions of states evidence how there continue to exist important divergences in the understanding of universal jurisdiction.[65] Withal, it is evident from these debates that basically no state defends nowadays an unqualified version of the rule, most of them tying the exercise of universal jurisdiction to the presence of the accused in the territory of the prosecuting party as well as acknowledging the primary jurisdiction of the territorial state.[66]

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[61] NYT (2021) "German Court Convicts Fomer Syrian Offical of Crimes Against Humanity", 24 February 2021, https://www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html

[62] TRIAL International (2020) "Universal Jurisdiction Annual Review 2020" : https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjP5MLE0cLvAhVR-qQKHQ29B4UQFjADegQIDRAD&url=https%3A%2F%2Ftrialinternational.org%2Fwp-content%2Fuploads%2F2020%2F03%2FTRIAL-International_UJAR-2020_DIGITAL.pdf&usg=AOvVaw3s-c1H01HF5oj05W2IFaCV

[63] Van der Wilt, H. (2015) "'Sadder but Wiser?' NGOs and Universal Jurisdiction for International Crimes", *Journal of International Criminal Justice*, 13(2), pp. 237-243.

[64] Chadwick (n 16) 17.

[65] UNGA Sixth Committee, 'The Scope and Application of the Principle of Universal Jurisdiction (Report of the Secretary-General) (A/75/151)' (9 July 2020).

[66] Hovell (n 54) 435.

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Another important venue where a discussion on universal jurisdiction has taken place is the International Law Commission, albeit indirectly. Since 2005, the ILC included in its programme of work the "Obligation to extradite or prosecute (*aut dedere aut judicare*)". The rapporteur Zdzislaw Galicki and then a working group found it necessary to touch upon the topic of universal jurisdiction since the beginning and until the elaboration of the final report in 2014. Yet, the findings of the ILC on the point of universal jurisdiction were generally cautious and limited. This is evident from the final report, in which the exercise of universal jurisdiction was only dealt with in the context of treaties containing an *aut dedere aut judicare* obligation, namely the Geneva Conventions and CAT, without fully addressing it.[67] More lately though, in 2018, the ILC decided to include the topic of "universal criminal jurisdiction" into its long-term programme of work.[68] This effort has not yet produced any outcomes.

III. State positions and other actors

There are quite a few states with explicit positions on universal jurisdiction either identifiable by case law in domestic courts or through provisions for universal jurisdiction in national legal codes. An effort is made here to cover the most relevant ones, but the list here is not exhaustive. Clearly, not all states are supportive of the norm and some have changed their position over time. According to an Amnesty International study from 2012, universal jurisdiction is a widely accepted norm, with laws allowing for its application in some form in 163 UN Member States.[69] Two caveats are however pertinent. The first is that, as Hovell, points out, Amnesty's report takes into accounts very different types of legislation, often with very dissimilar crimes covered and under very different rationales.[70] Second, that most consistent legislative pieces and case law covered in the study is indeed European, Canadian

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[67] ILC, 'The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare) (Final Report)' (Yearbook of the ILC, 2014, vol II (Part Two)) para 18.
[68] A/73/10 Report of the International Law Commission, Seventieth Session, 30 April- 1 June and 2 July-10 August 2018.
[69] Amnesty International (2012) "Universal Jurisdiction: A Preliminary Survey of legislation around the world-2012 update".
[70] Hovell (n 54).

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or Australian.[71] Other non-European countries who have utilised the norm in the recent years are Senegal[72], South Africa[73], and Argentina with regard to the Spanish civil war during the 1930s.[74]

Australia

The Australian Constitution foresees a right to universal jurisdiction over war crimes committed between 1939 and 1945 under the authority of the Australian Parliament[75]. Until 1993 there was a special investigation unit for these cases. The High Court of Australia confirmed this in 1991 in the *Polyukhovich v Commenwealth* case[76]. With this exception, Australia adheres to the common law doctrine that all crime is local[77].

Austria

Austria had the earliest municipal *aut dedere aut judicare* clause in its criminal law[78] which allows for universal jurisdiction over all extraditable offences if the foreign defendant cannot be extradited. Jurisdiction over treaty offences is established through a general enabling clause[79]. Regardless of these broad provisions, just two cases got to a trial stage in the pre-

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[71] Langer, M. (2011) "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes", *American Journal of International Law*, 105, pp. 1-35.
[72] Brody, R. (2017) "Victims bring a Dictator to Justice: The Case of Hissene Habré", Brot für die Welt.
[73] Werle, G.; Bornekamm, P. (2013) "Torture in Zimbabwe under Scrutiny in South Africa: The Judgement of the North Gauteng High Court in SALC v. National Director of Public Prosecutions", *Journal of International Criminal Law*, 11, pp.659-675.
[74] Trial International (2017) "Make your way for Justice #3: Universal Jurisdiction Annual Review 2017".
[75]Triggs, G. (1997) 'Australia's War Crimes Trials: All Pity Choked' in TLH McCormack and GJ Simpson (eds) *The Law of War Crimes: National and International Approaches*; Blewitt, G. (1998) 'National Prosecutions for international Crimes: The Australian Experience' in MC Bassiouni (ed) *International Criminal Law* (2nd edn) III.
[76] High Court of Australia (1991) *Polyukhovich v Commenwealth*/War Crimes Act Case, HCA 32, 172 CLR 501.
[77] Reydams, L. (2004) *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford: Oxford University Press.
[78]Pappas, C. (1996) *Stellvertretende Strafrechtspflege : zugleich ein Beitrag zur Ausdehnung deutscher Strafgewalt nach § 7 Abs. 2 Nr. 2 StGB*. Freiburg i. Br.: edition iuscrim.; Grützner, H. (1964) *Le champ d 'application du droit pénal: Aperçu comparatif élaboré en vue de la pré- paration d'une Convention européenne portant unification des dispositions relatives au champ d'application du droit pénal*.
[79] StG §§39 and 40 provided that when the territorial State refuses to undertake the prosecution of the offender, the punishment of the criminal must, as a general rule, take place in accordance with the provisions of Austrian criminal law.

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Syria era (one in 1952[80], one in 1995[81])[82]. Both were refugees from a neighbouring country in Austria and they were just prosecuted in Austria after extradition was unsuccessful[83]. Austria has initiated proceedings with regards to Syrian war crimes, including a high-profile investigation of the Syrian intelligence services' systematic torture practices. Torture survivors filed complaints through different NGOs in 2018[84].

Belgium

The Belgian Parliament passed a law of universal jurisdiction in 1993, which allowed Belgian courts to try people accused of war crimes, crimes against humanity, and genocide[85]. The law had a very wide scope allowing for the filing of cases against persons not in Belgium which led to a lot of political tension following much discussion in the run-up to the legislation[86].

There were multiple cases in the first years after the law was enacted. In 2001, four Rwandan citizens were tried and sentenced for involvement in the Rwandan genocide after 10 dossiers involving 21 individuals were opened originally[87]. Six of these were deferred to the ICTR[88].Ariel Sharon was accused of the involvement of the 1982 Sabra and Shatila massacre in Lebanon[89]. There was a case filed against Yasser Arafat on grounds of responsibility for terrorist activity. In 2003 victims of the 1991 Bagdad bombing brought charges against

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[80] Oberste Gerichtshof, 29 May 1958, reprinted in Oberste Gerichtshof, Serie Strafsachen, XXIX, No 32.
[81]Marschik, A. (1997) 'The Politics of Prosecution: European National Approaches to War Crimes' in TLH McCormack and GJ Simpson (eds) *The Law of War Crimes: National and international Approaches* 65, pp.77–82.
[82] Prosecutor v Milan Milutinovic (1994), Cvjetkovic (1994)
[83]Mayerhofer, C. (1994) 'Können Kriegverbrechen auf dem Gebiet des ehemaligen Jugoslowicn von österreichischen Gerichten verfolgt werden?' 116 *Juristische Blätter*.
[84] https://www.ecchr.eu/en/case/the-path-to-justice-leads-through-europe-eg-austria/
[85] Bosly, H. ; Vandermeersch, D. (1999) *Droit de procédure pénale* pp. 53–67
[86] Van den Wyngaert, C. (1989)'Belgium', 60 *Revue internationale de droit pénal* 153 ; Andries, A. ; Van den Wyngaert, C. ; David, E. ; Verhaegcn, J. (1994) 'Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire' 74 *Revue de Droit Pénal et de Criminologie* 1114
[87] Human Rights Watch and International Federation of Human Rights Leagues, (1999) *Leave None to Tell the Story: Genocide in Rwanda* 187–92; Vandermeersch, D. (2001) 'Les poursuites et le jugement des infractions de droit humanitaire en droit belge' in *Actualité du droit international humanitaire* 123.
[88] Ferdinand Nahimana (ICTR-96–11), Georges Ruggiu (ÏCTR-97–32), Theonestc Bagosora (ICTR-96–7), Bernard Ntuyahaga (ICTR-98–40), Elie Ndayambaje (ICTR-96–8), and Joseph Kanyabashi (ICTR-96–15). Only the latter 2 were present in Belgium at any time after the events.
[89] Cohl, K. (1983) *The Beirut Massacre: The Complete Kahan Commission Report*, Princeton.

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George H.W. Bush, Colin Powell, and Dick Cheney. There is a discrepancy between the intent of the legislation (going beyond treaty obligations) and the capacity of the justice system. There is much debate in particular about trying defendants in absentia, they were possible in Belgium due to unlimited and retrospective application of the war crimes act and an unrestricted right for victims to initiate proceedings before any district court. This ultimately resulted in Belgium assuming broader powers than the ICC, ignoring that universal jurisdiction without material and objective links violates the principle of sovereign equality of States. This 1993 law was repealed by parliament in 2003 following much political debate[90]. Currently Belgium has jurisdiction if the accused is Belgian, has his primary residence there, or if the victim is Belgian or has lived in Belgium the last three years, or if the country is required by treaty to exercise jurisdiction[91]. The decision whether to proceed with a complaint is entirely with the state prosecutor.

Canada

Canada only establishes extraterritorial jurisdiction in execution of a treaty obligation[92]. Through the Crimes Against Humanity and War Crimes Act universal jurisdiction is possible in cases of genocide, crimes against humanity, and war crimes even if no treaty obligation exists. The defendant must be present in Canada voluntarily. The federal executive has exclusive control over criminal proceedings in relation to extraterritorial offences and victims cannot intervene[93].

Denmark

Denmark has a general enabling clause establishing universal jurisdiction over all serious common offences and treaty offences as well as a domestic *aut dedere aut judicare* clause[94].

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[90]Langer, M. (2001) "The Diplomacy of Universal Jurisdiction, The Role of Political Branches in the Transitional Prosecution of International Crimes", *American Journal of International Law*, 105

[91] Langer, M. (2015) Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction, *International Criminal Justice*, 13 (2).

[92]Kos-Rabcewicz-Zubkowski, L. (1989) 'Canada' 60 *Revue internationale de droit pénal* 195.

[93] Schabas, W. (2000) 'Canadian Implementing Legislation for the Rome Statute' 3 *Yearbook of International Humanitarian Law* 337–46

[94] Hoyer, G.; Spencer, M.; Grève, V. (1997) *The Danish Criminal Code*

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Universal jurisdiction cases over common offences go ahead if a request for extradition has been received and rejected[95]. For treaty offences it is enough that the defendant is voluntarily present in Denmark. Therefore, a case against Pinochet *in absentia* was rejected, whilst a Bosnian refugee was tried and convicted for grave breaches of the Geneva Conventions[96].

France

There have been few cases of universal jurisdiction with French involvement.[97] Universal jurisdiction under French law is established only if a treaty obliges to do so, with the exception of the ICRY/ICTR cooperation which allow for retrospective universal jurisdiction if there is an objective and material link through the defendant being present in France[98]. With regards to Rwanda there were two cases under universal jurisdiction in France[99]. A complaint brought forward by an NGO with regards to opening an investigation into Rumsfeld was rejected in 2007. In 2018 France issued three arrest warrants against senior officials of the Assad government following an investigation of the French War Crimes Unit[100].

Germany

Between 1940 until 1975 the territoriality principle applied only to foreigners; crimes by Germans were governed by the active personality principle, even when committed in Germany[101]. Current German penal law is unique in the sense that all three doctrinal versions of the universality principle are included. The ordinary penal code includes a domestic *aut*

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[95] Cameron, I. (1992) 'The Protective Principle of Criminal Jurisdiction in Nordic Criminal Law' in R Lahti and K Nuotio (eds) *Criminal Law theory in transition: Finnish and comparative perspectives* 544, 556–8.
[96]Merlung, E. (1996) 'National implementation: The Universal Jurisdiction. The Saric Case' in *The Punishment of War Crimes: International Legal Perspectives*.
[97]Maison, R. (1995) 'Les premiers cas d'applications des dispositions pénales des Conventions de Genève par les jurisdictions internes' 6 *European Journal of International Law* 260–73.
[98] Desportes, F. ; Le Gunehee, F. (1995), *Le nouveau droit pénal*, 275–301; R Koeríng-Joulin and A Huet, (1991) 'Compétence des tribunaux répressifs français et de la loi pénale française: Infractions commises à l'étranger' *Editions Techniques-Juris-Classeurs. Fascicule 20, procédure pénale, articles 689 à 696*
[99] Simbikangwa (2016); Octavian Ngenzi and Tito Barahira (2018)
[100] https://www.hrw.org/news/2016/10/20/qa-first-cracks-impunity-syria-iraq#Q14
[101] C Pappas, (1996) *Stellvertretende Strafrechtspflege : zugleich ein Beitrag zur Ausdehnung deutscher Strafgewalt nach § 7 Abs. 2 Nr. 2 StGB*. Freiburg i. Br.: edition iuscrim.

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dedere aut judicare clause for common offences and a general enabling clause for treaty offences. The Code of Crimes Against International Law (2002), establishes universal jurisdiction over genocide, crimes against humanity, and war crimes[102]. It differentiates between applicability of the law and jurisdiction of the courts. The substantive provisions apply even when the offence bears no relation to Germany but the jurisdiction of German courts is limited by procedural constraints. Therefore, *in absentia* trials are in theory possible, but have not been applied in practice[103]. There have been multiple cases with relation to the Yugoslavia conflict (*Djajic, Jorgic, Sokolovic, Kusljic*) and the Rwandan genocide (*Ignace M, Straton M. FDLR*) in which all defendants had strong ties to Germany, sometimes predating the crimes – something also stressed in the judgements[104]. Multiple NGOs tried to bring cases against US officials in relation to the Abu Graib prison in Iraq which were rejected in 2005 and 2007. More recently Germany has taken on a leading role in investigating (through its War Crimes Unit) and prosecuting defendants linked to war crimes committed in Syria, including high ranking members of the Assad government[105]. These trials are often discussed in the media and have caught global attention, the latest being a conviction of a former Syrian official for crimes against humanity. The case was hailed a milestone as it convicted not a low-ranking soldier, as had often previously occurred, but indeed a former government official who had revealed much about the inner workings of the Syrian government's detention centres[106].

Israel

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[102] StGB §7

[103] Ahlbrecht, H.; Ambos, K. (eds) (1999) *Der fall Pinochet(s): Auslieferung wegen staatsverstärkter Kriminalität?*

[104] Ambos, K.; Wirth, S. (2001) 'Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts' in H Fischer, C Kreß, and SR Luder (eds) International and National Prosecutions of Crimes under International Law: Current Developments; Kroker, P. (2011) Universal jurisdiction in Germany: the trial of Onesphore R. Before the Higher Regional Court of Frankfurt, *German Yearbook of International Law*, 54, pp.671-689.

[105] Kaleck, W.; Krocker, P. (2018) „Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?", *Journal of International Criminal Justice*, 16(1), pp. 165-191.; E.g. https://www.ecchr.eu/en/case/trial-updates-first-trial-worldwide-on-torture-in-syria/
https://www.ecchr.eu/en/topic/syria/

[106] NYT (2021) "German Court Convicts Fomer Syrian Offical of Crimes Against Humanity", 24 February 2021, https://www.nytimes.com/2021/02/24/world/middleeast/germany-court-syria-war-crimes.html

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Historically as a common law country Israel adhered to the principle of territorial jurisdiction, but currently Israel claims extensive extraterritorial jurisdiction. The penal code provides for universal jurisdiction over violent crimes against a Jew as such, over any serious common crime by a foreigner who subsequently becomes an Israeli resident, and over certain grave violations of international humanitarian law[107]. The more prominent of two cases linked to World War II were *Eichmann* in 1962[108] and *Demjanjuk* in 1986, which was eventually overturned by the Supreme Court.[109]

Netherlands

The Netherlands have been very cautious about exercising extraterritorial jurisdiction, mainly motivated by international comity and human rights concerns. Ratification of international criminal law conventions does not usually lead to any extension of jurisdiction, unless the convention contains an unequivocal obligation to do so[110]. Even then a reservation is usually made to the effect that the Netherlands will only prosecute a foreign suspect if a request for extradition has been received and refused. *In absentia* proceedings are impossible since 1998 when a case related to Pinochet was dismissed.[111] This was later reinforced by the Supreme Court in a case related to the Rwandan genocide[112].

Senegal

Universal jurisdiction was introduced into Senegalese legislation in 2007 through an amendment to the Code of Criminal Procedure meant to implement Senegal's obligations

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[107] Kremnitzer, M. (1995) 'Criminal Law' in A Shapira and KC DeWitt-Arar (eds) *Introduction to the Law of Israel*

[108] District Court of Jerusalem, 12 December 1961, reprinted (1968) 36 *Int'l L Reports* 5; Supreme Court of Israel, 29 May 1962, reprinted in ibid 277

[109] *Demjanjuk* v *Attorney General of Israel*, Supreme Court of Israel, 29 July 1993; JM Wenig, 'Enforcing the Lessons of History: Israel Judges the Holocaust' in TLH McCormack and GJ Simpson (eds) *The Law of War Crimes: National and International Approaches* (1997)

[110] Swart; Klip, A. (eds) (1997) *International Criminal Law in the Netherlands*.

[111] *Chili Komitee Nederland* v *Pinochet*

[112] *Wijngaarde* et al. v *Bouterse*

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under the Rome Statute.[113] Under this amendment, Senegalese courts have jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and terrorism. This was made largely with the object of establishing the Extraordinary African Chambers meant to try former Chadian president Hissène Habré, following the ruling of the ICJ in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal).*

Spain

Spain has a rich history of varying universal jurisdiction norms and it is a prime example for the politicization of the norm. The 1985 Judicial Power Organization Act (article 23.4) establishes that courts have jurisdiction over crimes committed by Spaniards or foreign citizens outside Spain when such crimes can be described according to Spanish criminal law as genocide, terrorism, or some other, as well as any other crime that, according to international treaties or conventions, must be prosecuted in Spain. In addition, several specific offences (including genocide) are made subject to the universal jurisdiction of Spanish courts. Spain was but one of several States parties to the Genocide Convention that established a domestic legal basis for universal jurisdiction over genocide, despite Article VI of the Convention. In 2009 a law was passed that limits the competence of Article 23.4 to cases in which Spaniards are victims, there is a link to Spain, or the defendants are in Spain.

Unión Progresista de Fiscales de España et al. v *Pinochet* was a rare example of the unilateral limited universality principle put into practice[114]. Judicial authorities stretched the definition of genocide in this case so they could arrest a suspect with no connection to Spain. The highest court qualified the exercise of universal jurisdiction over genocide on the ground that Spanish jurisdiction is subsidiary to the jurisdiction of the territorial State in *Menchú Tum* et al. v *Montt* et al. *Pinochet* and *Montt* went even further opening the procedure not

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[113] 'Information and Comments by Senegal on General Assembly Resolution 74/192 of 18 December 2019, Entitled "The Scope and Application of the Principle of Universal Jurisdiction" (Doc. No. 2007607E)' <https://www.un.org/en/ga/sixth/75/universal_jurisdiction/senegal_e.pdf>.

[114] Brody, R.; Ratner, M. (eds) (2000) *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* .

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only to victims, but to any person or private organization[115]. NGOs could act as pseudo-international prosecutors[116]. Another peculiarity of the cases was the fact that a former colonial power claims jurisdiction over human rights violations in its erstwhile colonies, while the crimes of a former repressive regime in the forum State remain unprosecuted.

In 2009 universal jurisdiction in Spanish courts was restricted by a political agreement between Socialists and Conservatives[117]. Post this agreement the victim had to be Spanish or another relevant connection with Spain had to be made. In 2014 the Conservative Party introduced a bill that practically ended the 1985 universal jurisdiction law by making it impossible to prosecute crimes completely unrelated to Spain. In 2016 the Socialist Party made two attempts to reintroduce the norm of universal jurisdiction[118]. The Spanish High Court in 2018 rejected the application to repeal the 2014 bill.[119]

Switzerland

The penal code provides for universal jurisdiction over genocide and any other offence which Switzerland is obliged to prosecute under a treaty. Switzerland's military penal code allows for universal jurisdiction over violations of the laws or customs of war (in NIACs and IACs)[120]. If the suspect is present in Switzerland and cannot be extradited Swiss law provides for universal jurisdiction over the core Rome Statute crimes. Since 2012 the country has a war crimes unit. Crimes against Humanity as well as a specific chapter on war crimes were introduced into the SCC in 2011[121]. There is currently a trial against a former Liberian rebel leader which was brought by an NGO.

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[115] Cottier, (2001) 'What Relationship Between the Exercise of Universal Jurisdiction and Territorial Jurisdiction? The Decision of 13 December 2000 of the Spanish National Court Shelving the Proceedings Against Guatemalan Nationals Accused of Genocide' in H Fischer, C Kreß, and SR Lüder (eds) *International and National Prosecutions of Crimes under International Law: Current Developments*.

[116] Roht-Arriaza, N. (2001) 'The Pinochet Precedent and Universal Jurisdiction', 35 *New England Law Review* 311

[117] Jefatrua del estado 17492

[118] Proposicion de Ley de modificacion de la Ley Organica 1/2014, de 13 marzo, de modicicacion de la Ley Organica 6/1985, de 1 de julio del Poder Judicial, relativa a la justicia universal

[119] Tribunal Constitucional de Espana (20 Dec 2018) Sentencia 140/2018

[120] Schouwey, J. (1989) 'Suisse', 60 *Revue internationale de droit pénal* 465

[121] Article 264 SCC

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United Kingdom

Overall the UK relies on the rule that criminal jurisdiction is territorial in accordance with common law. With regards to extraterritorial crime it mainly refers to extradition.[122] Nevertheless, statues provide that there has to be a link (ranging from residency to simple presence) with the United Kingdom in cases of universal jurisdiction (certain war crimes, torture, hostage-taking). The executive branch has ultimate discretion of prosecution. As of 2011 the consent of the Director of Public Prosecution is required prior to issuing an arrest warrant in universal jurisdiction cases in order to "ensure that the system is no longer open to abuse by people seeking warrants for grave crimes on the basis of scant evidence to make a political statement or to cause embarrassment"[123].

United States

Historically the US had argued along the lines that crime is territorial,[124] but in the late 1990s its position increasingly shifted based on legislation and court proceedings. In 2001 Scheffer, the US Ambassador-at-Large for War Crimes Issues, endorsed universal jurisdiction as the official US position, clashing with the views of Kissinger who is staunchly opposed to the norm[125]. In the *Extradition of John Demjanjuk* case, authorities assisted and recognized the requesting State's assertion of universal jurisdiction over genocide, crimes against humanity, and war crimes.[126] In *United States v Yunis* and *United States v Rezaq*, the United States itself exercised universal jurisdiction over aircraft hijackers/attackers after apprehending them abroad and, in the case of Rezaq, even after a foreign conviction[127]. The United States has also actively lobbied other governments to exercise universal jurisdiction over the likes of

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[122] Home Office, Steering Committee Report, *Review of Extra-Territorial Jurisdiction* (July 1996)
[123] https://www.gov.uk/government/news/universal-jurisdiction
[124] Blakesley, C. (1982) 'United States Jurisdiction Over Extraterritorial Crime' 73 *Journal of Criminal Law and Criminology*; Bassiouni, M. (ed) (1998) 'Extraterritorial Jurisdiction' in *International Criminal Law* (2nd edn) II
[125] David Scheffer, 'Opening Address' (2001) 35 *New England Law Review* 233.
[126] Reiss, R. (1987) 'The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and The Political Offense Doctrine' (1987) 20 *Cornell International Law Journal.*
[127] 681 F.Supp. 896 (D.D.C.) (trial judgment); 924 F.2d 1086 (1991), reprinted in (1991) 30 *International Law Materials* 403 (appeals judgment); 927 F.Supp. 673 (S.D.N.Y. 1996); 134 F.3d 1121 (D.C. Cir. 1998).

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Pol Pot and Saddam Hussein[128]. Clearly, this is not reciprocal though. The US has been extremely hostile towards attempts of other states to prosecute US citizens, as in the Rumsfeld cases described above.

ICRC

The ICRC generally has a favourable view on universal jurisdiction, particularly with regards to the fight against impunity[129]. It has recorded around 110 States that have established some form of universal jurisdiction. Furthermore, the ICRC actively promotes universal jurisdiction efforts for example through hosting large events bringing together various stakeholders on the norm. For example, in 2016 the ICRC coordinated the Fourth Universal Meeting of National Committees on International Humanitarian Law, bringing together over 280 participants from 133 countries and more than 100 national committees on international humanitarian law, Red Cross and Red Crescent societies, individual experts, and IO representatives in order to promote and strengthen responses to atrocities in armed conflicts[130].

UNEP

Lately, UNEP has shown interest in universal jurisdiction norms, exploring their role and potential in bridging the enforcement gap in international environmental law. This gap might be an interesting area in which universal jurisdiction norms could branch out to. It is particularly relevant to crimes related to corporate crime in the forestry sector, illegal exploitation and sale of gold and minerals, hazardous waste trafficking, illegal fishing, and

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[128] David Scheffer, 'Opening Address' (2001) 35 *New England Law Review* 233.
[129] United Nations General Assembly (2017) "The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General, UN General Assembly: New York, A/72/112; United Nations General Assembly (2011) "The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General, UN General Assembly: New York, A/66/93 ; Nations Unies Assemblée Générale (2013) "Portée et application du principe de competence universelle, Rapport du Secrétaire general", Assemblée Générale: New York, A/68/113; United Nations General Assembly (2014) "Resolution adopted by the General Assembly on 18 December 2014", UN General Assembly: New York, A/69/174 ; United Nations General Assembly (2015) "Resolution adopted by the General Assembly on 16 December 2015", UN General Assembly: New York A/70/125 ; United Nations General Assembly (2016) "Resolution adopted by the General Assembly on 6 December 2016", UN General Assembly: New York, A/71/111.
[130] United Nations General Assembly (2017) "The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General, UN General Assembly: New York, A/72/112

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crimes linked to armed groups that are financed through illegal forms of natural resource exploitation[131].

IV. Trajectory of the case-study (SCR Framework)

a) *Selection stage*

Actors and agency

The push for universal jurisdiction as a tool for prosecuting international crimes has come from different actors. The most obvious one is perhaps states, which have at times been very proactive in creating the domestic institutional means to establish and use universal jurisdiction within their powers. Israel was the key first state to do so with regard to the *Eichmann* case in the 1960s, but other states followed suit in later decades: Spain with regard to the Latin American dictatorships, Argentina with regard to Francoism and the civil war in Spain, Belgium concerning African officials, Germany and other European countries vis-à-vis the Syrian civil war, and several others. These efforts have been undertaken mostly by lawmakers, prosecutors, and judges. In that sense, to say that states have been a crucial actor in pushing for change means in this case not diplomats or executives as in most instances, but the legislative and judicial branches of power.

More crucial, however, have been NGOs. Human rights activists and groups were at the origin of the push for universal jurisdiction in the 1990s. They were the ones who brought the first criminal complaints against international criminals in those years as part of a litigation strategy meant to open alternative pathways for justice – an effort which required financial means and human expertise. They were also the ones publicly advocating for these cases, taking the issue of universal jurisdiction to the media and therefore making it a subject of public debate. This created the political incentives that often drove the efforts of

[131] Ibid.

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lawmakers and prosecutors in Western countries to institute and implement universal jurisdiction.[132]

Academics also played an important role in producing the arguments with which to argue for universal jurisdiction legally. As Bassiouni put it, "the writings of scholars have driven the recognition of the theory of universal jurisdiction for serious international crimes and have offered new interpretations of customary international law, albeit without much support in the law and the practice of states".[133] This means that academic work played a crucial role in making universal jurisdiction plausible, both at a theoretical and at a policy level.

Pathways

The norm change mainly travelled on the state action/practice and the judicial pathway – mostly domestic courts making findings about domestic law in relation to international law. International courts, however, have had little occasion to deal with the subject and in the few instances when they did, they have generally eschewed having to take a stance. That was clearly the case with the ICJ in the *Arrest Warrant* case. Another case, *Certain Criminal Proceedings in France (Republic of the Congo v. France*, also came close to pushing the ICJ to take a stance, but the plaintiff surprisingly withdrew the case at an advanced stage in 2009.[134]

The private authority pathway, as seen before, also played a relevant role mainly through the work of scholars and the elaboration of relatively authoritative statements such as the Princeton Principles or the IDI resolution of 2005. For its part, the bureaucratic pathway has only very marginally played a role through the rather cautious work of the ILC on the topic and the shy endorsement of human rights institutions such as the UN High Commissioner of Human Rights in the person of Mary Robinson. Lastly, efforts to address universal

[132] Langer (n 24) 5.
[133] Bassiouni (n 30) 62.
[134] ICJ (9 December 2002) *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*.

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jurisdiction multilateral have generally failed, as is evidenced by the discussions on the topic at the Sixth Committee of the UN General Assembly.

Institutional availability

The evident institutional venue for universal jurisdiction has been domestic courts. Interestingly, the shortcomings of the jurisdiction of international criminal courts, such as the ICC, have meant that more cases have been redirected to domestic courts. This has been so with the Syrian Civil War, where the inability to channel cases towards the ICC has triggered numerous domestic prosecutions in Europe. Other international courts and venues have been only limitedly available: the ICJ as mentioned before, the ILC, the UNGA. In all of these, it has been clear that the disagreements and the complication of the topic are likely to obstruct any meaningful action.

Previous norm stability

As seen *Eichmann,* the attempt to mainstream universal jurisdiction into modern international criminal law relied originally in the previous consensus around the universality of jurisdiction for piracy. That made the argument for prosecuting serious crimes somewhat more plausible. That said, it is clear that the strength of the traditional doctrines of jurisdiction under international law – based on territoriality and nationality – have been very difficult to shake off for universal jurisdiction. In parallel to all of this, an important factor of stability have been the *aut dedere aut judicare* provisions of the Geneva Conventions and CAT – which have proven to be the most consolidated argumentative anchors of universal jurisdiction.

b) Construction stage

Opening and Factors

While there has been no clear critical juncture or particular event radically determining the trajectory of universal jurisdiction, there are two very important factors to consider when discussing opening and factors. The first is that certain particularly shocking and publicly known atrocities – mainly in the context of armed conflict – have triggered crucial prosecutions and debates around the topic. Such is the case of the conflicts in Yugoslavia and

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Rwanda during the 1990s – which led to several trials before the establishment of the *ad hoc* international tribunals – and more recently of Syria. The second factor is the acute mainstreaming of human rights after the end of the Cold War, which brought with it a sense – similar to the public mood after World War II – of the need to fight impunity, this time trough human rights adjudication.

Stakes

Political stakes have been high. For some key countries a lot is at stake with universal jurisdiction. For instance, the US opposes US citizens being prosecuted under the norm, even though in has itself sometimes used universal jurisdiction against foreigners. China, Russia, and India have much more consistently opposed universal jurisdiction. Most prosecutions under the norm of universal jurisdiction trials have a political component which has to be carefully navigated as it is a highly politicized issue.

Pace and mode of change

The pace of norm change in the case of universal jurisdiction has been intermittent. From the very early Israeli cases to the end of the 1980s, the issue of universal jurisdiction was barely discussed. Then, during the second phase of the chronology, the use of universal jurisdiction expanded greatly. However, after the backlash of the early 2000s, it took some time for prosecutions to regain their former pace, which happened with the Syria prosecutions in Europe. On the whole, however, one can see that the lack of a fully endorsing or rejecting pronouncement by an authoritative institution throughout this chronology has kept the trajectory from taking a clear, unequivocal direction.

c) Reception stage

Outcome

While the attempt at having an unbounded universal jurisdiction during the 1990s has clearly failed, the more limited version of the norm – requiring at least the presence of the accused in the territory of the prosecuting state – seems to have gained considerable traction nowadays, as seen from the state positions analysed in section 3. This statement requires a lot of nuance, nonetheless. First, the biggest success of universal jurisdiction has come via

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the interpretation of the *aut dedere aut judicare* provisions in the Geneva Conventions and CAT, not through customary international law. Much uncertainty prevails regarding every aspect of the customary law argument: which crimes are covered, under which conditions, how are immunities dealt with, and a large etcetera. More importantly, some important states still contest customary universal jurisdiction wholly, such as China, India and Russia. Second, even with regard to conventional universal jurisdiction, considerable divergences exist in practice, as evidenced by the very diverse nature of the judicial and legislative practice.[135] In consequence, universal jurisdiction can only be said to be partially successful nowadays.

[135] Hovell (n 54) 434–435.

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Case Study 13

Rape as a Crime in times of War/Armed Conflict

(April – August 2021)

Dorothea Endres[1]

I. Overview

Typical story

Typically, the story of the norm-change provides for three steps: (1) Rape has been part of war, but was left at the periphery or was entirely disregarded in regulations. (2) More recently rape has become a wartime weapon or strategy which has been prosecuted at the ICTY and ICTR, and the SCSL provides for more progressive jurisprudence. (3) The ICC solidifies the change produced by ICTY/ICTR and centralizes the prosecution of gender-based crimes, including rape.[2] Depending on the author, the shift produced by the ICTY/ICTR will be celebrated as huge progress or criticized as lost opportunity.

Evolution of the norm

The norm of rape developed on the national and international level, and has been increasingly criminalized. War crimes covers the violations of laws of war. These two strands of norm development merged in the jurisprudence of the ICTR and ICTY. For space reasons, from the scope of this case study is excluded: mens rea and modes of liability and the practice of cumulative charges.

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[1] I would like to thank Abhimanyu George Jain and Vera Piovesan for their critical engagement and help with this case study.

[2] See for instance: P. Weiner, 'The evolving jurisprudence of the crime of rape in international criminal law' (2013) 54 *Boston College law review* 1207.

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Rape as a crime has changed in all its 3 elements: (1) Actus reus: while the focus remains mostly on penetration, the implicated body parts are subject to change. (2) Criminalizing circumstances: the shift is between the requirement of proofing lack of consent and existence of coercion. (3) Mens rea: excluded from the scope of this study.

Synopsis

The norm change can be summarized in three core steps. (1) The prohibited 'wrong' changed: While before the 1990ies rape prohibitions protected men's and their women's honour, from 1990 on, increasingly the women's suffering and their agency would be protected in their own right. The crucial change point for this is ICTR/Y. (2) In the elements of the crime, there is an oscillation between requiring lack of consent to requiring the existence of coercion. That change starts at the ICTY and is settled at the ICC. (3) The object of the norm shifts from women specific to gender/sex neutral language: this change has preliminary traces at the ICTY, crystalizes at the SCSL, but is ongoing at the ICC. In a more formalistic way we can trace the norm-change from occasional mentioning to jurisprudential definition of the elements of the crime in the ICTY/ICTR jurisprudence to the final codification of the elements of the crime at the ICC.

II. Chronology

1. Before 1945

The 1899 and 1907 Hague Conventions do not explicitly prohibit rape, but they do mandate respect for 'family honour', implicitly, euphemistically, referring to rape.[3] Rape was, however, explicitly prohibited in the 1863 Lieber Code,[4] and recognised, along with enforced prostitution, as a war crime by the post-first world war International Commission on the

[3] R. Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential* (Cambridge University Press, 2019) p. 71; T. Inal, *Looting and Rape in Wartime - Law and Change in International Relations* (University of Pennsylvania Press, 2013) pp. 59–92.
[4] Lieber Code, Article 44; M. Eriksson, *Defining Rape: Emerging Obligations for States under International Law* (Martinus Nijhoff Publishers, 1969), p. 344.

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Responsibility of the Authors of the War and Enforcement of Penalties in 1919,[5] and by the UN War Crimes Commission in 1943.[6]

2. 1945-1992: Events leading up to the emergence of the norm

The charter of the International Military Tribunal at Nuremberg did not mention rape,[7] and though the evidentiary record was replete with references to sexual violence, these were not prosecuted by the tribunal.[8] Control Council Law No. 10 included rape as a crime against humanity,[9] but again, this was never charged.[10]

Like the Nuremberg tribunal, the statute of the International Military Tribunal for the Far East in Tokyo contained no reference to rape. However, prosecutors at the Tokyo tribunal did prosecute rape in conjunction with other crimes.[11] Reasons for this divergence may include the fact that both tribunals only prosecuted crimes that were not also committed by allied forces: the different context of the defeat of Japan – for instance, Chinese forces never entered Japan – created a greater disparity between allied and axis conduct in the far east, allowing for prosecution of Japanese troops' sexual violence without inviting accusations of hypocrisy.[12] This was further facilitated by the explicit and well-documented adoption of sexual violence as a policy by Japanese forces.[13]

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[5] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities, 'Report Presented to the Preliminary Peace Conference' (1920) 14 *The American Journal of International Law* 95–154 at 114.

[6] D. Plesch, S. Susana, and L. Change, 'The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today' (2014) 25 *Criminal Law Forum* 349–81.

[7] C. E. Arrabal. Ward, *Wartime sexual violence at the international level: a legal perspective* (Brill, 2018) p. 17.

[8] Eriksson, *Defining Rape: Emerging Obligations for States under International Law*, pp. 345–46; Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 18–25.

[9] Eriksson, *Defining Rape: Emerging Obligations for States under International Law*, pp. 345–46.

[10] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 76; Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 32–33.

[11] Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 25.

[12] C. Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326–41 at 334; Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 78–79; Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 25.

[13] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 19–20.

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Though the Tokyo tribunal charged and prosecuted rape, and made important contributions to the codification of rape as a war crime and crime against humanity – for instance, recognizing the possibility of widespread sexual violence during peacetime constituting a crime against humanity[14] – its engagement with these issues was limited. The tribunal did not consider the definition of rape,[15] its engagement with sexual violence was cursory and did not consider the testimony of the victims,[16] and some judges even disputed the existence of sexual violence.[17] The tribunal was able to do this because it subsumed rape within the broader crimes against humanity committed by Japanese forces, which were prosecuted on the basis of command responsibility.[18] Moreover, though the tribunal did engage with rape, it ignored other forms of sexual violence, such as the enforced prostitution of 'comfort women'.[19] Indeed, the plight of the comfort women was largely ignored,[20] save for a Dutch prosecution that recognized only on Dutch victims,[21] and more recently, a Women's International War Crimes Tribunal convened in Tokyo in 2000 by a coalition of Asian NGOs.[22]

So, while the Tokyo tribunal went further than the Nuremberg tribunal, rape remained at the periphery of war-crime prosecution. In sum, "[t]he lack of codification of rape as an international crime and the disregard of witness testimonies detailing sexual violence clearly demonstrated the standpoint that rape was not considered to be as serious as other violations committed during armed conflicts."[23]

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[14] C. Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17 *Human Rights Quarterly* 649–76 at 677–78.
[15] Eriksson, *Defining Rape: Emerging Obligations for States under International Law*, p. 347.
[16] R. J. Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277–185 at 279; Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 77.
[17] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 29–30.
[18] Goldstone, 'Prosecuting Rape as a War Crime', 279.
[19] Goldstone, 'Prosecuting Rape as a War Crime', 279.
[20] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 25–26.
[21] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 79.
[22] Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 32.
[23] Eriksson, *Defining Rape: Emerging Obligations for States under International Law*, p. 347; H. Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals' (2011) 12 *Human Rights Review* 109–32 at 111–12.

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Notwithstanding the relative side-lining of rape in these international tribunals,[24] some national prosecutions at this time did involve charges of rape as a war crime, including in the Takashi Sakai case in the Chinese War Crimes Tribunal,[25] three cases (two involving rape) in the Australian War Crime Trials,[26] and the John Schultz case in the US Court of Military Appeals.[27]

3.5 1947-1996: ILC Draft Code of offences against the peace and security of mankind

The International Law Commission's (ILC) 1954 Draft Code of Offences Against the Peace and Security of Mankind did not include any reference to rape.[28] When the ILC reprised the project in the 1990s, rape was included as a crime against humanity in a 1994 draft, and excluded in a 1995 draft.[29] Neither inclusion nor exclusion occasioned much comment from states in the ILC,[30] although the UN General Assembly 6th Committee, referring to ongoing events in Bosnia-Herzegovina, recommended the inclusion of rape.[31] The 6th committee's

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[24] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 75; N. Henry, 'Silence as Collective Memory: Sexual Violence and the Tokyo Trial' Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited, (Leiden: Brill Nijhoff, 2011), pp. 263–82 p. 270.

[25] China, War Crimes Military Tribunal of the Ministry of National Defence, *Takashi Sakai case* (1946). Cited in the ICRC Customary Law Study, Rule No. 93, (2005), available online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.

[26] B. Dunne and Durham, 'The Prosecution of Crimes against Civilians' in G. Fitzmaurice, T. McCormack, N. Norris (eds.), Australia's War Crimes Trials 1945-1951, (Leiden/Boston: Brill Nijhoff, 2016), pp. 196–235 pp. 213–16.

[27] United States, Court of Military Appeals, *John Schultz case* Cited in the ICRC Customary Law Study, Rule No. 93, (2005), available online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.

[28] J. Allain and R. W. D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind' (1997) *European Journal of International Law* 100–117 at 100.

[29] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 101. See also ILC, Special Rapporteur Doudou Thiam, Seventeenth Report on the draft Code of Crimes against the Peace and Security of Mankind, A/CN.4/466, 24 March 1995, in particular at paras 63, 81, 95 and 107.

[30] R. Rayfuse, 'The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission' (1997) 8 *Criminal Law Forum* 43–86 at 47–48. See also ILC, Special Rapporteur Doudou Thiam, Seventeenth Report on the draft Code of Crimes against the Peace and Security of Mankind, A/CN.4/466, 24 March 1995; ILC, Report of the International Law Commission on the work of its forty-seventh session 2 May - 21 June 1995, Official Records of the General Assembly, Fiftieth session, Supplement No. 10, 1/50/10, extract from the Yearbook of the ILC, 1995, vol II (2), par. 87-103 available online: *http://www.un.org/law/ilc/index.htm.* The text of the CaH and war crimes articles (among others) was referred back to the drafting committee to incorporate various comments, but as indicated in para 87-103, those comments do not relate to the exclusion of rape and sexual violence.

[31] A. Bos, 'From the International Law Commission to the Rome Conference (1994–1998)' in A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), The Rome Statute of the International Criminal Court, (Oxford: Oxford University Press, 2002), pp. 36–66 pp. 51–52.

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discussion of the draft code coincided with its discussion of the work of the Preparatory Committee for the ICC (see section 0), possibly providing the impetus for the inclusion of rape in the draft code.[32] The draft code finally adopted by the ILC in 1996 included rape as both a war crime and crime against humanity.[33] On the whole, the ILC Draft code seems to be a norm-change attempt in ICL that failed. It included rape as a war crime and crime against humanity, but without any discussion or deliberation. One of the reasons given for the Draft Code not becoming more than a frustrated attempt is the impracticability of "separating the efforts in formulating a "Draft Code" and an international jurisdiction",[34] i.e., the subsuming of the Draft Code into the contemporaneous efforts to establish the ICC.

3.6 1945-1990: Widespread silence

1. In general, in the period between 1945 and 1990, sexual violence does not seem to have been recognized as a serious problem:[35] "[u]ntil the 1990s, men did the drafting and enforcing of humanitarian law provisions; thus, it was primarily men who neglegted to enumerate, condemn and prosecute these crimes."[36] Notwithstanding the intense struggles waged by women's rights movements in this period, rape is not explicitly mentioned in the Genocide Convention, Refugee Convention or the Torture Convention; and nor was rape (or even violence against women) taken up by the Committee on the Elimination of Discrimination Against Women (the body that oversees implementation of the Convention on the Elimination of Discrimination Against Women).[37] Sexual violence committed by American soldiers in Vietnam

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[32] Bos, 'From the International Law Commission to the Rome Conference (1994–1998)', pp. 51–52.
[33] ILC, Yearbook of the International Law Commission, 1996 Vol. I, Summary records of the meetings of the 48th session 6 May -26 July 1996, A/CN.4/SER.a/1996, p. 33-34. The records of the drafting committee are not public. See also ILC, Draft Code of Crimes against the Peace and Security of Mankind, 1996, available online: https://legal.un.org/docs/?path=../ilc/texts/instruments/ english/draft_articles/7_4_1996.pdf&lang=EF.
[34] C. M. Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind' (1993) 27 *Israel Law Review* 247–67 at 261.
[35] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 79.
[36] K. D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkley Journal of International Law* at 295.
[37] Inal, *Looting and Rape in Wartime - Law and Change in International Relations*, pp. 127–28.

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attracted no scrutiny, and while the large scale of sexual violence in the 1971 Bangladesh war attracted attention, no action resulted.[38]

3.7 1949 and 1977 Geneva Conventions and its Additional Protocols

As opposed to early statements of international humanitarian law that prohibited sexual violence as a crime of property against the honour of men related to the victim rather than the victim themselves, the Geneva Conventions and their Additional Protocols prohibit rape and sexual violence against women amongst others.[39] This prohibition is set out in, among others, Common Art. 3, Art. 14(1) of GC III, Art. 27 of GC IV, Art. 75 of AP I and Art. 4 of AP II.[40] These provisions are concerned with the responsibility of belligerents rather than the individual criminal responsibility of perpetrators of sexual violence in armed conflicts. That criminal responsibility is addressed through the grave breaches regime. The grave breaches set out in the four Geneva Conventions and the first Additional Protocol do not expressly mention rape or sexual violence,[41] although these prohibitions have been read into them in the ICRC's updated commentaries.[42] Indeed, more broadly, the Geneva Conventions and Additional Protocols can be faulted for their outdated filtering of the crimes of sexual violence through lenses of women's honour and their construction of women's bodies as repositories for the honour of men and societies more broadly.[43] In this sense, while these treaties prohibit sexual violence in armed conflict, they oblige belligerents not to allow the infliction of sexual violence rather than recognizing rights of women against sexual violence;[44] and remain tied to an understanding of rape as a crime against property (chastity

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[38] Inal, *Looting and Rape in Wartime - Law and Change in International Relations*, pp. 131–32.
[39] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 33–35; Inal, *Looting and Rape in Wartime - Law and Change in International Relations*, pp. 92–132.
[40] ICRC, Customary Law Study, Rule No. 93, (2005), available online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93. The ICTY and ICTR tribunals hold the same opinion, see section 3.
[41] GC I Art. 50; GC II Art. 51; GC III Art. 130; GC IV Art. 147; AP I Art. 85.
[42] Compare ICRC GC I commentary 1952 and 2016 (Art. 50); ICRC GC II commentary 1960 and 2017 (Art. 51); ICRC GC III commentary 1960 and 2020 (Art. 130). See also the commentary to Art. 147 in ICRC GC IV commentary 1958 and to Art. 85 in ICRC AP I commentary 1987.
[43] J. Gardam, 'Women, Human Rights and International Humanitarian Law' (1998) 324 *International Review of the Red Cross* 421–32; C. McDougall, 'Challenge of Conflict' in U. Dolgopol, J. Gardam (eds.), (Leiden: Brill, 2006), pp. 331–46; Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia'.
[44] Chinkin, 'Rape and Sexual Abuse of Women in International Law', 332.

Electronic copy available at: https://ssrn.com/abstract=4430270

and honour) rather than a heinous and unjustifiable act of brutality against which victims have a right to be protected.[45]

2.4 Interim conclusion

The criminalization of rape was at the periphery of developments in international law and often not considered as an issue. To the extent that it is included in broader norm changes, the norm prohibiting rape changed little since the 19th century: without going into detail on the elements of the crime, the norm aims at protecting the honour of the concerned women and often somewhat more importantly the honour of men that may be concerned because they were not able to protect "their" women.

The core of the norm changed with the activities surrounding the atrocities committed in former Yugoslavia and Rwanda: not the honour but the suffering and agency of the women would become the focal point.

3. 1992- 2002: ICTR and ICTY

3.1 1992-1994: War in Yugoslavia and Rwanda and international response

The conflicts in the former Yugoslavia and Rwanda focused the attention of the international community on gender-based violence in armed conflict,[46] with rape in the context of armed

[45] Eriksson, *Defining Rape: Emerging Obligations for States under International Law*, p. 349-50; Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 34–35.

[46] A. Stiglmayr (ed.), *Mass rape: The war against women in Bosnia-Herzegovina* (University of Nebraska Press, 1994); Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 40. See further, for instance: Amnesty International News Release: Women on the front line: new report details "barbaric" abuses of women in more than 40 countries, 8 mars 1991, ACT 77/004/1991, p. 2; available online: https://www.amnesty.org/fr /documents/ act77/004/1991/en/; Amnesty International, Bosnia-Herzegovina: Rape and sexual abuse by armed forces, 21 January 1993, EUR 63/001/1993, available online: https://www.amnesty.org/en/ documents/eur63/001/1993/en/.

Electronic copy available at: https://ssrn.com/abstract=4430270

conflict being highlighted and and criticised by Western states,[47] including Yugoslavia.[48] However, this attention did not extend to sexual violence committed against men,[49] or to sexual violence in other conflicts. For instance, CHRISTINE CHINKIN, in 1994, points to numerous other instances of rape: by UN security forces, in Kuwait, Peru, Liberia, and East Timor, but those instances are rarely mentioned in accounts of the norm development.[50] Similarly, efforts by non-governmental and international organisations to sketch the broader

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[47] German Government, written reply to questions in parliament concerning the systematic rape of Muslim women and girls by Serb forces in Bosnia and Herzegovina, the German Government stated that it had made "vigorous and repeated representations to the 'Yugoslav' government, both bilaterally and within the framework of the European Community, in connection with these rapes and other grave human rights violations". It reaffirmed that rape was "already prohibited in armed conflict and deemed a war crime under the existing provisions of international humanitarian law" and cited Article 27 of the 1949 Geneva Convention IV and Article 4(2)(e) of the 1977 Additional Protocol II in support of its position. The Government further stated: "Should the reports of systematic mass rape of predominantly Muslim women and girls be confirmed, this would, moreover, meet the statutory definition for systematic harm to an ethnical group within the meaning of the 1948 Genocide Convention; In 1993, the Minister of Foreign Affairs of the Netherlands condemned the maltreatment and rape of women in the former Yugoslavia, letter to parliament; US, reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771, 1992, on grave breaches of the 1949 Geneva Convention IV committed in the former Yugoslavia, the United States described acts of sexual violence and rape perpetrated by the parties to the conflict; European Parliament, Resolution on HR in the World and Community for the years 1991-1992, 26 April 1993, Par. 7-8; EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, 3 February 1993, Annex I, § 42: "The mission believes there is now a strong case for clearly identifying [rape as a war crime], irrespective of whether they occur in national or international conflicts."; EU, Resolution on the rape of women in the former Yugoslavia, 11 March 1993, Par 1, 3 and 4: demanded that the systematic abuse of women be considered a war crime and a crime against humanity and called for the revision of existing military codes of conduct to set up new guidelines on the collection of evidence on the incidence of rape; European Parliament, Resolution on HR in the World and Community for the years 1991-1992, Par. 7-8 express the view that the International Criminal Tribunal for the former Yugoslavia should "consider acts of violence against women committed in former Yugoslavia"; Council of Europe Parliamentary Assembly, Res. 994 on the massive and flagrant violations of human rights in the territory of the former Yugoslavia, 3 February 1993, par. 1; Council of Europe, Committee of Ministers, Declaration on the Rape of Women and Children in the Former Yugoslavia, 18 February 1993, par. 4; See also: 89th Inter-Parliamentary Conference, New Delhi, Resolution on the need for urgent action in the former Yugoslavia, particularly as regards the protection of minorities and the prevention of further loss of life in order that peaceful coexistence and respect for human rights can be restored for all people, par 12 and 13. All mentioned resources available online at https://ihl-databases.icrc.org/customary-ihl/eng/print/v2_cha_chapter32_rule93.

[48] Socialist Federal Republic of Yugoslavia, exceptional report submitted to the Committee on the Elimination of Discrimination Against Women (CEDAW), 1993.

[49] D. Zarkov, 'The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media' in C. Moser, F. Clark (eds.), Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence, (London: Zed Books, 2001), pp. 69–82; S. Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict' (2010) 92 *International Review of the Red Cross* 258–77 at 261.

[50] Chinkin, 'Rape and Sexual Abuse of Women in International Law', 326-8.

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contours of the problem are also side-lined in favour of a focus on the ICTY and ICTR.[51] Indeed, within the spotlight on sexual violence in these two conflicts, the Rwandan conflict attracted less attention.[52] And even in the Yugoslavian context, notwithstanding the emphasis on gendered violence, women were excluded from the negotiation of the Dayton agreements,[53] and gender issues are absent from the agreements themselves.[54]

3.8 UN bodies

The incidence of sexual violence in these conflicts was also taken note of in the UN.[55] The UN Security Council ordered the establishment of a Commission of Experts to investigate grave breaches of the Geneva Conventions and other violations of international humanitarian law in the former Yugoslavia.[56] The Commission's report served as an authoritative investigation of sexual violence in that conflict, finding evidence of 'a systematic rape policy'; however, the Commission focused on sexual violence as a form of ethnic cleansing, excluding 'opportunistic rape', creating a context-based hierarchy of conflict-based sexual violence.[57] Reinforcing the uneven treatment of the conflicts in the former Yugoslavia and

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[51] World Conference on Human Rights, Regional Preparatory Meeting for the Asia-Pacific, 24-28 March 1993 Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, par. 6; Physicians for Human Rights and Asia Watch, Press Release, Rape in Kashmir: A Crime of War, India, 9 May 1993. It is however interesting to note that the wartime rape in Kashmir as much as the wartime rape in Congo were brought to the international community (according to the ICRC Customary Law Study) by medical experts.

[52] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 127; Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 48. Ward holds that the international community remained silent for a long time as neither the UNSC nor the Preliminary Reports of the Commission of Experts investigated violations of international law during the conflict. See also HRW Africa, Genocide in Rwanda April-May 1994, May 1994, p. 1-15, available online: https://www.hrw.org/sites/default/files/reports/ RWANDA945. PDF, p. 12-14.

[53] See for a detailed account of the agreements: F. Ni Aolain, 'The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis' (1998) 19 *Michigan Journal of International Law* 958–1004.

[54] M. O'Reilly, *Gendered Agency in War and Peace Gender Justice and Women's Activism in Post-Conflict Bosnia-Herzegovina* (Palgrave Macmillan, 2018) p. 40.

[55] UN SC Resolution 789; UN Committee on Elimination of Discrimination against Women, General recommendation No. 19 – eleventh session, 1992 violence against women 29 January 1992, par. 16.

[56] UN SC, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, 49th Sess., Annex, UN Doc S (1994/ 674/ 1994), p. 1.

[57] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 41 and 43. See also UN SC, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, p. 60, § 253 and Annex IX, p. 9, § 10.

Electronic copy available at: https://ssrn.com/abstract=4430270

Rwanda, the report of the corresponding UN ECOSOC Special Rapporteur on the events in Rwanda did not pay much attention to sexual violence issues.[58]

3.9 ICTY and ICTR Statutes

> *"Men had written the laws of war in an age when rape was regarded as being no more than an inevitable consequence of war. The two UN Tribunals truly represent a distinct shift in mindset. They are characterized as having the specific intent to prosecute the perpetrators of sexual assaults."*[59]

Thanks to intense lobbying efforts by women's and human rights organisations,[60] the ICTY (1993) and ICTR (1994) Statutes and Rules engage extensively with wartime sexual violence. Art. 5 of the ICTY Statute recognises rape as a crime against humanity. Under rule 34 of the Rules of Procedure and Evidence, the Victims and Witnesses Unit was mandated to 'provide counselling and support (...) in particular in cases of rape and sexual assault' and it was emphasized that 'due consideration shall be given, in the appointment of staff, to the employment of qualified women' for this purpose. As drafted, rule 96 excluded the possibility of consent as a defence for crimes of sexual violence.[61] This was amended in response to concerns of fairness to defendants, but it remains the case that corroboration of the victim's testimony is not required, evidence relating to consent is first presented in camera for assessment of relevance and credibility, and the rule allows for the negation of seeming consent by reference to surrounding circumstances.[62] The ICTR Statute goes further and also recognises rape as a war crime. However, neither statute defines rape.

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[58] UN, ECOSOC, Commission on Human Rights, SR René Degni Séqui, Report on the situation of human rights in Rwanda, 12 August 1994.

[59] Goldstone, 'Prosecuting Rape as a War Crime', 279. (R. Goldstone was the initial chief prosecutor of the ICTY).

[60] An open process of rule-making allowed states and NGOs to help formulate the rules and procedures of the ICTY. A subgroup of the Task Force for Accountability for War Crimes in the Balkans led by the International Women's Human Rights Law Clinic of CUNY Law School and staff and students at the Harvard Law School Human Rights Program drafted a submission of rules and procedures to the ICTY relating to crimes of sexual assault. The rules that were adopted included those pertaining to the protection of victims and witnesses, specifically the creation of a victim and witnesses unit and the rules on evidence in cases of sexual assault. More specifically, the progressive Rule 96 of the ICTY regarding evidentiary rules for crimes of sexual violence appears derived from the proposed rules - four of the five proposed rules are included in Rule 96. Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 122.

[61] ICTY, Rules of Procedure and Evidence, 11 February 1994, UN Doc. IT/32.

[62] ICTY, Rules of Procedure and Evidence, 5 July 1996, UN Doc. IT/32/Rev.9; Eriksson, *Defining Rape: Emerging Obligations for States under International Law*, p. 363.

Electronic copy available at: https://ssrn.com/abstract=4430270

3.10 Prosecutors' Policy and Civil Society

«I've got ten dead bodies, how do I have time for rape?»[63]Right at the outset, the ICTY established a Victims and Witness Protection Unit for support in cases of sexual assault.[64] In the early days, rape was seen as a 'less serious crime'.[65] But, increasingly, a wide range of sexual violence-related charges were levelled.[66] Michelle Jarvis (Deputy Prosecutor) attributed this to a willingness to interpret crimes in innovative ways to secure accountability for wartime sexual violence.[67]

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The story was very different at the ICTR. The first chief prosecutor – Richard Goldstone – consistently excluded charges relating to sexual violence.[72] It was civil society amicus briefs that brought these charges to the tribunal's attention.[73] It was only at the end of Goldstone's tenure – two years after the establishment of the tribunal, and thanks to external criticism, that a sexual assault investigation team was created within the prosecutor's office, and only

[63] Investigator at the ICTY, cit. in: Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 79.
[64] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 115.
[65] Grey, Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential, pp. 79–80.
[66] Grey, Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential, p. 80.
[67] M. Jarvis, 'Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes' in S. Brammertz, M. Jarvis (eds.), Prosecuting Conflict-Related Sexual Violence at the ICTY, (Oxford: Oxford University Press, 2016), p. 1 p. 9.
[68] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 115.
[69] Grey, Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential, pp. 79–80.
[70] Grey, Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential, p. 80.
[71] M. Jarvis, 'Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes' in S. Brammertz, M. Jarvis (eds.), Prosecuting Conflict-Related Sexual Violence at the ICTY, (Oxford: Oxford University Press, 2016), p. 1 p. 9.
[72] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 116; B. Nowrojee, *Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?* (2005) p. 9.
[73] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 122–23.

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two years after that, that a witness and victims protection unit was created.[74] Investigators didn't pursue incidents of sexual violence adequately.[75] When they did, they faced challenges in doing so, including: reluctance to talk to foreigners who had abandoned the Rwandans; language barriers; cultural barriers; the long five year period between the investigations and the trial; the logistics of moving witnesses from Rwanda to Arusha (the tribunal's seat).[76] Although, more attention was paid to sexual violence crimes under the tenure of the second (Louise Arbour) and fourth (Hassan Jallow) prosecutors,[77] the third prosecutor Carla Del Ponte dismantled the sexual assault investigation unit – reinstating it only under pressure from women's rights groups when she was seeking re-election,[78] and declined to charge rape despite the availability of evidence.[79]

Civil society and advocacy organisations assumed that the success in securing attention to gendered violence at the ICTY would extend equally to the ICTR, especially since the tribunals shared a chief prosecutor.[80] These expectations were misplaced. Once the disparity between the ICTY and ICTR was recognised, civil society organisations started mobilising to focus prosecutorial attention on sexual violence at the ICTR,[81] and to assist in documenting the systematic sexual violence that had characterised the conflict in Rwanda.[82]

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[74] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 115–16.
[75] Elizabeth Neuffer cit. in: J. Koomen, '"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda Signs' (2013) 38 *Signs* 253–77 at 258.
[76] Koomen, '"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda Signs', 259-62, 264, 270-1.
[77] Nowrojee, *Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?*, pp. 9–10.
[78] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 116; Nowrojee, *Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?*, p. 11.
[79] Nowrojee, *Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?*, p. 10.
[80] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 123.
[81] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 123.
[82] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 123.

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3.11 ICTY and ICTR Jurisprudence

Within the developments of the ICTR and ICTY jurisprudence there are two different strands. The first strand concerns the norms that the development was built on and were (1) domestic law, (2) torture (3) genocide, (4) crimes against humanity and (5) war crimes. The second strand concerns the dogmatic shift of the norm from the focus on specific body parts and consent to coercion.

i. Foundations of the norm

The norm developments of the ICTR and ICTY draw on different resources, and depending on what foundation is considered as more important the norm criminalizing rape in times of war takes different shapes and nuances. These foundations include: domestic law, especially to define rape, and especially in the context of non-international armed conflicts;[83] rape as a form of torture, as recognised in human rights law;[84] rape as genocide when the dolus specialis requirement for genocide (intent to destroy a group in whole or part) can be substantiated through acts such as enforced pregnancy and genital mutilation;[85] rape as a crime against humanity when it is widespread and committed systematically;[86] and rape as a war crime.[87] Across these foundations, the requirement of connection to the armed conflict, excluding so-called 'opportunistic rape', is consistent.[88]

ii. Change in the elements of the crime

The elements of rape as a crime are the same for all the different threads. In that sense, the change of the norm prohibiting rape has been driven by different norm changes together: rape as a crime against humanity, rape as genocide and rape as a war crime. Consequently, I will

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[83] A. Adams, 'The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape' (2018) 29 *European journal of interntional law* 749–69 at 750.
[84] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 81.
[85] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 69–71.
[86] M. Ellis, 'Breaking the Silence: Rape as an International Crime' (2006) 28 *Case Western Reserve Journal of International Law* 225–47 at 234–35; Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 63–69.
[87] Ellis, 'Breaking the Silence: Rape as an International Crime', 236–38.
[88] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 55–57.

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focus on the common underlying crime of rape as it has been changed through the jurisprudence of the ICTY and ICTR. The three elements of the crime of rape are:

1. Actus reus: sexual act
2. Context criminalizing the actus reus: non consent or coercion
3. Mens rea: will and knowledge of the perpetrator to commit the actus reus in the criminalizing context.

A fuller analysis of the case law has been removed from this version for reasons of space, but across all three elements, there are significant changes and developments in the jurisprudence. For instance, the actus reus varies from restriction to vaginal penetration to broader conceptual definitions in the forms of indicative or exhaustive lists, the context requirement varies from a narrow focus on the victim to a broader focus on the context.[89] What has been consistently sidelined or entirely excluded is male victims, notwithstanding its high incidence.[90] Both tribunals missed multiple opportunities to prosecute such crimes.[91]

iii. Differences between the two tribunals

Despite almost identical legal instruments, the statistics tell very different stories about the prosecution of sexual violence at the ICTY and ICTR.[92] At the ICTY, 20% of the indictments included rape charges, but 92% of these cases resulted in conviction; whereas at the ICTR, rape charges featured in 30% of the indictments, but only 25% of these cases resulted in conviction.[93] Nichols Haddad identifies three key reasons for this: (1) funding – ICTY received almost twice as much money; (2) administration – UN reports have lampooned the

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[89] V. E. Munro, 'From Consent to Coercion - Evaluating international and domestic frameworks for the criminalization of rape' in C. McGlynn, V. E. Munro (eds.), Rethinking Rape Law - International and Comparative Perspectives, (Oxon: Routledge, 2010), pp. 17–29; Adams, 'The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape', 750.
[90] Zarkov, 'The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media'; Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict', 263; D. E. Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 *Feminist Legal Studies* 145–63.
[91] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 88–92.
[92] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 119.
[93] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 115-7; Nowrojee, *Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?*, p. 3.

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training and competence of the ICTR investigators,[94] and highlighted administrative shortcomings;[95] and (3) transnational advocacy networks and coalitions – which, as discussed above, initially assumed that successes at the ICTY would carry over to the ICTR.[96] Transnational advocacy efforts to draw attention to sexual violence in armed conflicts also had to deal with significant differences in context.[97] For instance, Rwandan women's groups were less interested in retributive justice:[98] "If you want to do something useful … give them things they can use… housing, schooling, healthcare."[99] And ICTR witnesses and victims faced greater harassment and violence than those at the ICTY.[100] However, these contextual differences do not entirely explain the differences between the ICTY and ICTR in terms of prosecuting gendered violence, and the significant failures of the ICTR also played a significant role.[101]

iv. Interim conclusion

With the establishment of the ICTY and ICTR a crucial opening for the norm change of rape as a crime in times of war took place. In the process, the norm prohibiting rape as a war crime was changed in its war-time dimension, war crimes in general being extended to non-

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[94] N. Hayes, 'La Lutte continue' in C. Stahn (ed.), The Law and Practice of the International Criminal Court, (Oxford: Oxford University Press, 2015), pp. 801–39 p. 830; L. Bianchi and A.-M. de Brouwer, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR' Sexual Violence as an Internationalo Crime: Interdisciplinary Approaches, (Cambridge: Intersentia, 2013), pp. 123- p. 131; UN, Department of Peacekeeping Operations, Review of the Sexual Violence Elements of the Judgments of the ICTY, ICTR and SCSL, 9 March 2009, available online: https://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf.

[95] UN Office of Internal Oversight Services, Audit Report on ICTR, 1997

[96] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 119–29.

[97] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals'.

[98] Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 128.

[99] Anonymous leader within women's human rights movement, interview by Haddad, cit. in: Nichols Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 129. See also: Koomen, '"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda Signs', 262.

[100] Tribunal witnesses and other genocide survivors have been violently harassed and even murdered. The Akayesu witnesses were ostracized for years after they returned home from Arusha: Koomen, '"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda Signs', 258.

[101] Koomen, '"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda Signs'; Nowrojee, *Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?*, pp. 4–5.

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international conflicts, and in its rape dimension through a process that defined the elements of crime for rape, without distinguishing the different norms it is based on (in particular: crime against humanity, genocide, war crime).

While the norm change produced is undeniably seismic, if one looks into the details, one can see that rape still was much more side-lined than necessary. In particular if one considers that the ICTY/ICTR created a fundamental change for ICL in general, the intensity of the change is somewhat relativized. The key challenge hindering more change was the production of evidence: unmotivated prosecutors, untrained investigators, traumatised victims and lacking connections to local organizations were considerably big stones in the path of change for the prosecution and criminalization of rape in times of war.

4. 1993 – 2000s: Human Rights considerations on rape

The emergence of the war crime of rape in the jurisprudence of the ICTY and ICTR draws on the broader movement of women's human rights during the 1990s and 2000s.[102] Key developments in the human rights sphere that influenced the developing war crime of rape include: the negotiation and adoption of CEDAW, which served to highlight concerns relating to women's rights;[103] recognition of sexual violence in the conflicts in the former

[102] For a detailed assessment of the Global Women's Movement and Rape see: Inal, *Looting and Rape in Wartime - Law and Change in International Relations*, pp. 127–30.

[103] See for instance: OHCHR, joint Declaration of Dubravka Šimonovic, Special Rapporteur on violence against women, its causes and consequences; **Hilary Gbedemah** Chairperson of the UN Committee on the Elimination of Discrimination against Women; **Meskerem Geset Techane,** Chair of the UN Working Group on the issue of discrimination against women in law and in practice; **Marceline Naudi,** President of the Group of Experts on Action against Violence against Women and Domestic Violence of the Council of Europe (GREVIO); **Margarette May Macaulay,** Inter-American Commission on Human Right's Rapporteur for Women's Rights; **Lucy Asuagbor,** Special Rapporteur on Rights of Women in Africa; and **Sylvia Mesa,** President of the Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention, International Day on the Elimination of Violence against Women, Absence of consent must become the global standard for definition of rape, 22 November 2019, available online: https://www.ohchr.org/EN/News Events/Pages/DisplayNews.aspx?NewsID=25340&LangID=E.

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Yugoslavia[104] and Rwanda[105] as causes of concern by human rights bodies;[106] recognition of rape as a form of torture and inhumane treatment in the jurisprudence of international human rights courts;[107] and, shifts in understanding, from conceptualising armed conflict sexual violence as gendered questions of honour and protection,[108] to recognising the problem as one that is gender-neutral and is defined by the absence of consent.[109] As a result of these developments, in the 2000s, as was the case with the UN Security Council (see section 8), expressions of concern regarding sexual violence in armed conflict became ubiquitous in reports and resolutions of the UN Human Rights Commission and UN Human Rights

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[104] UN Commission on Human Rights, Res. 1994/72 of 9 March 1994, on the situation of human rights in the territory of the former Yugoslavia, §14; UN Subcommission on Human Rights, Res. 1995/8 on the situation in the territory of the former Yugoslavia, 8 August 1995, §7; Special Rapporteur of the Commission on Human Right, Tadeusz Mazowiecki, Final periodic report on the situation of human rights in the territory of the former Yugoslavia (22 August 1995), lit. H; UN Commission on Human Rights, res. 1996/71 on the situation of human rights in the territory of the former Yugoslavia 23 April 1996, par. 1.

[105] UN SR on HR, Report on the situation of human rights in Rwanda 29 January 1996, par. 16.

[106] UN, OHCHR, SR René Degni-Ségui, Report on the Situation of Huaman Rights in Rwanda, 25 May 1994, UN Doc. E/CN.4/1996/68, n. 88.

[107] P. Londono, 'Defining rape under the European Convention on Human Rights - Torture, consent and equality' in C. McGlynn, V. E. Munro (eds.), Rethinking Rape Law - International and Comparative Perspectives, (Oxon: Routledge, 2010), pp. 109–21 p. 110. See especially, IACtHR, *Fernando and Raquel Mejia v. Peru,* Report No. 5/96, (1 March 1996); ECtHR, Aydin v Turkey (25 September 1997); ECtHR, Maslova v Russia (24 January 2008).

[108] See for instance: Special Rapporteur of the UN Commission on Human Rights on violence against women, its causes and consequences, report on violence against women, its causes and consequences (26 January 1998) UN Doc. E/CH.4/1998/54, Part I, § 4-5.

[109] UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery like Practice during Wartime, Final Report, 26 June 1998 (UN Doc. E/CN.4/Sub.2/1998/13); UN Subommission on Human Rights, Res. 1998/18, 21 August 1998, §3.

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Committee.[110] However, throughout this process, the restriction of the scope of concerns regarding sexual violence in armed conflict to women, excluding men, has persisted.[111]

5. 1997 – 2021: Norm developments through the ICC

5.1 Statute and Elements of Crime

A group of feminist organisations and NGOs – the Women's Caucus for Gender Justice (WCGJ),[112] drawing on the broader movement for the protection of women from violence,[113] played an important role in the codification of the war crime of rape in the Statute and

[110] See for instance: UN Commission on Human Rights, Special Rapporteur on Violence against Women its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict, 23 January 2001, §44; Human Rights Committee, Concluding Observations on the third periodic report of the Democratic Republic of the Congo (26 April 2006) UN Doc. CCPR/COO/CO/3; UN Commission on Human Rights - Res. 2003/12 on the situation of human rights in Myanmar 16 April 2003, par.3; Res. 2003/15 on the situation of human rights in the Democratic Republic of the Congo (17 April 2003); Res. 2003/16 on the situation of human rights in Burundi (17 April 2003); Res. 2003/45 on the elimination of violence against women (23 April 2003), par 15; Res. 2003/52 on human rights and mass exoduses (24 April 2003), Par. 10; Res. 2003/72 on impunity (25 April 2003), par. 11; Res. 2003/78 on assistance to Somalia in the field of human rights (25 April 2003); Res. 2003/86 on the rights of the child (25 April 2003), par. 32; Res. 2004/46 on the elimination of violence against women (20 April 2004), par. 3, 15-16, 18 and 19; Res. 2004/48, on the rights of the child 20 April 2004, par. 22, 27, 32, 37, 41; Res. 2004/61 on the situation of human rights in Myanmar (21 April 2004), par. 3; Res. 2004/72 on impunity 21 April 2004, par. 6; Res. 2004/77 on the protection of UN personnel (21 April 2004); Res. 2004/80 on the protection of UN personnel (21 April 2004); Res. 2004/83 on technical cooperation and advisory services in Liberia, (21 April 2004), par 3(e); Res. 2004/84 on technical cooperation and advisory services in the Democratic Republic of the Congo, 21 April 2004; Concluding Observations on the fifth periodic report of Colombia, (26 May 2004), par. 14; Res. 2005/10 on the situation of human rights in Myanmar, 14 April 2005, par. 3; Res. 2005/41 on the elimination of violence against women, 19 April 2005, par. 2 and 17; Res. 2005/43 on the abduction of children in Africa 19 April 2005, par. 1 and 2; Res. 2005/44 on the rights of the child par. 14, 21, 26, 32, 34, 36 38 and 39 (vote 52-1-0); Res. 2005/48 on human rights and mass exoduses 19 April 2005; Res. 2005/75 on advisory services and technical assistance in Burundi 20 April 2005, par. 20; Res. 2005/78 on technical cooperation and advisory services in Nepal 20 April 2005, par. 4 and 8; Res. 2005/81 on impunity 21 April 2005; Res. 2005/82 on the situation of human rights in the Sudan, 21 April 2005; Res. 2005/83 on assistance to Somalia in the field of human rights 21 April 2005, par. 5;, Res. 2005/85 on technical cooperation and advisory services in the Democratic Republic of the Congo 21 April 2005, par. 4 and 5; Res. 2005/44 on the rights of the child (19 April 2005); UN Human Rights Council, Res. 4/8 on the situation of human rights in Darfur (30 March 2007).

[111] L. Stemple, 'Male rape and human rights' (2008) 60 *Hastings Law Journal* 605–46.

[112] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 99–100; A. Facio, 'All Roads Lead to Rome, but Some are Bumpier than Others' in S. Pickering, C. Lambert (eds.), Global Issues: Women and Justice, (Sydney: Federation Press, 2004), pp. 308–34.

[113] WCGJ, Recommendations and Commentary For December 1997 Prep Com On The Establishment of An International Criminal Court United nations Headquarters December 1-2, 1997. See for a detailed account: P. Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' (2003) 28 *Journal of Women in Culture and Society* 1233–54; Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 53.

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Elements of Crimes of the ICC.[114] The WCGJ's efforts were challenged by religious states and conservative NGOS – e.g., the Vatican had concerns with enforced pregnancy, [115] and Islamic states with broad definitions of gender to include homosexuals[116] – resulting in an ambiguous definition of gender.[117] However, building upon a Swiss and New Zealand proposal to recognise rape, enforced prostitution and comparable sexual violence as war crimes in international and non-international armed conflicts,[118] the WCGJ succeeded in securing the inclusion of these war crimes in the Rome Statute with overwhelming support.[119]

In detail, the statute codified rape as a crime in the following terms:

Art. 6 Crime of Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (1) Causing serious bodily or mental harm to members of the group; (2) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (3) Imposing measures intended to prevent births within the group; (4) Forcibly transferring children of the group to another group.

Art. 7: Crimes against humanity. Par. 1 For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

Lit. g: Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

Art. 8 War crimes. Par. 2: For the purpose of this Statute, "war crimes" means:

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[114] B. S. Moshan, 'Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity' (1998) 22 *Fordham International Law Journal* 145–84 at 171–83; Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 55; Hall, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30 *Michigan Journal* 1–123; Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 102–5.

[115] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 107–11.

[116] See for a more detailed analysis of the drafting history: Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 52–53.

[117] Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 53.

[118] UN, Preparatory Committee on the Establishment of an International Criminal Court (PrepCom), Decisions Taken by the Preparatory Committee at Ist Session Held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, 12 March 1997, p. 9-10.

[119] See for detail: Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 98–122.

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Lit. b: Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

Sublit. XXII: Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

Article 68(1) of the Rome Statute requires the court to take appropriate steps to protect victims and witnesses. The Rules of Procedure and Evidence and the Regulations provide additional details on the methods by which this can be done, such as permitting a support person to be present during the testimony of a sexual violence witness (Rule 88).

The draft Elements of Crimes for the ICC were finalised in June 2000, before the ICTY's *Kunarac* judgment. The ICC follows the ICTY's approach in *Furundžija* – defining rape by reference to penetration without reference to the absence of consent, with the result that there is a divergence between the norm change at the ad hoc tribunals (see section 0) and at the ICC (followed by the SCSL - see section 0).[120] The norm change instigated by the ICC is extended to the national level through Article 17 of the Rome Statute, which restricts the jurisdiction of the ICC to situations where member states are unable or unwilling to investigate or prosecute, leading states to establish jurisdiction over the war crimes listed in the Rome Statute, including rape.[121]

5.2 Prosecutors' policy

The first prosecutor of the ICC - Luis Moreno Ocampo (2003-12)[122] – charged gender-based violence in a majority of the cases he prosecuted.[123] However, this positive charging practice was undermined by significant deficiencies in investigatory practices, resulting in inadequate evidence and reliance on public source information.[124] Indeed, more broadly, Ocampo's

[120] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 118.
[121] See Annex II, state practice report. See also state practice report of the ICRC Customary Law Study, Rule 93, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule93.
[122] ICC, CV of Luis Moreno Ocampo, available online: https://www.icc-cpi.int/NR/rdonlyres/9A924BCD-A9C0-4B59-9F60-7DCB2B78CB13/284273/ LuisMorenoOcampoCV1.pdf.
[123] Hayes, 'La Lutte continue', pp. 806–7.
[124] See: Hayes, 'La Lutte continue', pp. 815–22. This was also recognised and criticised by the ICC - ICC, Prosecutor v. Mbarushimana, Decision on Confirmation of Charges, ICC-01/04-01/10-465-Red PTC I, 16 December 2011, par. 51: "The reader of the transcript of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations."

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many public pronouncements about charging gender-based violence[125] were undercut by his actions – his failure to reform investigatory and evidentiary practices;[126] the delay in appointing the gender adviser required by the Rome Statute;[127] and the limited emphasis on prosecuting gender violence in the policy documents issued by his office.[128]

Even during Ocampo's tenure, it was his deputy – Fatou Bensouda, who led the charge against sexual and gender-based violence.[129] As Ocampo's successor (2012-21), Bensouda declared her intention to "to draw on the experience of the other tribunals in investigating and prosecuting sexual and gender based violence" [130] (reflecting her own prior experience at the ICTY[131]) and to learn from the previous experience at the ICC.[132] This goal was reflected in her strategic plan for 2012-15,[133] as well as in a policy paper on sexual and gender-based crimes that was based on a broad consultation process and draws on similar endeavours at other international criminal tribunals,[134] and also in her bonafide engagement with the position of gender adviser.[135] One indication of Bensouda's more credible

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[125] Hayes, 'La Lutte continue', p. 824.
[126] Hayes, 'La Lutte continue', pp. 825–26.
[127] ICC, Press Release, ICC Prosecutor appoints Prof. Catherine McKinnon as Special Advisor on Gender Crimes, 26 November 2008, available online: https://www.legal-tools.org/doc/866eda/pdf/; Womens Initiatives for Gender Justice, Gender Report Card 2008, p. 21, available online: https://4genderjustice.org/home/publications/gender-report-cards/.
[128] ICC, OTP, Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, available online: https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-paper-2003; ICC, OTP, Report on the Activities Performed during the First Three Years (June 2003-June 2006), 12 September 2006, available online: https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-activities-during-three-years.
[129] Hayes, 'La Lutte continue', p. 838.
[130] ICC, OTP, Strategic Plan June 2012-2015, 11 October 2013, par. 61, available online: https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2013.
[131] ICC, Who is who, online: https://www.icc-cpi.int/about/otp/who-s-who/pages/fatou-bensouda.aspx. See for a different opinion: Hayes, 'La Lutte continue', p. 829.
[132] See: Hayes, 'La Lutte continue', p. 828.
[133] ICC, OTP, Strategic Plan June 2012-2015, 11 October 2013, p. 4-6 and 27, available online: https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-strategy-2013. At par. 58-9, the paper highlights the requirement for strategic change in light of a "serious and systematic under-reporting of sexual and gender-based violence".
[134] ICC, OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available online: http://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf. See for detail Hayes, 'La Lutte continue', p. 827-9.
[135] ICC, Press Release, ICC Prosecutor Appoints Patricia Sellers, Leila Sadat and Diane Marie Amman As Special Advisers, 12 December 2012, available online : https://www.icc-cpi.int/Pages/item.aspx?name=pr861&ln=en; ICC, Press Release, The Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, Appoints Patricia V. Sellers as her Special Adviser on Gender, 19 December 2017, available online: https://www.icc-cpi.int/Pages/ item.aspx?name=pr1352. See also: Hayes, 'La Lutte continue', p. 838.

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engagement with issues of gender-based violence is charging sexual violence against men in four cases.[136] This is the beginning of the last stage of the norm change being traced in this paper.

That said, concerns remain. Charging practice relating to sexual violence seems to be curtailed by previous experience at the ad hoc tribunals, with charges not previously prosecuted in those tribunals – e.g., forced pregnancy, sterilisation and prostitution - not being prosecuted at the ICC either.[137] Moreover, while Bensouda has improved upon Ocampo's record of sexual violence-based charges being dismissed at the confirmation stage, the improvement is meagre – from 50% to 40%.[138]

5.3 Jurisprudence

i. <u>Change in the scope and elements of the crime</u>

The norm change achieved through the ICC's jurisprudence continues to be driven by women's movements' interventions and to be dependent on the Prosecutors' priorities. In the few cases that have been decided in the ICC's history, we can see several norm changes: first and foremost, the last step of the outlined norm change is solidifying: male rape victims are increasingly included in the prosecution and conviction process. Furthermore, the charges and convictions of war-time criminals contain increasingly long lists of gender-based crimes. Lastly, in the context of war crimes specifically, the commission of rape instigated a norm change of the dogmatic of war crimes more broadly, in the sense that for the first time, a military commander was convicted for the commission (of rape as) a war crime against his own forces.

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[136] ICC, Prosecutor v. Bemba, Trial Judgment, 21 March 2016, TC III, ICC-01/05-01/08-3343.; ICC, Prosecutor v Ntaganda ; ICC, Prosecutor v. Francis Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali - Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11, International Criminal Court (ICC), 30 May 2011; ICC, Prosecutor v. Ntaganda, Trial Judgment, 8 July 2019, TC IV, ICC-01/04-02/06-2359. See also : Hayes, 'La Lutte continue', p. 835.
[137] Hayes, 'La Lutte continue', p. 807.
[138] Hayes, 'La Lutte continue', p. 808-9.

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ii. Chronology of the cases

Even though many of the ICC's cases have involved allegations and evidence of sexual violence, this has not translated into convictions: In *Mbarushimana* (2010-11) charges were not confirmed; in *Lubanga* (2006-12), despite repeated urging from NGOs, victim' counsel and the bench, these charges were not prosecuted; in *Katanga* (2006-12) they were dismissed; and in *Bemba* (2008-16/18) they were dismissed on appeal.[139] In two cases – *Ntaganda* (2006-19/21) and *Ongwen* (2005-21), sexual violence-based crimes were not charged initially during Ocampo's tenure and only included later under Bensouda.[140] Although the charging and conviction of Ntaganda for war crimes relating to sexual abuse of child soldiers in his own army has been heavily criticised,[141] in 2019, Ntaganda was convicted, among others, for sexual slavery and rape, including of child soldiers who served within the FPLC.[142] The appeals chamber confirmed the judgment in 2021.[143] The *Ongwen* case stands out for successful prosecution of several gender-based crimes, including rape as a war crime and as a crime against humanity, [144] and including against male victims,[145] and for being the first case in which forced pregnancy was charged as a standalone war crime and crime against humanity, and successfully prosecuted.[146]

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[139] For an extensive analysis of all cases before the ICC, including those at the arrest warrant stage, see: Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 123–246.

[140] For a detail see: Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 142–6, 173-4.

[141] P. Gaeta and A. George Jain, 'Individualisation of IHL Through Criminal Responsibility for War Crimes and Some (Un)Intended Consequences' in D. Akande, J. Welsh (eds.), The Individualisation of War, (Oxford: Oxford University Press, 2023 forthcoming) pp. 14–15 Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853333. For further detail see: Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, pp. 142–46.

[142] *ICC, Prosecutor v. Ntaganda, Trial Judgment, 8 July 2019, TC IV, ICC-01/04-02/06-2359.*

[143] *ICC, Ntaganda v. Prosecutor, Appel Judgment, 30 March 2021, ICC-01/04-02/06-2667-Red.*

[144] ICC, Prosecutor v. Ongwen, Trial Judgment, 21 February 2012, ICC-02/04-01/15; Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 171.

[145] T. Maliti, 'Manoba and Cox: There is a Conspiracy of Silence About Male Victims of Sex Crimes' (September 2018). Justice Monitor, Available online: https://www.ijmonitor.org/2018/09/manoba-and-cox-there-is-a-conspiracy-of-silence-about-male-victims-of-sex-crimes/.

[146] Grey, *Prosecuting Sexual and Gender-based Crime at the International Criminal Court - Practice, Progress and Potential*, p. 171.; Varia Nisha, LRA's Ongwen: A critical first ICC Conviction, HRW News, 13 March 2019, available online: https://www.hrw.org/news/2021/03/13/lras-ongwen-critical-first-icc-conviction.

Electronic copy available at: https://ssrn.com/abstract=4430270

5.4 Interim Conclusion

In sum the ICC provides the logical next focal point for the norm change. With the codification of the elements of crime, the change that started with the ICTY/ICTR jurisprudence solidifies and is taken further: not only the suffering and agency of women is addressed but also male victims are included – also increasingly in the jurisprudence. With regards to the elements of crime, the ICC, overlapping with the jurisprudential path of the ICTY/ICTR somewhat ends up with a different definition of the criminalizing circumstances. As for the war-crime element, this has been – through the prosecution of rape as a war-crime - expanded to cover members of the own forces as well.

6. 1999 – 2018: Towards the Nobel Peace Price

In 1999 Denis Mukwenge founds the Panzi hospital in Bukavu, DRC. In 2008, Non-profit Panzi Foundation DRC founded in the US. The non-profit Panzi Foundation DRC was created in order to support the work of Panzi Hospital with "legal assistance, psycho-social support and socio-economic programmes. 25 September 2012, Speech by Denis Muwenge, (medical doctor in Bukavu, DRC) at UN. condemned the mass rape occurring in the Democratic Republic of the Congo and criticized the Congolese government and other countries for not doing enough to stop 'an unjust war that has used violence against women and rape as a strategy of war'.

In 2015, Nadia Murad, Yezidi refugee in Germany, starts campaigning for Yazidis, in particular the issue of sex slaves. In 2018, Nadia Murad, Yezidi human rights activist and Denis Mukwege, gynecologist in DRC receive the Nobel peace prize. Both laureates' activism focuses on sexual violence in war time. This development can be considered as indicative of increasing salience of the issue. However, while some Congolese war criminals have been held accountable for committing rape, the rape of Yezidi women remains covered by impunity.[147]

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[147] P. Castellano San José, 'The Rapes Committed against the Yazidi Women: a Genocide?: A Study of the Crime of Rape as a Form of Genocide in International Criminal Law' (2020) *Comillas journal of international relations* 50–71 at 61–65.

Electronic copy available at: https://ssrn.com/abstract=4430270

7. ***2000 – 2012: Special Court on Sierra Leone***

7.1. Statute and Rules of Procedure

Unlike the ICTY and ICTR, which are international tribunals, most other international criminal tribunals have been hybrid tribunals, including both national and international criminal law and judges. One hybrid tribunal that has been particularly influential in the norm development of rape as a war crime is the Special Court on Sierra Leone (SCSL).[148] The court has included forced marriage and sexual slavery within the scope of conflict-related sexual violence,[149] and recognised rape as a tool of control and power.[150]

The court's statute criminalises rape as a crime against humanity (Art. 2) and as a war crime (Art. 3). Art. 15 of the statute provides that "Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice." And finally, its rules of procedure and evidence demonstrate consideration for the requirements of victims of sexual violence in evidentiary procedures and through the creation of a Witness and Victims section including trauma experts.[151] However, the court's statute does not define rape, leading to divergences between the two trial chambers that took up this question.[152]

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[148] The Special Court was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000.

[149] V. Oosterveld, 'Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Sierra Leone as Object Lesson' (2009) 17 *American University Journal of Gender Social Policy & the Law* 407–30; V. Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments' (2011) 44 *Cornell International Law Journal* 54–74.

[150] Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', 53; T. Hansen-Young, 'Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone' (2005) 6 *Chicago Journal of International Law* 479–94 at 480.

[151] Hansen-Young, 'Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone', 483; SCSL, Rules of Procedure and Evidence, 16 January 2002, last amended 31 May 2012, available online: http://www.rscsl.org/documents.html.

[152] Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', 52; SCSL, Statute, annexed to the Agreement of 16 January 2002 between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone.

Electronic copy available at: https://ssrn.com/abstract=4430270

7.2. Prosecutors' policy

Although the SCSL had significantly fewer resources at its disposal than the ICTY and ICTR, prosecution of sexual violence was prioritized much more by the prosecutors, and the SCSL has arguably been more successful in this regard than the ICTY and ICTY.[153] As NOWROJEE recounts, CRANE dedicated 20% of his investigators (two out of 10) to investigating sexual assault (as opposed to one to two per cent at the ICTR) and included multiple forms of gendered violence within the investigatory scope.[154] Sexual violence was charged in two out of three cases tried by the tribunals – in the AFRC (Armed Forces Revolutionary Council) and RUF (Revolutionary United Front) cases, but not (it is not clear why[155]) in the CDF (Civil Defence Forces) case. The SCSL's greater success in this effort is also explained by the hybrid nature of the tribunal – which diminished cultural gaps and misunderstandings,[156] and by the complementary investigatory efforts of truth commissions.[157]

7.3. Case law

In the 2007 *Fofana* and *Kondewa* case (members of the Civil Defence Forces allied to the government), sexual violence charges were not included in the indictment and concerns of prejudice to the accused led the chamber to refuse later attempts to amend the indictment.[158]

In the 2007 Brima et al case (against members of the Armed Forces Revolutionary Council), the accused were convicted of rape and forced marriage (as an inhumane act) as crimes against humanity and outrages against personal dignity (but not rape) as a breach of common article 3 of the Geneva Conventions.[159] In defining rape, the trial chamber followed *Kunarac*

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[153] B. Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims' (2005) 18 *Harvard Human Rights Journal* 85–105 at 99.
[154] Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims', 100.
[155] J. T. A. Doherty, 'Developments in the Prosecution of Gender-Based Crimes - the Special Court for Sierra Leone Experience' (2009) 17 *American University Journal of Gender, Social Policy & the Law* 301–25 at 328.
[156] V. Oosterveld, 'Prosecuting Sexual Violence at the Special Court for Sierra Leone' (December 2017), Intlawgrrls, available online: https://ilg2.org/2017/12/18/prosecuting-sexual-violence-at-the-special-court-for-sierra-leone/.
[157] Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims', 102–4.
[158] SCSL, Prosecutor v. Fofana and Kondewa, Judgment, 2 August 2007, SCSL-04-14-T, par. 48.
[159] SCSL, Prosecutor v. Brima et al, Judgment, 20 June 2007, SCSL-04-16-T, p. 571-73 and par. 240-54.

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in focussing on non-consensual penetration and recognising that force is indicative of absence of consent but absence of force is not determinative of consent.[160] However, it goes beyond *Kunarac* in recognising that:

> *"The Trial Chamber acknowledges that the very specific circumstances of an armed conflict where rapes on a large scale are alleged to have occurred, coupled with the social stigma which is borne by victims of rape in certain societies, render the restrictive test set out in the elements of the crime difficult to satisfy. Circumstantial evidence may therefore be used to demonstrate the actus reus of rape."*[161]

The appeals chamber upheld the judgment without engaging with this aspect of the trial judgment.[162]

In the 2009 Sesay case (against members of the Revolutionary United Front), the accused was convicted of rape, sexual slavery and forced marriage (as an inhumane act) as crimes against humanity and outrages upon personal dignity as a violation of common article 3 of the Geneva Conventions and of Additional Protocol II.[163] In defining rape, the trial chamber followed the actus reus element as defined by the ICC, but as to the second element – the absence of consent that mark the sexual act as criminal – it followed *Kunarac*.[164] This judgment notably considered sexual violence against male victims as well, but in the regressive, narrow sense of the secondary harm suffered by males as a result of sexual violence against related women.[165] The appeals chamber confirmed the judgment without commenting on these aspects of the judgment, or considering the divergence between the *Brima* and *Sesay* trial chambers. [166]

The divergence between the *Brima* and *Sesay* trial chambers was not addressed or resolved by the trial chamber in the Charles Taylor case. The former president was convicted of rape, sexual slavery and outrages upon personal dignity,[167] relying on ECOWAS reports of sexual

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[160] SCSL, Prosecutor v. Brima et al, Judgment, 20 June 2007, SCSL-04-16-T, par. 693-4.
[161] SCSL, Prosecutor v. Brima et al, Judgment, 20 June 2007, SCSL-04-16-T, par. 695.
[162] SCSL, Brima et al. v. Prosecutor, Appeal Judgment, 22 February 2008, SCSL-2004-16-A.
[163] SCSL, Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, par. 60.
[164] Oosterveld, 'Gender and the Charles Taylor Case at the Special Court for Sierra Leone', 12-3.
[165] SCSL, Prosecutor v. Sesay, Kallon & Gbao, SCSL-04-15-T, Judgment, 2 March 2009, 1302, 1350.
[166] SCSL, Sesay, Kallon & Gbao v Prosecutor, SCSL-04-15-A, Appeals Judgment 26 October 26 2009.
[167] SCSL, Prosecutor v. Charles Ghankay Taylor, Judgment, 26 April 2011 SCSL-03-1-T, p. 43 and 44.

Electronic copy available at: https://ssrn.com/abstract=4430270

violence to prove that he must have known of the actions of the armed groups he was supporting.[168] The trial chamber followed *Brima* and *Sesay* in highlighting that sexual violence formed an intrinsic part of the violence and the armed groups' strategies.[169] But as to the definition of rape and the recognition of male victims of sexual violence, it followed *Brima* (i.e., *Kunarac*), without considering the alternative approach in *Sesay*.[170] The appeals chamber upheld the judgment without remarking on these aspects of the judgment.[171]

7.4. Interim conclusion

The SCSL is somewhat a sidekick of the change in the norm prohibiting rape. It is fundamental in the expansion of gender-based crimes and also pushes forward the inclusion of male victims in the prosecution. With regards to the elements of the crime, in contrast to the ICTY/ICTR the SCSL aligned itself with the ICC elements of crime, thereby providing confirmation of the ICC's definition of the criminalizing circumstances. Furthermore, it is an example of how prosecution and norm change of gender-based crimes can be at the heart of a prosecutors' strategy and how this can produce impressive results.

8. 2000 – 2010: UN SC and the Women Peace and Security movement

From 2000 onwards the UN Security Council has vigorously pursued the 'women, peace and security agenda',[172] involving highlighting the problem of sexual violence in armed conflict,[173] framing it as in issue of international peace and security,[174] demanding the

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[168] SCSL, Prosecutor v. Charles Ghankay Taylor, Judgment, 26 April 2011 SCSL-03-1-T, par. 6950 and 6971.
[169] SCSL, Prosecutor v. Charles Ghankay Taylor, Judgment, 26 April 2011 SCSL-03-1-T, par. 6787, 896–97, 901, 903, 923–28, 1002–1004.
[170] Eriksson, *Defining Rape: Emerging Obligations for States under International Law*, pp. 398–403; Oosterveld, 'Gender and the Charles Taylor Case at the Special Court for Sierra Leone', 12–13; SCSL, Prosecutor v. Charles Ghankay Taylor, Judgment, 26 April 2011 SCSL-03-1-T. par. 415.
[171] SCSL, Taylor v Prosecutor, Appeals Judgment, 18 May 2012, SCSL 03-01-A.
[172] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 38–39.
[173] Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 36; UN SC, Res. 1325, para. 10, 31 October 2000, S/ RES / 1325 (2000); UN SC, Res. 1820, 19 June 2008. S/ RES / 1820 (2008); UN SC, Res. 1888, 30 September 2009, S/ RES / 1888 (2009); UN SC, Res. 1889, 5 October 2009, S/ RES / 1889 (2009).
[174] UN SC, Resolution 1820, 19 June 2008, UN Doc. S/RES/1820 (2008).

Electronic copy available at: https://ssrn.com/abstract=4430270

prosecution of those responsible,[175] and putting in place enforcement measures. This included the 2009 UN SC Resolution 1888, which appointed a special rapporteur to coordinate preventive efforts, required the inclusion of advisers on women's protection within peacekeeping contingents, and established a team of experts for rapid deployment to situations of special concern.[176] Further resolutions 1889 (2009) and 1960 (2010) required belligerents to undertake concrete obligations towards ending conflict-related sexual violence.[177] However, remaining entirely within step two of the change traced in this case study, these efforts have focused on female victims of these crimes.[178]

9. 2005 ICRC Customary Law Study

Rule 93 of the ICRC Customary Law study holds that rape and other forms of sexual violence are prohibited. While the study has only been published in 2005, the resources it draws on in order to establish rule no. 93 go back to the Lieber Code.[179] Amongst others, the study lists numerous military manuals state that rape, enforced prostitution and indecent assault are prohibited and many of them specify that these acts are war crimes.[180] The legislation of many States provides that rape and other forms of sexual violence are war crimes.[181] The ICRC Customary Law study further highlights that "Violations of the prohibition of rape and other forms of sexual violence have been widely condemned by States and international organizations". This statement is supported with reference to 3 statements – by the statements

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[175] UN SC, Resolution 1325, 31 October 2000, UN Doc. S/RES/1 (2000). See also US, State Department and US Aid, United States Strategy to Prevent and Respond to Gender Based Violence Globally, August 2012, Available online: https://2009-2017.state.gov/documents/organization/196468.pdf.
[176] UN SC, Resolution 1888, 30 September 2009, UN Doc. S/RES/1888 (2009).
[177] UN SC, Resolution 1889, 5 October 2009, UN Doc. S/RES/1889 (2009) and UN SC Resolution 1960, 16 December 2010, UN Doc. S/RES/1960 (2010).
[178] Ward, *Wartime sexual violence at the international level: a legal perspective*, pp. 38–39.
[179] ICRC, Customary Law Study, Rule No. 93, (2005), available online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.
[180] Argentina, Australia, Canada, China, Dominican Republic, El Salvador, France, Germany, Israel, Madagascar, Netherlands, New Zealand, Nicaragua, Nigeria, Peru, Senegal, Spain, Sweden, Switzerland, Uganda, United Kingdom, United States, and Yugoslavia. Listed in the ICRC Customary Law Study, Rule No. 93, (2005), available online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.
[181] Armenia, Australia, Azerbaijan, Bangladesh, Belgium, Bosnia and Herzegovina, Canada, China, Colombia, Congo, Croatia, Estonia, Ethiopia, Georgia, Germany, Republic of Korea, Lithuania, Mali, Mozambique, Netherlands, New Zealand, Paraguay, Slovenia, Spain, United Kingdom, and Yugoslavia; see also the draft legislation of Argentina, Burundi, and Trinidad and Tobago. Listed in the ICRC Customary Law Study, Rule No. 93, (2005), available online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.

Electronic copy available at: https://ssrn.com/abstract=4430270

of Germany, Netherlands and United States.[182] For the present case study, the fact that the study draws on certain resources has been taken as evidence for those resources having been "taken up" by the international communities' legal discourse.

10. *Most recent developments*

Enduring problems in the development of a war crime of rape include the exclusion of male victims (who are also less likely to report such crimes[183]),[184] and the limitations of race, class and geography that define the woman who is a victim of sexual violence in armed conflict.[185] In sum, the norm change shifting the core of the norm from protecting the honour of women and men to the suffering of (female) bodies has been accepted to an extent that it can be considered quite successful. The inclusion of male victims in the norm protecting against rape in war times is still more in progress.

iii. Analysis

1. *SCR elements*

Selection

Previous to the establishment of the ad hoc tribunals, the norm prohibiting rape was fairly *stable:* For centuries, interest in rape as a crime in times of war was quite peripheral or even entirely silent. Albeit its ubiquity, rape was barely prosecuted and in general only considered

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[182] ICRC Customary Law Study, Rule No. 93, (2005), available online: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93, FN 14.
[183] Chynoweth Sarah for UNHCR, Sexual Violence against Men and Boys in the Syria Crisis, 2017, available online: https://www.unhcr.org/ news/press/2017/12/5a27a6594/unhcr-study-uncovers-shocking-sexual-violence-against-syrian-refugee-boys.html, p. 6.
[184] S. Sivakumaran, ''Male/Male Rape and the "Taint" of Homosexuality' (2005) 27 *Human Rights Law Quarterly* 1274; S. Sivakumaran, 'Sexual Violence against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253–76; Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict'; A. Jones, 'Gender and Ethnic Conflict in ex- Yugoslavia' (1994) 17 *Ethnic and Racial Studies* 115–34; A. DelZotto and A. Jones, '"Male-on-Male Sexual Violence in Wartime: Human Rights" Last Taboo?'' (2002); C. R. Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations' (2006) 37 *Security Dialogue* 83–103; D. A. Lewis, 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law' (2009) 27 *Wisconsin Journal of International Law* 1–49.
[185] L. Chappel, 'Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court' (2003) 22 *Policy and Society* 3–25 at 5.

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as a violation of honour – the suffering of the victim was disregarded. Increasing inclusion of women and women's concerns in international law irritated this state.

The selection phase for this norm change is then centralized around the establishment of the ICTY/ICTR. Indeed, the creation of the ICTR/ICTY is an important *opening*, that may even be qualified as a *critical juncture*. With that step the *judicial pathway* becomes the central highway for the norm change in question. Crucial *change agents* were the UN Security Council, but also numerous women's movement in particular in the context of the war in former Yugoslavia pushing for a mechanism to remedy impunity for war-time rape. Furthermore, for the detailed changes in the elements of the crime, the prosecutors and judges were crucial *actors*. Thus, the *private authority pathway* is a crucial motor for the rape-specific change.

Institutional availability: With the creation of the ad hoc tribunals the landscape of available institutions changed considerably, which is directly reflected in the speed in which the norm change propelled through those ad hoc tribunals. Given that institutions are dynamic rather than static entities, activist's engagement is never on a secure road. Indeed, "[f]eminists wanting to use institutions to advance their aims are engaged in a process of incremental change and very often in the dance of 'one step forward and two steps back'".[186] Beyond the creation of the ICTR/ICTY the establishment of the ICC,[187] and the change of prosecutors at ICTR/ICTY and ICC respectively may be considered as an *openings.* As can be argued contrasting the interest in female and male rape victims, increasing *salience* was a crucial facilitating factor for the norm-change.

Construction

a. Construction of change

Norm adjustment: Before 1994 rape at the periphery of regulations in the laws of war. With the war in Yugoslavia, this changed. Starting with the ICTY/R jurisprudence the elements of

[186] Chappel, 'Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court', 4–5.
[187] Chappel, 'Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court', 4 and 8; Ward, *Wartime sexual violence at the international level: a legal perspective*, p. 40.

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the crime of rape were increasingly codified. This was indeed a change at the core of the norm, changing the logic from the protection of honour to the protection from suffering. Given that the statutes of the tribunals did not contain any definition of rape, it was entirely in the hands of the judicial pathway. However, the role of women's and human rights movements pushing the prosecution and criminalization of rape is outstanding. Furthermore, with the notable exception of Del Ponte, it was female prosecutors and female judges that were key to the success of the norm-change. In fact, the criminalization of rape did ride on the general *paradigm shift* in international law that increasing integrated women and their concerns in the law-making process. The inclusion of men as rape victims as norm change is *ongoing*. While it started in the jurisprudence of the ICTY, the change is much slower and incremental.

b. Conditions for change

Stability: (1) While rape had been referenced and mentioned in legal texts, before 1994, there was not much of an interpretation of rape as a crime in times of war. (2) With the jurisprudence of the ICTY/ICTR the existing references were expanded. Defining the elements of the crime, several notions competed. (3) With the codification of the Elements of Crime at the ICC the crime of rape became a settled norm. The norm change built on several pre-existing norms. (1) Domestic law, (2) prohibition of torture, (3) genocide, (4) crime against humanity, (5) war crimes. Regarding the institutional availability, the institutions of the ad hoc tribunals and of the ICC as well as their authority are of fundamental importance for the norm change. A crucial factor repeatedly hindering the norm change was the continuing des-interest of prosecutors and investigators. The salience of the issue increased continuously. Key steps were the reporting on the war in former Yugoslavia in 1992 (elevating the issue to the level of the UN SC) and the Nobel Peace award in 2018.

c. Actors

At the stage of the ICTR/ICTY norm construction, feminist activism was relevant in three ways: Lobbyism through Women's Projects, lawyering through the submission of amicus

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curiae briefs and key female prosecutors and judges sentive to the gender issue.[188] “To catch sight of the road that led to Rome, one should retrace the steps and try to reconstruct how this road came into being. Inevitably the walkers on this road will have different memories and probably also different views on what contributed to its creation.”[189] Crucial *support* came from women’s activists and female lawyers in several positions. At the ICTY, *opposition* came from Rwandan rape victims that did not feel compelled to participate in the ICTRs endeavour for multiple reasons (see section 0). At the ICC, *opposition* came to some extent from religious states and conservative NGOs (see section 0). In general, it was more dis-interest than explicit opposition that hindered the change.

Reception

The drafters of the ICC statute and elements of crimes as well as the prosecutor at the ICC have been crucial *actors* in confirming the norm change (see section 0). The *outcome* is a successful and an ongoing change: The criminalization of rape as a war crime was successful with the codification in the ICCs Elements of Crimes. The expansion of the protection against rape to cover also men is ongoing. Regarding *institutional availability,* the ICC’s is a crucial institution for the reception in its statute and elements of crime. The ICRC customary law study may be of relevance for the determination of consolidation of the norm.

Regarding the *pace and mode of change,* the core of the change happened in a very short period with the prosecution of the war criminals of former Yugoslavia and Rwanda. This can only partly be explained with the outrage and consequent salience regarding the issue. In addition to that a well-connected feminist movement of Former Yugoslavia was crucial in providing resources and impetus for the prosecution of rape in times of war. Despite ubiquitous evidence, the expansion to cover men is much slower, which may be explained with men as victims have not been subject to much civil society activism.

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[188] Chappel, ‘Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court’, 9–10.

[189] Bos, ‘From the International Law Commission to the Rome Conference (1994–1998)’, pp. 35–36.

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2. ***Particularities of the case***

Seismic shift in the 1990ies

It is striking how with the creation of two ad hoc tribunals and their jurisprudence the core of the norm changed fundamentally (see section 3). Put in context of the general ICL pathway this is not surprising: after all the ICTY/ICTR judgments are a corner stone of contemporary ICL norm development. Furthermore, close examination of the case law provides for a more ambiguous picture: with a more dedicated structure, the norm change could have been much more straight forward (see section 0. and 0 in particular).

The challenge of producing and judging evidence

A key challenge that keeps coming up throughout change on the judicial pathway is the production and judging of evidence. Lack of prosecutorial strategy, untrained investigators, lack of connection to local groups were main blockages for the norm change (see sections 0, 0 and 0). It is impossible to determine whether this problem materializes only at the site of the prosecutor – arguably the courts and tribunals also require(d) a higher standard of evidence for gender-based crimes.

Difference between words and action

The first Chief Prosecutor at the ICTY/ICTR Richard Goldstone and the first Prosecutor at the ICC Luis Moreno-Ocampo demonstrate an interesting similarity: both paid a lot of lip service to the prosecution of gender-based crimes which then stood in quite striking contrast to the actual practice of their prosecution. In both cases it was a female prosecutor that came in in showed how gender-based crimes can go at the forefront of prosecution in practice not only in words (see sections 0 and 0).

Cyclical and selective citation

An interesting strategy for norm change employed by ICC and ICRC and SCSL is cyclical norm citation: while the Ntaganda trial chamber's argument that war crimes also expand to the accused own forces was basically built on nothing. Repeated citation through several institutions created a sense of authority for the norm change (see section 0).

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With regards to the elements of crime there is a strikingly wide-spread practice of selective citation. Defining the criminalizing circumstances, courts/tribunals would not necessarily engage with the diverging jurisprudence but just build on the cases that support the way in which they want to develop the definition. For instance, reiterating the ICTY *Kunarac* definition of criminalizing circumstances the ICTR *Gacumbitsi* judgment refrains from engaging with the contrasting ICTR *Akayesu* definition at all (see section 0). The same strategy was employed by by the *Bagosora* judgment (see section 0.

Norm transfer

EITHNE DOWDS argues that a fundamental strategy of feminist engagement with international criminal law is norm transfer.[190] The idea is basically to transfer more progressive norms from the domestic regime into the international and vice versa. In that sense, early feminist criminalization strategies in international criminal law formed part of a larger strategy which went beyond securing investigations and convictions in international criminal tribunals to the possibility of achieving normative change in both international and domestic criminal law.[191] This is particularly convincing with regards to the ICC's rule of complementarity.[192] According to Art 17 of the Rome Statute states retain primary jurisdiction over international crimes and the ICC only steps in where a state is unwilling or unable to investigate and prosecute those accused of being responsible for crimes under its statute (see section 0). Feminists see a positive dimension in that norm for 'opening up an avenue for transforming criminal law across all state parties.[193] And indeed, numerous states have refined the criminalization of acts covered by the statute around the time of the Rome Statutes creation (see section 0).

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[190] E. Dowds, *Feminist Engagement with International Criminal Law - Norm Transfer, Complementarity, Rape and Consent* (Hart Publishing, 2019).
[191] Dowds, *Feminist Engagement with International Criminal Law - Norm Transfer, Complementarity, Rape and Consent*, p. 58.
[192] Dowds, *Feminist Engagement with International Criminal Law - Norm Transfer, Complementarity, Rape and Consent*, pp. 60–77.
[193] Dowds, *Feminist Engagement with International Criminal Law - Norm Transfer, Complementarity, Rape and Consent*, p. 59.

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The transplantation of norms has also been the key strategy for the ILC Draft Code in particular in the second phase. In that case, however, the aim seems to have been less to change law progressively than to keep ICL as coherent as possible, in other words, the ILC was rather busy to keep up with norm change taking place elsewhere (see section 0).

3. ***Conditions hindering or furthering change***

Disinterest of men

As has been highlighted throughout the chronological account, rape was regularly not at the forefront of men's regulatory and prosecutorial strategies. With the notable negative exception of Carla Del Ponte and positive exception of David Crane, it was regularly a women taking up office or being present in court that made the change possible. This highlights how their predecessors had failed to have gender-based crimes substantially on their agenda (see sections 0, 0 and 0).

Lobbying of women

As has been pointed out throughout the chronological account, the lobbying of women's movements regularly brought the necessary resources and impetus for the legal change. This is particularly the case for the changes around the ICTY/ICTR and the ICC (see sections 3 and 0).

Stereotypes

While the step from protection of honour to protection from suffering is definitely in line with many feminist agendas, the protection of women from rape remains well within typical stereotypes of women as victims and men as perpetrators. That the recognition of male rape victims is much slower and difficult reinforces that point. What has been entirely excluded from the scope of the norm are women as war-time rapists, as demonstrated in much detail.[194] To exclude non-stereotypical behaviour and to play on gender stereotypes may have been an

[194] L. Sjoberg, *Women as Wartime Rapists - Beyond Sensation and Stereotyping* (New York University Press, 2016).

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important facilitating factor for this norm-change, or vice versa, the impetus of the norm change was not strong enough to overcome stereotypes.

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Part V.

LAW OF THE SEA

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Case Study 14

Evolving Rules of Continental Shelf Delimitation: The Fate of the Equidistance Principle

(February - June 2019, Rev. April 2021)

(Pilot case)

Ezgi Yildiz[1]

I. Typical Story

Finding an ideal method for continental shelf delimitation has been an arduous and confusing process. It was not always this way, however. Article 6 of the 1958 Geneva Convention on the Continental Shelf had once established that "in the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is *equidistant* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."[2] This provision clearly identifies using equidistance (median line) as *the* method of delimiting continental shelf. Equidistance, as an operational principle, comes with a single objective: divide right in the middle.

While, the 1958 Geneva Convention had consolidated the default position of the equidistance, subsequent interventions from international courts, in particular, the International Court of Justice (ICJ), challenged the equidistance's default method status.

[1] I would like to acknowledge the research support from Umut Yüksel, Carlos Cruz, and Peter Stevens. We collected the data used in this case study for our project entitled "Testing the Focal Point Theory of International Adjudication: An Empirical Analysis of the ICJ's Impact on Maritime Delimitation" funded by the Swiss National Science Foundation (grant agreement No CRSK-1_190545). An extended analysis can be found at Ezgi Yildiz and Umut Yüksel, "Understanding the Limitations of Behavioralism: Lessons from the Field of Maritime Delimitation," *German Law Journal* 23, no. 3 (April 2022): 413–30, https://doi.org/10.1017/glj.2022.24.

[2] International Law Commission, *Convention on the Continental Shelf*, 29 April 1958, United Nations, Treaty Series, vol. 499, p. 311.

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With its 1969 *North Sea* ruling, the ICJ did not only reject the equidistance's default status but also endorsed an alternative principle, *equity*. Equity, being an aspirational principle, does not refer to any particular delimitation method. Rather, it focuses on the result of the delimitation exercise, which should ideally lead to equitable outcomes for all the parties involved. This ruling gave the legal ground for states to pick and choose from alternative options and politized a field that was becoming more and more technical. It also widened the space for contestation, which essentially prepared the ground for states forming blocs around the delimitation methods they prefer during the negotiations of the 1982 UN Convention of the Law of the Sea. The prominence of these blocs and persistence of states favoring one of these two approaches meant that drafters could not reach an agreement and instead adopted a vague treaty provision, which essentially does not refer to any particular method of delimitation. The uncertainty around the ideal method persists to this day, as it is underlined by several authorities in the field.[3]

The underlining characteristic of this field is likely to increase the salience of the discussions around the default method and aggravate the degree and the pervasiveness of uncertainty in this field. This is because the field concerns "a negative sum game, whereby a state's gain would imply another state's loss."[4] There are distributional consequences arising from application of one delimitation method over another. These consequences are not negligible. Depending on the method chosen, one party may have control over a larger area including the natural resources beneath the surface—compared the other one. Evidently, the stakes are higher when it comes to deciding on a single method, as we will see in the analysis section.

The analysis presented below is drawn from two co-authored journal articles and a book chapter authored with Umut Yüksel, who gives full consent for our analysis to be used for

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[3] See for example, Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed. (Cambridge: Cambridge University Press, 2019), https://doi.org/10.1017/9781108545907; Massimo Lando, *Maritime Delimitation as a Judicial Process*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2019), https://doi.org/10.1017/9781108608893; Malcolm D. Evans, "Maritime Boundary Delimitation," in *The Oxford Handbook of the Law of the Sea*, ed. Donald Rothwell et al. (Oxford, New York: Oxford University Press, 2015), 254–79.
[4] Nico Krisch and Ezgi Yildiz, "The Paths of International Law: Stability and Change in the International Legal Order," *Concept Note for the Paths Workshop*, April 2019, 7.

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this case study.[5] We conducted this analysis in the context of a Swiss National Science-funded *Testing the Focal Point Theory of International Adjudication* project.[6] In the context of this project, we conducted semi-structured interviews with 11 experts, selected using a purposeful sampling strategy. We made sure to include different experts that may have experience in the various sites in which states' maritime delimitation policies are defined and pursued. Of these experts, five have served as legal advisors to governments, two have participated in concluding bilateral treaties on behalf of governments, and two have worked at international courts. We also talked to two academics who are leading scholars in this field. These interviews lasted between 45 and 60 minutes and were all conducted online via Zoom. We have asked our respondents questions about the determinants of state positions on the question of the appropriate maritime delimitation method.

II. Chronology

First phase: Early Attempts to Claim Continental Shelves – from Truman Declaration to the 1969 North Sea ruling (1945-1969)

The enclosing of the oceans started with the 1945 Truman Proclamation through which the US made a claim over the resources of continental shelf.[7] Similar claims made by other countries[8] such as the UK and Mexico,[9] as well as Argentina.[10] While states began making claims over their continental shelves, there was not an overall agreement about how to delimit overlapping claims. There was also not an agreement around whether these areas could be

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[5] Ezgi Yildiz and Umut Yüksel, "De-Focalizing Effect of International Courts: Evidence from Maritime Delimitation Practices," *Unpublished Manuscript*, n.d.; Ezgi Yildiz and Umut Yüksel, "Understanding the Limitations of Behaviouralism: Lessons from the Field of Maritime Delimitation," *German Law Journal*, n.d.; Ezgi Yildiz and Umut Yüksel, "How Different Takes on Custom Shape State Practice," n.d.

[6] Part of this case builds on a study financed by the Swiss National Science Foundation (grant no. CRSK-1_190545).

[7] Donald Cameron Watt, "First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf, 28 September 1945," *Marine Policy* 3, no. 3 (July 1, 1979): 211–24, https://doi.org/10.1016/0308-597X(79)90053-8.

[8] In the context of the SNSF-funded "Testing Focal Point Theory of International Adjudication" project, we built a dataset outlining each state's position on continental shelf delimitation method.

[9] Watt, "First Steps in the Enclosure of the Oceans," 219–23.

[10] J. A. C. Gutteridge, "The 1958 Geneva Convention on the Continental Shelf," *British Year Book of International Law* 35 (1959): 105.

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considered to fall under national authorities or whether they should be considered as global commons. It proved to be difficult to settle these differences in the context of the negotiations for the 1958 Geneva Convention, which was built upon International Law Commission's 1956 Draft Articles on the Law of the Sea (Articles 67-73 on the continental shelf)[11]. The ILC does not mention any method to delimit overlapping claims.[12]

The 1958 Geneva Convention, on the other hand refers to the equidistance principle as the default method, in the absence of any other agreement.[13] This solidified the equidistance's default method status. Subsequently, the equidistance principle began to spread in state practice as one of the most preferred methods for continental shelf delimitation. As Leonard Legault and Blair Hankey note, "until the 1969 judgment in the *North Sea* cases, most policy-makers assumed the existence of a binding legal presumption in favor of the equidistance method, whether under treaty law or customary law."[14]

The principle lost its firm standing with the 1969 *North Sea Continental Shelf* ruling, where the ICJ emphatically refused to grant equidistance a preferential status and instead held that delimitation had to follow *equitable principles*.

What gave grounds to this case was a delimitation agreement between Denmark and the Netherlands in accordance with equidistance principle without including Germany.[15] This led to a dispute between Germany, on the one hand, and Denmark and the Netherlands, on the other, with respect to the method to be employed for continental shelf delimitation. While the former requested that the boundary be determined in a manner to give all parties a fair

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[11] Gutteridge, 105.

[12] ILC, Articles Concerning the Law of the Sea with Commentaries, *Yearbook of the International Law Commission*, 1956, vol. II.

[13] Article 6 of the 1958 Geneva Convention on the Continental Shelf (CSC) establishes that "in the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."[13]

[14] Leonard Legault and Blair Hankey, "Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation," in *International Maritime Boundaries*, ed. Jonathan Charney and Lewis Alexander (Leiden ; Boston: Martinus Nijhoff Publishers, 1993), 205.

[15] Joseph W. Morris, "The North Sea Continental Shelf: Oil and Gas Legal Problems," *The International Lawyer* 2, no. 2 (1968): 191–214.

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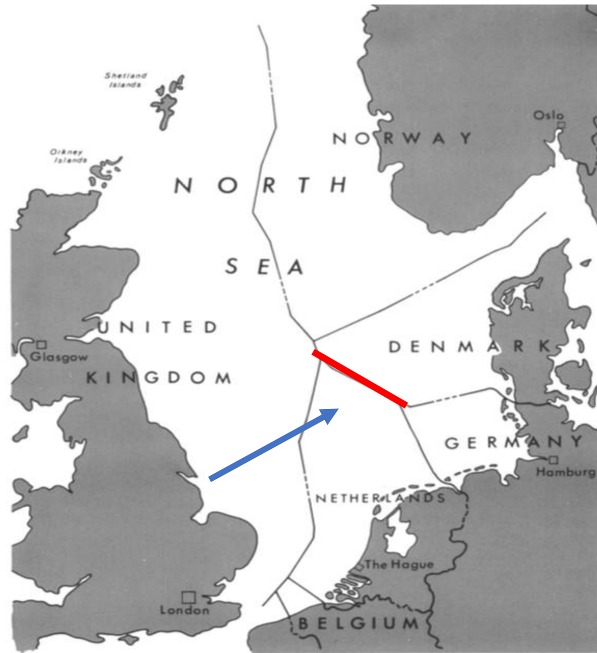
and equitable share, the latter argued that the boundary should be determined in line with equidistance principle. Denmark and the Netherlands argued that this was because the equidistance principle represented customary law. Therefore, it would bind Germany even if it is not a party to the 1958 Geneva Convention.

Figure 2: The delimitation agreement between Denmark and the Netherlands from Morris 1968[16]



The ICJ was confronted with a big dilemma. Entertaining Danish and Dutch position would mean solidifying the equidistance method as a custom, locking in states that are not party to the 1958 Geneva Convention. The Court carefully analyzed whether this treaty would ordinarily bind Germany. To that effect, it listed the number of signatories (46 at the time) and ratifications (39 at the time) to the Convention. While Denmark and the Netherlands were parties to the Convention, Germany was only a signatory, and therefore not officially a

[16] Morris, 197.

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party. The ICJ effectively concluded that Germany did not have obligations directly deriving from the treaty.[17]

Subsequently, it turned to the thorny questions: first, whether Germany would be bound in view of the fact that the equidistance principle is custom;[18] second, whether the equidistance principle crystalized as custom after the adoption of Geneva Convention. To answer this question, the ICJ started with explaining the genesis and the development of the equidistance principle. In particular, it referred to the Truman Proclamation of 1945, which does not mention equidistance, but talks of equitable principles.[19] Then, it underlined that neither the International Law Commission (ILC) nor its Committee of Experts had given special prominence to equidistance while considering the issues surrounding the delimitation.[20]

Furthermore, it evaluated the Danish and Dutch claims that even if the principle of equidistance was not crystalized as custom before the Geneva Convention, it certainly did so subsequent to its adoption. Yet, the ICJ did not find this argument convincing. Specifically, it said that "the number of ratifications and accessions so far secured is, though respectable, hardly sufficient," for the Convention provisions to reflect custom.[21] Following these considerations, with 11 to six votes, the ICJ decided that Article 6 of Geneva Convention did *not* reflect customary law. Yet, the Court did not stop there. It boldly put forward its own interpretation of what customary law would require. In ruled that custom required that "delimitation […] be effected by agreement *in accordance with equitable principles*, and taking account of all *the relevant circumstances*, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other."[22] This decision opened the possibility of two different approaches to delimitation, either "equidistance/special circumstances" rule under Article 6,

[17] *North Sea Continental Shelf Cases,* [26]-[26].
[18] *North Sea Continental Shelf Cases,* [49]-[55].
[19] *North Sea Continental Shelf Cases,* [47].
[20] *North Sea Continental Shelf Cases,* [49]-[55].
[21] *North Sea Continental Shelf Cases,* [57].
[22] *North Sea Continental Shelf Cases,* [101(1)] (emphasis added).

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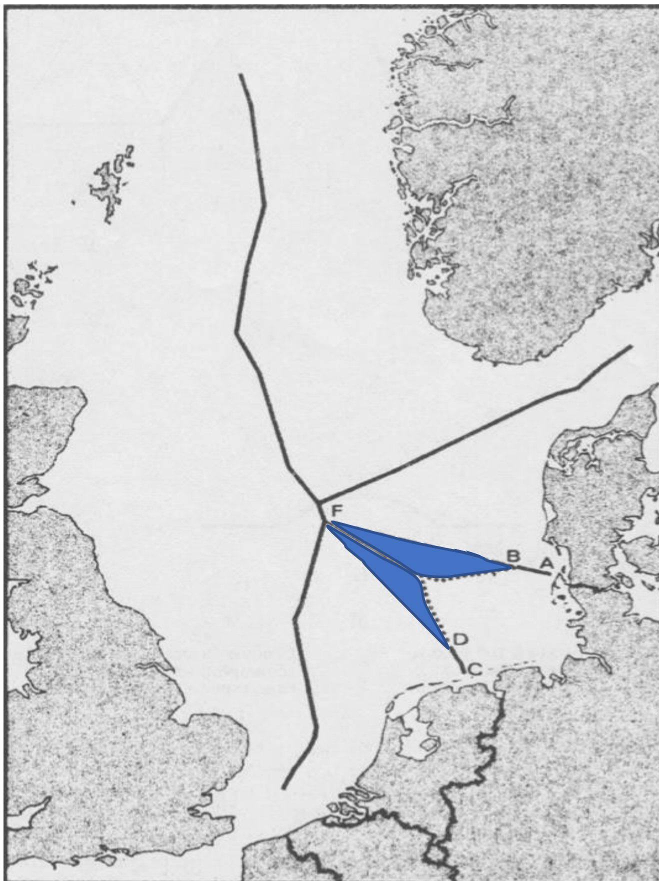
or “equitable principles/relevant circumstances.” The latter approach endorsed in the *North Sea Continental Shelf Cases* judgment has been known to be relatively more open.

Figure 3: Additional area that Germany could claim



Following the ruling, the Denmark and the Netherlands canceled their delimitation agreement and the agreements that resulted in the new boundary between the Netherlands, Denmark, and Germany—with Germany getting this extra area covered in blue.

Beyond the specifics about this case, the Court’s statement that equidistance is not custom and that custom requires delimitation agreement to be effectuated in light of equitable principles generated a generalizable effect. As we will see below, the ratio of states preferring

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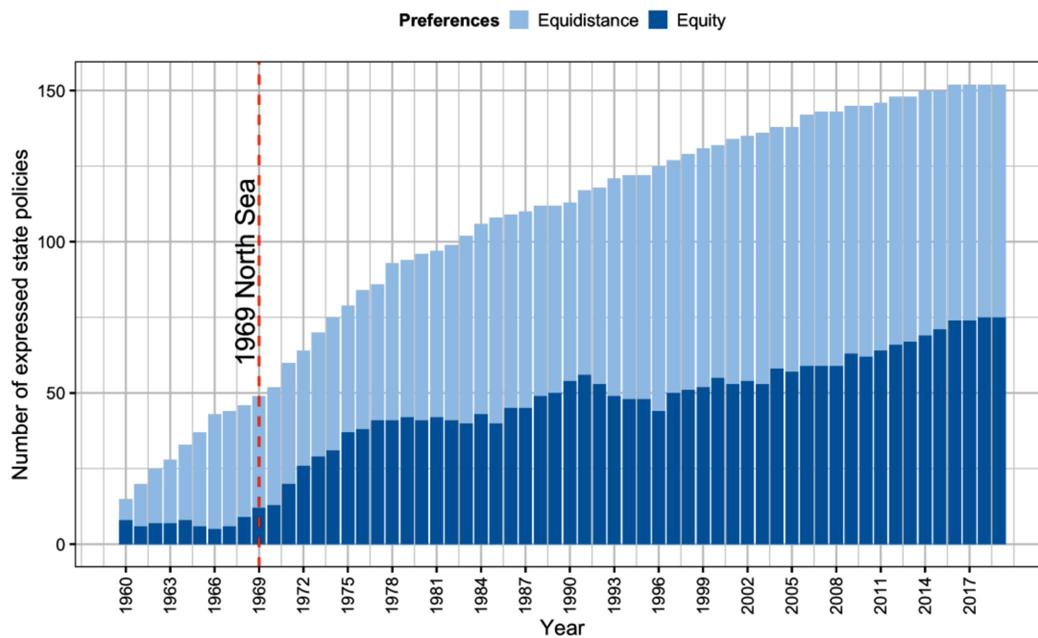
equidistance among states with expressed preferences was extremely high. Yet, this was overlooked in the *North Sea* judgment, which, according to Mark Weisburd is something typical for the ICJ.[23] Weisburd observes that "[i]n some cases, [the ICJ] has reached decisions clearly inconsistent with significant and relevant state practice; in others, it has proclaimed doctrines unsupported by state behavior as rules of law."[24]

Figure below shows the distribution of state preferences for equity and equidistance over time.

Figure 4:Evolution in State Preferences



Up until 1969, we see a clear preference for the equidistance principle, and equity supporters were a minority then. In 1968, 880% of the states with an expressed preference were for equidistance. However, things change quickly after 1969 ruling. This ruling endorsed equity and the ratio of states supporting equity quickly rose to 50%.

[23] A. Weisburd, "The International Court of Justice and the Concept of State Practice," *University of Pennsylvania Journal of International Law* 31, no. 2 (January 1, 2009): 295.
[24]Weisburd, 295.

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Highly popular in state practice at the time of the *North Sea* decision, equidistance could have emerged as a focal rule if the Court cued states in its favor. The ICJ's refusal to declare equidistance customary, and its endorsement of other delimitation methods allowed states to deviate from it by adopting rival principles. This meant that states and tribunals could freely pick and choose between various available delimitation methods instead of having to apply equidistance. It is highly plausible that states which would be disadvantaged by the application of equidistance saw an opportunity to change their policies, which prevented the unification of state practices around equidistance.

More importantly, this ruling effectively obliterated any chance for achieving consensus around one method. It created a rift between two camps of states, each backing one method of choice. During the UNCLOS III, these camps pushed for the method that suited their interests the best—to be discussed in the following section.

Second Phase: Post-North Sea Developments (1969-1993)

Encouraged by the *North Sea* ruling, many states argued that the equidistance principle is not custom and that the delimitation exercise should be carried out following equitable principles. These states were opposed by a group of states that sought to include equidistance as the method of delimitation in the treaty text. Unlike other issues governed by the UNCLOS, the formation of opposing groups was not motivated by ideology or power differentials. For example, the negotiations for Part XI (the resources in the area—i.e. deep seabed mining) were largely led by blocs grouping along ideology and economic positions (i.e. the global and global south).[25]

When it came to Part VI, the section concerning the continental shelf, the dividing appeared to lie in considerations of what rule would be the most advantageous for each state, given that state's coastal configuration and geography. The two *pro-equidistance* and *pro-equitable principles* camps were composed of countries that supported the method that would favor

[25] See the specific case study on this topic.

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their position the most, primarily in function of their geographical features. The *pro-equidistance* group included, for example, Bahamas, Barbados, Canada, Colombia, Cyprus, Denmark, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, South Yemen, Spain, Sweden, the United Arab Emirates, the United Kingdom, and Yugoslavia. The *pro-equitable principles* group, on the other hand, comprised of Algeria, Argentina, Bangladesh, Benin, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Somalia, Turkey, and Venezuela.[26]

The disagreements between the blocs continued throughout the negotiations resulting in minimal agreement and a vague formula under Article 74(1) and 83(1) of the UNCLOS. According to Art. 83(1), the continental shelf delimitation is to be "effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the ICJ, in order to achieve an equitable solution." Art. 74(1) contains the same rule for the delimitation of the exclusive economic zone (EEZ).[27] This formulation carefully avoided the controversial terms such as *equidistance*, *equitable principles*, *special circumstances*, or *relevant circumstances*. While this compromise appeased the opposing camps, they left little guidance as to how to delimit the boundaries of continental shelves. It would be up to the judicial bodies to articulate a more predictable rule.

Around the time of the 1982 Law of the Sea Convention's adoption, the ICJ delivered three judgments, all of which emphasized the role of equity at the expense of equidistance: *Tunisia/Libyan Arab Jamahiriya*; *Canada v United States of America; Libyan Arab Jamahiriya v Malta.*[28] In its *Gulf of Maine* decision, the Court emphasized that equidistance is not custom.[29] In *Tunisia/Libya*, the Court reiterated that "equidistance is not, in the view

[26] Official records of the UNCLOS III, A/CONF.62/RCNG/1 (1978), 124-125.
[27] UN General Assembly, Convention on the Law of the Sea, 10 December 1982.
[28] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Judgment) [1984] ICJ Rep 246 (hereinafter *Gulf of Maine*); *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13 (hereinafter *Libya v Malta)*
[29] *The Gulf of Maine Area,* p. 246, para 122.

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of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods."[30] Similarly, in *Libya v Malta,* the Court explained that state practice "falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any method, as obligatory."[31]

Finally, the tides turned with the 1993 *Jan Mayen* judgment, where the ICJ announced that "[p]rima facie, a median line delimitation between opposite coasts results in general in an equitable solution."[32] This ruling marked a dramatic change in the ICJ's approach to equidistance.[33] It heralded a form of *modified equidistance*, linking the use of a provisional *equidistance* line to the achievement of an *equitable* result.[34] With this decision, the ICJ began its attempt to bring back a sense of predictability into the law of maritime delimitation. *Qatar v Bahrain,*[35] and subsequent rulings reiterated this method of beginning with a provisional equidistance line and "equity-correcting" it.[36] However, the damage was already done until this point. The ICJ's *North Sea* judgment not only gave the legal grounds to claim two different methods of delimitation but also dealt a blow at the possibility of having state consensus around one delimitation method.

Third Phase: the ICJ Fashioning its Own Approach to Delimitation - Three-stage approach (post-1993)

Following *Jan Mayen*, the ICJ continued to bring some elements of equidistance back. It almost appeared as if the ICJ attempted to fill in the gaps left in the UNCLOS and complete

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[30] *Tunisia/Libya,* p. 18, para 110.
[31] *Libya/Malta*, p. 13, para 44.
[32] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38, [64] (hereinafter *Jan Mayen*)
[33] Fayokemi Olorundami, "The ICJ and Its Lip Service to the Non-Priority Status of the Equidistance Method of Delimitation," *Cambridge International Law Journal* 4, no. 1 (January 1, 2015): 60, https://doi.org/10.7574/cjicl.04.01.53. The Court referred to the *Anglo-French Arbitration* when attempting to re-focalize equidistance and departing from its previous case-law.
[34] This modified equidistance concept is borrowed from Legault and Hankey, "Method, Oppositeness and Adjacency, and Proportionality in Maritime Boundary Delimitation."
[35] *Qatar v Bahrain* (Judgment) [2001] ICJ Report 40, para. 175–176. This model was then developed further in *the Black Sea (Romania* v *Ukraine)* (Judgment) [2009] ICJ Rep 61, para. 116.
[36] Tanaka, *The International Law of the Sea*, 205.

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the UNCLOS whose provisions concerning continental shelf delimitation were written vaguely and resembled incomplete contracts.[37] The subsequent rulings such as the 2001 *Qatar v. Bahrain* judgment described drawing a provisional line based on the equidistance principle and then adjusting it if special circumstances so require as "the most logical and widely practiced approach."[38] Curiously, it did not refer to the state practice or *opinio juris* while arriving at this conclusion. This reasoning presented here was subsequently confirmed in *Nicaragua v Honduras.*[39]

The ICJ did not stop there, and continued to clarify things in the next few cases, yet this time with an objective to create a single method with predictability and a degree of flexibility.[40] In the 2009 *Black Sea* case, it attempted to systematize delimitation practice by introducing a three-stage approach and merging the principles of equidistance and equity: i) draw a provisional line (an equidistant line for adjacent coasts unless there are compelling reasons that make this exercise *unfeasible*, and a median line for opposite coasts); ii) consider the factors which might necessitate shifting or adjusting this provisional line; and iii) verify that this line does not lead to an inequitable result.[41] The ITLOS endorsed this three-stage test in *Bay of Bengal* in 2012,[42] and the ICJ reiterated it in *Peru v Chile* in 2014.[43] This three-stage method can be best described as *modified equidistance* (or equity correcting equidistance).

Although the ICJ devised and advocated a single method (i.e. modified equidistance) in the most recent period, the prior zigzagging certainly contributed to the semantic and legal confusion around which delimitation method to choose.[44] An indication of this confusion is

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[37] Gillian K. Hadfield, "Judicial Competence and the Interpretation of Incomplete Contracts," *The Journal of Legal Studies*, October 21, 2015, https://doi.org/10.1086/467919; Wolfgang Alschner, "Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory," *SSRN*, 2013, https://doi.org/10.2139/ssrn.2241652.
[38] *Qatar v Bahrain,* [176].
[39] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, [268] and [281]
[40] Interview 1; Interview 4
[41] *Maritime Delimitation in the Black Sea (Romania* v *Ukraine)* (Judgment) [2009] ICJ Rep 61, [116].
[42] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment) [2012] ITLOS Rep 12 [240].
[43] *Maritime Dispute (Peru v Chile)*, (Judgment) [2014] ICJ Rep 3 [91]–[92].
[44] Evans 2015.

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easily observed in cases adjudicated. State positions expressed in the course of international adjudication are not necessarily representative of the broader state practice, yet they give clues how much each method was preferred. What is more illustrative is the position taken by courts and tribunals, which follow the jurisprudence of the ICJ in the 1969 *North Sea Continental Shelf,* to a certain extent, until 1993, after which modified equidistance is almost exclusively presented as the only solution.[45]

Table 1: Continental shelf delimitation methods preferred by states before international tribunals, and the delimitation methods used by the international tribunals.

	States		**Tribunals**		
	Between 1969 and 1993	*After 1993*	*Between 1969 and 1993*	*After 1993*	**Total**
Equidistance	7	10	0	0	17
Modified equidistance	1	13	2	14	30
Equity	11	9	6	1	27
Total	19	32	8	15	74

Since there are no delimitation cases before 1969, the first period in consideration begins with 1969. The table also takes 1993 as a cut-off point for the change in ICJ's view on the appropriate delimitation method. This was when the ICJ brought equidistance back as *modified equidistance* and heralded that the logic of equity would be blended into it.

The majority of the states preferred equity in the course of the proceedings between 1969 and 1993. While equidistance was the second favorite, modified equidistance was proposed by only one state. In the period after 1993, we see a different picture. States whose disputes were judicialized had divided loyalties to three different methods, with slightly more preference to

[45] This table includes jurisprudence from the ICJ, ITLOS, and arbitral tribunals.

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modified equidistance. Equidistance and equity came as not so distant second and third, respectively. The tribunals, on the other hand, tended to predominantly favor equity and relied on modified equidistance only twice in the pre-1993 period. While none of the rulings depended on equidistance principle, equity delimitation methods seemed to fall from the tribunals' favor after 1993. Indeed, in this period nearly all tribunal decisions used modified equidistance while only one relied on equity.

Indeed, the ICJ was not alone; the others international courts and tribunals largely followed the ICJ's reasoning and conclusions. Indeed, what makes the ICJ rulings potentially impactful is that other specialized courts commonly cite its decisions about the state of the principles of general international law.[46] In the field of maritime delimitation, other adjudicatory bodies—namely the International Tribunal of the Law of the Sea (ITLOS) or *ad hoc* Arbitral Tribunals—have largely orbited around the ICJ.[47] For example, Tullio Treves, who served as a judge at the ITLOS, discloses that the jurisprudence of the ITLOS has followed the ICJ's interpretations without any "intention of breaking away from it."[48] This observation also goes for *ad hoc* Arbitral Tribunals that often follow the ICJ's reasoning.

Table 1 below illustrates the evolution of the position of states as well as courts and tribunals.

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[46] Michael Byers, "Custom, Power, and the Power of Rules," *Michigan Journal of International Law* 17, no. 1 (January 1, 1995): 109–80; Curtis A. Bradley, ed., *Custom's Future: International Law in a Changing World* (New York, NY: Cambridge University Press, 2016); Laurence Helfer and Ingrid Wuerth, "Customary International Law: An Instrument Choice Perspective," *Michigan Journal of International Law* 37, no. 4 (2016): 563–609.
[47] Interview 10.
[48] Tullio Treves, "What Have The United Nations Convention And The International Tribunal For The Law Of The Sea To Offer As Regards Maritime Delimitation Disputes?," *Maritime Delimitation*, January 1, 2006, 71.

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Table 1: Judgements and awards on continental shelf delimitation

Year	Case name	Judicial body	State position I	State position II	Court solution
1969	*North Sea Continental Shelf (Germany/Denmark; Germany/the Netherlands)*	ICJ	Equity	Equidistance (x2)	**Equity**
1977	*Anglo-French Arbitration*	Arbitral Tribunal	Equidistance	Equity	Modified equidistance
1978	*Aegean Sea Continental Shelf Case (Greece v Turkey)*	ICJ	Equidistance	Equity	*No jurisdiction*
1982	*Tunisia/Libya*	ICJ	Equity	Equity	Equity
1984	*The Gulf of Maine (Canada/USA)*	ICJ	Modified equidistance	Equity	Equity
1984	*Libya/Malta*	ICJ	Equity	Equidistance	Modified equidistance
1985	*Guinea v Guinea-Bissau*	Arbitral Tribunal	Equity	Equidistance	Equity
1989	*Guinea-Bissau v Senegal*	Arbitral Tribunal	Equity	Equity	Equity
1992	*Canada v France*	Arbitral Tribunal	Equity	Equidistance	Equity
1993	*Jan Mayen (Denmark v Norway)*	ICJ	Equity	Equidistance	**Modified equidistance**
1999	*Eritrea/Yemen*	Arbitral Tribunal	Equidistance	Equidistance	Modified equidistance
2001	*Qatar v Bahrain*	ICJ	Modified equidistance	Modified equidistance	Modified equidistance
2002	*Cameroon v Nigeria*	ICJ	Modified equidistance	Modified equidistance	Modified equidistance
2006	*Barbados v Trinidad and Tobago*	Arbitral Tribunal	Modified equidistance	Modified equidistance	Modified equidistance

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2007	*Nicaragua v Honduras*	ICJ	Equity	Equity	Equity
2007	*Guyana v Suriname*	Arbitral Tribunal	Modified equidistance	Equity	Modified equidistance
2009	*Black Sea (Romania v Ukraine)*	ICJ	Modified equidistance	Modified equidistance	Modified equidistance
2012	*Nicaragua v Colombia*	ICJ	Equity	Equidistance	Modified equidistance
2012	*Bay of Bengal (Bangladesh/Myanmar)*	ITLOS	Equity	Equidistance	Modified equidistance
2014	*Peru v Chile*	ICJ	Equidistance	Equity	Modified equidistance
2014	*Bay of Bengal (Bangladesh v. India)*	Arbitral Tribunal	Equity	Modified equidistance	Modified equidistance
2017	*Croatia v Slovenia*	Arbitral Tribunal	Equidistance	Equity	*No relevant assessment*
2017	*Ghana/Côte d'Ivoire*	ITLOS	Equidistance	Equity	Modified equidistance
2018	*Costa Rica v Nicaragua*	ICJ	Modified equidistance	Modified equidistance	Modified equidistance
2018	*Timor-Leste v Australia*	Arbitral Tribunal	Equidistance	Equidistance	Modified equidistance
2021	*Somalia v Kenya*	ICJ	Modified equidistance	Equity	Modified equidistance

Table 2 provides a summary and outlines the distribution of the states' and courts' positions before and after 1993, when the ICJ's position on delimitation changed dramatically.[49] Before the ICJ brought equidistance back as *modified equidistance* in 1993 and heralded that

[49] This table includes jurisprudence from the ICJ, ITLOS, and arbitral tribunals.

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the logic of equity would be blended into it, the tribunals tended to predominantly favor equity and relied on modified equidistance only twice. While none of the rulings depended on the equidistance principle, equity-based delimitation methods seemed to fall from the tribunals' favor after 1993. Indeed, in this period nearly all tribunal decisions used modified equidistance while only one relied on equity.

What this picture tells us is that international courts and tribunals favored modified equidistance after 1993, and attempted to rally states around this method, which promised to combine predictability (equidistance) and flexibility (equity).[50]

III. Analysis

1. Trajectory of Change (SCR Framework)

This is an example of norm emergence, solidification as well as norm's subsequent adjustment. For the purposes of this study, we will focus on the norm's subsequent adjustment since it better reflects the informal aspects of norm development. The equidistance principle which was consolidated under the 1958 Geneva Convention got subsequently undermined and then got refashioned in the shape of modified equidistance. The main pathways leading to this outcome were *state action pathway* and *judicial pathway* (alongside multilateral treatymaking efforts for the 1958 Geneva Convention and the 1982 UNCLOS).

Selection Phase

The main impetus to make a claim over continental shelf resources came from the states. States such as the US, the UK, Mexico, and Argentina initially made unilateral declarations claiming their rights to use the resources to be found in the continental shelf area, though their efforts became an issue to be considered under International Law. These efforts in a way created **disturbance** and **created an opening** for the norm's emergence and solidification under the 1958 Geneva Convention. Once the norm got solidified under the

[50] This was also confirmed in Interview 1; Interview 4; Interview 6.

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1958 Geneva Convention, the norm faced serious challenges especially from a central authority: the ICJ.

Salience of the issue was high due to the distributional stakes it involved. The continental shelf is a resource-rich area with a great potential to contain oil and gas. It is also easier for states to extract resources from this area compared to any other part of the ocean, because continental shelves are the shallowest parts of the oceans. While unilateral state action started the trend of sharing the resources of the ocean, judicial interventions were key in determining how to delimit overlapping claims and the rules around continental shelf delimitation. Existing institutions—in particular international courts and tribunals—showed a high degree of **receptiveness and availability**. Especially, the ICJ did not only settle disputes and make occasional interventions about some abstract principles as it does in some other fields. On the contrary, it made a few key interventions that shaped the course of the fate of these delimitation methods. Hence, **the judicial pathway was the most active and most dominant pathway**—alongside multilateral treaty-making processes, which are beyond the scope of this study.

Construction Phase

While the state action path led to the trend of enclosing the oceans and claiming state rights over continental shelves, it was through the judicial pathway that the rules around continental shelf, and in particular the equidistance principle, got refashioned. The ICJ undermined this principle's default status in the 1969 *North Sea* ruling and instead endorsed an alternative principle: *equity*. According to the Court, equidistance was not "the" method; certainly not the custom. It was just a method. Rather, custom required that continental shelf delimitation to be effectuated in light of the principle of equity. While arriving at this conclusion the Court referred to scant existing state preferences (since there were not clear ***existing norms*** around this yet), and in particular the Truman Proclamation. However, the Court overlooked the changing position of the US government that is a signatory to the Geneva Convention that includes equidistance as the default method. The US not only signed and ratified this treaty but also did not put in any reservation challenging the equidistance's default method status or calling for equity in its stead. Hence, while the sources of this ruling can be traced to earlier

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state practice of a great power, it appears that the Court did not trace the changing state practice in this newly emerging field.

The ICJ's *North Sea* ruling influenced state preferences. This alone shows that the Court clearly had an effect. But instead of consolidating around emerging default rule, it endorsed an alternative and created a legitimate ground for states to diverge. After this ruling, the countries preferring equity become an equal majority. Then in 1993 with the *Jan Mayen* ruling, the Court changed heart and decided to bring elements of equidistance and combine them with the equity principle. In a way, it morphed equity and equidistance in the shape of modified equidistance—according to which the delimitation exercise starts with the median line (as equidistance would require) and this line is then adjusted in light of equitable principles. This new approach got more solidified in 2009 with the *Black Sea ruling*, where the Court introduced the three-stage approach—a solution also accepted by the ITLOS in the *Bay of Bengal*.

This norm adjustment and refashioning took place in an ***incremental fashion*** with several twists and turns, which arguably essentially made it difficult for any particular interpretation to prevail. The vagueness and incompleteness of the UNCLOS, the most comprehensive treaty on the law of the sea, did not aggravated this situation. The UNCLOS provision pertaining the continental shelf delimitation are extremely vague and they are limited to mentioning delimitation should ideally lead to equitable outcomes. One could argue that the incompleteness of UNCLOS combined with judicial incoherence and misdirection led to norm's non-consolidated status.

The continental shelf delimitation is a **salient** issue due to its importance in allocating natural resources, and determining how much of an area of economic control a particular state may enjoy. That is to say, the field has a zero-sum dimension: what falls under the jurisdiction of one state is necessarily denied to the other.[51] The field of maritime delimitation makes

[51] An exception is joint development zones, which are meant to be provisional solutions awaiting final delimitation.

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distributional consequences salient, which might encourage states to pick and choose from existing options to maximize their interests. This could explain the difficulties in consolidating around a single delimitation method. The salience of the issue was also raised in the expert interviews carried out as well. Some of our interlocutors described maritime delimitation as "not legal or technical, but a political exercise," and that "law is used selectively to provide arguments for solutions in line with national interest."[52] High-stake nature of this exercise can explain why rational calculations play an important role.

Reception phase

While the ICJ and other courts pointed states towards modified equidistance (which combined the elements of equidistance and equity), when we look at the state position, we do not see any convergence around the modified equidistance method signaled by the courts. The figure below shows how divided state preferences are across these three methods.

Figure 5: *Evolution of state policies regarding the continental shelf delimitation rule among states having expressed a preference for equidistance, modified equidistance, or non-equidistance (equity). The vertical dashed lines indicate the landmark ICJ rulings in 1969 and 1993.*

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[52] Interview 7. *See* also, Interview 10.

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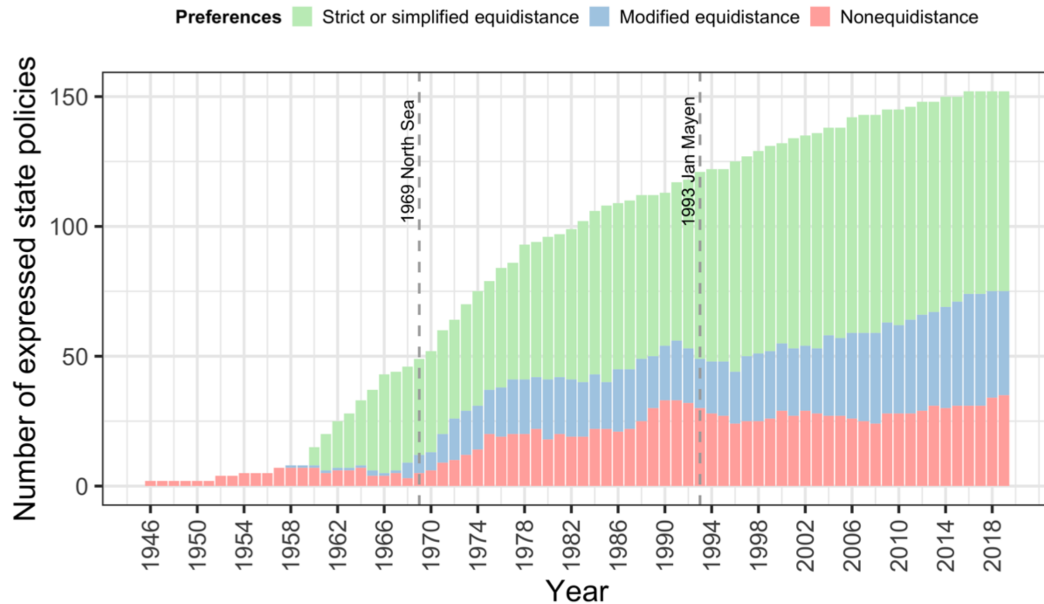

This figure presents the distribution of new policies instead of the state of preferences each year, further confirms that non-equidistance has been through a period of high popularity between the late-1960s and until the early-1990s. The same figure also shows that modified equidistance increased in popularity after the late-1960s and again after the early-1990s. The figure also attests to the persistent popularity of the equidistance method, which lost its dominant position in the late-1960s, but still had some states enacting it almost every year since 1969. Since the early 1990s, the proportion of states preferring strict or simplified equidistance consistently stays at slightly above 50%. Finally, we see no tendency toward a convergence around one single method.

This finding goes against the explanations of the legal experts we interviewed. The majority of the experts we interviewed expected that there is now a predictable yet flexible method of delimitation—referring to the three-stage approach, which was clearly distilled in the 2009 Black Sea ruling though an earlier version of it can be traced back to the 1993 *Jan Mayen*

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ruling.[53] However, when we looked at state practice, there is no convergence around the three-stage approach (or modified equidistance). This leads to the conclusion that the rules around continental shelf delimitation evolved. On the one hand, the popularity of equidistance and equity changed over time; and on the other hand, equidistance merged with equity and resulted in modified equidistance, which got solidified as the three-stage model with the 2009 *Black Sea* decision.

In terms of **powerful state support and opposition**, it is not possible to detect any consistent pattern. This is because while some countries only benefit from one method, some countries benefit from the flexibility of mixing them. For example, while Germany, Turkey, and Kenya benefit from equity, Greece and Norway largely benefit from equidistance, and Australia, Denmark, and the US favor a flexible approach that would allow them to pick and choose from multiple options. Since state preferences largely determine the degree of support for one of these principles, it is hard to detect a strong supporter for any of these methods apart from some staunch benefactors that seek to make maximalist claims—such as Turkey and Greece. As for the big power support, there is not a consistent pattern to follow. For example, the Truman Proclamation refers to equity, as the ICJ acknowledged in its 1969 *North Sea* ruling. However, the Court did not refer to the fact that the US ratified the 1958 Geneva Convention, which lists equidistance as the default method and while doing so it did not add a reservation about this provision (Article 6). As a matter of fact, none of the signatories add a reservation about the principle of equidistance, including Germany (a signatory state but not a state party). It appears that the strongest and most consistent support for first equity and then modified equidistance came from the Court itself.

2. *Characteristics of the study*

Importance of law and courts for the development of the field:

International Law has been important in the inception and subsequent development of extended state jurisdiction in the sea. Most notably, the 1982 United Nations Convention of

[53] Interview 1; Interview 4; Interview 6.

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the Law of the Sea (UNCLOS), considered to be "a constitution for the oceans,"[54] emerged as the product of a long multilateral treatymaking process aimed at formulating comprehensive rules for state rights and obligations in the sea. In addition, there have been frequent interventions by courts and tribunals that were asked to resolve disputes and interpret the state of the law. As such, the law was developed as much by courts as it was through multilateral efforts. This development by the courts also meant that the law of the sea took shape in an incremental fashion, though occasional but significant interventions of judicial bodies.

The court as a de-focalizer:

This case shows the importance of courts on state preferences. However, in this case, the Court endorsed an alternative and created a legitimate ground for states to diverge—instead of consolidating around an emerging default rule. Having alternative principles, equally legitimate, creates opportunities for states to contest: Not to converge, but diverge; not to agree but to contest—something we call as de-focalizing effect.[55]

The characteristics of the field making it difficult for norm consolidation:

The zero-sum nature of the issue makes it a hard case to observe norm consolidation. States have *exclusive* rights over the maritime zones allocated to them at the expense of their neighbors. The possibility for states to obtain more by following an alternative rule undercuts the likelihood that any single rule will emerge as focal.

Costs and Benefits of legal uncertainty and de-focalization:

Beyond normative consequences, this *de-focalization effect* increases the chances of policy divergence and the potential for dispute. We found that courts might have an enduring *de-focalizing* effect, aggravating the heterogeneity of state preferences, and coordination problems. But such heterogeneity might have even bigger consequences in other fields such

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[54] Tommy T. B. Koh, "A Constitution for the Oceans," https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.
[55] Ezgi Yildiz and Yüksel, "The De-Focalizing Effect of International Courts: Evidence from Maritime Delimitation Practices."

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as human rights or the environment. However, legal uncertainty generated by the de-focalization effect might also be beneficial for states, as we see in this example. This is because uncertainty may give them license to pick and choose whatever works best for state interests and actually opens room for contestation and the politicization of the field, which was otherwise becoming technical and quite automatic with the equidistance principle. In a way, we can even argue that, indirectly, court also created grounds for future disputes to emerge in this field. Hence, while de-focalization poses several serious costs to policy coordination and rule consolidation, it might benefit individual states that are better off with having a larger selection of options.

Regime complexity as a consequence of interaction between courts and treaties:

We observe an interesting dynamic between treaties and courts and their interaction may add to regime complexity when each point states to different solutions. As regime complexity scholars have already established, when there are institutions with overlapping mandates, their agendas or outputs might be sometimes incongruent and this may lead to conflict and discordance. This is what we see here as well. Instead of different organizations, we see a clash of different authorities (a treaty and a court). We observe that when courts deviate from treaties in the way the ICJ did here, they might create a rift. This is not a normative claim that the courts should never deviate from treaties. On the contrary, we see that they sometimes might and sometimes they need to and this is how the law actually develops. We only want to shed light on a particular process in which this deviation might create an unexpected layer of complexity with enduring effects.

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Case Study 15

Revising the 'Parallel System of Access' Rule for Seabed Mining

(January – May 2020)

Ezgi Yildiz

I. Typical Story

The International Seabed Authority (ISA) is one of the most important Law of the Sea organizations. Created under the 1982 Convention on the Law of the Sea (UNCLOS) and the 1994 Implementation Agreement, it is mandated to oversee the development and the implementation of the deep seabed mining regime. It also adopts rules and regulations for protecting and preserving marine environment, and regulating large-scale mining operations. The ISA, thus, plays a key role in regulating the distribution of the resources of the seabed, which has been a bone of contention since the early days. There was a significant disagreement between the industrialized nations, which preferred a first-come-first-serve basis licensing system, and the developing countries that favored a strong international regime operating under the principle of common heritage of humankind during the UN Conferences on the Law of the Sea.[1] While the developed countries were primarily interested in accessing to raw materials, the newly independent developing states sought to ensure fair redistribution of resources.[2] What brought these two polarized groups together was a compromise – parallel system of access rule – proposed by Henry Kissinger in 1976.

[1] Isabel Feichtner and Surabhi Ranganathan, "International Law and Economic Exploitation in the Global Commons: Introduction," *European Journal of International Law* 30, no. 2 (July 22, 2019): 541–46, https://doi.org/10.1093/ejil/chz026.

[2] Isabel Feichtner, "Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation," *European Journal of International Law* 30, no. 2 (July 22, 2019): 601–33, https://doi.org/10.1093/ejil/chz022.

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According to this system, contractors would need to propose two areas of exploration of roughly equal value. They would mine one area and the other one would be reserved – this is also known as site-banking.[3] The Enterprise, the independent mining arm of the ISA, would explore and exploit the reserved areas in the name of international community. The profits incurred would be distributed to the UNCLOS state parties. If the Enterprise could or would not mine the area within 15 years, the contractors would then have the right to exploit both areas.[4] Alternatively, these reserved areas may be given to the developing countries that do not possess advance technology or funding to undertake costly exploration missions. That is to say, the designation of reserved areas has been an integral part of the parallel system of access rule and the UNCLOS's vision for redistributive justice.

While the 1982 UNCLOS sketched out the important details of the seabed mining regime, the regime was not immediately operationalized because of industrialized countries' reluctance to be bound by it. The 1994 Implementation Agreement managed to enlist the reluctant developed countries, and bring this legal regime to life. Yet, the Agreement also watered down some of the most progressive provisions of the UNCLOS, and established that states are under no obligation to finance the Enterprise's operations.[5] This effectively meant that there are no available funds for the Enterprise. Despite this impasse, the ISA began its operations and adopted mining regulations for exploration for polymetallic nodules (PMN) in 2000, polymetallic sulphides (PMS) in 2010 and cobalt-rich crust (CRC) in 2012.[6] These mining codes are not purely technical, however. They bring about some adjustment to the

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[3] As of January 2019, a total of 888,218 sq. km area remains available in the reserved area site bank for polymetallic nodules and 3000 sq. km for carbon-rich crusts. For more see, ISA, "Current Status of the Reserved Areas with the International Seabed Authority," *Policy Brief 01/2019.*

[4] Aline Jaeckel, Jeff A. Ardron, and Kristina M. Gjerde, "Sharing Benefits of the Common Heritage of Mankind – Is the Deep Seabed Mining Regime Ready?," *Marine Policy* 70 (August 1, 2016): 201, https://doi.org/10.1016/j.marpol.2016.03.009.

[5] This parallel system runs a problem since the Enterprise does not exist yet. This is mostly because of the wording of the Implementation Agreement. According to the Agreement, states are under no obligation to finance the Enterprises' operations. Moreover, the Enterprise has to conduct its initial operations through joint ventures. The decision to establish the Enterprise could be taken by the Council when/if any contractor's work plan for exploitation is approved or when/if there is an application for a joint venture with the Enterprise.

[6] Aline Jaeckel, "An Environmental Management Strategy for the International Seabed Authority? The Legal Basis," *The International Journal of Marine and Coastal Law* 30, no. 1 (February 17, 2015): 94, https://doi.org/10.1163/15718085-12341340.

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regime and revise the parallel system of access rule. According to the most recent mining codes for PMS and CRC, the ISA gives the applicants two options: (i) providing a reserve area; or (ii) offering the Enterprise a future equity interest (a minimum of 20 percent and, if negotiated well, up to 50 percent) at the stage of exploitation. A clear majority of the contractors for PMS and CRC prefer the equity interest in a joint venture option. Moreover, in 2013, the ISA signaled that they might consider applying this formula for PMN as well. While some scholars view this as a way of bringing the Enterprise to life,[7] others argue that it undercuts the Enterprise's ability to gather knowledge, and the international seabed regime's redistribution goal.[8]

II. Background and Stakes

The Challenger Expedition discovered deep seabed manganese nodules in the 19th century. Later on, pioneers such as the US, Japan, and Germany conducted mining tests to scope out the viability of large-scale operations to recover these minerals.[9] Mining the deep seabed floor has become a reality today with the advancement of robotics and new mining technologies. As the Atlantic reports, "history's largest mining operation is about to begin."[10] With the proliferation of seabed mining explorations, the Pacific Ocean has turned into "the scene of new wild west."[11] Currently, there are 30 contractors – some of them are governments and some of them are private companies – that explore the ocean floor.[12] The majority of these operations are clustered between Hawaii and North America – known as the Clarion-Clipperton Fracture Zone. They look for are some essential minerals such as

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[7] Michael Lodge, "The Deep Seabed," *The Oxford Handbook of the Law of the Sea*, 2015, https://doi.org/10.1093/law/9780198715481.003.0011.
[8] Feichtner, "Sharing the Riches of the Sea."
[9] Keyuan Zou and Clive Schofield, eds., "Exploring the Deep Frontier: Deep Sea Mining Opportunities and Challenges in the Pacific," in *Global Commons and the Law of the Sea* (Boston; Leiden: Brill Nijhoff, 2018), 160.
[10] Wil S. Hylton, "History's Largest Mining Operation is About to Begin," *the Atlantic* (January/February 2020).
[11] Mining Watch Canada, Deep Sea Mining Campaign, London Mining Network, *Why the Rush? Seabed Mining in the Pacific Ocean* (July 2019).
[12] For more, see International Seabed Authority, *Deep Seabed Mining Contractors*, available at https://www.isa.org.jm/deep-seabed-minerals-contractors.

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cobalt, nickel, copper, manganese and some other rare earth minerals. What drives this heightened interest in these deposits is the fact that these minerals are "essential for a wide variety of high-tech, green-tech, emerging-tech, and energy applications."[13] Within this zone there is "six times more cobalt and three times more nickel than all known land-based stores," as well as vast manganese and copper reserves.[14] Studies show that there are 175 billion dry tons of mineable nodules scattered over some 15% of the seabed floor.[15] Deep seabed appears the place to go to meet the demand for collecting minerals to generate low-carbon energy.[16] Mining the ocean floor looks like a good alternative to land-based mining whose environmental and human rights consequences are well documented.[17] However, turning to the deep seabed in the areas beyond national jurisdiction to supply the minerals brings a host of other issues. 65% of the world's oceans is beyond any one nation's jurisdiction, and the large-scale seabed mining operations are to take place in this area. That is, this area is not under the control of any single state, and the resources therein are therefore the common heritage of humankind – to be used and shared equally and fairly by all nations and people. This is also the reason the area beyond national jurisdiction is afflicted with the tragedy of the commons.[18]

The ISA was created in 1996 to prevent such a predicament and govern the resources of the seabed. This organization – located in Kinston, Jamaica – practically oversees an enormous

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[13] James R. Hein et al., "Deep-Ocean Mineral Deposits as a Source of Critical Metals for High- and Green-Technology Applications: Comparison with Land-Based Resources," *Ore Geology Reviews* 51 (June 1, 2013): 2.

[14] Mary Beth Gallagher, "Understanding the Impact of Deep Seabed Mining," *MIT News* (5 December 2019), available at http://news.mit.edu/2019/understanding-impact-deep-sea-mining-1206.

[15] Malcolm Nathan Shaw, *International Law*, 8th ed. (Cambridge: Cambridge University Press, 2018), 469.

[16] World Bank, *The Growing Role of Minerals and Metals for a Low Carbon Future* (June 2017), xii.

[17] For example, in DRC, which supplies more than 40% of the world's cobalt needs, mining has been a source of conflict, human rights violations, and environmental degradation. For more, see Siri Aas Rustad, Gudrun Østby, and Ragnhild Nordås, "Artisanal Mining, Conflict, and Sexual Violence in Eastern DRC," *The Extractive Industries and Society* 3, no. 2 (April 1, 2016): 475–84; Pierre Jacquemot, "The Dynamics of Instability in Eastern DRC," *Forced Migration Review; Oxford*, no. 36 (November 2010): 6–7. See also, Nural Kuyucak, "Mining, the Environment and the Treatment of Mine Effluents," *International Journal of Environment and Pollution* 10, no. 2 (January 1, 1998): 315–25; Zhengfu Bian et al., "The Impact of Disposal and Treatment of Coal Mining Wastes on Environment and Farmland," *Environmental Geology* 58, no. 3 (August 1, 2009): 625–34.

[18] Garrett Hardin, "The Tragedy of the Commons," *Science* 162, no. 3859 (December 13, 1968): 1243–48.

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geographical space, and carries out important governance and regulatory functions. Most importantly, it is mandated to set the parameters of access and benefit sharing arrangements for all parties.[19] Nevertheless, the creation of such an institution did not immediately ensure fair and equitable distribution of resources. This is because the governance of the seabed has been an evolving structure where multiple interests had to be balanced. These are national resource access rights and free market ideology; and common heritage of humankind principle and intergenerational equity. Different iterations of these clusters of interests have resulted in different governance solutions over time.

The mining codes for explorations play a key role in this regard. This is because the way these mining codes are drafted is likely to aggravate or alleviate some of the systemic inequalities embedded in the legal regime for seabed mining. For example, keeping the parallel access rule intact will mean that the developed states, as early movers, would not be able to grab all the best sites.[20] Moreover, the developing countries would benefit from the system more since they could be able to explore the reserved areas without undertaking costly exploration missions. As a result, they may have a better chance in developing their scientific, economic and operational expertise as it is envisaged under Articles 143, 144 and 145 UNCLOS.[21] Nauru, Kiribati, Tonga, Singapore, Cook Islands, and China were all assigned to areas that were reserved by other exploration contractors – a condition of parallel system of access.[22] Such balancing acts might be necessary because the eventual advent of seabed

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[19] Jaeckel, Ardron, and Gjerde, "Sharing Benefits of the Common Heritage of Mankind – Is the Deep Seabed Mining Regime Ready?," 199.

[20] Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge, United Kingdom: Cambridge University Press, 2014), 160.

[21] Jaeckel, Ardron, and Gjerde, "Sharing Benefits of the Common Heritage of Mankind – Is the Deep Seabed Mining Regime Ready?," 201.

[22] Having said that, it should be underlined that two of these six operations are undertaken by Western companies in *Nauru* (Nautilus Minerals Inc, a Canadian company), in *Tonga* (Nautilus Minerals Inc, a Canadian company), *Kiribati* (Kiribati owned and controlled enterprise), in *Singapore* (Ocean Mineral Singapore, a subsidiary of the Singaporean corporation Keppel Corporation Limited), in *Cook Islands* (a state-owned enterprise supported by G-TEC Sea Mineral Resources NV, a Belgian corporation), and in *China* (Chinese company, China Minmetals corporation). It is also impossible to know whether these agreements included technology transfer as there are no minimum standards set by the ISA in this regard. For more, see Jaeckel, Ardron, and Gjerde, "Sharing Benefits of the Common Heritage of Mankind – Is the Deep Seabed Mining Regime Ready?"

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floor mining is likely to create further inequalities between the developing and the developed states. First and foremost, it is the developed countries that has the technology and the know-how to extract these minerals. Therefore, there is no question who will reap the benefits of being the first mover. As early as 1990s, companies from the US, Japan, Canada, the UK, Belgium, Germany, the Netherlands, and France established six major seabed mining consortia and began leading the way. Second, several developing countries' economies rely on land-based mining, hence with seabed mining their competitive advantage will be reduced. For example, one third of global cobalt production comes from DRC alone, whereas Gabon and India each produce 8% of the total manganese used globally.[23] The seabed mining operations might deepen the existing inequalities unless necessary safeguards concerning access, equitable distribution of resources, and transfer of technology are further regulated.

In what follows, I will discuss three different phases of the seabed mining regime that were shaped by diametrically opposed state interests.

III. Chronology

Phase I: The Creation of the Legal Regime for the Area (1966-1989)

Who should control and exploit the resources of the deep seabed that are deemed to be the common heritage of humankind? This question dominated the discussions at the at the Sea-Bed Committee (between 1969 and 1973) and in the course of the Third United Nations Conference on the Law of the Sea (between 1974 and 1982).[24] Because it revealed the irreconcilable differences between the interests of industrialized Western countries and those of the rest. The developed countries preferred a first-come-first serve basis licensing system. The developing countries, on the other hand, preferred exploration and exploitation through an international organization. This way all member states would be equal participants in the regime and share resources in an equitable way.[25]

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[23] Shaw, *International Law*, 469.
[24] Lodge, "The Deep Seabed," 238.
[25] Lodge, 238.

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Legislative efforts for the seabed mining began in the 1960s. In 1966, the Soviet Union and the US agreed to meet with other maritime states to discuss issues such as coastal states' creeping jurisdiction, and passage through international straits.[26] The same year, the UNGA passed Resolution 2172(XXI) on the resources of the sea, which described "the effective exploitation and the development these [ocean] resources" as a way to alleviate economic levels of all nations and in particular the developing countries with 100 to 0 votes.[27] This resolution was proposed by Chile, Colombia, Costa Rica, Denmark, Ecuador, Iceland, Nigeria, Norway, Pakistan, Panama, the Philippines, Peru, Trinidad and Tobago, the United Arab Republic and the USA. As the preparations for the Third UN Convention on the Law of the Sea began in 1967, the question of who would benefit from the resources of high seas became divisive. There were two main blocs: (i) developing states rallied under Group of 77 and later supported by the Socialist and Eastern European coalition, and (ii) industrialized Western states.[28]

First, the newly independent developing states wanted to show that they would not stand-still while a handful industrialized states reap the benefits of the deep sea—quintessential example of global commons.[29] As their experience with colonization was drawing near, they united as a solid block under the Group of 77.[30] This group, formed in 1964, was originally

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[26] David L. Larson, "Deep Seabed Mining: A Definition of the Problem," *Ocean Development & International Law* 17, no. 4 (January 1, 1986): 271–308, https://doi.org/10.1080/00908328609545807.
[27] For more on this see, Feichtner, "Sharing the Riches of the Sea."
[28] There was also small group of landlocked and geographically disadvantaged states. Their strategy was not ideological. They simply threatened to hamper the negotiation process unless they were given access to the resources of the seabed. For more, see Alan Friedman and Cynthia Williams, "The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea," *San Diego Law Review* 16, no. 3 (April 1, 1979): 563.
[29] Jaeckel, Ardron, and Gjerde, "Sharing Benefits of the Common Heritage of Mankind – Is the Deep Seabed Mining Regime Ready?," 198.
[30] Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Bahamas. Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Micronesia, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Palestine, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Qatar, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines,

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composed of 77 states and served as an effective negotiator on behalf of the developing countries.[31] By the time of the Third United Nations Conference on the Law of the Sea, its membership rose to 120 states.[32] During this Conference, the Group 77 pushed for governing the resources of the deep sea in light of the common heritage of humankind principle, and preferred a strong ISA with an operating arm.[33] That meant extracting the resources through the Enterprise and distributing the economic and scientific benefits equally.

The common heritage of humankind principle was first introduced by the Maltese Ambassador Dr. Arvid Pardo, who presented a draft agenda item concerning the deep seabed and its resources at the 22nd Regular Session of the UNGA.[34] Pardo was first to identify the resources of the deep seabed as common heritage of humankind. This idea was subsequently endorsed by the UNGA in two resolutions passed in 1969 and 1970. The first of these was the Resolution 2574D (XXIV) – also known as Moratorium Resolution – which called for moratorium on the unilateral activities on the seabed floor until an international regime is

Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, United Arab Emirates, United Republic of Tanzania, Uruguay, Vanuatu, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, and Zimbabwe.

[31] Friedman and Williams, "The Group of 77 at the United Nations," 555.

[32] Stephen Vasciannie, "Part XI of the Law of the Sea Convention and Third States: Some General Observations," *The Cambridge Law Journal* 48, no. 1 (1989): 85–97.

[33] For more, see Feichtner, "Sharing the Riches of the Sea."

[34] Maltese Request, 22 U.N. GAOR, 2 Annexes (Agenda Item 92) 1, U.N. Doc. A/6695 (1967).

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established. This resolution adopted by 62[35] to 28[36] votes with 28 abstaining.[37] While the Group 77 supported this resolution, the Western countries and the Socialist bloc was against it. Calling out the developing countries as "paper majority," the major powers such as Australia, Canada, France, Japan, the Netherlands, Norway, the Soviet Union, the UK, and the US opposed this resolution.[38] The Resolution 2749 (XXV) –"Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction" – defined the resources of the seabed as common heritage of humankind. This resolution attracted a more uniform support with 108 states its favor and none against it.[39] Although the US voted in its favor, it then announced that the UNGA resolutions are only recommendations. In order to ensure that it is not bound by it, the US also underlined that it had voted against Resolution 2574D (XXIV) earlier, and that exploiting resources of the deep sea was "high sees freedom" under the 1958 Convention on the High Seas.[40]

Despite such opposition from the US and the Socialist bloc's initial lack of support, the Group 77 worked towards presenting common heritage of humankind principle as a "moral and legal obligation" binding upon the international community as whole.[41] Associating this

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[35] In favor: Afghanistan, Algeria, Argentina, Barbados, Bolivia, Brazil, Burundi, Central African Republic, Ceylon, Chad, Chile, Colombia, Congo (Brazzaville), Congo (Democratic Republic), Costa Rica, Cyprus, Dahomey, Dominican Republic, Ecuador, Ethiopia, Finland, Guatemala, Guinea, Guyana, Haiti, Honduras, India, Iraq, Jamaica, Jordan, Kenya, Kuwait, Lesotho, Malaysia, Maldives, Mali, Mauritania, Mauritius, Mexico, Morocco, Nepal, Nicaragua, Niger, Pakistan, Panama, Paraguay, Peru, Rwanda, Singapore, Somalia, Southern Yemen, Sweden, Thailand, Trinidad and Tobago, Tunisia, Uganda, United Republic of Tanzania, Uruguay, Venezuela, Yemen, Yugoslavia, Zambia.

[36]Against: Australia, Austria, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Denmark, France, Ghana, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Malta, Mongolia, Netherlands, New Zealand, Norway, Poland, Portugal, South Africa, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

[37] Abstaining: Burma, China, Cuba, El Salvador, Greece, Indonesia, Iran, Israel, Ivory Coast, Laos, Lebanon, Liberia, Libya, Madagascar, Malawi, Nigeria, Philippines, Romania, Saudi Arabia, Sierra Leone, Spain, Sudan, Swaziland, Syria, Togo, Turkey, United Arab Republic, Upper Vo1ta.

[38] Dennis W. Arrow, "The Customary Norm Process and the Deep Seabed," *Ocean Development & International Law* 9, no. 1–2 (January 1, 1981): 23, https://doi.org/10.1080/00908328109545656.

[39] There were 14 abstentions.

[40] Larson, "Deep Seabed Mining," 274–75. The 1958 Convention on High Seas does not specifically mention that enjoying the resources of the seabed is a high see freedom.

[41] Larson, 275.

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principle with the debates on the legal regime governing the resources of the deep sea, they wanted to stake a claim that developing countries have equal rights to enjoy "the scientific and economic benefits" of exploring and exploiting the resources of the deep sea.[42] Group of 77 acted as a solid block during the negotiations of the UNCLOS, which served as a fertile ground to test their ideals for the New International Economic Order (NIEO).[43] Moreover, the Socialist block switched sides at the Seventh Session convened in 1978 and joined the Group 77.[44]

Second, on the other end of the spectrum, there stood the Western countries with seabed mining capacity (such as the US, the UK, Japan and Germany), as well as those that involved in seabed mining consortia (e.g. Belgium, France, Italy, and the Netherlands). Other technologically advanced, richer countries such as Canada also supported this group.[45] But this group was a "loose coalition at the negotiating table" driven by self-interest.[46] The US, in particular, was against the creation of the ISA with powers to regulate since it firmly believed that the market forces could regulate themselves.[47] Moreover, the US opposed to mining through the Enterprise to the exclusion of others. They preferred a system, whereby the most competent and equipped states would exploit the resources of the seabed mining on a first come first serve basis. Their concern was that the seabed mining regime was built around the common heritage of humankind ideal at the expanse of free market ideology.[48]

Indeed, two sides upheld irreconcilable positions and there was a visible tension between the ideals of common heritage of humankind and free market ideology. The US Secretary of

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[42] Jaeckel, Ardron, and Gjerde, "Sharing Benefits of the Common Heritage of Mankind – Is the Deep Seabed Mining Regime Ready?," 199.
[43] Elizabeth Borgese, "The New International Economic Order and the Law of the Sea," *San Diego Law Review* 14, no. 3 (May 1, 1977): 584. See also, Allan G. Kirton and Stephen C. Vasciannie, "Deep Seabed Mining Under The Law Of The Sea Convention And The Implementation Agreement: Developing Country Perspectives," *Social and Economic Studies* 51, no. 2 (2002): 63–115.
[44] Arrow, "The Customary Norm Process and the Deep Seabed," 35.
[45] Elizabeth Riddell-Dixon, "State Autonomy and Canadian Foreign Policy: The Case of Deep Seabed Mining" *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 21, no. 2 (June 1988): 297–317, https://doi.org/10.1017/S0008423900056316.
[46] Friedman and Williams, "The Group of 77 at the United Nations," 567.
[47] Larson, "Deep Seabed Mining," 276.
[48] Shaw, *International Law*, 471.

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State Henry Kissinger proposed a compromise in 1976, the so-called Kissenger's "parallel system of access" – according to which to be qualified for a mining license, a sponsoring state would need to offer a reserved area to be explored and exploited by Enterprise in the name of developing countries. Kissinger's proposal brought a truce to the fierce debates and became accepted as the basis of the legal regime of seabed mining under Article 153 of UNCLOS. That is to say, the legal regime governing the resources located within the area beyond national jurisdiction (the Area), under Part XI of the 1982 UNCLOS, was crafted as a compromise between the interests of the developing and developed states. Although this proposal eased tensions, it did not provide concrete plans concerning other controversial details such the financing of the Enterprise or its access to technology.

Diplomatically speaking, Part XI was a victory for the Group of 77, while Part III – over straits and international navigation – was a success story for the US and other maritime powers.[49] Indeed, the US was willing to make compromises over seabed – Kissinger's proposal case in point – in order to secure transit passage through international straits. However, the Reagan administration following Gerald Ford's presidency, backtracked from this position. The Reagan government characterized Part XI as "fundamentally flawed and cannot be corrected by procedural rules and regulations."[50] The US and its Western allies (primarily, the UK, France, Germany, Italy and Japan) refused to ratify the treaty and insisted that Part XI would not be binding on non-signatories.[51] They either withhold signature or express political reservations about the Part XI.[52]

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[49] Larson, "Deep Seabed Mining," 272.

[50] Larson, 273.

[51] See, e.g., Statement by the USA in UNCLOS III, Official Records, Vol. IX, p. 104; Statement by the USA. in response to Statement by the Chairman of the Group of 77, UN Doc. A/CONF. 62/89, ibid.. Vol. XII, p. I 11 ; UK: Statement by John MacGregor, Parliamentary Undersecretary of State, Department of Industry, H.C. Debs., Vol. 3, cols. 842-9, 29 April 1981, Italy: Statement by the Italian delegation to the UNCLOS III, dated 7 March 1982, in UN Doc. A/CONF. 62/WS 37; Federal Republic of Germany: Statement dated 9 March 1982, ibid.; France: Statement in UNCLOS HI, Official Records, Vol. IX, p. 106; Japan: Statement, ibid., Vol. XIV, p. 7; recent assertions of the Western position in the General Assembly are to be found in UN Doc. A/40/PV.110 (1985) and UN Doc. A/41/PV.58).

[52] David Anderson, "Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment," *ZaöRV* 55 (1995): 275–89.

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While they were protesting, state parties and signatories to the UNCLOS attempted to prepare the ground for the UNCLOS's entry into force. They established the Preparatory Commission for the ISA and the ITLOS (PrepCom) which governed the interim regime. The PrepCom met twice a year between 1983 and 1994.[53] While for state parties this was a way to transition, the expectation of the non-signatories was that the PrepCom would put "significantly moderating gloss upon the terms of the Convention."[54] The PrepCom took important steps. For example, in order to protect states that had made large investments in the seabed, the PrepCom began administrating a pioneer investor regime, whereby states could apply for exploratory licenses following parallel system of access rule.[55] The PrepCom registered 7 pioneer investors: China, France, India, Japan, Korea and Russia as well as the Interoceanmetal Joint Organization (a concortium).[56] This mean that these countries would have an automatic right to mine once the treaty enters into force. Yet, this scheme did not entice countries like the US, the UK, and Germany. Initially the UNCLOS was only endorsed by the developing countries – Iceland being the only developed country among the first fifty states to ratify the UNCLOS.[57]

Unconvinced by this scheme, several Western states initiated the so-called reciprocating states regime and passed domestic legislation allowing seabed mining outside of the international legal regime.[58] The list of countries included the US (1980), the UK (1981), West Germany (1981), the Soviet Union (1982), Japan (1983).[59] In addition, France,

[53] Michael Wood, "International Seabed Authority: The First Four Years," *Max Planck UNYB* 3 (1999): 174.
[54] E. D. Brown, "Seabed Mining: From UNCLOS to PrepCom," *Marine Policy*, Special Issue International organizations in marine affairs, 8, no. 2 (April 1, 1984): 152, https://doi.org/10.1016/0308-597X(84)90089-7.
[55] Moritaka Hayaski, "Registration of the First Group of Pioneer Investors by the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea," *Ocean Development and International Law* 20, no. 1 (1989): 2.
[56] These contracts went into effect either in 2001 and 2002.
[57] Anderson, "Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment," 276.
[58] For more on this, see, Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, 147–211.
[59] U.S.A.: Deep Seabed Hard Mineral Resources Act, 1980, ILM, Vol. 19 (1980), p. 1003; U.K.: Deep Seabed Mining (Temporary Provisions) Act, 1981, ILM, Vol. 20 (1981), p. 1228; F.R.G.: Act of Interim Regulation of Deep Seabed Mining, 1980, ibid., p. 393; France: Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, 1981, ibid., Vol. 21 (1982), p. 808; Japan: Law on Interim Measures for Deep

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Germany, the UK and the US signed the 1982 Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed.[60] In 1984, Belgium, France, Germany, Italy, Japan, the Netherlands, the UK and the US issued the Provisional Understanding Regarding Deep Seabed Mining – to prevent overlapping claims.[61] For a while it looked possible that there would be two parallel regimes.[62] This was immediately challenged by the Group 77 and the Socialist states, however. They collectively described this move as "wholly illegal" and stated that the ISA was the "only competent body to manage the deep sea-bed and authorize activities for exploration and exploitation therein."[63] In the meantime, some countries, namely the Soviet Union and several Western allies, began having overlapping claims in the Clarion–Clipperton Zone. They overcame this standstill by the Midnight Agreement between Belgium, Canada, Italy, the Netherlands and the Soviet Union (UNCLOS signatories) concluded on 14 August 1987. The parties to this agreement also exchanged of notes with the US, the UK, Germany (non-signatories to the UNCLOS). The Soviet Union managed to get the rest agree to not to bloc PrepCom's licenses, but it conceded that the parties would not support mining operations over the areas partitioned under the Midnight Agreement. While the Midnight Agreement brought a truce, it did not solve the fundamental disagreements.[64] The fate of Part XI and the 1982 UNCLOS would be hanging in balance until the mid-1990s.

Phase II: Implementation Agreement and afterward (1989-2000)

Seeing the developed countries' unwillingness to sign the UNCLOS, the Group 77 signaled that they were willing to negotiate to ensure the universal recognition of the treaty.[65] The UN

Sea-bed Mining, 1982, ibid., Vol. 22 (1983), p. 102. For more see, Vasciannie, "Part XI of the Law of the Sea Convention and Third States," 86.

[60] Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Seabed, 1982, ibid., Vol. 21 (1982), p. 950.

[61] Provisional Understanding Regarding Deep Seabed Mining, 1984, ibid., Vol. 23 (1984), p. 1354. For more see, Shaw, *International Law*, 471.

[62] Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, 167.

[63] Larson, "Deep Seabed Mining," 281.

[64] Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, 173–74.

[65] Anderson, "Resolution and Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea: A General Assessment," 276.

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Secretary General conveyed the consultations that began in 1990, under the leadership of Señor Perez de Cuellar and his successor Boutros Ghali. What gave momentum to the consultations was a proposal made by the Boat Group composed of several Group 77 states and some industrial states. The Boat Group attempted to remedy some of the problems that industrialized states had identified without changing the object and the purpose of the treaty in UNGA Resolution 48/263 "Agreement Relating to the Implementation of Part XI of UNCLOS." The following states co-sponsored this resolution in 1994: Antigua and Barbada, Argentina, Australia, Austria, Bahamas, Belgium, Benin, Botswana, Brazil, Cameroon, Chile, China, Denmark, Fiji, Finland, France, Germany, Greece, Granada, Guinea Bissau, Guyana, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Luxembourg, Malta, Marshall Islands, Micronesia, Myanmar, Namibia, Netherlands, New Zealand, Norway, Papua New Guinea, Portugal, Republic of Korea, Samoa, Senegal, Seychelles, Singapore, Solomon Islands, Spain, Sri Lanka, Sweden, Trinidad and Tobago, the UK, United Republic of Tanzania, USA, Uruguay, Vanuatu. This resolution was accepted with 121 to 0 vote and 7 abstentions (Colombia, Nicaragua, Panama, Peru, Russian Federation, Thailand, Venezuela).[66]

Following Resolution 48/263's success, the 1994 Implementation was opened for signature at the UNGA. The 1994 Implementation Agreement which overcame the impasse between the developing and developed states entered into force on 28 July 1996.[67] The legal regime governing the resources of the seabed, thus, became finally operational in 1996. Its principle organs are the Assembly (composed of representatives from all member states), the Council (the executive organ, composed of 36 members elected by the Assembly), the Secretariat and the Enterprise (operational arm of the ISA).[68] The Council is mandated to establish policies to be pursued by the ISA. The Council has two organs: Economic Planning Division, and

[66] 99th to 101st Plenary Meetings of the 48th Regular Session.
[67] The chronological list of ratification for the 1982 UNCLOS and the 1994 Implementation Agreement can be found at https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement%20relating%20to%20the%20implementation%20of%20Part%20XI%20of%20the%20Convention
[68] For more on the ISA, see Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012), 174–75.

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Legal and Technical Commission (a body of experts specialized in ocean mining or related fields; in charge of formulating rules, regulations, procedures related to exploration and exploitation of mineral resources, and the protection of marine environment). Finally, the Secretariat is composed of a Secretary General and staff members, who are neutral and independent civil servants tasked with organizing the day-to-day operations of the ISA.

According to Article 2 of the Agreement, the 1982 UNCLOS and the 1994 Implementation Agreement were to be interpreted and applied as a single instrument. What is more, the states could only be bound by the Agreement when they become parties to the UNCLOS. Although these two instruments were presented to be complementary, the Implementation Agreement brought along a host of changes to the UNCLOS, which favored the position of the developed states. For example, the Agreement increased the role of Council over the Assembly and secured a seat for the country with the largest GDP at the Council. In addition, the Implementation Agreement slowly but surely introduced the free market logic into the operation of the legal regime of seabed mining. The most notable influence of market logic can be seen in the provisions concerning technology transfers. Under Article 144 of the UNCLOS, the ISA and states are expected to undertake (a) “programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;” and (b) “measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.” This changed with the Implementation Agreement. Under Section 5 1(a) of the Agreement, “The Enterprise, and developing States wishing to obtain deep seabed mining technology, shall seek to obtain such technology *on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements*. The Implementation Agreement also proposes under Section 2(2) that the initial operations of the Enterprise are to be carried *out through joint-ventures, and the contractors have a right to refuse to offer joint-venture initiatives to the Enterprise*. These refinements practically modified the original regime to the developed countries’ favor. It also

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eliminated some controversial issues, such as the compulsory technology transfer, and the subsidization of the Enterprise.

Yoshifumi Tanaka describes the changes brought by the Implementation Agreement as follows: First, due to the concerns for cost-effectiveness, the Enterprise "lost its original advantageous position."[69] Second, market-oriented approaches began to dominate the regime, which no longer applies production quota, nor obliges technology transfer to the Enterprise or the developing countries. The revised regime began issuing contracts on a reduced fee and disposed of the generous economic adjustment assistance established under the UNCLOS. Third, the Council became a more important body and with the changes introduced, Russia and the US – when it is a party, if not one of the Western allies such as the UK, Italy and Japan – became its permanent members.[70] Moreover, the weighted voting introduced with the Implementation Agreement became more favorable to the developed states.[71] Four, the Implementation Agreement ensured that rules for a Review Conference on Part XI – as it was originally stipulated under Article 155 the UNCLOS – would not apply. Having enumerated these changes, Tanaka underlines that the common heritage of humankind is still the "cardinal principle governing the activities in the Area."[72] However, R. P. Anand, a proponent of NIEO, argues that the Implementation Agreement "'mutilated' the common heritage principle," since it ensured that the seabed's exploitation in commercial

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[69] Tanaka, 179–82.

[70] Section 3, 15(a) "Four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent in value terms of total world consumption or have had net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area, *provided that the four members shall include one State from the Eastern European* region having the largest economy in that region in terms of gross domestic product *and the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product,* if such States wish to be represented in this group."

[71] In addition to what Section 3, 15(a) stipulates, the Council will include the following states: four from among the eight largest investors in the Area, four from among the major net exporters of minerals from the Area, six from developing countries representing special interests, and eighteen seats elected on the basis of equitable geographical representation. Moreover, each group will be treated as a separate chamber. The voting scheme operates on the two-thirds majority rule, yet it also stipulates that no decision may be carried out if such decisions are opposed by majority of states voting in different chambers. This essentially implies while a chamber of 4 developed countries may block a Council decision, it will take all developed states with special interests or eleven of them to block vote to create a similar impact. For more see, Kirton and Vasciannie, "Deep Seabed Mining Under the Law Of The Sea Convention And The Implementation Agreement."

[72] Tanaka, *The International Law of the Sea*, 184.

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terms in disregard of the broader community's interests.[73] As we will see in the next section, mining codes could further chip away at this principle.

Phase III: ISA and Mining Codes for Explorations (2000-present)

The ISA became fully operational in June 1996 after its first Secretary General, Satya Nandan a former diplomat from Fiji, was elected in March 1996. Satya Nandan used to be the beloved Chairman of the Group 77, and a strong opponent of unilateral ocean mining.[74] Under his leadership the ISA began devising rules and regulations for exploring and exploiting deep seabed minerals. The ISA started with developing mining codes for polymetallic nodules (PMN) – most known the minerals that are also easiest to explore and exploit. The Legal and Technical Commission presented the Draft Regulations on Prospecting and Exploration for PMN in the Area during the Fourth Session in Kingston (16-27 March 1998). During the same session in August of 1998, the Russian delegation reminded the Assembly of the existence of other lesser-known minerals and requested the ISA to adopt rules concerning polymetallic sulphides (PMS) and cobalt-rich crusts (CRC).[75]

While the Assembly approved the mining codes for PMN on 13 July 2000, the ISA had already began considering how to develop regulations for PMS and CRC. In June 2000, the ISA convened a workshop on different mineral resources in the Area with more than 60 participants from 34 countries. While some of the participants had academic and scientific background, some others represented governments, companies, or international organizations.[76] The workshop participants discussed the scientific and environmental concerns as well as the commercial viability of exploiting PMS and CRC. In particular, the workshop helped uncover a few points about these lesser known minerals: First they are more difficult to prospect and estimating their value requires costly drilling operations due to their

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[73] Qtd. in Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, 175.
[74] For more, see Arrow, "The Customary Norm Process and the Deep Seabed."
[75] Secretariat, Considerations relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich crusts in the Area, *ISBA/7C/2*, Seventh Session (May 2001)
[76] ISA, Proceedings Workshop on Minerals Other than Polymetallic Nodules of the International Seabed Area, 26-30 June 2000, Kingston, Jamaica, *ISA/04/01* (2004).

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three-dimensional nature. Second, it is harder to identify two sites of equal value, which makes the designation of a reserved area a harder endeavor.

The workshop proceedings reveal that the ISA Secretary General questioned whether the parallel system would work for PMS and CRC at the outset, and signaled that "their commercialisation will require a certain amount of flexibility in rule making."[77] The Secretary General Nandan, also underlined that the alternative ways to prospect and explore these minerals should serve the idea of common heritage of humankind and ensure the developing countries' participation.[78] He, then, added that when they discover mineable deposits, "some kind of equity for the Authority (carried interest) in the mining operations would have to be agreed upon."[79] In a later discussion session, Nandan asked to the participants "what equity or interest in the operation should be made available to the Authority," and how the new codes should be drafted.[80] What appeared clear in this discussion session was that investors would be vary of financing costly prospecting operations for PMS and CRC without the confirmation that they will have exclusive right over a given territory. The fear of sunk cost would prevent them into prospecting and exploring PMS and CRC. Another point they made was that these minerals can also be found within the Exclusive Economic Zones (EEZ) and that this should compel the ISA to devise competitive rules.[81]

The Secretariat presented the outcomes of this workshop in a report issued during the Seventh Session of the Authority in 2001.[82] The Secretariat made a case for devising different

[77] Satya Nandan, "Foreword," in Proceedings Workshop on Minerals Other than Polymetallic Nodules of the International Seabed Area, 26-30 June 2000, Kingston, Jamaica, *ISA/04/01* (2004), 1.
[78] ISA, Proceedings Workshop on Minerals Other than Polymetallic Nodules of the International Seabed Area, 50.
[79] ISA, Proceedings Workshop on Minerals Other than Polymetallic Nodules of the International Seabed Area, 50.
[80] ISA, Proceedings Workshop on Minerals Other than Polymetallic Nodules of the International Seabed Area, 473.
[81] This discussion was anonymized in the final proceedings of the workshop. ISA, Proceedings Workshop on Minerals Other than Polymetallic Nodules of the International Seabed Area, 474-482.
[82] ISA Secretariat, Considerations relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area, *ISBA/7/c/2* (29 May 2001).

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regulations for PMS and CRC due to two reasons. First, since PMS and CRC have a three-dimensional nature "no two occurrences are the same and there may be substantial variation in grade of deposits even within one seamount. *It would be impossible to determine two sites of equal estimated commercial value without substantial and costly exploration work on the part of the would-be contractor."*[83] The Secretariat, thus, underlined the impractically to implement site-banking for PMS and CRC and proposed the following:

> It was suggested that, instead of providing the Authority with a reserved area, which the Authority might never be in a position to utilize in any event, another possible option would be to require the contractor to give the Authority, through the Enterprise, the right of first refusal to enter into a joint venture with the contractor, subject to certain specified terms and conditions. It was considered that equity participation in this manner would constitute a mechanism to avoid monopolization and ensure participation by the international community in the development of the common heritage.[84]

Second, the Secretariat brought everyone's attention to the fact that there is no competitive advantage to exploit these minerals in the Area, since it is easier to discover them in areas under national jurisdiction. Indeed, studies established that they are more likely to be in the EEZ.[85] In order to encourage prospecting and not to discourage long-term investment, the Secretariat felt the need to offer favorable terms to the investors. This way the ISA could generate interest in exploration in the Area and still be competitive in accordance with free market logic.[86] The Secretariat also underlined that "the Convention itself requires the Authority to promote the development of the resources of the Area, which are the common heritage of mankind" invoking its other constitutive logic. Yet, it appears that the Authority's concern over its competitiveness might have overshadowed its dedication to common

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[83] ISA Secretariat, Considerations relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area, p.4, para 12.
[84] ISA Secretariat, Considerations relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area, 4, para 12.
[85] ISA, "Polymetallic Massive Sulphides and Cobalt-Rich Ferromanganese Crusts: Status and Prospects," *ISA Technical Study: No. 2* (2002).
[86] ISA Secretariat, Considerations relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area, 4-5 para 13.

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heritage principle. As a result, instead of pondering upon inter-generational equity – whereby the benefits of these resources may be left to the future generations – the Authority chose to consider flexible alternatives to site-banking. [87] Taking this pragmatic approach one step further, the Secretariat proposed a template mining code, whose provisions concerning the equity interests in a joint venture option were replicated in the mining codes developed for PMS and CRC in 2010 and 2012, respectively.[88]

The Legal and Technical Commission of the Council took up from where the Secretariat left off in 2002.[89] The Commission assigned Ms. Frida Maria Armas Pfirter (Argentinian Public International Law Professor), Mr. Arne Bjørlykke (Norwegian Geogolist), Mr. Baïdy Diène (Senegalese Geological Engineer), Mr. Yuwei Li (Chinese Geologist who held government positions in China), and Ms. Inge Zaamwani (Namibian business woman) to start the research for devising rules for exploring PMS and CRC.[90] This diverse group of experts prepared a draft based on the Secretariat's proposal in 2004.[91] This draft was discussed by the Council during its Eleventh Session in 2005, and then again in 2006, where two technical experts, James Hein (American Geologist) and Charles Morgan (Australian Geoscientist), provided oral briefing. While different drafts circulated between the Secretariat and the Legal and Technical Commission, none of the parties raised specific objections to the equity interest in joint venture option as an alternative to site-banking. Other issues such as the size of the area to be allocated for exploration, and the establishment of a progressive fee system, or environmental guidelines appeared to be more controversial. The Russian delegation was the only one to write up a proposal with requested changes. Yet, the 2006 Russian proposal did not touch on the equity interest option.[92] Similarly, France, Honduras, Germany, and Spain

[87] ISA Secretariat, Considerations relating to the regulations for prospecting and exploration for hydrothermal polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area, 7, para 25.
[88] According to plagiarism check software the provisions about equity interests in these three sets of documents matched at 87%.
[89] ISA, Report of the Chairman of the Legal and Technical Commission on the work of the Commission during the 8th session of the Authority, *ISBA/8/C/6* (13 August 2002)
[90] ISA, Report of the Chairman of the Legal and Technical Commission on the work of the Commission during the ninth session, *ISBA/9/c/4* (1 August 2003).
[91] ISA, Draft regulations on prospecting and exploration for polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area, *ISBA/10/C/WP/1* (24 May 2004).
[92] Proposal from the Russian Federation, *ISBA/12/c/6* (8 August 2006).

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made suggestions about other issues and requested that since the scientific knowledge is insufficient, "the regulations should contain a review clause in the light of improved knowledge."[93]

The Council reviewed another draft in 2007, where Mark Hannigton (Professor of the Dynamics of the Ocean Floor) presented models for exploring PMS in the Area.[94] The Council finally adopted regulations for PMS on 6 May 2010.[95] The Assembly followed suit on 15 November 2010.[96] The Council then adopted regulations for CRC on 26 July 2012, and Assembly approved these regulations on 22 October 2012.[97] In 2013, the Council requested the Legal and Technical Commission to align the mining codes – that is to include the joint-venture option in the mining codes for PMNs. Yet, the Commission turned its attention to exploitation codes as early as 2013 and marine biodiversity in the areas beyond national jurisdiction (BBNJ) as of 2016.

Then in 2016, the Council reiterated its request and the Commission called upon the Secretariat to prepare a note explaining legal and policy implications of the alignment of the mining codes. In this note, the Secretariat first explained that the terms and conditions of the equity interest option as well as its benefits for the Enterprise are still not fully clarified.[98] The Secretariat also reminded that the reason why the mining codes for PMS and CRC involve an alternative to site-banking is due to their different nature, which makes it harder to prospect two areas of equal commercial value. Yet, the designation of a reserved area is a

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[93] ISA, Statement of the President on the work of the Council at the thirteenth session, ISBA/13/c/7 (19 July 2007),
[94] ISA, Review of outstanding issues with respect to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area, *ISBA/14/c/4* (8 April 2008).
[95] ISA, Decision of the Council relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area, *ISBA/16/c/12* (6 May 2010).
[96] ISA, Decision of the Assembly of the International Seabed Authority relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area, *ISBA/16/A/12/Rev.1* (15 November 2010).
[97] ISA, Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, *ISBA/18/A/11* (22 October 2012).
[98] ISA, Issues related to the possible alignment of the Authority's regulations on prospecting and exploration concerning the offer of an equity interest in a joint venture arrangement, *ISBA/24/LTC/4* (6 February 2018), p. 2 §6.

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relatively easier when it comes to PMN. Underscoring that site-banking is the cornerstone of the mining regime under the UNCLOS and the Implementation Agreement, the Secretariat clarified that "the reserved areas and the resources contained therein represent the core financial asset available to the Enterprise in the future and a key element in giving effect to the principle of the common heritage of mankind."[99] It, then, added that "the designation of reserved areas for exploration for or exploitation of polymetallic nodules by the Enterprise or in association with developing States enables direct participation in the development of mineral resources by the Authority or developing States, or entities sponsored by them."[100] The Secretariat also expressed concerns over contractors' preference for the equity interest, which effectively could mean fewer reserved areas and fewer opportunities for the developing states and the Enterprise to explore and collect data. Equally problematic consequence would be the unfair treatment of the contractors that had already committed costlier site-banking option. Reminding the Commission that the drafters tailored the rules around site-baking with PMN in mind, the Secretariat cast doubts on aligning the mining codes without an official amendment.[101] What can be deduced from this note is that the Secretariat does not consider the alignment a technical issue; rather a substantial revision which requires an amendment. It remains to be seen how the Commission and the Council will proceed.

What would aligning the mining codes mean for the regime? Looking at the current trajectory of exploration contracts, we can see a clear majority of the contractors prefer the joint-venture option over site-baking. This essentially means that if the regulations for PMNs are adjusted, there may not be any sponsoring state preferring reserved areas, as the Secretariat rightly warned. Site-banking is a condition for the parallel system of access – which is the condition for realizing the common heritage principle and building developing states' capacity under the UNCLOS.[102] Making it optional for all minerals obstructs this vision. Moreover, these

[99] Ibid., p.4 §13.
[100] Ibid., p.4 §14.
[101] Ibid., p.6, §25.
[102] Jaeckel, Ardron, and Gjerde, "Sharing Benefits of the Common Heritage of Mankind – Is the Deep Seabed Mining Regime Ready?," 201.

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changes remodel the Enterprise's role as merely "a silent partner,"[103] rather than "an independent mining entity."[104] However, it is also possible to imagine that replacing the site-banking with the equity interest in a joint-venture option could present the Enterprise with "a more secure revenue stream." [105] According to the mining codes, the Enterprise would receive 10 % as soon as the commercial exploitation begins – while the rest comes in when the contractor recovers its costs. Hence, the equity interest in a joint venture option might provide some monetary compensation – although it is not clearly set how this money would be redistributed to the parties. Therefore, while site-banking appears to be more promising when it comes to realizing fair distribution of scientific and economic benefits, the equity interest option might help with the regime's immediate liquidity problem.

IV. Analysis

1. *Trajectory of the case (SCR framework)*

This a case of norm adjustment. According to the legal regime for seabed mining created under 1982 UNCLOS and 1994 Implementation Agreement, states that wished to explore seabed would need to offer a reserved area. Yet, the site-banking rule became an alternative to offering an equity interest in joint venture by means of the mining codes for PMS and CRC introduced in 2010 and 2012, respectively. Concerning the changes introduced via mining codes, a pathway that is particularly dominant is the *bureaucratic pathway*. The *multilateral pathway* is also engaged to a lesser extent. This is also an example of how a primary norm gets changed through secondary law making within an institution.

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[103]Nautilus Minerals, a Canadian mining company, submitted a proposal for a joint venture with the Enterprise in 2012, yet the Council decided that the Enterprise is not ready to undertake such a mission. Later in 2018, Poland expressed a similar interest. Moreover, the groups of African, Latin American and the Caribbean States underlined that exploitation regulations cannot be realized "without independent inputs from the Enterprise Feichtner, "Sharing the Riches of the Sea."
[104] Jaeckel, Ardron, and Gjerde, 201.
[105] Jaeckel, Ardron, and Gjerde, 201.

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Selection phase

The legal regime of seabed mining became fully operationalized with the 1994 Implementation Agreement. In a way, the Agreement created the ***opening*** for mining codes to be developed –the first of which was for PMN. The suggestion to create mining regulations for PMS and CRC was made by Russia in 1998. ***Russia was the change agent*** that activated the ISA. The ISA, as the only institution with an official mandate to adopt mining codes, and it was completely open to this proposal (***institutional availability/high institutional receptiveness***). When it comes to issue characteristics, parallel system of access rule was ***highly salient*** during the negotiations for the UNCLOS and then the Implementation Agreement. This is due to this rule's implications on resource distribution. However, we can argue that **the issue's salience diminished** when it was treated in mining codes. This is because drafting of mining codes is a highly technical matter; as a result, politicians are likely to defer to the scientists and specialists. Moreover, the broader interpretive community and the civil society groups are not particularly interested in this change attempt due its technical nature.

Construction phase

Once activated the ISA began fully dedicating itself to the matter. The ISA's drafting efforts benefited from the input provided by scientific community, companies and government agents who attended the 2000 workshop in Kingston. When it comes to revising the parallel system of access rule, the ISA Secretariat played the most important role. The idea of the equity interest in a joint venture option was first proposed by the Secretariat as early as 2001. The Legal and Technical Commission which then on assumed the responsibility of drafting mining codes for PMS and CRC replicated the Secretariat's template in 2004. The equity interest idea was rapidly adopted – albeit its formal recognition took nearly a decade. Therefore, we can characterize ***the pace of change as sudden***. The actors situated on ***the bureaucratic path,*** namely the Secretariat and Legal and Technical Commission (a legislative body of the Council, composed of scientists, and practitioners specialized in mining/ocean mining) carried out the construction process and crafted the equity interest in a joint venture solution. Actors situated on ***the multilateral path***, namely the Council and the Assembly, simply approved their proposals – although these two bodies provided feedback

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and requested revisions concerning other provisions in the mining codes. It appears that they might play a bigger role for the possible alignment of the mining codes since the Secretariat has reservations about leading the way.

Site-banking was a ***stable practice*** of the parallel system of access rule that came as a result of years-long negotiations between the global south and the global north. It was devised as a compromise to bring together the principle of common heritage of humankind and free market logic. Hence, sidelining this rule is a substantial change that is couched in technical terms. As discussed above, the new mining codes do not get rid of site-banking altogether, but present an alternative to it. However, this is far from being a technical detail, because as we will see in the next section, this alternative is much more preferred by the investors. The idea of joint ventures was expressed under the 1994 Agreement as "the Enterprise shall conduct its initial deep seabed mining operations through joint ventures," as in joint operations. Yet, reducing the Enterprise's to a simply a shareholder was not envisaged even under the 1994 Agreement. [106]

Reception phase

The equity interest in a joint venture as an alternative to site-banking appears to be ***fully accepted by the relevant actors***. Nine out of ten PMS and CRC contractors opted for the equity interest option: CRC contractors are the Republic of Korea, Brazilian Companhia De Pesquisa de Recursos Minerais, Russian Ministry of Natural Resources and Ecology, Japan Oil, Gas and Metals National Corporation (JOGMEC), China Ocean Mineral Resources Research and Development Association (COMRA);[107] PMS contractors are the Government of Poland, the Government of India, Federal Institute for Geosciences and Natural Resources of the Federal Republic of Germany, Institut français de recherche pour l'exploitation de la mer, Government of the Republic of Korea, Russian Ministry of Natural Resources and

[106] Edwin Egede, Mati Pal and Eden Charles, *A Study on Issues Related to the Operationalization of the Enterprise in particular on the Legal, Technical and Financial Implications for the International Seabed Authority and for States Parties to the United Nations Convention on the Law of the Sea*, International Seabed Authority (13 June 2019), available at http://orca.cf.ac.uk/126997/
[107] For more, see https://www.isa.org.jm/deep-seabed-minerals-contractors

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Ecology, and China Ocean Mineral Resources Research and Development Association. Russian Ministry of Natural Resources and Ecology is the only contractor that offered a reserved area instead of opting for equity interest in order to secure an exploration contract for CRC.[108] However, this does not really imply that Russia is against the equity interest option. As a matter of fact, the same Russian Ministry of Natural Resources and Ecology opted for the equity interest in a joint venture option in order to secure a contract to explore PMS.[109] The overwhelming popularity of equity interest option over parallel system of access attests to this ***change attempt's success***.

The following countries were the members of the Council at the time of these codes' adoption.[110] While voting patterns are not publicly shared. The fact that these codes were adopted means that they had a consensus on the contents of these codes:[111] *Group A* (Russia, Japan, China), *Group B* (India, South Korea, France, Germany), *Group C* (Australia, Indonesia, Canada, South Africa), *Group D* (Bangladesh, Fiji, Brazil, Jamaica, Egypt, Sudan), *Group E* (the UK, Kenya, Chile, Poland, Czech Republic, Netherlands, Spain, Vietnam, Qatar, Cameroon, Nigeria, Senegal, Côte d'Ivore, Angola, Namibia, Argentina, Trinidad & Tobago, Guyana, Mexico). Moreover, there was a window of nearly a decade to raise concerns about the equity option at the Council, and one session at the Assembly. Indeed, Russia, France Honduras, Germany and Spain made recommendations about other provisions of the mining codes, but did not approach this subject. Their silence signals tacit agreement.

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[108] For more on this, see Report and recommendations to the Council of the International Seabed Authority relating to an application for approval of a plan of work for exploration for polymetallic sulphides by the Government of the Russian Federation, *ISBA/17/c/12* (11 July 2011).

[109] Application for approval of a plan of work for exploration for cobalt-rich ferromanganese crusts by the Ministry of Natural Resources and Environment of the Russian Federation *ISBA/19/LTC/12* (25 June 2013).

[110] Voting patterns are not publicly shared. The fact that these codes were adopted means that at least two-thirds of the member states voted in their favor.

[111] The voting rules at the Council is complex and requires two-third of majority in each chamber according to the Implementation Agreement. The author was told in an interview that the Council operates based on the consensus rule since the voting rules under the Implementation Agreements are too complex to operate with. Interview with Alfonso Ascencio-Herrera, Legal Counsel and Deputy to the Secretary-General, ISA (29 April 2020).

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Moreover, there was no opposition to this change attempt from other parts of the international community either – again likely because of its highly technical nature. Environmentalists disagree and reject commercial deep seabed mining both within the national jurisdiction and in the Area.[112] The Deep Sea Conservation Coalition (an observer at the ISA; composed of 80 environmentalist groups) has been pressuring the ISA, while Greenpeace sailed *Esperanza* into the harbor in Kingston to protest during an ISA session.[113] Last but not least, the EU Parliament called for a thorough assessment of seabed mining's impact on the environment.[114] While such criticisms are directed at seabed mining's potential environmental impact, they do not even touch upon revising the parallel system of access rule.

While there is visibly no opposition, the support behind this change attempt appears to be uniform – although one can expect that different groups might be motivated by different reasons. For example, for the developing states, the support could be due to the fact that the equity interest in joint venture option might mean a continuous line of revenue for the Enterprise, and possibly later for the developing states. Indeed, there has not been any serious attempt to operationalize the Enterprise (due to the Implementation Agreement making funding of the Enterprise not an obligation). This option may have appeared to be a viable way to fund the Enterprise. For the developed states and companies, the equity-interest option reduces the costs and expediates the mining operations. It allows them to begin exploring without huge sunk-costs to be incurred from extensive prospecting operations from the get go. Therefore, it appears to be a win-win solution.

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[112] Luz Danielle O. Bolong, "Into the Abyss: Rationalizing Commercial Deep Seabed Mining through Pragmatism and International Law," *Tulane Journal of International and Comparative Law* 25 (2017 2016): 129.

[113] Greenpeace International, "Scientists sound alarm about "destructive" deep sea mining as Greenpeace demands government action" (23 July 2019) available at https://www.greenpeace.org/international/press-release/23390/scientists-sound-alarm-about-destructive-deep-sea-mining-as-greenpeace-demands-government-action/

[114] Tood Woody, "European Parliament Calls for a Moratorium on Deep-Sea Mining," February 1, 2018, available at https://www.newsdeeply.com/oceans/articles/2018/02/01/european-parliament-calls-for-a-moratorium-on-deep-sea-mining

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2. ***Particularities of the case***

Changes of technical nature

This case shows how arduous change attempts made through diplomatic channels (seen in phases I& II) may differ from those of technical nature carried out by bureaucrats within an organization (phase III). As we see in this case, while the former involved a long process and years-long negotiations, the latter materialized in a rather swift manner. Only three years after the Russian delegation's first request for mining codes for PMS and CRC the Secretariat put forward a template mining code, which presented the equity interest option in 2001. This was done in a way to "adjust to the new reality and the special circumstances" surrounding the exploration of new minerals.[115] This may appear to be a technical change concerning mining contracts, yet it signifies an important transformation for the seabed mining regime, as explained above.

The role of the Secretariats

This case also exemplifies how big of a role the secretariats may play when it comes to initiating change or putting breaks on it. Adopting an entrepreneurial spirit, the Secretariat of the ISA led the way for creating an alternative rule to site-banking for PMS and CRC. Building upon the Secretariat's template, other organs of the ISA formally adopted the new mining rules. It was also the Secretariat that discouraged the automatic introduction of the equity interest in a joint venture option in mining codes for PMN. The Secretariat, this time acting as the guardian of the parallel system of access, suggested a formal amendment process.

Scientists and companies driving from the backseat

Although scientists and companies are not part of the decision-making bodies in the seabed mining regime, they have played an important role behind the scenes. Increased knowledge

[115] Interview with Alfonso Ascencio-Herrera, Legal Counsel and Deputy to the Secretary-General, ISA (29 April 2020).

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of different minerals, technological advancements made seabed mining a soon-to-achievable reality. But the scientists' input is not limited to this. They played an important role in drafting the mining codes. The idea of an equity interest in a joint venture was formulated in the course of a scientific workshop in 2000 in Kingston. Studies on PMS and CRC showed that they are different in nature and finding two areas of equal value would be difficult. These studies also showed that mining for these minerals within the EEZ might be more profitable. Hearing this advice and the companies' unwillingness to undertake costly prospecting operations, the ISA Secretariat attempted to increase the regime's competitiveness by means of introducing favorable terms to the investors. The Legal and Technical Commission, composed of scientists or practitioners with industry knowledge, channeled the Secretariat's vision. Beyond mining contracts, scientists serve an important function for the operations of the ISA and the governance of the oceans. For example, MIT has an observer status at the Assembly and it has collaborated with ISA and provided the institution with several economic models or environmental analyses.[116] Similarly, the ISA has been in corporation with the Joint Programming Initiative Healthy and Productive Seas and Oceans (JPI Oceans) – an intergovernmental platform open to the EU members and the associated countries.[117] One of the objectives of this platform to translate scientific research into policy language.

Possible reasons behind lack of opposition to the changes generated by mining codes

Although it is not possible to establish with full certainty, several reasons might be behind this change attempt's rapid acknowledgement by all parties. First, the Group 77 achieved to make common heritage of humankind principle as the cornerstone of the legal regime over seabed mining. The group also managed to conclude favorable terms for developing states, including equal distribution of resources and technology transfers. However, this group

[116] See for example, Randolph Kirchain, Frank R Field, and Richard Roth, *Financial Regimes for Polymetallic Nodule Mining: A Comparison of Four Economic Models* (July 201) available at https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/mit.pdf; see also Randolph Kirchain, and Richard Roth "Decision Analysis Framework & Review of Cash Flow Approach" at Financial Payment System Working Group Meeting (February 21-22, 2019) available at https://www.isa.org.jm/document/mit-presentation-decision-analysis-framework-review-cash-flow-approach
[117] For more see, https://www.jpi-oceans.eu/what-jpi-oceans

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ceased to be a strong bloc with a uniform vision. Hence, their influence on the seabed mining regime weakened over time. The changes introduced through the 1994 Implementation Agreement further aggravated this. The Assembly's role was downgraded and the voting rules at the Council favored the industrialized states. This has certainly made it difficult for the developing states to raise their voices unless they act as a bloc. Therefore, it is no surprise that the new mining codes are more favorable to the industrial states and the northern companies. Second, these changes were proposed by then Secretary General Satya Nandan, who is a legendary leader of the Group 77. His active role in their preparation could be another reason why the developing countries did not oppose to the changes. Last but not least, the developing states may not be looking at the ISA though critical lenses. The ISA symbolizes a moment of triumph for the Group 77, and it might be perceived a neutral body wholly committed to the common heritage of humankind principle. This can be most visible in a statement made by an Algeria's delegate, Mehdi Remaoun, who argued that "if not for the authority, the seabed would be a new form of colonisation, with the interests of a few being more important than the common good."[118] The current Secretary General Michael Lodge's description of the ISA's objectives also confirms this observation: "If managed effectively, in accordance with the rule of law as set out in the Convention, deep sea mining has the potential to contribute to the realization of Sustainable Development Goal 14, particularly for landlocked and geographically disadvantaged States, and small island developing States that are heavily reliant on the ocean and its resources for economic development."[119] The ISA's role as the guardian of the common heritage of humankind principle was also underlined by the ITLOS Seabed Disputes Chamber's advisory opinion in 2011, "the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind by assisting the Authority and by acting on its own with a view to ensuring that entities under its

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[118] World Ocean Initiative, International Seabed Authority under Pressure over Deep-see Mining Impacts, (August 16, 2019), available at https://www.woi.economist.com/international-seabed-authority-under-pressure-over-deep-sea-mining-impacts/

[119] Michael Lodge "The International Seabed Authority and Deep Seabed Mining" https://www.un.org/en/chronicle/article/international-seabed-authority-and-deep-seabed-mining

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jurisdiction conform to the rules on deep seabed mining."[120] However, as we saw in this case study, the ISA does not solely operate on the common heritage of humankind principle; its DNA also contains the free market logic, which provided the impetus behind the mining codes for PMS and CRC.

Why is it so easy with mining codes when it was so difficult during negotiations?

We can list a number of reasons to explain this change attempts easy success. First, weakening the parallel system of access rule by means of practically phasing out site-banking in two of the mining codes was also possible because of the changes introduced via the Implementation Agreement. Making the Enterprise dependent on joint-ventures and not obligating states to fund the Enterprise, the Implementation Agreement might have forced the ISA to devise means to secure funding. The equity interest option is particularly appealing because it is an economic solution of convenience. Second, the ideological division fueling the debates on Part XI, and the run-up to the Implementation Agreement ceased to exist. Since Group 77 lost its negotiating power as a solid bloc and idealize ISA as one of their biggest achievement, they remain silent when it comes to the changes introduced by the ISA via the mining codes. Third, the prevailing scientific knowledge about the differences between PMN vs CRC and PMS made it an easy case to build and defend why site-banking might not work for CRC and PMS. The technical nature of the change attempt is also another reason why states did not care enough to take an issue with it. Last but not least, the equity interest option was introduced as an alternative and not as a replacement of site-banking on paper. However, since states predominantly favored the equity interest over site-banking, it phased out site-banking in practice at least for CRC and PMS.

What this case can teach us about the conditions under which change is more likely to be smooth?

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[120] ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber),* (1 February 2011), §226.

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1) High technicality (i.e. trusting the scientists and technicians more makes an issue less controversial politically or legally)
2) Lack of (or limited) ideological division around a subject matter
3) Favorable support from the main gatekeeper (in this case the ISA Secretariat)
4) Procedural legitimacy – trust the process and the bureaucratical steps taken by the relevant institutions to produce legally valid outcomes

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Case Study 16

The Emergence of Port State Measures Against IUU Fishing

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I. Synopsis & Typical Story

The port state measures to prevent, deter and eliminate Illegal, Unregulated and Unreported (IUU) fishing is a new norm devised to counter this entrenched global problem.[1] The port state measures were introduced to complement the existing legal framework on ocean governance. In particular, it is viewed as a remedy to counter enforcement problems, "where flag state control is weak or lacking, including when vessels are registered on open registries and there is no effective supervision of their operations."[2] The UNCLOS does not mention port states' obligation to curb IUU fishing. At the time of UNCLOS' adoption, the dominant view was that emphasizing on flag state obligations as well as those of coastal states would suffice to regulate fishing.[3] In particular, the conviction around the importance of coastal state control to preserve marine environment catalyzed the efforts to create Exclusive Economic Zones (EEZs).[4] As Tore Henriksen, Geir Hønneland, and Are Sydnes argue, "the

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[1] For more on the novelty of the idea. William Edeson, "Closing the Gap: The Role of 'Soft' International Instruments to Control Fishing," *Australian Year Book of International Law* 20, no. 1 (2000): 83–104.
[2] David Doulman, "Illegal, Unreported and Unregulated Fishing: Mandate for and International Plan of Action," US:IUU/2000/6, 2000, http://www.fao.org/3/y3274e/y3274e06.htm.
[3] Erik Molenaar explains the difference between coastal and port states as follows: "Port State jurisdiction can be defined as relating to activities and standards occurring within, or applicable to: the port; the maritime zones of other coastal States; areas beyond national jurisdiction (i.e. the high seas and the 'Area'); and the maritime zones of the coastal State in which the port is located. Coastal States are universally understood to be States with a sea-coastline. A coastal State's jurisdiction relates to its own maritime zones, and encompasses the resources and activities therein as well as external impacts on them." Erik Molenaar, "Port and Coastal States," in *The Oxford Handbook of the Law of the Sea*, ed. Donald Rothwell et al., 2016, https://doi.org/10.1093/law/9780198715481.003.0013.
[4] S.M. Garcia, "Ocean Fisheries Management: The FAO Programme," in *Ocean Management in Global Change*, ed. Paolo Fabbri (London; New York: Elsevier Applied Science, 1992), 409.

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expectation was that the EEZs would provide coastal states with an authority and incentives to conserve and manage the living marine resources in a sustainable manner."[5] What became clear in the 1990s, however, was that these measures (i.e. taken by flag state and coastal states) were not enough to combat IUU fishing.[6] According to Kevin Bray, there are four reasons why port state measures were introduced as an innovative tool to complement states' existing obligations: (i) "Lack of effective control of fishing vessels by some flag states;" (ii) "the difficulty experienced by regional fisheries bodies in applying responsible fisheries management measures to the vessels of non-Parties;" (iii) "the ineffectiveness of measures implemented by single countries;" and (iv) "the problem of some countries, particularly developing countries to provide high quality human and adequate financial resources to effectively combat IUU fishing."[7] Port state measures to curb IUU fishing, solidified under the 2009 Agreement on Port State Measures (PSM), were introduced to fill this vacuum.

II. Background & Stakes

Due to the vacuum in the current international legal framework under the UNCLOS, over-fishing without getting detected by national and international regulations is possible.[8] Indeed, any vessel can fish in the high seas and there are not strict legal recourse against over-exploitation. This evidently encourages overfishing. According to the estimates, 7 out of 10 worldwide fish stocks are exploited beyond sustainable levels.[9] The practice of overfishing,

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[5] Tore Henriksen, Geir Hønneland, and Are Sydnes, *Law and Politics in Ocean Governance: The Fish Stocks Agreement of 1995 and Regional Fisheries Management Regimes* (Leiden ; Boston: Martinus Nijhoff, 2005), 4.

[6] More on this, see Terje Lobach, "Measures to Be Adopted by the Port State in Combating IUU Fishing," US:IUU/2000/6, 2000, http://www.fao.org/3/y3274e/y3274e0h.htm#bm17.

[7] Kevin Bray, "A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing," AUS:IUU/2000/6, 2000, http://www.fao.org/3/y3274e/y3274e08.htm#fn67.

[8] Bertrand Le Gallic and Anthony Cox, "An Economic Analysis of Illegal, Unreported and Unregulated (IUU) Fishing: Key Drivers and Possible Solutions," *Marine Policy* 30, no. 6 (November 1, 2006): 689–95, https://doi.org/10.1016/j.marpol.2005.09.008.

[9] Kevin W. Riddle, "Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious?," *Ocean Development & International Law* 37, no. 3–4 (December 1, 2006): 265, https://doi.org/10.1080/00908320600800929.

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fishing in disregard of regulations, or without reporting is known as IUU fishing.[10] While IUU fishing may also happen within national waters, it is more prevalent in the high seas.

IUU fishing has flourished due to the deficiencies of the existing ocean governance framework that divides the oceans into zones (territorial waters, continental shelf, EEZs and high seas). While coastal states have prescriptive and enforcement jurisdiction over their own territorial waters and EEZs, what happens in the high seas is entirely left to the authority of flag states, some of which have little or no control over vessels that fly their flags. Moreover, the high seas fisheries or fishery regions are governed by International Regional Fishery Management Organizations (RFMOs).[11] RFMOs introduce measures to regulate sustainable fishing. Yet, states operating outside of RFMOs frameworks, or recommendations pose a big problem. Examples of such behavior include operating fishing vessels without nationality or with flags of states non-parties to the relevant RFMOs (flying the Flags of Convenience) in order to circumvent national or international regulations.[12] The IUU fishing may have various forms such as "noncompliance with fishing seasons, fishing without proper permits, catching prohibited species, using illegal fishing gear, catching more than the allowable quota, and not reporting or underreporting the amount of fish caught."[13] No matter how it happens, IUU fishing has disastrous impact on the environment. It does not only deplete the resources but also dangers the health of marine ecosystem.[14]

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[10] Andrew Serdy is against lumping these concepts together. For more, see Andrew Serdy, *The New Entrants Problem in International Fisheries Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2016), https://doi.org/10.1017/CBO9780511736148.
[11] A number of RFMOs are supported and established within the Food and Agriculture Organization (FAO)'s constitutional framework such as General Fisheries Commission for the Mediterranean (GFCM), Western Central Atlantic Fishery Commission (WECAFC) or South Indian Ocean Fisheries Commission (SWIOFC). There are others that were established outside of the FAO's framework such as Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), North-East Atlantic Fisheries Commission (NEAFC), International Commission for the Conservation of Atlantic Tunas (ICCAT) or Southern Indian Ocean Fisheries Agreement (SIOFA). These are often created by international conventions or agreements. For more on this, http://www.fao.org/fishery/rfb/search/en
[12] Gallic and Cox, "An Economic Analysis of Illegal, Unreported and Unregulated (IUU) Fishing."
[13] Riddle, "Illegal, Unreported, and Unregulated Fishing," 266.
[14] Erik J. Molenaar, "Chapter 13. Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement," *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles*, January 1, 2011, 13.

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The international community introduced some measures to discourage IUU fishing.[15] However, what we have right now appears to be a patchwork of measures,[16] and international fisheries law remains to be fragmented.[17] A prevailing strategy to curb IUU fishing seems to be increasing the operating costs of vessels. Here the port state measures, solidified under the 2009 Agreement on Port State Measures (PSM), carry a particular importance. Currently, there are 66 parties to this Agreement, including the US, Canada, Australia, the EU and Japan.[18] The ratification of the PSM Agreement received bipartisan support in the US Senate.[19] Moreover, the EU Commission has been particularly active in this field and developed a Community system to prevent, deter, and eliminate IUU fishing, which includes port state control measures.[20]

The PSM Agreement promises to complement existing legal framework, which relies entirely on flag state and coastal state control, and make up for the failures of the flag states to curb IUU fishing.[21] Port state control measures may include "prior notification of port entry, use of designated ports, restrictions on port entry and on landing or trans-shipment of fish, restrictions on supplies and services, documentation requirements and port inspections, as

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[15] For more on these measures, see Gallic and Cox, "An Economic Analysis of Illegal, Unreported and Unregulated (IUU) Fishing."

[16] For more on this, see Anastasia Telesetsky, *Updates and Commentary in Public International Law, 2019* (Wolters Kluwer Law & Business, 2019).

[17] Richard Caddell and Erik J. Molenaar, "International Fisheries Law: Achievements, Limitations and Challenges," in *Strengthening International Fisheries Law in an Era of Changing Oceans*, ed. Richard Caddell and Erik J Molenaar (Oxford: Hart Publishing, 2019).

[18] Albania, Australia, Bahamas, Bangladesh, Barbados, Cabo Verde, Cambodia, Canada, Chile, Costa Rica, Cuba, Cote d'Ivoire, Denmark, Djibouti, Dominica, Ecuador, EU, Fiji, France, Gabon, Gambia, Ghana, Grenada, Guinea, Guyana, Iceland, Indonesia, Japan, Kenya, Liberia, Libya, Madagascar, Maldives, Mauritania, Mauritius, Montenegro, Mozambique, Myanmar, Namibia, New Zealand, Norway, Oman, Palau, Panama, Peru, Philippines, Republic of Korea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sri Lanka, Sudan, Thailand. Togo, Tonga, Trinidad and Tobago, Turkey, United States of America, Uruguay, Vanuatu and Viet Nam.

[19] This was led by Edward Markey of Massachusetts (D) and Morco Rubio of Florida (R). For extended statements, see the Transcripts of the Hearing Before *the Committee on Foreign Relations United States Senate*, One Hundred thirteenth Congress, Second Session (February 12, 2014) *S. HRG. 11-482*.

[20] For more, see https://ec.europa.eu/fisheries/cfp/illegal_fishing/info_en

[21] Cedric Ryngaert and Henrik Ringbom, "Introduction: Port State Jurisdiction: Challenges and Potential," *The International Journal of Marine and Coastal Law* 31, no. 3 (September 5, 2016): 379–94, https://doi.org/10.1163/15718085-12341405.

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well as trade-related measures and even sanctions."[22] These measures are to prevent poachers from freely roaming with impunity. In particular, not allowing vessels engaged in IUU fishing to land their catch in a given port increases their operating costs and makes it harder for them to access to certain markets.

The extent to which port state measures can be employed to counter IUU fishing is still debated in the literature. For example, Erik Moleenar maintains that "As ports lie wholly within a state's territory and fall on that account under its territorial sovereignty, customary international law acknowledges a port state's wide discretion in exercising jurisdiction over its ports. This was explicitly stated by the International Court of Justice (ICJ) in the Nicaragua case and is implicitly confirmed by, *inter alia*, Articles 25(2), 211(3), and 255 of LOSC."[23] Andrew Sendy counters such claims by arguing that states have been historically relucted to "make extensive use of this power."[24] This debate also spills over to the question about the influence of the PSM Agreement. While Sendy claims that the effect of the PSM is limited as it cannot oblige states that are not party to the Agreement,[25] Molenaar views this Agreement to be of universal nature as it serves the interests of the international community as a whole.[26]

Moreover, port state measures are not the only novel mechanisms to tackle IUU fishing. Another way to drive up the operating costs is to force fishing vessels to observe the ILO standards of labor. Applying enforceable minimum standards of conduct on all vessels (see

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[22] Andrew Serdy, "The Shaky Foundations of the Fao Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?," *The International Journal of Marine and Coastal Law* 31, no. 3 (September 5, 2016): 424, https://doi.org/10.1163/15718085-12341408.
[23] Erik Jaap Molenaar, "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage," *Ocean Development & International Law* 38, no. 1–2 (July 1, 2007): 376, https://doi.org/10.1080/00908320601071520.
[24] Andrew Serdy, "The Shaky Foundations of the Fao Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?," *The International Journal of Marine and Coastal Law* 31, no. 3 (September 5, 2016): 424.
[25] Andrew Serdy, "Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal," *Ocean Development & International Law* 48, no. 3–4 (October 2, 2017): 345–64.
[26] Erik Jaap Molenaar, "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage," *Ocean Development & International Law* 38, no. 1–2 (July 1, 2007): 225–57.

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for example MSC – Marine Stewardess Council label) is yet another way to improve fishing practices. Last but not least, states could play a larger role.[27] The ITLOS's 2015 Advisory Opinion provides a detailed explanation of flag state and coastal state obligations to ensure sustainable fishing.[28] Beyond these measures, states could also extraterritorially apply their domestic sanctions to their citizens whom operate over the high seas, in areas considered as "risk zones."[29] In addition, there are other legal instruments that directly or indirectly touch upon IUU fishing such as trade related agreements,[30] maritime safety and labor related measures,[31] environmental instruments,[32] and rules on transnational crime.[33] This case study focuses on the emergence of port state measures to curb IUU fishing, as "a simple and economic means of hitting at the profitability of IUU fishing."[34] As such, it traces the emergence of the notion of IUU fishing as well as the formulation of port state obligations in parallel.

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[27] For more, see Eva R Van der Marel, "Problems and Progress in Combating IUU Fishing," in *Strengthening International Fisheries Law in an Era of Changing Oceans*, ed. Richard Caddell and Erik J Molenaar (Oxford: Hart Publishing, 2019), 291–318.

[28] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion), Advisory Opinion of Apr. 2, 2015, ITLOS, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf

[29] Gallic and Cox, "An Economic Analysis of Illegal, Unreported and Unregulated (IUU) Fishing."

[30] The GATT and other WTO agreements such as the Agreements on the Technical Barriers to Trade, Pre-shipment Inspection, Rules of Origin, Import Licensing Procedures, and Subsidies and Countervailing Measures

[31] The IMO's 1993 Torremolinos Protocol for the Safety of Fishing Vessels, the IMO's 1995 International Convention on Training, Certification and Watchkeeping for Fishing Vessels and the ILO's the Work in Fishing Convention in 2007 (C188), and the ILO's Work in Fishing Recommendation 2007 (R199)

[32] The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention), Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), Convention on the Conservation of Migratory Species of Wild Animals (CMS), Agenda 21, particularly Chapter 71 and the Convention on the Conservation of Biological Diversity (CBD).

[33] the UN Convention against Transnational Organized Crime and the UN Office on Drugs and Crime (UNODC) report on transnational organized crime and fishing.

[34] Emma Witbooi, "Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context," *The International Journal of Marine and Coastal Law* 29, no. 2 (June 9, 2014): 290–320, https://doi.org/10.1163/15718085-12341314.

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III. Chronology

1. *Treaties and Other General Legal Instruments (1946 - 1998)*

Due to their consensual nature, early international agreements concerning living marine resources – such as the 1946 International Convention for the Regulation of Whaling, the 1948 Convention on the International Maritime Organization and the 1958 Geneva Conventions on the Law of the Sea – include vague provisions and tend not to address protecting marine biodiversity.[35] This is even the case for the 1958 UN Convention on Fishing and Conservation of the Living Resources of the High Seas – arguably the most comprehensive treaty on fisheries in the high seas with limited impact due to having only 39 state parties.[36] While the 1958 Convention refers to the danger of overexploitation and states' obligation to conserve the living resources of the high seas, the most of the treaty text is dedicated to solving disagreements between states wishing to exploit the same stock of fish. Similarly, as Benjamin Sovacool and Kelly Siman-Sovacook rightly identify, "the 1982 UNCLOS is concerned less with conservation and more with economic exploitation, and is analogously non-committal concerning the protection of marine biodiversity."[37]

It was not until the 1990s, the international community adopted specific legal instruments promoting responsible fishing or conservation measures. Yet, the earlier attempts were not directly related to IUU fishing or port state measures. The first of these was the 1992 Cancún Declaration on Responsible Fishing that urged states to fish responsibly on the high seas. In consultation with the Food and Agriculture Organization (FAO), the Mexican government organized an International Conference on Responsible Fishing, where they adapted the

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[35] Benjamin K. Sovacool and Kelly E. Siman-Sovacool, "Creating Legal Teeth for Toothfish: Using the Market to Protect Fish Stocks in Antarctica," *Journal of Environmental Law* 20, no. 1 (2008): 20.
[36] Yet the impact of the 1958 UN Convention on Fishing and Conservation of the Living Resources of the High Seas is limited since it has only 39 parties and it has not been signed by some of the most important fishing nations. State parties are as follows: Australia, Belgium, Bosnia and Herzegovina, Burkina Faso, Cambodia, Colombia, Congo, Denmark, Dominican Republic, Fiji, Finland, France, Haiti, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Malaysia, Mauritius, Mexico, Montenegro, Netherlands, Nigeria, Portugal, Senegal, Serbia, Sierra Leone, Solomon Islands, South Africa, Spain, Switzerland, Thailand, Tonga, Trinidad and Tobago, Uganda, the UK, the US, Uruguay, Venezuela.
[37] Sovacool and Siman-Sovacool, "Creating Legal Teeth for Toothfish," 20.

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Cancún Declaration and requested the FAO to draft a Code of Conduct for Responsible Fishing.[38] Second important piece of legal instrument is the Rio Declaration and Agenda 21 adopted by the UN Conference on Environment and Development met in Rio in 1992. Chapter 17 of Agenda 21 makes a reference to the management of high seas fisheries and unregulated fishing, and calls for state cooperation to address these issues.[39] Finally, in 1994, the year the UNCLOS entered into force, the UNGA considered unauthorized fishing in national jurisdiction for the first time and called on the Secretary General to submit reports on this matter.[40] However, it is important to note that the resulting resolution, *A/RES/49/116*, only referred to flag state and coastal state obligations to eliminate unregulated fishing – obligations listed under the UNCLOS.[41] Indeed, the UNCLOS does not mention port state obligations in the context of fisheries management. It refers to port state control and enforcement measures only for preventing and reducing pollution in the marine environment under Article 218(4).

While these above-mentioned legal instruments touch on responsible fishing in broad terms, two documents produced by the FAO as well as the 1995 Fish Stock Agreement approached the topic in a more targeted fashion. First one is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, which was adopted in 1993 and circulated for acceptance in 1994.[42] The Agreement requires flag states to take measures on the high seas and calls them not to undermine the effectiveness of conservation measures under International Law. Second one is the 1995 Code of Conduct

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[38] For more on Cancún Declaration, see https://iea.uoregon.edu/treaty-text/1992-cancundeclarationresponsiblefishingentxt

[39] UN, Report of the UN Conference on Environment and Development A/CONF.151/26 (Vol.II) (13 August 1992), available at https://www.un.org/Depts/los/consultative_process/documents/A21-Ch17.htm

[40] UNGA, Unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas, *A/RES/49/116* (22 February 1995).

[41] This resolution was adopted without a vote.

[42] The Agreement is accepted by Albania, Angola, Argentina, Australia, Barbados, Belize, Benin, Brazil, Canada, Cape Verde, Chile, Cook Islands, Cyprus, Egypt, EU, Georgia, Ghana, Japan, Madagascar, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, New Zealand, Norway, Oman, Peru. Philippines, Republic of Korea, Senegal, Seychelles, Sierra Leone, Sri Lanka, St. Kitts and Nevis, St. Lucia, Sweden, Syria, Tanzania, the US, Uruguay and Vanuatu.

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for Responsible Fisheries. This is the first instrument that specifically mentions port state duties to promote responsible fishing:

> Port States should take, through procedures established in their national legislation, in accordance with international law, including applicable international agreements or arrangements, such measures as are necessary to achieve and to assist other States in achieving the objectives of this Code, and should make known to other States details of regulations and measures they have established for this purpose.[43]

Finally, the 1995 Fish Stock Agreement, which regulates the conservation of marine resources within and beyond EEZs, fleshed out the contours of this obligation further under Article 22:[44]

> 2. A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.
>
> 3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas
>
> 4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

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[43] FAO, *Code of Conduct for Responsible Fisheries*, 1995, available at http://www.fao.org/resilience/resources/resources-detail/en/c/273397/, §8.3.

[44] Parties to the 1995 Fish Stock Agreement are: Australia, Austria, Bahamas, Barbados, Belgium, Belize, Brazil, Bulgaria, Canada, Cook Islands, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, European Union, Fiji, Finland, France, Germany, Greece, Guinea, Hungary, Iceland, India, Indonesia, Iran, Ireland, Italy, Japan, Kenya, Kiribati, Latvia, Liberia, Lithuania, Luxembourg, Maldives, Malta, Marshall Islands, Mauritius, Micronesia, Monaco, Mozambique, Namibia, Nauru, Netherlands, New Zealand, Nigeria, Niue, Norway, Oman, Palau, Panama, Papua New Guinea, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Lucia, Samoa, Senegal Seychelles, Slovakia, Slovenia, Solomon Islands South Africa, Spain, Sri Lanka, Sweden, Tonga, Trinidad and Tobago, Tuvalu, Ukraine, United Kingdom, United States, Uruguay.

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The UNGA continued to broach the subject by issuing three almost identical resolutions between 1995 and 1998 on "Large-scale pelagic drift-net fishing and its impact on the living marine resources of the world's oceans and seas; unauthorized fishing in zones of national jurisdiction and on the high seas; fisheries by-catch and discards; and other developments."[45] In a similar vein, the Secretary General issued "Oceans and the Law of the Sea" reports in 1997, and 1998 covering, *inter alia*, the issues related the conservation of marine resources and responsible fishing.[46] While the problem of overfishing had been on the radar of several of these more generalist institutions, it was a regional regime that formally defined the IUU fishing and it was the FAO that developed innovative measures to curtail it. Having described the general developments at the international level, this case study will now visit two different sites in which the notions of IUU fishing and the port state obligation to prevent IUU fishing came to be defined.

2. ***CCAMLR Regime, IUU Fishing in the Southern Ocean & ITLOS (1997-2001)***

The concept of IUU fishing is not captured under the UNCLOS, as discussed above.[47] The term IUU fishing was first uttered in the context of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) in 1997. The Standing Committee on Observation and Inspection (SCOI) discussed the subject in response to some member states' reports on illegal fishing shared in the 1996 session.[48] The term got immediately popular and in 1999 and began appearing in the reports of the FAO, the International Maritime Organization (IMO), the UN Commission on Sustainable Development (CSD) and other regional fishery bodies.[49] Moreover, the UN Secretary General discussed the concept in their

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[45] UNGA, Large-scale pelagic drift-net fishing and its impact on the living marine resources of the world's oceans and seas, *A/RES/50/25* (4 January 1996); *A/RES/51/36* (21 January 1997); *A/RES/52/29* (26 January 1998). All were adopted without a vote.

[46] UNGA, Report of the Secretary General: Oceans and the Law of the Sea, *A/52/487* (20 October 1997); A/53/456 (5 October 1998).

[47] Telesetsky, *Updates and Commentary in Public International Law, 2019*.

[48] Edeson, "Closing the Gap: The Role of 'Soft' International Instruments to Control Fishing," 605.

[49] Doulman, "Illegal, Unreported and Unregulated Fishing: Mandate for and International Plan of Action,"§38-41.

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1999 report,[50] and the UNGA referred to IUU fishing in its *Resolution 54/32* issued in 1999. It is remarkable to observe how fast the concept gained traction in more central institutions such as the UNGA and found its way to the UN Secretary General's report.

Although the concept originates in the CCAMLR regime, the IUU fishing problem was not unique to this area. After the term became popular, it was henceforth discussed during the annual or subsidiary sessions of other RMFOs – such as the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Indian Ocean Tuna Commission (IOTC), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Northwest Atlantic Fisheries Organization (NAFO) and the North-east Atlantic Fisheries Commission (NEAFC).[51]

However, in order to understand the nature of this entrenched problem and the initial attempts to resolve it, it is fitting to zoom in on the CCAMLR regime – the first site where the problem of IUU fishing was identified and the concept was defined.[52] The CCAMLR is an international regulatory regime that aims to conserve marine resources in the Southern Ocean.[53] It is part of the 1959 Antarctic Treaty System and its Commission is based in Australia. Its current members are Argentina, Australia, Belgium, Brazil, Chile, China, EU, France, Germany, India, Italy, Japan, Korea, the Netherlands, New Zealand, Norway, Poland, Russia, South Africa, Sweden, Ukraine, the UK, the US and Uruguay. Therefore, this regime – composed of great powers and important fishing nations – can be characterized as the microcosm of global fisheries politics and presents us with rich insights regarding the stakes involved.

It all started with concerns over Patagonian toothfish – a type of fish found in cold waters. In the late 1990s, several environmental NGOs such as World Wildlife Fund (WWF) and the

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[50] United Nations, "Oceans and the law of the sea: Report of the Secretary-General," *A/54/429* (30 September 1999).
[51] Doulman, "Illegal, Unreported and Unregulated Fishing: Mandate for and International Plan of Action," §36.
[52] For more, see https://www.ccamlr.org/en/organisation.
[53] Erik Jaap Molenaar, "CCAMLR and Southern Ocean Fisheries," *The International Journal of Marine and Coastal Law* 16, no. 3 (January 1, 2001): 465–99.

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International Union for the Conservation of Nature (IUCN) brought attention to the IUU fishing of Patagonian toothfish in the region.[54] The issue was first phrased as a problem in 1996 by the Delegation of Norway that described "illegal and unreported fishing is currently the greatest threat to CCAMLR."[55] The following year, the members discussed IUU fishing, where the Scientific Committee presented a report on the IUU fishing's impact on Patagonian toothfish and the seabird population that were killed off as by-catch.[56]

The way the IUU fishing problem was brought to light in the Southern Ocean and Antarctica exemplifies the reasons why the existing legal framework – built upon flag state and coastal state obligations – was insufficient to address IUU fishing and the tragedy of global commons. Since the mid-1980s, Patagonian toothfish (popularly known as Antarctic Sea Bass or Chilean Sea Bass) has been exploited on massive scales.[57] This large and predatory fish is found "almost exclusively in the Southern Ocean" and "due to their long life span, late sexual maturity, large size and unique lifecycle, they have been exceptionally vulnerable to overexploitation."[58] The IUU fishing of Patagonian toothfish was exacerbated due to a unique quality of the CCAMLR area. There is technically no coastal state and therefore no coastal state jurisdiction over EEZ areas adjacent to Antarctica. Therefore, the regime is primarily enforced by flag states except the area around sub-Antarctic islands, where states can enforce traditional coastal state jurisdiction to regulate the fisheries. These sub-Antarctic islands are French islands of Kerguelen and Crozet, Australia's Heard and McDonald Islands and the UK's Shag Rocks, South Georgia, and South Sandwich Islands.[59] IUU fishing is particularly

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[54] Donald R. Rothwell and Tim Stephens, "Illegal Southern Ocean Fishing And Prompt Release: Balancing Coastal And Flag State Rights And Interests," *International & Comparative Law Quarterly* 53, no. 1 (January 2004): 172–73.
[55] CCAMLR, "Report of the Fifteenth Meeting of the Commission" *CCAMLR-XV* 21 October – 1 November 1996, Hobart, Australia, available at https://www.ccamlr.org/en/ccamlr-xv
[56] CCAMLR, "Report of the Sixteenth Meeting of the Commission" *CCAMLR-XVI* 27 October – 7 November 1997, Hobart, Australia, available at https://www.ccamlr.org/en/ccamlr-xvi
[57] Molenaar, "CCAMLR and Southern Ocean Fisheries," 466.
[58] Sovacool and Siman-Sovacool, "Creating Legal Teeth for Toothfish," 17.
[59] Rothwell and Stephens, "Illegal Southern Ocean Fishing And Prompt Release."

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prevalent in the areas under Australian and French control. Therefore, these two countries took an active role in regulating fisheries and leading the efforts to curb IUU fishing.

To do so, as coastal states and port states, they initially relied on carrying out inspections, and arresting suspected vessels – a practice sanctioned under Article 73(1) of UNCLOS. For example, France arrested 20 vessels in the Kerguelen and Crozet EEZs between 1997 and 2001,[60] and ended up before the ITLOS in three prompt release cases concerning the seized vessels:[61] the *Camouco,*[62] *Monte Confurco,*[63] and *Grand Prince.*[64] Australia arrested six vessels, including Russian-flagged vessels the *Lena* and the *Volga* in 2002.[65] What is interesting about these two arrests is that Russia is a member of the CCAMLR Convention and yet at the same time it failed to enforce CCAMLR regulations as a member state and a flag state. Furthermore, Russia brought a case concerning the *Volga*'s prompt release before the ITLOS in pursuant to Article 292 of UNCLOS. Australia countered Russia's claims for a prompt release with two requests: (i) the vessel should carry a monitoring system, and (ii) Russia should release information about the owner and the beneficiaries of this ship's operations. Australia justified these requests by arguing that there is a "serious problem of continuing illegal fishing in the Southern Ocean, the dangers this poses to the conservation of fisheries resources and the maintenance of the ecological balance of the environment."[66] The ITLOS dismissed these claims by arguing that imposing non-financial conditions is beyond the scope of the prompt release procedure.[67] That is, the ITLOS refused to consider the implications of IUU fishing despite Australia's extensive submissions about the *Volga* being "a part of a sophisticated illegal fishing enterprise," and Russia's lack of opposition to

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[60] CCAMLR, "Report of the Twentieth Meeting of the Commission" *CCAMLR-XX* 22 October – 2 November 2001, Hobart, Australia, available at https://www.ccamlr.org/en/ccamlr-xx § 5.11
[61] For more on the prompt release procedure see, Seline Trevisanut, "Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends," *Ocean Development & International Law* 48, no. 3–4 (October 2, 2017): 300–312.
[62] *The "Camouco," Panama v France*, Prompt Release, ITLOS Case No 5 (7 February 2000).
[63] *The "Monte Confurco" Case (Seychelles v. France),* Prompt Release ITLOS Case No. 6 (18 December 2000).
[64] The "Grand Prince" Case (Belize v. France), Prompt Release ITLOS Case No. 8 (20 April 2001).
[65] Rothwell and Stephens, "Illegal Southern Ocean Fishing And Prompt Release," 175.
[66] The "Volga Case" (Russian Federation v. Australia), Prompt Release, ITLOS Case No. 11 (23 December 2002)
[67] The "Volga Case" (Russian Federation v. Australia), §77.

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such claims.[68] As Donald Rothwell and Tim Stephens argue, in these prompt release cases of late 1990s and early 2000s, the ITLOS took the side of the flag states,[69] most probably in order to continue receiving more prompt release requests from flag states. In so doing, it has effectively blocked the emergence of a port state obligation to curb IUU fishing via judicial pathway. As a result of this experience, Australia and France, as well as New Zealand and South Africa to a lesser degree, became the pioneers of the legal efforts to prevent IUU fishing to be developed on the regional and global levels.[70]

In particular, Australia took swift action within the CCAMLR regime. In 2002 meeting, in the presence of all 24 Members of the Commission (Argentina, Australia, Belgium, Brazil, Chile, European Community, France, Germany, India, Italy, Japan, Republic of Korea, Namibia, New Zealand, Norway, Poland, Russian Federation, South Africa, Spain, Sweden, Ukraine, the UK, the US and Uruguay), Australia made three recommendations to act against IUU fishing. First, Australia proposed amending Article 73(2) of the UNCLOS so that the vessels arrested for IUU fishing would not be released.[71] The UK, Chile, Norway, Sweden, South Africa, the EU, Argentina, France sympathized with this proposal but refused it since amending the UNCLOS appeared inconceivable.[72] Second, Australia suggested extending the CCAMLR regime's coverage to Indian Ocean (to William's Ridge, Marion Rise and Del Cano/Africana Rise) by virtue of a formal amendment to the CCAMLR Convention. This would ensure that they can manage the Patagonian toothfish population in a larger area. Russia, Norway, the EU, Spain, Sweden, Chile, Argentina, Japan expressed concerns about the legal viability and complications of effectuating such an amendment.[73]

Finally, Australia announced that it had nominated the Patagonian toothfish to be listed as an engendered species under the 1973 Convention on International Trade on Endangered

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[68] Rothwell and Stephens, "Illegal Southern Ocean Fishing And Prompt Release," 184.
[69] Rothwell and Stephens, 183.
[70] Rothwell and Stephens, 175.
[71] CCAMLR, "Report of the Twenty-first Meeting of the Commission" *CCAMLR-XXI* 21 October – 1 November 2002, Hobart, Australia, available at https://www.ccamlr.org/en/ccamlr-xxi §8.62
[72] CCAMLR, "Report of the Twenty-first Meeting of the Commission," §8.62-8.73
[73] CCAMLR, "Report of the Twenty-first Meeting of the Commission,"§ 8.74-8.84.

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Species of Wild Fauna and Flora (CITES). This move spurred fervent reactions from some of the other members.[74] While New Zeeland was the only member that supported the initiative, 19 members encouraged Australia to withdraw its proposal.[75] For example Japan, Norway, Russia, China, Ukraine and Korea protested this move because Australia took this action unilaterally without consulting them first and damaged CCAMLR's reputation as a conservation regime. The EU expressed its reservations about this move and recommended further consultations. Chile, Argentina, Sweden, Namibia, South Africa seconded this call for further consultations to figure out a common position and criteria to consider this matter. Spain and the US, on the other hand, maintained that cooperation with CITES would not undermine the CCAMLR regime in principle. Nevertheless, they did not directly support listing toothfish as an engendered species.

Following this debate, Dr. S. Stone, the Australian Parliamentary Secretary for the Environment and Heritage, expressed Australia's exasperation as follows:

> The Australian Government is also frustrated at the apparent disregard of some countries for CCAMLR management and conservation measures. This disregard is undermining the credibility of CCAMLR. Australia therefore encourages all Members to reassess their obligations under the Convention and to take action against those who support and/or facilitate illegal fishing activities. Australia's frustration at the illegal fishing that is occurring is not only found in our increased domestic efforts. It is also expressed in the package of initiatives that it has developed for consideration at this Commission meeting, and at the CITES meeting which begins in Chile next week.[76]

This speech did not convert those members that are normally sympathetic to the cause, however. The UK, Italy, Germany, Belgium, Brazil, and even France – Australia's close ally

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[74] For a good account of the debate read, CCAMLR, "Report of the Twenty-first Meeting of the Commission,"§ 10.1-10.72

[75] CCAMLR, "Report of the Twenty-first Meeting of the Commission,"§ 10.72

[76] CCAMLR, "Report of the Twenty-first Meeting of the Commission,"§ 10.42

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in the fight against IUU fishing – tried to dissuade Australia.[77] Australia brought its proposal to the CITES meeting but withdrew it later. The Conference of the Parties (Cop) to CITES did not have a reason to add the Patagonian toothfish to Annex II. Instead, it passed a resolution calling for further cooperation between CITES and CCAMLR during its twelve session in 2002.[78] This meant that another door was closed to the efforts for addressing IUU fishing through CITES. This interaction also showed how political it is to propose species to be listed under Annex II to CITES.

Australia's change attempts through *formal means* (by amending UNCLOS or CCAMLR convention), *state action path* (by arresting vessels involved in IUU fishing activities), *judicial path* (though an ITLOS decision acknowledging port state obligations to prevent IUU fishing or the seriousness of IUU fishing) or *multilateral path* (by listing Patagonian toothfish as an endangered species in CITES's Annex II with the approval of the COP to CITES) were all blocked. However, Australia would find a more sympathetic ally: FAO. Australia's contemporaneous efforts to raise awareness around IUU fishing within the FAO would go more smoothly, as we see in the next section.

3. FAO and the Agreement on Port State Measures (1999-2016)

The FAO was more receptive to the idea of creating a legal framework to curb IUU fishing. As described above (under section a), the FAO has been one of the pioneers in developing measures against overfishing. Created on 16 October 1945 (8 days before the UN itself), the FAO has a specific mandate on fisheries. Its Fisheries Division was the first ever established body within the organization (established in 1946).[79] The FAO has been increasingly involved in the fisheries management since the late seventies.[80] In particular, it has supported Regional Fisheries Management Organizations (RFMOs) – international bodies that are

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[77] CCAMLR, "Report of the Twenty-first Meeting of the Commission,"§ 10.53-10.71
[78] CITES, "Cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources regarding trade in toothfish" *Resolution Conf. 12.4 (Rev. CoP18),* Twelve Meeting of the Conference of the Parties (3-15 November, Santiago, Chile) available at https://cites.org/eng/res/12/12-04.php.
[79] Garcia, "Ocean Fisheries Management: The FAO Programme," 385.
[80] Garcia, 399.

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created to manage regional fisheries and to fill "the institutional void between EZZs."[81] The FAO has also participated in the establishment of many of RFMOs. Several RFMOs were created under the FAO's Constitution – e.g. Central Asian and Caucasus Regional Fisheries and Aquaculture Commission (CACFish), Asia-Pacific Fishery Commission (APFIC) or General Fisheries Commission for the Mediterranean (GFCM). That is all to say, although the FAO is not a central Law of the Sea organization that one can immediately think of, it has slowly and steadily carved its place as an institution specialized in the management of fisheries.

Indeed, the FAO and Australia were like-minded about IUU fishing (**ideological proximity**). Acting upon Australia's initiative, the Commission on Fisheries of FAO (COFI) discussed IUU fishing during its 15-19 February 1999 session.[82] A few months after, the FAO Ministerial Meeting on Fisheries, which took place between 10-11 March 1999, adopted the Rome Declaration on the Code of Conduct for Responsible Fisheries. The Declaration expressed concern for IUU fishing especially by vessels operating under flags of convenience.[83] As such, the Declaration served as a reference point. The same year, the Secretary General articulated the same concern in their 1999 report, and the UNGA addressed the issue in *Resolution 54/32*. More specifically, the resolution underlined that IUU fishing "threatens serious depletion of populations of certain fish species" and it urged "States and entities to collaborate in efforts to address these types of fishing activities."[84]

In 2000, the Australian government, in collaboration with the FAO, organized an Expert Consultation on IUU fishing in Sydney (15-19 May 2000). The outcome document of this meeting served as the basis for the International Plan of Action on IUU (IPOA-IUU). The Plan, introduced by the FAO in 2001 and complements two other Plans of Actions developed

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[81] Henriksen, Hønneland, and Sydnes, *Law and Politics in Ocean Governance*, 2.
[82] William Edeson, "The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument," *The International Journal of Marine and Coastal Law* 16, no. 4 (January 1, 2001): 605, https://doi.org/10.1163/157180801X00243.
[83] Edeson, 606.
[84] UNGA, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *A/RES/54/32* (19 January 2000).

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by the FAO: (i) International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, and International Plan of Action for Conservation and Management of Sharks, and (ii) the International Plan of Action for the Management of Fishing Capacity.[85] The IPOA-IUU is based on the UNCLOS, the UN Fish Stocks Agreement, and the 1993 FAO Compliance Agreement.[86] Yet, the IPOA-IUU goes beyond these instruments and introduces novel "toolbox" which "contains a range of measures for the flag states, port states, coastal states and market states or states that engage in international trade in fishing."[87] The Plan urges national and supranational authorities to develop measures against IUU fishing. In particular it calls for improving transparency so that fish products can be traced and IUU fishing would not be mixed with fish caught through legitimate means.[88]

One of the most innovative aspects of the Plan is port state obligations to curb IUU fishing. While the employment of port state measures in the context of IUU fishing was novel, port state measures have been in use to prevent marine pollution. Several regional cooperation efforts, establishing Port State Memoranda of Understanding (MOUs) had emerged or transformed in the late 1980s and 1990s.[89] These regional MOUs were established in pursuant to IMO *Resolution A.682(17)* of 1991 and in light of Article 218 of UNCLOS.[90] These MOUs were created to carry out systematic inspection of vessels to prevent pollution and eliminate those that are in sub-standard conditions. Yet their existence created "an international acceptance" around port state control.[91]

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[85] Edeson, "The International Plan of Action on Illegal Unreported and Unregulated Fishing," 608.
[86] It is also based on the WTO and the IMO agreements.
[87] Mary Ann E. Palma, Martin Tsamenyi, and William R. Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (BRILL, 2010), 16.
[88] Melania Borit and Petter Olsen, "Evaluation Framework for Regulatory Requirements Related to Data Recording and Traceability Designed to Prevent Illegal, Unreported and Unregulated Fishing," *Marine Policy* 36, no. 1 (January 1, 2012): 96–102, https://doi.org/10.1016/j.marpol.2011.03.012.
[89] UNGA, Report of the Secretary General: Oceans and the Law of the Sea, §199.
[90] IMO, Regional Co-Operation in the Control of Ships and Discharges, *Resolution A. 682(17)* (6 November 1991).
[91] Lobach, "Measures to Be Adopted by the Port State in Combating IUU Fishing."

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There are currently nine MOU regimes across the globe. **Paris MOU (Europe and the Atlantic)** which entered in 1982 is the oldest.[92] Its members include Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Spain, Sweden and the United Kingdom. **Tokyo MOU (Asia and the Pacific)** went into effect in 1994 and its members are Australia, Canada, Chile, China, Fiji, Hong Kong (China), Indonesia, Japan, Republic of Korea, Malaysia, Marshall Islands, New Zealand, Panama, Papua New Guinea, Peru, Philippines, Russian Federation, Singapore, Thailand, Vanuatu, and Viet Nam.[93] **Acuerdo de Viña del Mar (Latin America)** signed in 1992 in Viña del Mar in Chile. Its current members are Argentina, Bolivia Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Panama, Peru, Uruguay and Venezuela.[94] **Caribbean MOU (Caribbean)** was signed in Christ Church, Barbados in 1996. Its members are Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, Jamaica, the Netherlands Antilles, Suriname and Trinidad and Tobago.[95] **Abuja MOU (West and Central Africa)** established on 22 October 1999. Members of Abuja MoU are Benin, Congo, Gabon, Ghana, Guinea Conakry, Cote D'Ivoire, Angola, Liberia, Guinea Bissau, Nigeria, Senegal, Sierra Leone, South Africa, the Gambia, Togo, Sao Tome and Principe and Cape Verde.[96] **Black Sea MOU (the Black Sea region)** signed in 2000 by Bulgaria, Georgia, Romania, Russia, Turkey, Ukraine.[97] **Mediterranean MOU (the Mediterranean)** signed on 28 November 1995 during Euro-Med Conference in Barcelona. Its current members are Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Tunisia, Turkey.[98] **Indian Ocean MOU (the Indian Ocean)** finalized in 1998 in Pretoria. Its current members include Australia, Bangladesh, Comoros, Djibouti, Eritrea, France, India, Iran, Kenya, Maldives, Mauritius, Mozambique, Myanmar, Oman, Seychelles,

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[92] Its origins go to 1978 Hague Memorandum, which was renewed in 1982 in Paris. For more, see https://www.parismou.org/about-us/history
[93] For more, see http://www.tokyo-mou.org/organization/about_tokyo_mou.php
[94] For more, see http://197.230.62.214/VMoU.aspx
[95] For more, see http://www.caribbeanmou.org/content/about
[96] For more, see http://www.abujamou.org/index.php
[97] For more, see http://www.bsmou.org/about
[98] For more, see http://www.medmou.org/

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South Africa, Sri Lanka, Sudan, Tanzania and Yemen.[99] **The Riyadh MoU**, signed by Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE in 2004 in Riyadh.[100] Finally, **the United States Coast Guard** maintain the tenth port state control regime.[101] These regimes do not include provisions about inspection for IUU fishing. However, they set out a sophisticated inspection and reporting mechanism and detention procedures, which could be used as a template.

Enforcing port state measures to curb IUU fishing appeared to be a viable option that could fill in the cracks of the existing legal framework for the high sea fisheries. As Secretary General recounts in their 1999 report, port state measures were encouraged by the CSD and the IMO.[102] While the CSD called for "further development of effective port state control" in its decision 7/1, the IMO's Sub-Committee on the Flag State Implementation acknowledged the importance of port state controls to complement weaknesses of flag state implementation in response to continuous pleas from the FAO, Australia, the USA and Canada.[103] Hence, when the idea was first introduced in the IPOA-IUU, establishing a global or a regional regime of port state control did not ring out of ordinary. Last but not least, the IPOA-IUU received positive reaction from the UNGA, which welcomed the adoption of the Plan with a 2001 resolution.[104]

Upon such a positive appraisal, the FAO began formulating a Model Scheme on Port State Measures to Combat IUU Fishing, which was introduced in 2005. This non-binding

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[99] For more, see http://www.iomou.org/

[100] For more, see https://www.riyadhmou.org/index.html

[101] Their annual reports go as far back as 1998 with statistics from 1996. For more, see https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Commercial-Vessel-Compliance/Foreign-Offshore-Compliance-Division/

[102] Commission on Sustainable Development, *Decision 7/1. Oceans and Seas*, 1999, Document E/1999/25, Section I.C, available at https://www.un.org/Depts/los/consultative_process/documents/CSDdec71.htm

[103] Doulman, "Illegal, Unreported and Unregulated Fishing: Mandate for and International Plan of Action," §29-30.

[104] UNGA, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *A/RES/56/13* (13 December 2001).

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document served as the basis of the Agreement on Port State Measures (PSM).[105] 2006 Review Conference of the UN Fish Stock Agreement supported this initiative and described the Model Scheme as "the international minimum standard for port State control and a necessary reference for the development of a global instrument."[106] The final version of the PSM Agreement was adopted under Article XIV of the FAO Constitution in November 2009 at the 36th session of FAO Conference (Rome, 18-23 November 2009). This first ever legally binding legal instrument on IUU fishing went into force on 5 June 2016.[107]

IV. SCR Framework

1. *Trajectory of the Case*

This case is an example of norm emergence. When it comes to the management of fisheries the only two well-established obligations have been those of flag states and coastal states. IUU fishing emerged and flourished in areas without strong coastal state control and when flag states were unwilling or unable to enforce control over the vessels flying their flags. Reflagging vessels became a common practice and a source of side income for some states with each new registry generating about $12'000 for a new flag and additional $20'000 for certifications and registry.[108] What also contributed to the aggravation of IUU fishing problem was the advancement in technology that allowed fleets to more efficiently deplete fishing stocks.[109] The scale of this problem became apparent in the 1990s, especially in areas

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[105] Witbooi, "Illegal, Unreported and Unregulated Fishing on the High Seas," 299–300.

[106] UNGA, Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, A/CONF.201/2006/15 (5 July 2006), §108.

[107] At the time of its adoption these were the countries at the Council: Afghanistan, Argentina, Australia, Brazil, Canada, Cape Verde, Chile, China, Cote d'Ivoire, Cuba, Egypt, El Salvador, Equatorial Guinea, France, Gabon, Germany, Ghana, Greece, India, Indonesia, Iran, Ireland, Italy, Japan, Jordan, Mauritania, Mauritius, Mexico, Mozambique, Norway, Pakistan, Philippines, Republic of Korea, Russia, Saudi Arabia, Slovakia, Spain, Sri Lanka, Syria, Thailand, Trinidad and Tobago, Tunisia, Tanzania, Uganda, UK, US, Uruguay, Venezuela, Zimbabwe.

[108] Ian Urbina, *The Outlaw Ocean: Journeys Across the Last Untamed Frontier*, 1st Edition edition (New York: Knopf, 2019), 9.

[109] University of British Columbia, "New Technology Allows Fleets to Double Fishing Capacity and Deplete Fish Stocks Faster," Science Daily (16 September 2019) available at https://www.sciencedaily.com/releases/2019/09/190916160819.htm

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far from coastal state control.[110] This was a moment of realization that allowing states to claim their EZZs was really not the solution to overfishing. As countries expanded their control over their EEZs, IUU fishing retreated to far corners of the oceans and became a flourishing business as reports from marine conservation groups such as Greenpeace and Friends of the Earth showed.[111]

The 1990s were also the right period to push for this issue because the concerns over IUU fishing tapped on the ones that have been raised for driftnet fishing since the l980s.[112] In particular, Australia and the US had been vocal against driftnet fishing and restricted the use of this equipment.[113] The first regional denunciation of driftnet fishing was the 1989 Tarawa Declaration issued by the South Pacific Forum Fishing Agency in response to Japan and Taiwan's driftnetting. South Pacific states instituted a ban on driftnetting in November 1989 (Wellington Convention on Drift-nets) which was then extended to North Pacific Region, and the Caribbean.[114] By the early 1990s, the issue was picked up by the UNGA, which issued a series of resolutions calling for the restriction of the use of driftnets.[115] Another UNGA resolution issued in 1991 called for "a moratorium on large-scale pelagic driftnet fishing. . . notwithstanding that it will create adverse socio-economic effects on the communities involved."[116] In 1992 the EU began introducing measures to control the use of driftnets following this call.[117] Hence, the awareness raising around IUU fishing grew on top of and alongside the concerns for driftnet fishing (**change attempt building on another one developed in an adjacent field**).

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[110] Edeson, "Closing the Gap: The Role of 'Soft' International Instruments to Control Fishing."
[111] Paul Wapner, "Politics beyond the State Environmental Activism and World Civic Politics," *World Politics* 47, no. 3 (April 1995): 311–40, https://doi.org/10.1017/S0043887100016415.
[112] "Driftnetting may be broadly described as a process whereby 'the surface layer of the ocean is fished with nets allowed to drift with winds and currents. . . held open in a vertical position by the tension exerted between numerous floats on the floatline and a weighted deadline." For more see, Richard Caddell, "Caught in the Net: Driftnet Fishing Restrictions and the European Court of Justice," *Journal of Environmental Law* 22, no. 2 (January 1, 2010): 301–14, https://doi.org/10.1093/jel/eqq008.
[113] Caddell, 303.
[114] Caddell, 303.
[115] UN Doc A/Res/44/225 of 22 December 1989 and UN Doc A/Res/45/197 of 21 December 1990
[116] UN Doc A/Res/46/215 of 20 December 1991
[117] Caddell, "Caught in the Net," 305.

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Selection Stage

Australia is by far the most engaged change agent, although Norway, France, New Zealand, and South Africa play a significant role in supporting Australia's attempts. When it comes to selection stage, what we see is that Australia activated different authority structures and engaged with different paths of change contemporaneously. Although it was Norway that first attempted to raise awareness around IUU fishing within the CCAMLR regime – where one of the most emblematic cases of IUU fishing was taking place in the early 1990s – Australia was certainly the most persistent change agent.

Australia first began its change attempt within the CCAMLR regime. **As environmental NGOs and marine conservation groups reported, the Patagonian toothfish population was under risk** and the CCAMLR regime was able to do little to nothing to counter this trend. Even some CCAMLR members – such as Russia – were not able to enforce conservation measures as member states and flag states (**opening**). Seeing such enforcement problems concerning the conservation of Patagonian toothfish, Australia and France began arresting vessels. When Australia found itself before the ITLOS for prompt release requests, it appealed to the ITLOS to consider IUU fishing as significant problem and to request non-financial measures. However, the ITLOS refused these claims and issued decisions that favor the interests of flag states, most likely with the hope of receiving more prompt release requests from other flag states (**low to none institutional receptiveness**).What became apparent at this stage while *state action path* was not sufficient on its own, *judicial pathway* was blocked. Seeing these frustrated pathways, Australia proposed to initiate amendments to the UNCLOS and the CCAMLR Convention so that these two documents would reflect the gravity of the IUU fishing problem and recommended listing Patagonian toothfish as an endangered species. All these three proposals were vehemently protested by other members of the CCAMLR regime – except New Zealand. This meant that *formal change pathway* and *multilateral pathway* were also closed to this cause.

While these multiple change processes were already in motion (and slowly hitting roadblocks) Australia had already activated another authority structure: FAO. The FAO was far more sympathetic to this initiative (**high institutional availability and receptiveness**). Although the FAO was not a central law of the sea institution, it has focused on the

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management of fisheries since its inception and became a leading institution in this area particularly since the late 1970s. Upon Australia's proposal, the FAO concentrated its efforts on increasing awareness around IUU fishing and devising legal measures to curb it. Finally, the port state measures to prevent, deter and eliminate IUU fishing is **quite a salient topic** since it has been discussed at the UNGA level, the Ministerial Level (in the context of the FAO and the CCAMLR regime) and by the Secretary General themselves.

Construction stage

As described under the selection stage, Australia attempted to activate several pathways: *formal change pathway* (amendment); *judicial path* (ITLOS decisions in favor of port state obligations); and *multilateral path* in the context of CITES regime (by listing Patagonian toothfish as an endangered species in Annex II). These paths were all frustrated. What worked was the *multilateral pathway* and *bureaucratic pathway* under the auspices of the FAO. Once activated in 1999, the FAO immediately concentrated its efforts on defining the scope of the IUU fishing problem as well as devising measures to counter it at the Commission on Fisheries of FAO (COFI) (**bureaucratic pathway)** as well as the FAO Ministerial Meeting on Fisheries and FAO Conference (**multilateral pathway**). As a result, the FAO produced a few important reference documents such as the 1999 Rome Declaration on the Code of Conduct for Responsible Fisheries, the 2001 the International Plan of Action on IUU (IPOA-IUU), and the 2005 Model Scheme on Port State Measures to Combat IUU Fishing. These documents helped develop the notion of employing port state measures to prevent and eliminate IUU fishing. Then came the 2009 Agreement on Port State Measures – first legally binding instrument to tackle IUU fishing – which went into force in 2016. It took only 10 years to develop these first initiatives into a legally binding treaty. Therefore, we can characterize **the pace of change as sudden**.

Development of port state measures to curb IUU fishing relied on existing norms and in particular port state obligations. The employment of port state measures to prevent marine pollution was already envisaged by the UNCLOS and several regional Port State MOUs that were created in pursuit of the 1991 IMO Resolution and the UNCLOS (**previous norm availability**). Hence, it was pretty stable obligation (**stability**). Moreover, the 1995 Fish Stock Agreement was the first legal instrument to talk about port state measures in the context

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of managing straddling *and* highly migratory *fish stocks. When the documents produced by the FAO, in particular the IPAO-IUU and the PSM Agreement, included port state measures as a method to prevent IUU fishing, it sounded natural and not out of the ordinary. In addition, as explained above,* the concerns over IUU fishing also tapped onto the awareness raising campaigns and legal framework developed against driftnet fishing (**previous norm availability**). This certainly the increased the pace of framing IUU fishing as a problem and generating solutions to curb it.

Reception stage

The steps taken by the FAO were well received by the relevant authority structures. In particular, the Committee of Sustainable Development (CSD) and the International Maritime Organization (IMO) encouraged the FAO to define effective port state measures. The FAO's attempts were also welcomed by the UNGA, for example, in *Resolution 54/32*, and the Secretary General's 1999 report. Last but not least, the 2006 Review Conference of the UN Fish Stock Agreement supported the FAO's Model Scheme and defined it as the minimum international standard for port state control.

Even before the adoption of the PSM Agreement, there were already several states that relied on port states measures. In addition to Australia and France, Norway has been one of the pioneers in using port state measures against vessels engaged in IUU fishing. [118] Norway also entered into information sharing agreements concerning port state control with Canada, Denmark, Faroe Islands, France, Iceland, Ireland, Netherlands, Sweden, Russia and United Kingdom.[119] Similarly, the US, Canada, Iceland and South Africa introduced legislation allowing them to deny their ports to vessels engaged in driftnet fishing and IUU fishing.[120]

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[118] Lobach, §17. Regulation No. 1130 of 23 December 1994 concerning the entry into and passage through Norwegian territorial waters

[119] Lobach, § 20-21.

[120] For Canada, see Coastal Fisheries Protection Act (R.S.C. 1970, c.C.21) Sections 3 and 4, and Coastal Fisheries Protection Regulations (C.R.C., 1978, c. 413), Section 5. For the US, See SEC.206a of Magnuson-Stevens Fishery Conservation and Management Act (As Amended Through October 11, 1996). For Iceland, See Article 3 of Act No 228 April 1998 concerning fishing and processing by foreign vessels in Iceland's exclusive fishing zone.

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In addition to states, some of the RFMOs also put in place port state measures – some before and some after the PSM Agreement. The following RFMOs have port state measures in place:[121]

- CCAMLR (since 1998), CCSBT - Commission for the Conservation of Southern Bluefin Tuna (since 2017),
- GFCM- General Fisheries Commission for the Mediterranean (since 2008),
- ICCAT - International Commission for the Conservation of Atlantic Tunas (since 2012),
- IOTC - Indian Ocean Tuna Commission (since 2011),
- NAFO - Northwest Atlantic Fisheries Organization (since 1996),
- NEAFC - North-East Atlantic Fisheries Commission (since 2007),
- NPFC - North Pacific Fisheries Commission (since 2015),
- SEAFO - South East Atlantic Fisheries Organization (since 2005),
- SPRFMO - South Pacific Regional Fisheries Management Organization (since 2014),
- WCPFC - Western and Central Pacific Fisheries Commission (since 2018).

Moreover, the PSM Agreement has 66 state parties: Albania, Australia, Bahamas, Bangladesh, Barbados, Cabo Verde, Cambodia, Canada, Chile, Costa Rica, Cuba, Cote d'Ivoire, Denmark, Djibouti, Dominica, Ecuador, EU, Fiji, France, Gabon, Gambia, Ghana, Grenada, Guinea, Guyana, Iceland, Indonesia, Japan, Kenya, Liberia, Libya, Madagascar, Maldives, Mauritania, Mauritius, Montenegro, Mozambique, Myanmar, Namibia, New Zealand, Norway, Oman, Palau, Panama, Peru, Philippines, Republic of Korea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sri Lanka, Sudan, Thailand. Togo, Tonga, Trinidad and Tobago, Turkey, United States of America, Uruguay, Vanuatu and Viet Nam.

[121] This information is compiled from Terje Lobach et al., *Regional Fisheries Management Organizations and Advisory Bodies: Activities and Developments, 2000–2017* (Rome: FAO, 2020), 16.

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One can therefore say that the change attempt is relatively well-received. Other institutions and like-minded states supported the FAO's construction efforts. The initiatives to make port state measures against IUU fishing an accepted norm have certainly created enough disturbance to allow sympathetic actors to enforce port state measures. That is, these attempts were enough to destabilize the old norm that only allowed flag state and coastal state control (**the burden of argument shifted**). However, it is hard to say that this new norm is fully and successfully internalized (**partial success**). There are importance pockets of states that either ignore or deny these measures by being silent about them. According to newly compiled IUU fishing index, when it comes to port state obligations, important fishing countries like China and Russia have the worst score, 4.67 and 4,07 – 5,00 being the worst score available and 1,00 being the best score available. These two are followed by Cambodia, Vietnam, Singapore, Taiwan, Yemen, Grenada, Ukraine, Cameroon Jamaica, Timor-Leste, Sierra Leone and Tanzania.[122]

Even relatively good enforcement of port state measures does not seem to be the panacea for IUU fishing. In particular, weak (or non) enforcement of flag state obligations is still the biggest challenge in this regard. Having seen states' inability or unwillingness to take steps to enforce existing laws on the high seas, some marine conservation groups stepped up. Sea Shepherd, in particular, is a remarkable example. Founded in 1977 by Paul Watson, one of the founding members of Greenpeace, Sea Shephard took some of the boldest moves to combat IUU fishing vessels. For example, to bring us back to the story of Patagonian toothfish, they carried out a successful campaign in the CCAMLR regime: Operation Icefish. They patrolled across the CCAMLR area in collaboration with Australia and New Zealand to spot and stop six IUU fishing vessels issued with Interpol Purple Notices (i.e. Bandit-6).[123] As a non-governmental organization, Sea Shephard has no authority to arrest vessels. Knowing this, they come up with an innovative plan: pursuing vessels until they deplete their resources, or arrive to shores where they can get arrested. For example, two Sea Shephard vessels, the *Paul Baker* and the *Sam Simon* carried out the longest pursuit of an IUU fishing

[122] For a view of the ranking, see http://iuufishingindex.net/ranking
[123] For more, see the campaign's website, https://www.seashepherdglobal.org/our-campaigns/icefish/

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vessel in history, which took over 110 days across more than 11,550 nautical miles.[124] The *Thunder,* a Nigerian-flagged poaching vessel, could not shake them off or seek refuge in a safe port to refuel. The world's eyes were turned to this chase and the US began threatening Nigeria with sanctions to coerce them to act. Instead of issuing an arrest warrant, Nigeria stripped them of their flag in the midst of the pursuit.[125] Having lost all the hope and most of their fuel, there was not much left to do for the *Thunder*. The *Thunder*'s began sinking within São Tomé and Príncipe's EEZ under suspicious circumstances.[126] Sea shepherd's vessels saved the crew and reported that the incidence was most likely an attempt of self-sabotage motivated by a desperate attempt to hide evidence of IUU fishing.[127] The officers of the *Thunder* were then put on trial in São Tomé and Príncipe. Other vessels had similar faiths. While the *Viking* and the *Perlon* was detained in Malaysia, the *Kunlun* was arrested in Thailand. The *Songhua* and the *Yongding* were arrested in Cabo Verde. The *Viking* escaped and re-chased by Sea Shepard and recaptured in Indonesia, where it was ordered to be sunk.[128] Although this little success story is soothing, it is only a drop in the ocean. IUU fishing remains to be a significant problem.

2. ***Particularities of the Case***

a) *Multiplicity of pathways invoked contemporaneously*

One of the particularities of this case was the difficulty to apply a purely chronological analysis under one single thread. This was because the main change agent invoked multiple pathways contemporaneously at different sites of norm construction. These paths did not immediately converge, but run in parallel. Therefore, focusing on the developments on

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[124] For a detailed description of the chase, see chapter 1 of Urbina, *The Outlaw Ocean*. This book is written by an investigative journal who was onboard at the *Sam Simon* during the pursuit.
[125] Urbina, 35.
[126] For details of the incidence, see https://www.seashepherdglobal.org/latest-news/sea_shepherd_concludes_epic_op_icefish/
[127] Urbina, *The Outlaw Ocean*, 37–38.
[128] See the Sam Simon's captain, **Siddharth Chakravarty's account,** https://www.seashepherd.org.uk/news-and-commentary/commentary/the-end-of-the-bandit-6.html

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different sites of construction appeared to be a more effective way of analyzing the emergence of port state obligations. In this regard, this case carries resemblance to the rules for (hostile) cyber operations case.

b) Frustrated pathways leading to the path of least resistance

What this case shows really well is how certain paths can be frustrated when change attempts are not supported by other actors who might be normally sympathetic to the cause. This is precisely what happened to Australia's change attempts within the CCAMLR regime. Their suggestion to amend the UNCLOS and the CCAMLR Convention were immediately rejected (*frustration of the formal pathway*). Their attempts to prevent IUU fishing by arresting vessels turned out to be ineffective too. This was especially because the ITLOS repeatedly decided against port states and refused to acknowledge port state obligations to curb IUU fishing despite the evidence showing the prevalence of the problem (*frustration of the state action and judicial paths*). Finally, Australia's proposal to list Patagonian toothfish as an endangered specifies under Annex II of CITES was vehemently rejected by other CCAMLR members – except New Zealand. Upon seeing such resistance, Australia later dropped this proposal. As a result, a change attempt that could be effectuated by the COP to CITES was also blocked (*frustration of the multilateral path*). This also showed the political nature of the process of listing endangered species under Annex II of CITES, which on the surface appears to be rather a technical affair.

c) ITLOS as change attempt blocker

The ITLOS' unwillingness to make authoritative statements definitely hindered and frustrated early change attempts. In this regard, the story presented here resembles the case on self-defense against non-state actors, where ICJ played a similar role. Indeed, the prompt release decisions of the late 1990s and the early 2000s dealt a blow to the attempts to construct port state obligations to fight IUU fishing. While this hindrance closed one path, change flew through other channels: multilateral and bureaucratic pathways under the auspices of the FAO. What is also interesting about this case is that none of the states that are against (or ignorant of) port state measures in principle – such as China, Russia, or Nigeria

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– brought a case before international courts to contest these measures. Even prompt release requests stopped around the early-to-mid 2000s.[129] The most likely explanation behind this development is that opposing states do not have enough incentive to fight these measures. They are not too invested in vessels engaged in IUU fishing. Indeed, they make profit by selling their flags or charging registration fees but most of the vessels that get arrested are those that receive Interpol Purple Notices. Therefore, there is a reputation cost in defending such vessels, which was the reason why Nigeria stripped the *Thunder* in the middle of a pursuit, as discussed above. Similarly, taking a strong official position against port state measures to curb IUU fishing is likely to have reputation costs. Because IUU fishing is an act that is not popular in the eyes of international community. Hence, **the burden of argument shifted**, and defending IUU fishing requires a lot more justification now compared to a decade ago. There might be huge obstacles when it comes to enforcing measures to fight IUU fishing but justifying the act itself is rather difficult now. Hence, there is definitely a discursive change concerning IUU fishing even if there remains serious limitations concerning the implementation of port state measures.

d) Move from the periphery to the center: How the concept of IUU fishing became popular

The way the concept of IUU fishing got first defined and got popularized shows how ideas, definitions and frames can move from the periphery to the center, which we previously observed in the case of state obligation to prevent domestic violence. The term IUU fishing was first conceptualized in the context of the CCAMLR regime in 1997. The term then travelled to more centralized institutions such as the FAO, the UNGA and the Secretary General's report in 1999 – in a very short time span. The CAMMLR regime served as a fertile ground to define the scope and the reasons of the problem, which then was taken up by more central institutions.

[129] The last prompt release decision was issued in 2007. The "Tomimaru" Case (*Japan v. Russian Federation*), Prompt Release, Case No. 15 (6 August 2007).

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e) Three well-known lessons about International Law

First, measures implemented by single countries are likely to be ineffective especially when the problem is a global one. France and Australia's initial arrest attempts did not create too much of an impact until port state measures to fight IUU fishing become more accepted through the initiatives of authority structures such as the FAO and the UNGA. Second, this case also shows it is rather difficult (if not nearly impossible) to effectuate change through formal means. When Australia proposed amending the UNCLOS and the CCAMLR Convention, these proposals were immediately rejected by the rest of the CCAMLR member states since formal amendment procedure appeared to be inconceivable. This is the reason why change often flows through other pathways that we study in this project. Third, while it is difficult to include 'measures with teeth' in consensus-based treaties, it is possible to include them in soft law documents or in treaties with limited scope (**form vs substance debate**). Indeed, early treaties like the UNCLOS and the Geneva Conventions have very vague provisions about conservation and protection of biodiversity. Later produced soft law documents (e.g. Code of Conduct for Responsible Fishing) or the PSM Agreement could levy more direct obligations related to conservation and responsible fishing.

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Part VI.

INTERNATIONAL ENVIRONMENTAL LAW

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Case Study 17

The Human Right to a 'Good' Environment

(June – October 2020)

Dorothea Endres

I. Typical story

Typically, the emergence of the human right to a clean environment is traced back to the Stockholm Declaration of 1972.[1] Despite its soft law status, the declaration is supposed to have impacted profoundly on developments of national constitutional laws and regional human rights instruments.[2] From the Stockholm Declaration, the development is typically traced to diverging paths in the different international and regional human rights instruments.[3] Similar to the general developments in International Environmental Law, the description of the norm development is then divided into a procedural branch and a substantive branch.[4] This case study is focusing on the (more incrementally changing) substantive branch.[5] For this typical story, it is important to highlight that human rights textbooks usually do not address the issue, but textbooks on international environmental law

[1] John H. KNOX et Ramin PEJAN, « Introduction », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 1-16; David R. BOYD, « Catalyst for Change », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 17-41 at p. 17; Ulrich BEYERLIN et Thilo MARAUHN, *International environmental law*, Oxford, Hart Publishing, 2011, p. 391-392.

[2] David R. BOYD, « Catalyst for Change », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 17-41 aux pages 18-23.

[3] Ulrich BEYERLIN et Thilo MARAUHN, *International environmental law*, Oxford, Hart Publishing, 2011, p. 394-402; Edith BROWN WEISS, « The Contribution of International Environmental Law to International Law: Past Achievements and Future Expectation - The Evolution of International Environmental Law », (2011) 54 *Japanese Yearbook of International Law* 1-27, 15-17; John H. KNOX et Ramin PEJAN, « Introduction », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 1-16 aux pages 1-2.

[4] John H. KNOX et Ramin PEJAN, « Introduction », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 1-16 at p. 3.

[5] This focus, as well as the decision not to go into detail about the normative content were taken after discussing the question with the Postdoc, Ezgi Yldiz.

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regularly have a chapter on human rights and the environment.[6] For the human rights field, the issue is treated in the context of specialized textbooks, either on new rights or on environmental issues.[7]

While in general, the existence of a human right to clean environment is rarely denied entirely,[8] the precise scope of the right remains subject to controversy.[9] Illustratively for this is the broad variation of qualifying adjectives in the denomination of the environment the human is supposed to have a right to: sustainable, clean, healthy, etc. To some extent, the latest reports of the Special Rapporteurs (SR), on human rights and the environment can be considered as evidence for the degree of consolidation of the right in question.[10] In that respect, it is important to highlight that two of the most authoritative textbooks on the issue are written by the two SRs.[11]

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[6] See for instance: John G. MERRILLS, « Environmental Rights », in Daniel BODANSKY, Jutta BRUNNÉE et Ellen HEY (ed.), *The Oxford Handbook of International Environmental Law*, 2008; Dinah SHELTON, « Human rights and the environment: substantive rights », in Malgosia FITZMAURICE (ed.), *Research Handbook on International Environmental Law*, Northampton, Edward Elgar Publishing, 2010, p. 265-283; Jona RAZZAQUE, « Human rights to a clean environment: procedural rights », in Malgosia FITZMAURICE (ed.), *Research Handbook on International Environmental Law*, Northampton, Edward Elgar Publishing, 2010, p. 284-300.
[7] See for instance: Dinah L. SHELTON et Donald K. ANTON (ed.), « Substantive Human Rights and the Environment », in *Environmental Protection and Human Rights*, Cambridge, Cambridge University Press, 2011, p. 436-544; Lavanya RAJAMANI, « Human Rights in the Climate Change Regime », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 236-251; Günther HANDL, « The Human Right to a Clean Environment and Rights of Nature: Between Advocacy and Reality », in Andreas VON ARNAULD, Kerstin VON DER DECKEN et Mart SUSI (ed.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, Cambridge, Cambridge University Press, 2020, p. 137-153.
[8] See however: Günther HANDL, « The Human Right to a Clean Environment and Rights of Nature: Between Advocacy and Reality », in Andreas VON ARNAULD, Kerstin VON DER DECKEN et Mart SUSI (ed.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, Cambridge, Cambridge University Press, 2020, p. 137-153.
[9] See: David R. BOYD, « Catalyst for Change », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 17-41.
[10] See infra chapter 4.2.
[11] David R. BOYD, *The environmental rights revolution : A global study of constitutions, human rights, and the environment*, Vancouver, UBC Press, 2012; John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018.

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II. Chronology

1. 1972 -1992 : From Stockholm to Rio

1972 is the year in which modern International Environmental Law crystalized as an autonomous field of international law: The Stockholm Conference concluding with the *United Nations Stockholm Declaration on Human Environment* set the cornerstone for the emergence of international environmental law which would somewhat solidify with the Rio Conference concluding with the *Rio Declaration on Environment and Developmen*t in 1992.[12] Ironically, the United States of America (US) - most vehemently opposing a similar formulation in the Rio Declaration - proposed the inclusion of a specific right to a clean environment in the Stockholm Declaration.[13] While this suggestion found much support amongst the NGOs, the Conference participants opted for the more indirect formula merely linking the two fields.[14]

The Stockholm Conference was enabled by the United Nations General Assembly (UNGA) Resolution 2398 (XXIII) of 3rd December 1968. It was however the unprecedented – and uninvited – participation of countless non-state actors (250 Non-Governmental Organisations (NGOs) were accredited) which would particularly characterize and push the developments at said conference.[15]

It is the very first principle of the *Stockholm Declaration*, which is of interest here:[16]

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[12] UN GA, Rio Declaration on Environment and Development (3-4 June 1992), UN Doc. A/CONF.151/26 (Vol. I). ; see: Edith BROWN WEISS, « The Contribution of International Environmental Law to International Law: Past Achievements and Future Expectation - The Evolution of International Environmental Law », (2011) 54 *Japanese Yearbook of International Law* 1-27, 4-10.

[13] UN Doc. A/Conf.48/PC/WG-1/CRP.4 (1971) at p. 65; also: Dinah SHELTON, « What Happened at Rio to Human Rights », (1992) 3-1 *Yearbook of International Environmental Law* 75-93, 76-77.

[14] Dinah SHELTON, « What Happened at Rio to Human Rights », (1992) 3-1 *Yearbook of International Environmental Law* 75-93, 77.

[15] Edith BROWN WEISS, « The Contribution of International Environmental Law to International Law: Past Achievements and Future Expectation - The Evolution of International Environmental Law », (2011) 54 *Japanese Yearbook of International Law* 1-27, 5.

[16] UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994 (Stockholm Declaration), principle 1.

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"Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

This formulation is considered to be the first clear link between human rights law and international environmental law.[17] Interestingly, the subsequent formulation in the *Rio Declaration* (1992) is more restraint, referring only to human beings who are 'entitled to a healthy and productive life in harmony with nature'.[18]

In their codification processes, the euro-centric human rights bodies were not paying much attention to the relation between human rights and the environment. The travaux préparatoires of the two Covenants do not provide any evidence for the consideration of a possible autonomous environmental human right.[19] This discussion on the Covenants (adopted 1966, entering into force in 1976) took however place before the Stockholm Declaration was made. Equally, drafting the European Convention on Human Rights (ECHR), States did not consider an autonomous environmental human right. In the Americas as well as in Africa, a human right to a healthy environment was codified.[20] Due to the respective institutions' weaknesses, these codifications had however little impact.

Important developments happened also on the national level – arguably in particular at the periphery of the Cold war tensions (tensions of particular relevance her may have been about human rights, the juxtaposition of civil and political rights and social and economic rights). For instance, Indian courts – embedded in a rich history of environmental law litigation - adopted an approach based on a broad interpretation of a constitutional right to life, where

[17] Francesco FRANCIONI, « International Human Rights in an Environmental Horizon », (2010) 21-1 *The European Journal of International Law* 41–55, 44.

[18] UN GA, Rio Declaration on Environment and Development (3-4 June 1992), UN Doc. A/CONF.151/26 (Vol. I).

[19] Marc J. BOSSUYT, *Guide to the « Traveaux Préparatoires » of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff Publishers, 1987; Ben SAUL, *The International Covenant on Economic, Social and Cultural Rights, Vol II, Traveaux Préparatoires 1948-1966*, Oxford, Oxford University Press, 2016; Ben SAUL, *The International Covenant on Economic, Social and Cultural Rights, Vol I, Traveaux Préparatoires 1948-1966*, Oxford, Oxford University Press, 2016.

[20] Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), 16 November 1999, A-52, Art. 11; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 24. For details, see chapter 2.2.2 and 2.2.3.

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the right to a decent environment is drawn indirectly from the right to life: In 1991, the Supreme Court of India in the case of *Subhash Kumar v State of Bihar* stated that "the right to life guaranteed by article 21 [of the Constitution] includes the right of enjoyment of pollution free water and air for full enjoyment of life".[21] While a profound analysis exceeds the scope of the present study, it is noteworthy that in this process, the Stockholm Declaration served as argumentative backdrop, and that public interest litigation, (i.e. civil society) was crucial.[22] In other words, for India, the interplay of international soft law and civil society movements was crucial for the norm change at the national level.

In 1982, certain environmental human right aspects were endorsed in the World Charter for Nature.[23] Put forward by the World Commission on Environment and Development Expert Legal Group,[24] another proposition for a 'fundamental right to an environment adequate for the health and well-being of all human beings' appeared on the UN-agenda in 1987.[25] Its impact is however hard to pin down. Apart from the UN GA endorsing these draft articles, they seem not to have gained much attention.[26]

In 1989, a conference, initiated by France, the Netherlands and Norway was convened in The Hague. The result was the Hague Declaration on the Environment, signed by Australia, Brazil, Canada, Côte d'Ivoire, Egypt, France, Federal republic of Germany, Hungary, India, Indonesia, Italy, Japan, Jordan, Kenya, Malta, Norway, New Zealand, the Netherlands,

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[21] Supreme Court of India (Judges K.N. Singh and ND Ojha JJ, Subhash), Kumar v. State of Bihar and others (1 September 1991) AIR 1991 SC 420, para. 7.

[22] Gitanjali Nain GILL, « Human Rights and the Environment in India: Access through Public Interest Litigation », (2012) 14-3 *Envtl. L. Rev.* 200-218; David R. BOYD, « Catalyst for Change », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 17-41 at p. 24.

[23] UN GA Resolution 37/7, UN Doc. A/RES/37/7 (1982); See: Sumudu ATAPATTU, « The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law », (2002) 16-1 *Tulane Environmental Law Journal* 65-126, 75-76.

[24] This Commission was an independent body whose mandate included re-examining critical environmental and development issues and formulation of proposals to deal with them; proposing new international cooperation and raising awareness among individuals, organizations and governments.

[25] Expert Group on Environmental Law of the World Commission on Environment and Development, Environmental Protection and Sustainable Development: Legal Principles and Recommendations, 25; UNGA res. 42/187 of 11 December 1987, A/42/427.

[26] See: Sumudu ATAPATTU, « The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law », (2002) 16-1 *Tulane Environmental Law Journal* 65-126, 76.

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Senegal, Spain, Sweden, Tunisia, Venezuela, and Zimbabwe.[27] This declaration also endorses in its preamble the right to live in dignity in a viable environment.[28]

2. ***1994-2002/2020: Jurisprudential developments***

2.1. International level

2.1.1. In general

On the general international law level, at the International Court of Justice (ICJ), the link between human rights and environment has been recognized by Judge Weeramantry (in his separate opinion) in the Case on the *Gabcikovo-Nagymros Project* (1997).[29]

At the environment-focused front, the International Union for the Conservation of Nature and Natural Resources,[30] provided as set of draft articles on environment and development, recognizing the link between development, environmental protection and human rights. [31] This document has undergone 5 revisions, and is presented as "living document".[32] The latest version from 2015 continues to highlight the interlinkage between human rights and environment.[33] In its commentary, the document draws heavily on the existing case law when

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[27] The Hague Declaration on the Environment, 28 I.L.M 1308 (1989).

[28] The Hague Declaration on the Environment, 28 I.L.M 1308 (1989), preamble.

[29] ICJ, Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, Separate Opinion of Judge Weeramantry, at p. 87 and 91-92.

[30] The IUCN is a membership Union composed of both government and civil society organisations. See for more information: https://www.iucn.org/about.

[31] For a detailed analysis see: Nicholas ROBINSON, « "Colloquium: The Rio Environmental Law Treaties" IUCN's Proposed Covenant on Environment & Development », (1995) 13 *Pace Environmental law Review* 133-189; Sumudu ATAPATTU, « The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law », (2002) 16-1 *Tulane Environmental Law Journal* 65-126, 83-87.

[32] See: https://www.iucn.org/fr/content/draft-international-covenant-environment-and-development-implementing-sustainability.

[33] Art. 4 holds: "Peace, development, environmental conservation, rule of law and respect for human rights and fundamental freedoms are indivisible, interrelated, and interdependent, and constitute the foundation of a sustainable world." IUCN, Draft International Covenant on Environment and Development, 5th edn., 2015, available online: https://www.iucn.org/fr/content/draft-international-covenant-environment-and-development-implementing-sustainability.

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elaborating on the preamble, but barely references any human rights document when elaborating on article 4.[34]

At the human-rights-focused part of the UN-level, the Covenants (International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR)) do not provide for a specific human right linked to environmental concerns. However, from the 1990ies onwards, the Committees interpreted several norms in ‘a green light’. In particular in relation to minority protections, some jurisprudence linking human rights and environmental concerns was developed. Arguably, the changing political environment was a crucial enabler for this change. Nevertheless, one should not be too quick in classifying the environmental human right as a second or third generation right.[35] Drawing on different existing norms, the ICCPR committee’s jurisprudence on the one side and the ICESCR committee’s General Comment on the other side endows the emerging environmental right with features of all three generations.

2.1.2. Minority rights

In 1989, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities named its member, FATMA ZOHRA KSENTINI, as Special Rapporteur on Human Rights and the Environment.[36] In her final report, in 1994, she finds a right to a healthy and flourishing environment evolving, and provides a Draft Declaration of Principles on Human Rights and the Environment.[37] The impact of this report is not exactly clear. The facts of the key case of the ICCPR Committee would lend itself perfectly for taking into account the SRs

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[34] IUCN, Draft International Covenant on Environment and Development, 5th edn., 2015, available online: https://www.iucn.org/fr/content/draft-international-covenant-environment-and-development-implementing-sustainability, p. 38-39 and 46-48.

[35] While this theory (on generations of human rights) is fairly flawed and has been replaced by the new insistence on three dimensions of all human rights, the non-conformity of the environmental human right with the categories of (1) civil and political rights, (2) social and economic rights and (3) group rights is a dominant argument against its existence.

[36] UN Sub-Conmmission on Prevention of Discrimination and Protection of Minorities, Decision 1989/108 of 31 August 1989 (adopted without vote).

[37] UN ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of Further Developments in Fields with which the Sub-Commission has be concerned, Human Rights and the Environment, Final Report prepared by Fatma Zohra Ksentini, Special Rapporteur (6 July 1994), UN Doc. E/CN.4/Sub.2/1994/9.

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findings. While the final report was published only two months before the *Länsmann decision*, the SRs interim reports would have been publicly available for the decision-makers.[38]

While the ICCPR Committee included some environmental considerations into its rulings already in the *EHP v Canada* case (1982),[39] and the *Ominayak and Lubicon Lake Band v Canada* case (1990),[40] the landmark case is *Länsmann and Others v Finland* in 1994, finding no violation of Art. 27 ICCPR because Finland had taken adequate measures to minimize the impact of stone quarrying activities on reindeer herding in the traditional lands of the Sami people.[41] It is noteworthy that - contrary to the regional developments in the Americas and Africas - the committees continues to rely on the perspective of 'individual rights' of minority members. In line with the *Länsmann case*, in *Apriana Mahuika and Others v New Zealand* (2000), the ICCPR committee balanced indigenous rights to fishing resources with governmental efforts to conserve these resources, and held that government actions neither interfere with the rights of the Maori people to self-determination under Art. 1 ICCPR nor were in violation of Art. 27 ICCPR.[42]

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[38] UN ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review , Human rights and the environment : preliminary report / prepared by Fatma Zohra Ksentini, Special Rapporteur, pursuant to Sub-Commission resolutions 1990/7 and 1990/27 (2 August 1991) UN Doc. E/CN.4/Sub.2/1991/8; Human rights and the environment : progress report / prepared by Fatma Zohra Ksentini, Special Rapporteur, in accordance with Sub-Commission resolution 1991/24 (2 July 1992) UN Doc. E/CN.4/Sub.2/1992/7; Human rights and the environment : progress report / prepared by Fatma Zohra Ksentini, Special Rapporteur, in accordance with Sub-Commission resolution 1991/24 (14 August 1992) UN Doc. E/CN.4/Sub.2/1992/7/Add.1; Human rights and the environment : 2nd progress report / prepared by Fatma Zohra Ksentini, Special Rapporteur (26 July 1993) UN Doc. E/CN.4/Sub.2/1993/7.

[39] ICCPR Committee, EHP (on behalf of Port Hope Environmental Group and Present and future citizens of Port Hope, Ontario, Canada) v Canada, Admissibility, Communication No 67/1980, UN Doc CCPR/C/17/D/67/1980, IHRL 2558 (UNHRC 1982), 27th October 1982; Regarding the question whether the storage of radioactive waste threatens the right to life of present and future generations.

[40] ICCPR Committee, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984, UN Human Rights Committee (HRC), 26 March 1990; Regarding re indigenous rights and their access to natural resources, judging whether the provincial government of Alberta had deprived the complainants of their means of subsistence and their right of self-determination by granting leases for oil and gas exploration.

[41] ICCPR Committee, Länsman and others v Finland, Merits, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992, (1995) 2 IHRR 287, IHRL 2798 (UNHRC 1994), 26th October 1994.

[42] ICCPR Committee, Mahuika and 18 other individuals belonging to the Maori People of New Zealand v New Zealand, Merits, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993, (2000) 8 IHRR 372, IHRL 1733 (UNHRC 2000), 27th October 2000.

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From the 2000s on, additionally, the right to water and the right to life were rights interpreted in a 'green light'. Similar attempts regarding the right to privacy were not successful so far.

2.1.3. Right to water

In its General Comment 15 (2002), the ICESCR Committee recognizes a state obligation to ensure adequate and accessible supply of water for drinking, sanitation and nutrition, based on Art. 11 and 12 of the ICESCR.[43]

2.1.4. Right to life

In 1996, the ICCPR committee dismissed a complaint about French nuclear tests in the South Pacific, alleged to interfere inter alia, with the right to life.[44] However, in its GC 36 on the right to life (2019) the ICCPR Committee emphasizes environmental degradation as both an enabler of threats and a direct threat to the right to life. Most recently, in the cases *Portillo Cáceres v Paraguay* (2019) and *Teitiota v New Zealand* (2020) the ICCPR Committee recognized explicitly the connection between the right to life and environmental protection. [45]

2.1.5. Right to privacy

In *Brun v France* (2006), the ICCPR considered the question whether the use of genetically modified crops violates the right of the complainants to live in a healthy environment. Additionally, to the right life, the complaint was based on the argument that Burn had acted out of necessity to protect the environment and health from the impacts of the open–field trials of genetically modified organisms, and the legitimacy of his actions should have been

[43] UN Committee on Economic, Social and Cultural Rights, General comment no. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11.
[44] UN ICCPR Committee, Mrs. Vaihere Bordes and Mr. John Temeharo v. France, Communication No. 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (22 July 1996).
[45] ICCPR Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2751/2016, UN Doc. CcPR/C/126/D/2751/2016 (20 September 2019); *Ioane Teitiota v. New Zealand,* UN Doc. CCPR/C/127/D/2728/2016 (7 January 2020).

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recognized by local courts. Their failure to do so was considered to have breached his rights of privacy under Art.17 ICCPR. However, the court found no violation of either right.[46]

2.2. *Regional level*

2.2.1. Europe

Since the 1970ies several attempts to codify a European environmental human right were not successful. The main reason given by the ministerial committee was that such a right would not be covered by the means and tasks of the European Court of Human Rights (ECtHR), in particular because the issue of protecting the environment emerged posterior to the entry into force of the European Convention of Human Rights (ECHR).[47]

In the Courts jurisprudence, it is the right to life (art. 2) and the right to private and family life (Art. 8) that provide for the link to environmental concerns. The specific facts of the case *Lopez Ostra v Spain* (1994) carved out the unlikely candidate Art. 8 as entry door for environmental concerns: A high concentration of tanneries, all belonging to one corporation, were malfunctioning and continued to pollute the environment to a degree that the health of residents was possibly endangered.[48] The applicant held that:

> *'the plant continued to emit fumes, repetitive noise and strong smells, which made her family's living conditions unbearable and caused both her and them serious health problems. She alleged in this connection that her right to respect for her home had been infringed.'*[49]

The court took her allegations up, arguing that:

> *Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.*
>
> *Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (art. 8-1) -, as the applicant wishes in her case, or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2 (art. 8-2), the applicable principles are broadly similar. In both*

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[46] ICCPR Committee, Brun v France, Admissibility, Communication No 1453/2006, UN Doc CCPR/C/88/D/1453/2006 (18th October 2006).

[47] See for a detailed account: Elisabeth LAMBERT, *Environnement et droit des l'homme -Rapport introductif à la Conférence de haut niveau Protection environnementale et droits de l'homme*, Strasbourg, Council of Europe, 2020, p. 11-13.

[48] ECtHR, Case of Lopez Ostra v. Spain, Chamber Judgement (9 December 1994).

[49] ECtHR, Case of Lopez Ostra v. Spain, Chamber Judgement (9 December 1994), par. 47.

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> *contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8-1), in striking the required balance the aims mentioned in the second paragraph (art. 8-2) may be of a certain relevance.*[50]

More recent case law has however made clear that state obligations in environmental matters are only recognized very restrictively: In *Hatton v UK* (2003), the court quite explicitly emphasized that there is no environmental human right in the catalogue of rights granted by the ECHR, and highlighted the subsidiary role of the Convention showing considerable deference to national policy decisions.[51] In *Fadeyeva v Russia* (2007), the court further built on Hatton and restrained the use Art. 8 as grounds for a claim in relation to human rights and environmental degradation: firstly, the deleterious effects of pollution must directly affect the applicant's home, family or private live life; secondly, the adverse effects must have reached a certain minimum level.

Another particularity of the ECtHR is its explicit introduction of 'prior informed consent' borrowed from various environmental treaties as the *Aarhus Convention* (1998) and the *Espoo Convention* (1991).[52] This concerns however the procedural branch of the norm, which is not the focus of this case-study.

In 2006, the Council of Europe published a manual on human rights and the environment, detailing six principles from the Courts case law: (1) the right to life and the environment, (2) respect for private and family life as well as the home and the environment, (3) protection of property and the environment, (4) information and communication on environmental matter, (5) decision-making processes in environmental matters and public participation in them, and (6) access to justice and other remedies in environmental matters.

This manual was published in 2012 in a revised version, detailing 8 principles derived from the courts case law. The two additional elements concern: (7) the territorial scope of the

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[50] ECtHR, Case of Lopez Ostra v. Spain, Chamber Judgement (9 December 1994), par. 51 (emphasis added).
[51] ECtHR, Case of Hatton and others v. the United Kingdom, Grand Chamber Judgment (8 July 2003).
[52] See in particular ECtHR, Case of Taskin and others v. Turkey, Chamber Judgement (10 November 2004).

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conventions' application, and (8) the right to protection of health and the environment, derived from the European Social Charter and the revised European Social Charter.

In the meantime, in 2009, the Council of Europe also reiterated its proposal to draft an additional protocol on the right to a healthy environment.[53] This has however not materialized much further. In February 2020 the Council of Europe held a conference on « Environnement et droits de l'homme : vers un droit à un environnement sain ? ».[54] The final statement made no reference to any potential codification.[55]

In sum, the European Human Rights System has identified a substantive body of environmental human rights obligations, but stops short of actually codifying this body. One crucial particularity of this regional pathway is the centrality of the right to respect for private and family life (Art. 8) for the emergence of a human right to a healthy environment.

2.2.2. Americas

In 1988, the *Protocol of San Salvador* entered into force, holding in Art. 11 that 'everyone shall have the right to live in a healthy environment and to have access to basic public services'.[56] However, the only way to ensure implementation of this right is via annual reports. For this reason, most norm development took place based on the Convention, via the individual complaint mechanism.[57]

The Inter-American Court of Human Rights (IACtHR) has reviewed a considerable number of cases with concerns related to the protection of the environment. It found the basis for the

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[53] CoE, Recommendation on Drafting an AP on right to healthy environment, https://assembly .coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17777&lang=en.

[54] Council of Europe, Environnement et droits de l'homme : vers un droit à un environnement sain ? Réf. DC 028(2020) https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016809c8ff1.

[55] Déclaration finale par la Présidence géorgienne du Comité des Ministres, Protection de l'environnement et droits de l'homme, Conférence de haut niveau organisée par la Présidence géorgienne du Comité des Ministres Strasbourg, 27th February 2020, available online : https://www.coe.int /fr/web/human-rights-rule-of-law/final-declaration-by-the-presidency-of-the-committee-of-ministers.

[56] Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), 16 November 1999, A-52, available at: https://www.refworld.org/docid/3ae6b3b90.html.

[57] Malgosia FITZMAURICE, « A Human Right to a Clean Environment: A Reappraisal », in *The Global Community Yearbook of International Law and Jurisprudence 2015*, New York, Oxford University Press, 2016 at p. 223.

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introduction of such concerns in the right to property (art. 21) in particular when linked to the rights of indigenous communities (for a review of the case law, see timeline). The landmark case is *Awas Tigni v Nicaragua* (2001), holding that logging concessions awarded by Nicaragua to private investors in an area claimed by a tribal community constitute a violation of the petitioners' property rights.[58]

In 2017, on request of Colombia, the IACtHR issued an *advisory opinion* on the environment and human rights.[59] Colombia had presented the request in relation to environmental concerns regarding the construction of major infrastructure projects in the Caribbean. The request was limited to concerns in the context of the *1984 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention)*. The Court however, exercising its discretion, reformulated the request to cover the "general environmental obligations arising out of the obligations to respect and ensure human rights", "and in relation to the rights to life and personal integrity in particular".[60] The IACtHR distilled and detailed sets of obligations from the right to life and personal integrity in the context of environmental protection. It distinguished obligations of prevention, obligations of cooperation, the precautionary principle and procedural obligations.

Most recently, in February 2020, the IACtHR ruled in *Indigenous Communities Members of the Lhaka Honhat Association v Argentina - for the first time in a contentious case - on the rights to a healthy environment, indigenous community property, cultural identity, food and water based on Art. 26 of the ACHR (progressive development of economic, social and cultural rights).* The Court found Argentina in violation of these rights of the Lhaka

[58] IACtHR, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, reparations and costs, IACHR Series C No 79, [2001] IACHR 9, IHRL 1462 (IACHR 2001), 31st August 2001.
[59] IACtHR, Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights (IACrtHR), 15 November 2017.
[60] IACtHR, Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights (IACrtHR), 15 November 2017, paras. 35 and 38.

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Honhat indigenous groups and ordered measures including actions for access to adequate food and water, for the recovery of forest resources, and to maintain indigenous culture.[61]

In sum, the Inter-American Human Rights System has been particularly active in the construction of an environmental human right. We can distil as particularity of this pathway the role of indigenous rights in the creation of the right to a healthy environment: Since the 1970ies, with the modern indigenous rights movement gaining momentum, in particular drawing on the International Labour Organization (ILO) Convention of 1989 and various UN related activities, the Inter-American human rights system proved to be highly responsive to concerns of indigenous peoples. Its focus was thereby on the central demand of the indigenous human rights movement: the protection of indigenous peoples' rights over traditional lands and natural resources.[62] That this was intrinsically linked to the development of the right to healthy environment is already evident from the cases: both key cases were raised by indigenous communities. This link has a visible impact on the norm-emergence: the Inter-American human right to a healthy environment is a lot more receptive to group dimensions than its European sibling - and also more than the UN-jurisprudence.

2.2.3. Africa

The *African Charter on Humans' and Peoples Rights* (1981) provides in Art. 24 for a specific group dimension regarding environmental concerns:

> '*All people shall have the right to a general satisfactory environment favourable to their development (...) all peoples shall freely dispose of their wealth and natural resources. This right be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*'

In 1996, two NGOs, Social and Economic Rights Action Centre (based in Nigeria) and Centre for Economic and Social Rights (based in New York) lodged a complaint regarding the violation of a number human rights of the Ogoni people, because environmental degradation and health problems finding their cause in activities of the Nigerian National

[61] IACtHR, Case of the indigenous communities of the lhaka honhat (our land) Association *v.* Argentina, Judgment of 6th February 2020, Series C No. 400.
[62] S. James ANAYA et Robert A. Jr. WILLIAMS, « The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System », (2001) 14 *Harv. Hum. Rts. J.* 33-86, 35-36.

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Petroleum Company and the Shell Petroleum Development Corporation. On 27 May 2002, the African Commission issued its landmark case in that regard: the *Ogoniland Case*, considering the environmental devastation caused by the oil extraction industry in Nigeria, holding that:[63]

> *'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health.'*

This case is very widely cited as one of the most important cases regarding a progressive position on environmental human rights.[64] Furthermore, the African Charter has also had clear impact on the national level: for instance, Kenyan and Nigerian courts interpret their constitution as covering environmental human rights, despite the lack of an explicit constitutional norm.[65]

In sum, the African Human Rights System provides for a substantial environmental human right that goes beyond the individualistic nature of European and UN concepts of environmental human rights.

3. 2008-2015: Codification (attempts)

3.1. Regional human rights treaties

A considerable number of Arabic States endorses an environmental human right – presumably due to civil society movements' activities.[66] Arguably, they are regularly quite

[63] African Commission on Peoples and Human Rights, Soc. And Eco. Rights action Centre v. Nigeria, Case No. ACHPRH/Comm/A044/1, OAU Doc. CAB/LEG/67/3rev5 (13-27 October 2001), par. 51.

[64] See for instance: Günther HANDL, « The Human Right to a Clean Environment and Rights of Nature: Between Advocacy and Reality », in Andreas VON ARNAULD, Kerstin VON DER DECKEN et Mart SUSI (ed.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, Cambridge, Cambridge University Press, 2020, p. 137-153 at p. 142; 631 Alan BOYLE, « Human Rights and the Environment: Where Next? », (2012) 23-3 *European Journal of International Law* 613-642; Malgosia FITZMAURICE, « A Human Right to a Clean Environment: A Reappraisal », in *The Global Community Yearbook of International Law and Jurisprudence 2015*, New York, Oxford University Press, 2016 at p. 222; Francesco FRANCIONI, « International Human Rights in an Environmental Horizon », (2010) 21-1 *The European Journal of International Law* 41–55, 51.

[65] David R. BOYD, « Catalyst for Change », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 17-41 at p. 24.

[66] This information has been obtained through e-mail conversation with Ahmed Kamal Badr, a recent international law graduate of the Graduate Institute. Lack of Arabic language skills make verifications and further research impossible for me. The e-mail conversation can be found in the annex.

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limited in their effectiveness due to broad formulations and lacking enforcement possibilities.[67]

In 2008, the revised Arab Charter on Human Rights entered into force, after ratification of Algeria, Bahrain, Jordan, Kuwait, Syria, Libya, and the United Arab Emirates. In Art. 38 it codifies explicitly a right to a safe environment – in the context of the right to an adequate standard of living. As of 2020, the following states have subscribed to that charter: Algeria, Bahrain, Comoros, Djibouti, Egypt (signed, not ratified), Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco (signed, not ratified), Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan (signed, not ratified), Syria, Tunisia (signed, not ratified), United Arab Emirates, Yemen.[68] Inserting the right of a safe environment, was proposed by the Report of Arab Experts in the UN – mandated to review and update the Arab Charter on Human Rights.[69]

In 2012, the Association of Southeast Asian Nations (ASEAN) issued its Human Rights Declaration. In Art. 28 (f) this codifies a right to a safe, clean and sustainable environment. The subscribing member states are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.[70] The introduction of human rights and environmental concerns into the ASEAN's agenda was fundamentally driven by NGOs.[71]

Considering the San Salvador Protocol for the Americas, this makes the European human rights system the only regional human rights body that has no explicit codification of environmental human rights.

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[67] This information has been obtained through e-mail conversation with Ahmed Kamal Badr, a recent international law graduate of the Graduate Institute. Lack of Arabic language skills make verifications and further research impossible for me. The e-mail conversation is on file with the author.
[68] http://www.lasportal.org/ar/humanrights/Committee/Pages/MemberCountries.aspx.
[69] http://www.bibalex.org/arf/ar/ImpDocs/AHRrenew.htm. This source is available only in Arabic, special thanks to Ahmed Kamal Badr for his help.
[70] https://asean.org/asean-human-rights-declaration/.
[71] JoAnn Fagot AVIEL, « Placing human rights and environmental issues on ASEAN's agenda: The role of non-governmental organizations », (2000) 8-2 *Asian Journal of Political Science* 17-34.

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3.2. Paris Agreement

Despite those widespread endorsements on the national level, States representatives in the context of environmental law seem reluctant to codify a substantive environmental human right. Two of the main sponsors of the Climate Change Resolutions in the Human Rights Council (HRC) (see 4.2.1), Maldives and Switzerland, pressed for the inclusion of human rights language in the draft United Nations Framework Convention on Climate Change (UNFCC) agreement negotiated at the Conference of the Parties (COP) 15 in Copenhagen.[72] Their success materialized a year later in Cancun:

In 2010, the Cancun Agreements emphasized "that Parties should, in all climate change related actions, fully respect human rights."[73] Building on this, the 2015 Paris agreement became the first multilateral environmental agreement to include an explicit reference to human rights in its preamble. The instrument however stops short of recognizing a right to a healthy environment or a stable climate. The Preamble holds that:

> "*Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.*"

In the negotiation leading up to Paris, many parties and NGOs argued for the inclusion of references to human rights to life, food, shelter, and health, which would be adversely affected by climate impacts. With an eye toward the COP 21 discussions, the Office of the High Commissioner on Human Rights (OHCHR) and the Mary Robinson Foundation – Climate Justice co-hosted a Climate Justice Dialogue in Geneva on 9 February 2015. The dialogue brought together delegates to the UNFCCC and the HRC, experts, and key civil society actors to discuss human rights and climate change. One outcome of this meeting was the Geneva Pledge for Human Rights in Climate Action, an initiative led by Costa Rica to facilitate the sharing of best practices and knowledge between human rights and climate

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[72] https://www.universal-rights.org/nyc/blog-nyc-2/2018-important-year-human-rights-climate-chan ge/.

[73] 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,' in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1 (15 March 2011), para 8.

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experts at a national level. In February 2015, eighteen countries voluntarily pledged to enable meaningful collaboration between their human rights representatives and their climate negotiators.[74] By 2016, it had 33 signatories: Andorra, Algeria, Belgium, Chile, Costa Rica, Côte d´Ivoire, Fiji, Finland, France, Germany, Guatemala, Ireland, Italy, Kiribati, Luxembourg, Maldives, Marshall Islands, Mexico, Morocco, Micronesia, Netherlands, Palau, Panama, Peru, Philippines, Romania, Samoa, Slovenia, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uganda, and Uruguay.[75] While their activity towards the implementation of the human rights link in the Paris agreement is publicly available,[76] their position during the Paris agreement negotiations is not entirely clear.

It is clear that some actors pushed for an explicit human rights reference in what became Article 2 of the Paris Agreement, which identifies the purpose of the agreement.[77] However, this effort met with resistance from a considerable number of states, and in the end, the reference was only included in the preamble in carefully limited language that focuses on the human rights aspects of response measures rather than climate change itself.[78]

4. ***2008-2020: Institutional impetus***

4.1. HRC

In the HRC, the issue of climate change was first raised by the Maldives in 2008 – and found much resistance, in particular from large industrialised and emerging economies.[79] Nevertheless, a year later, alongside a core group of sponsors including Bangladesh,

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[74] https://www.mrfcj.org/resources/geneva-pledge-human-rights/.
[75] http://climaterights.org/our-work/unfccc/geneva-pledge/.
[76] Human Rights and Climate Change Working Group, Briefing Note: COP-22 Marrakesh Climate Conference, Integrating Human Rights to Climate Action, available online: http://climaterights.org/wp-content/uploads/2015/11/Briefing-HumanRightsCOP-22-ENG.pdf.
[77] CARE International and the Center for International Environmental Law , Climate Change: Tackling the Greatest Human Rights Challenge of Our Time, (Feb 2015), available online: http://www.ciel.org/wp-content/uploads/2015/06/CCandHR_Feb2015.pdf.
[78] Conference of the Parties, Adoption of the Paris Agreement (12 December 2015) U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015), preamble: "Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity"
[79]: https://www.universal-rights.org/nyc/blog-nyc-2/2018-important-year-human-rights-climate-cha nge.

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Germany, Philippines, Switzerland, Uruguay and the United Kingdom, the Maldives was able to push through a Council resolution on 'human rights and climate change' in 2008.[80] With its landmark resolution 7/23 (adopted without a vote), the Council acknowledged, for the first time, that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.'[81] A further resolution (resolution 10/4; adopted without a vote) went on to recognize another dimension of the relationship between human rights and climate change: that 'human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change.'[82]

In 2009, pursuant to HRC Resolution 7/23 on human rights and climate change, the OHCHR submitted a report to the UN GA on the relationship between climate change and human rights.[83] This report identified human rights obligations on the national level, and human rights obligations of international cooperation relevant in the context of climate change.[84]

In 2012, building on resolutions on human rights and climate change, the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,[85] the HRC appointed (without vote) an independent expert to on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[86]

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[80]: https://www.universal-rights.org/nyc/blog-nyc-2/2018-important-year-human-rights-climate-cha nge.

[81] UN HRC, Resolution 7/23, UN Doc. (28 March 2008).

[82] UN HRC, Resolution 10/4, UN Doc. (25 March 2009).

[83] UN HRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61, Geneva, UN HRC, 2009.

[84] UN HRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, A/HRC/10/61, Geneva, UN HRC, 2009, par. 69-91.

[85] Of particular relevance are: including resolution 16/11 of 24 March 2011 on human rights and the environment, resolutions 7/23 of 28 March 2008, 10/4 of 25 March 2009 and 18/22 of 30 September 2011 on human rights and climate change, resolutions 9/1 of 24 September 2008 and 12/18 of 2 October 2009 on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, and resolution 18/11of 29 September 2011 on the mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, as well as relevant Commission on Human Rights resolutions, including resolutions 2003/71 of 25 April 2003 and 2005/60 of 20 April 2005 on human rights and the environment as part of sustainable development

[86] UN HRC, Resolution 19/10 Human rights and the environment, Un Doc. A/HRC/RES/19/10 (12 April 2012) (adopted without a vote).

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The HRC appointed JOHN KNOX, and mandated him to prepare a compendium of best practices regarding environmental policymaking and to submit recommendations consistent with the millennium goal 7 (ensure environmental sustainability).[87] The mandate has been extended several times, [88] the denomination evolved as well to Special Rapporteur on Human Rights and the Environment,[89] and in 2018 DAVID R. BOYD was appointed as successor of JOHN KNOX.[90]

4.2. Special Rapporteur on Human Rights and the Environment

4.2.1. Mapping Report

In 2014, the independent expert, John Knox, presented a mapping report to the HRC, identifying three branches of environmental human rights:[91]

Procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in decision-making, and to provide access to remedies for harm; *Substantive obligations* of States to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors; and *Non-discrimination and other obligations* of States relating to the protection of members of groups in vulnerable situations, including women, children and indigenous peoples.

Interestingly, the SR draws on statements from very varying sources (from universal periodic review statements over other SR's reports to COP decisions), and "encourages States to accept these statements as evidence of actual or emerging international law".[92] Regarding the substantive element, the report finds that: "States have obligations to protect against

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[87] UN HRC, Resolution 19/10 Human rights and the environment, Un Doc. A/HRC/RES/19/10 (12 April 2012).
[88] UN HRC Resolution 25/21 Human Rights and the Environment, UN Doc. A/HRC/RES/25/21 (15 April 2014); UN HRC, Resolution 28/11 Human Rights and the Environment, UN Doc. A/HRC/RES/28/11 (7 April 2015); UN HRC Resolution 31/8 Human Rights and the Environment, UN Doc. A/HRC/RES/31/8 (23 March 2016); UN HRC, Resolution 34/29 Human Rights and the Environment (24 March 2017); UN HRC, Resolution 37/8, Human Rights and the Environment, UN Doc. A/HRC/RES/37/8 (22 March 2018).
[89] UN HRC, Resolution 28/11 Human Rights and the Environment, UN Doc. A/HRC/RES/28/11 (7 April 2015).
[90] UN HRC, Resolution 37/8, Human Rights and the Environment, UN Doc. A/HRC/RES/37/8 (22 March 2018).
[91] See: https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx.
[92] John H. KNOX, *Mapping Report, UN Doc. A/HRC/25/53*, Geneva, UN HRC, 2013, par. 27.

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environmental harm that interferes with the enjoyment of human rights",[93] and continued holding that:[94]

> "Although the contours of the specific environmental obligations are still evolving, some of their principal characteristics have become clear. In particular, States have obligations
>
> (a) to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights; and
>
> (b) to regulate private actors to protect against such environmental harm."

This document evidences the coming together of diverse regional strands: the Environmental Impact Assessment for instance travelled from the Espoo Convention to the ECHR jurisprudence, while group rights and in particular indigenous rights gained much momentum in the Inter-American human rights system. In the development of the following two key documents of the SR, those strands seem to become a little more intermingled.

4.2.2. Framework Principles

With the Report of 2018, the SR, JOHN KNOX, proposed 16 framework principles in order "to facilitate implementation of the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment".[95] In this document it is particularly striking how International Environmental Law (IEL) terminology dominates those principles. While the principles barely reference existing case law, they are supposed to be based on the mapping report.

The report claims to look "forward to the next steps in the evolving relationship between human rights and the environment",[96] but at the same time emphasizes that the framework principles "do not create new obligations".[97]

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[93] John H. KNOX, *Mapping Report, UN Doc. A/HRC/25/53*, Geneva, UN HRC, 2013, par. 44.
[94] John H. KNOX, *Mapping Report, UN Doc. A/HRC/25/53*, Geneva, UN HRC, 2013, par. 46.
[95] John H. KNOX, *Framework Principles*, A/HRC/37/59, Geneva, UN HRC, 2018, op. 7.
[96] John H. KNOX, *Framework Principles*, A/HRC/37/59, Geneva, UN HRC, 2018, par. 1.
[97] John H. KNOX, *Framework Principles*, A/HRC/37/59, Geneva, UN HRC, 2018, par. 8.

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4.2.3. Best Practices

In 2015, JOHN KNOX already presented a report with more than 100 good practices to the HRC,[98] and published a searchable data-base.[99]

In 2019, without referencing the practice report of his predecessor, SR DAVID BOYD presented a report with best practices to the HRC. This document is highlighted on the SR website as key document, along with the framework principles of John Knox.[100] In order to establish best practices, the SR DAVID BOYD, relies extensively on state practice in order to establish authority. Based on a survey conducted in cooperation with the Vance Center for International Justice,[101] the SR identifies 156 out of 193 UN member states legally committed to respect some sort of environmental human right.[102]

In that sense, if customary international law is created bottom up, some of the constitutional law developments on the national level can be considered to have crystallized into customary international law.[103]

The document provides procedural and substantive elements that are recommended in order to respect the human right to a healthy environment. Procedural elements are (1) access to environmental information, (2) public participation in environmental decision-making and (3) access to justice.[104] Substantive elements concern: (1) clean air, (2) safe climate, (3) healthy and sustainably produced food, (4) access to safe water and adequate sanitation, (5) non-toxic environments in which to live, work and play and (6) healthy ecosystems and

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[98] John KNOX, *Compilation of good practices*, A/HRC/28/61, Geneva, UN Human Rights Council, 2015.
[99] http://environmentalrightsdatabase.org/.
[100] See: https://www.ohchr.org/en/Issues/environment/SRenvironment/Pages/SRenvironmentInd ex.aspx.
[101] David R. BOYD, *Right to a healthy environment: good practices*, A/HRC/43/53, Geneva, UN Human Rights Council, 2019, par. 10.
[102] David R. BOYD, *Right to a healthy environment: good practices*, A/HRC/43/53, Geneva, UN Human Rights Council, 2019, par. 13.
[103] See: Rebecca M. BRATSPIES, « Reasoning Up », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 122-135.
[104] David R. BOYD, *Right to a healthy environment: good practices*, A/HRC/43/53, Geneva, UN Human Rights Council, 2019, par. 14-37.

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biodiversity.[105] The United Nations Environment Programme (UNEP) references the SR's construction now as existing environmental human right.[106]

Much like IEL more generally, the procedural branch is very clear and concise while the substantive elements lend themselves easily to criticism of being rather aspirational, programmatic and that the addressed issues are already covered by other, codified rights.[107] This may however summarize quite well the state of norm-emergence of an environmental human right: while the concise procedural elements from IEL have been quite successfully integrated into the human rights system, the substantive scope of the right remains quite malleable and contextual.

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[105] David R. BOYD, *Right to a healthy environment: good practices*, A/HRC/43/53, Geneva, UN Human Rights Council, 2019, p. 38-112.

[106] See: UNEP, Environmental rights, available online: https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what.

[107] See for instance: Günther HANDL, « The Human Right to a Clean Environment and Rights of Nature: Between Advocacy and Reality », in Andreas VON ARNAULD, Kerstin VON DER DECKEN et Mart SUSI (ed.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, Cambridge, Cambridge University Press, 2020, p. 137-153 aux pages 146-147; David R. BOYD, « Catalyst for Change », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 17-41 at p. 25.

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III. Analysis

1. *Phases of the legal change*

1.1. Synopsis

In 2019, the SR on Human Rights and Environment identifies 6 substantive elements of the right to a healthy environment: (1) clean air, (2) safe climate, (3) healthy and sustainably produced food, (4) access to safe water and adequate sanitation, (5) non-toxic environments in which to live, work and play, (6) healthy ecosystems and biodiversity.[108] This is the clearest indication of where the legal change in question has arrived. It is however hard to distinguish particular phases of selection, construction and reception: the norm-emergence is based on very entangled pathways in diverging stages. The following analysis may be oversimplifying the dynamics of the legal change in question.

Broadly, the norm evolved in three stages, with intertwined regional and international selection and reception phases. In the first phase, with the Stockholm Declaration, the issue of protecting the environment and the issue of protecting human rights became broadly linked.[109] In the second phase, national constitutional developments and regional human rights instruments created some sorts of environmental human rights.[110] Due to the very varying context (in facts and in norms) those norm-emergences took quite varying forms. In a third phase, the UN more seriously took up the issue, and at the same time, [111]at the regional levels, the existence of an environmental human right solidified.[112]

1.2. Selection phase

Stability: At first sight, it seems like there was wide agreement among the States drafting the Covenants that the right to a healthy/sustainable/… environment does not exist as an autonomous right. National developments at the periphery of the big powers at that time point

[108] David R. BOYD, *Right to a healthy environment: good practices*, A/HRC/43/53, Geneva, UN Human Rights Council, 2019, p. 8-18.
[109] See section 1.
[110] See section 2.
[111] See section 4.
[112] See sections 2.2 and 3.1.

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however to an actually quite wide-spread recognition of that right – outside of Eurocentric international law-making.[113]

Opening: Since the Rio-Declarations' wording is actually more limited than the Stockholm Declaration, it is possible that it was more the changing political climate in the 1990ies in general, that made ECHR and UN bodies consider an environmental dimensions of existing human rights.[114]

Critical juncture: One would expect the diverse environmental catastrophes to amount to some sort of critical juncture. However, my research could not confirm this expectation. The end of the capitalism v. communism dichotomy was critical for the change in question. It is a very detailed element of this large event, which is crucial for this case: the opposition between civil and political rights v. social and economic rights did not represent the two opposing world-ideologies anymore. Since the environmental human right is placed somewhat in between those two human rights groups, the end of this opposition was a fundamental opening factor for the norm change.[115]

Pathways: With the Stockholm Declaration providing the link between IEL and HR, it is the state action path activating the norm-emergence in question.[116] Depending on the weight given to the participating NGOs, it may however be more accurate to speak of the multi-stakeholder path activating the state action path in order to activate the norm change in question. The different courts are then selecting diverging norms in order start the construction of the norm.

Institutional availability: this norm emergence seems to be particularly bottom up: selection was much more enunciated on the regional levels. In a way, this made a second selection phase necessary, when the SRs knitted the different regional strand a little together. So, to

[113] See sections 1 and 3.1
[114] See section 1.
[115] See section 1.
[116] See section 1.

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the extent that one can speak about an international environmental HR, the SR was crucial for enabling this emergence.[117]

Salience: While the question of an environmental human right, in the selection phase, did not hit any indicator for high salience, it seems to have been on the agenda of a considerable number of states of three continents. If one wants to assume the SRs reporting as a second layer of selection phase, salience would be considerably higher, the HRC having endorsed its resolution on climate change, and the Paris agreement having highlighted the environmental human right in its preamble.[118] However, it can still not be considered particularly salient.

Actors: Clearly, courts played the crucial role in selecting the way in which the norm would develop: the diverging pathways on the regional level are the most striking evidence thereof.[119] Throughout the norm-development, and as highlighted in the different sequences, repeatedly, the norm emergence has been pushed, sustained or enabled by non-state actors in different forms and shapes: the 'multi-stakeholder pathway' is extremely entangled, and always in the background of the pathways that are perceived as dominant.

It is in general striking how absent the big powers are from the colourful scene of change agents: India is spearheading the norm development, Codifications in all regional human rights regimes except for the European one. Africa and the Americas are the first regional bodies to codify the right. The European Union, normally famous for pushing for environmental protection, is absent from the picture, and the Maldives are the crucial force pushing the HRC into the environmental corner. The Arab Charter, regularly criticized for not owning up to international standards, for instance, is at the forefront of processes solidifying an environmental human right.

[117] See chapter 4.2.
[118] See chapter 3.2 and 4.
[119] See chapter 2.2.

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1.3. Construction phase

Type of change: Norm emergence. The right to a clean environment is quite explicitly considered as a 'new right'. At the time of the drafting of the UN Covenants and of the ECHR, the right was clearly not on the agenda. The right has been emerging in the last two decades on the basis of diverse existing human rights. It is striking how this emergence took different paths depending on the context and the specific norm it drew on. (see in particular section 2).

Paradigm shift: While the emergence of an environmental human right quite clearly rides on the shifting paradigm regarding the dogmatic considerations of human rights, and on the increasing consideration of environmental concerns most generally, the norm itself is far from constituting any sort of paradigm shift.

Conditions of change: a) Stability: At first sight, it seems like there was wide agreement among the States drafting the Covenants that the right to a healthy/sustainable/… environment does not exist as an autonomous right. National developments at the periphery of the big powers at that time point however to an actually quite wide-spread recognition of that right – outside of Eurocentric IL-making. b) Previous norm-availability is crucial for this norm change: set in different normative contexts, the international and the different regional pathways develop different substantive content of an environmental human right (see section 2.2). Similar concerns had to shapeshift differently in order to enter the different human rights regimes since different norms and tools for interpretation were available. In short: the need to protect the environment entered through different doors into the human rights regime.

Crucial construction actors are the regional courts.[120] It is crucial to highlight that most claimants of the cases brought before the courts had substantial back up from civil society movements.[121] However, the courts' diverging constructs necessitate some sort of second universalizing construction phase, which may be quite ongoing at the level of the SR on environment and human rights.[122] It is striking how absent the old and new Hegemons are in

[120] See section 2.2.
[121] See for instance the Ogoniland case in section 2.2.3.
[122] See section 4.2.

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this process. The least surprising is probably China, who is generally avoiding human rights language. The most surprising absentee is the EU, who is regularly pushing for environmental protection in other international fora.

1.4. Reception phase

The reception happens in three stages: (1) the human rights bodies consider the Stockholm and Rio Declarations' link between environment and human rights, (2) the SR considers the various constructions of the different human rights bodies and national constructions and (3) the construction of the SR is taken up by other global actors. However, this description falsifies the picture in the sense that it presents a direct pathway – it would be more accurate to speak of a more and more densely knitted normative web – with those three steps at the core.[123]

Outcome of change: The determination of success of the change in question depends profoundly on the perspective diverse actors are taking. Arguments vary from assertions that it clearly exists to assertions that it clearly does not exist. Two factors have been emphasized in order to argue against an environmental human right: the vagueness of such a right, and the classification of such a right (first/second/third generation).[124] Those arguments are not too convincing if one considers law as process embedded in social context (that can vary). For the present research framework, it is however crucial to highlight the existence of a considerable amount of disagreement on the state of an environmental human right. It is not clear who in this argument has what weight, i.e., whether to consider contestation as dominant or not.

The problem is to some extent the reluctance of many states to directly contest human rights. Preferably, they make the norm extremely broad - to cover everything and nothing - or block

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[123] For instance, in 2006, the SR on Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Okechukwu Ibeanu, did not even mention the right to a clean or healthy environment in her report. See: ECOSOC, UN Doc. E/CH.4/2006/42 (20 February 2006).

[124] Malgosia FITZMAURICE, « A Human Right to a Clean Environment: A Reappraisal », in *The Global Community Yearbook of International Law and Jurisprudence 2015*, New York, Oxford University Press, 2016 at p. 224.

Electronic copy available at: https://ssrn.com/abstract=4430270

enforcement mechanisms. Another reason for the problematic is the vast diversity of background noise on the issue: while the field of human rights is already quite densely populated by a broad range of actors, for the present case, environmental interest representative joined the debate as well. For instance, it is impossible to either deny the role of NGOs for this norm-change nor to actually identify their contributions in detail.[125]

Furthermore, actors in the environmental field are also divided on the issue: Some clearly welcome the additional force pushing for more environmental protection, but others resist and accuse the environmental human rights approach as being too anthropocentric, neglecting the intrinsic value of nature.[126] Others find some sort of middle ground between those two positions, supporting a rights based approach but pushing for an emphasis on conservation of environment.[127]

Pace and mode of change: it is hard to imagine a more incremental norm-emergence than the one in question: it is very slowly built by an un-traceable number of actors and meanders in all sorts of directions. However, the norm-change only took predominantly place in the last three decades, and in that sense, it may be considered as somewhat sudden.

2. ***Particular features of the case***

From national to international

It seems that the Stockholm Declaration and civil society activism instigated numerous governments to legislate on the national level with regards to environmental human rights. This has now been the main source for the SR in order to claim that there is an established environmental human right. However, the content of the norm-constructions varies widely,

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[125] See on the role of NGOs: Malgosia FITZMAURICE, « A Human Right to a Clean Environment: A Reappraisal », in *The Global Community Yearbook of International Law and Jurisprudence 2015*, New York, Oxford University Press, 2016.
[126] See: Leena HEINÄMÄKI, « Right to Be a Part of Nature: Greening Human Righs via Strengthening Indigenous Peoples », (2012) 4 *Yearbook of Polar Law* 415-474, 416-417.
[127] See for instance: International Union for Conservation of Nature, Briefing on Human Rights and Biodiversity (April 2017), available online: https://www.iucn.org/theme/governance-and-rights/our-work/rights-based-approaches/human-rights.

Electronic copy available at: https://ssrn.com/abstract=4430270

also on the national level.[128] The clearest trend in that respect is probably the convergence of environmental movements with human rights movements, in particular in the countries of the Global South.[129]

For instance, the constitution of Mali provides for a right to a healthy environment, while the constitution of Malawi links the environmental human right to the right to development.[130]

The Constitution of the Philippines has a justiciable environmental human right in Art. 15. This was the ground for the lodging of the case *Minor Oposa v Factoran* regarding commercial logging in the Philippines, which had a deleterious effect on the rain forest in the Philippines. Children argued that their right and the right of future generations to the constitutional right to a healthful environment was breached by granting logging licenses.[131] This approach is distinctly different from the predominant approach in the Americas for instance, because the Philippine constitution recognizes indigenous rights to an extent that a pathway similar to the IACtHR pathway, theoretically, would have been an option.[132]

The spearheading of India has already been described in section 1. Here, it has to be highlighted that this Indian national legal development drew on the international resources available, but had itself not much impact on the UN human rights system at that time. In

[128] See: Malgosia FITZMAURICE, « A Human Right to a Clean Environment: A Reappraisal », in *The Global Community Yearbook of International Law and Jurisprudence 2015*, New York, Oxford University Press, 2016 at p. 225; Kaniye S.A. EBEKU, « Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited », (2008) 16-3 *Review of European Community & International Environmental Law* 312-320, 312-315.

[129] Sumudu ATAPATTU, « The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law », (2002) 16-1 *Tulane Environmental Law Journal* 65-126, 69-70.

[130] Constitution of the Republic of Mali 1992 (promulgated by Decree No 92-073 on 25 February 1992), Article 15, states 'Every person has the right to a healthy environment. The protection and defense of the environment and the promotion of the quality of life are a duty for all and the state'. Constitution of the Republic of Malawi 1994 (enacted by the Republic of Malawi (Constitution) Act, 1994 (No 20 of 1994)), Section 13(d), states 'The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals… To manage the environment responsibly in order to – (i) prevent the degradation of the environment; (ii) provide a healthy living and working environment for the people of Malawi; (iii) accord full recognition to the rights of future generations by means of environmental protection and sustainable development of natural resources; and (iv) conserve and enhance the biological diversity of Malawi'.

[131] *Oposa v. Factoran*, GR No 1083 (10 July 1993)

[132] S. James ANAYA et Robert A. Jr. WILLIAMS, « The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System », (2001) 14 *Harv. Hum. Rts. J.* 33-86, 73.

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general, in the Universal Period Review State Reports only those states that subscribe to the OHCHR related initiatives reference environmental human rights. The other states remain silent on the issue – despite their national legislations.[133]

Against this background, the approach of the SR to claim that the right to a healthy, sustainable, safe, etc. environment has been recognized in more than 100 States, and to base his claim to the existence of a universal environmental human right on this finding may be qualified as a quite optimistic view. It may be more accurate to speak of an international web of environmental human rights normativity that varies according to normative, regional and social context.

It has to be highlighted however, that the distinction between national and international level is painting black and white what is actually rather grey. For instance, in the Ogoniland Case before the African commission, claimant and respondent are both a mix of Nigerian and Global North entities.[134]

‘Greening’ different human rights leading to different ‘green’ pathways

The norm-emergence in question appeared through re-interpretation of existing rights in a “green light” – drawing on Environmental Law. This greening of different human rights created a web of rights through which the right to a healthy environment has been built.[135] There is general agreement that the international recognition of a right to a healthy environment would be a ‘capstone’ recognizing the maturity of this body of law.[136] However, this stage has not (yet) been reached.

As has been highlighted in section 2, different human rights bodies, finding themselves in different social and normative settings, draw on different existing norms in order to introduce environmental concerns into the human rights regime. This leads to diverging paths of change

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[133] See: https://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx. My control of this assertion was only punctual and focused on Europe. Details can be found in the annex.
[134] See chapter 2.2.3.
[135] John H. KNOX et Ramin PEJAN, « Introduction », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 1-16 at p. 5.
[136] John H. KNOX et Ramin PEJAN, « Introduction », in John H. KNOX et Ramin PEJAN (ed.), *The Human Right to a Healthy Environment*, Cambridge, Cambridge University Press, 2018, p. 1-16 at p. 5.

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for the different regimes. Taking one step back it is however impossible to contest that human rights in every context are a lot 'greener' today than they were 20 years ago. Also, the different pathways did not evolve in isolation from one another. CHRISTEL COURNIL provides detailed insights into the circulation and standardization of norms in this context.[137]

It is crucial to note that different facts also contributed to different elements of law being highlighted. For instance, the ECHR ruling on Hatton is not incompatible with the African Ogoni-land case: the former concerning far less extreme circumstances than the latter.[138]

Malleability of the norm dependent on legal and social context

If the outcome of those months of research on a substantive environmental human right were to be summarized in one sentence, it would be: "the substantive environmental human right is everywhere and nowhere." The substantive environmental human right's content varies depending on its normative and social context – to a degree that it becomes impossible to classify it in the general terms of human rights generations. Clearly, the European version, drawing on the right to family, is much more individual than the version in the Americas, drawing on indigenous rights.[139] Given that the UN human rights system does not provide for a proper group right in Art. 27, it is unsurprising that indigenous rights in the UN human rights jurisprudence were not able to instigate the same level of group dimension than in the Americas.[140] At the same time, indigenous rights are not the only pathway allowing to include a group dimension, as has been evidenced by the African human rights system.[141]

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[137] Christel COURNIL, « "Verdissement" des systèmes régionaux de protction des droits de l'Homme: circulation et standardisation des normes », (2016) 1 *Journal européen des droits de l'homme* 1-31; See also: Francesco FRANCIONI, « International Human Rights in an Environmental Horizon », (2010) 21-1 *The European Journal of International Law* 41–55.
[138] Alan BOYLE, « Human Rights and the Environment: Where Next? », (2012) 23-3 *European Journal of International Law* 613-642, 631.
[139] See chapters 2.2.1 and 2.2.2.
[140] See chapter 2.1.2.
[141] See chapter 2.2.3.

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Introduction of IEL terminologies

In order to push the emergence of a environmental human right, the introduction of IEL concepts seems to be a powerful and fundamental tool. Prior informed consent, Environmental impact assessment, biodiversity or framework-approach are just some of the element that prove to be substantial in the creation of the human rights norm on environment.[142] The most striking evidence parallel content of the environmental human rights norm to IEL in general: Both have a much more elaborate and succinct procedural branch and are particularly hard to be pinned down on their precise substantive content.[143]

Indirect opposition

Explicit opposition to the protection of environment comes generally from developing states highlighting the tension between resources necessary for the protection of environment and the right to development. However, this claim has not been predominant in the opposition to the emergence of the human right to development.[144]

It seems like most of the push for this right came not from the big powers. However, within the human rights field, they also did not explicitly oppose.[145] This may be linked to a particularity of the human rights field: opposition is mostly then explicit when it is emphasizing lacking consideration of different cultural backgrounds. This argument is not really available for Europe and North America, though. The second typical strategy for

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[142] See in particular chapters 2.2.1, 4.2.2 and 4.2.3.

[143] See: Dinah L. SHELTON et Donald K. ANTON (ed.), « Substantive Human Rights and the Environment », in *Environmental Protection and Human Rights*, Cambridge, Cambridge University Press, 2011, p. 436-544,; Jona RAZZAQUE, « Human rights to a clean environment: procedural rights », in Malgosia FITZMAURICE (ed.), *Research Handbook on International Environmental Law*, Northampton, Edward Elgar Publishing, 2010, p. 284-300.

[144] See chapters 1 and 2.1.1.

[145] See for instance the US position towards the HRC resolution in 2017 : "The United States agrees with other members of the Council that protection of the environment is important to sustainable development, human well-being, and the enjoyment of human rights. In this spirit, we join consensus on this resolution. (…) At the same time, we remain concerned about the general approach of placing environmental concerns in a human rights context and about addressing them in fora that do not have the necessary expertise." Explanation of Position by the United States of America, As Delivered by William J. Mozdzierz, Head of the U.S. Delegation, Geneva, 24 March 2017, UN Doc. A/HRC/34/L.33, available online: https://geneva.usmission.gov/2017/03/24/u-s-explanation-of-position-on-human-rights-and-the-environment/.

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resistance is pushing the norm development into such fluffiness that its content becomes unclear and 'aspirational'. The impact of this strategy hopefully has become evident by now: the content of a possible universal environmental human right is quite malleable and contextual.[146] Whether the strategy was successful, however, depends profoundly on the underlying idea of what law is. If the UN does not recognize such a right, but the vast majority of regional human rights bodies, to what extent can the emergence of an environmental human right be actually contested,[147] and to what extent does indirect opposition matter?

[146] See: Leena HEINÄMÄKI, « Right to Be a Part of Nature: Greening Human Righs via Strengthening Indigenous Peoples », (2012) 4 *Yearbook of Polar Law* 415-474, 430-431.
[147] See: Leena HEINÄMÄKI, « Right to Be a Part of Nature: Greening Human Righs via Strengthening Indigenous Peoples », (2012) 4 *Yearbook of Polar Law* 415-474, 436.

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Case Study 18

CITES and the Changing Definition of Conservation - Incorporation of Sustainable Use

(November 2020 – March 2021)

Ezgi Yildiz

I. Introduction

1. Background and Stakes

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was drafted following a resolution passed by the meeting members of IUCN – the World Conservation Union in 1963.[1] The final text was signed by 21 countries in Washington, D.C on 3 March 1973. Only three years after, on 1 July 1975, the CITES entered into force. The CITES is a conservation treaty aiming at regulating the trade in specimens of wild animals and plants in order to prevent their extinction. Its current membership includes 183 parties.[2] It is known as the largest multilateral agreement tailored for conservation of species and the regulation of their trade.[3] The treaty governs a rather lucrative business – trade in endangered species is estimated to worth between $5 billion and $17 billion per year.[4]

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[1] For more on the history of the CITES see, Willem Wijnstekers, *The Evolution of CITES* (Budapest, Hungry: International Council for Game and Wildlife Conservation, 2011). See also the CITES website, https://www.cites.org/eng/disc/what.php

[2] See generally, Phyllis Mofson, "Zimbabwe and CITES: Influencing the International Regime," in *Endangered Species, Threatened Convention: The Past, Present and Future of CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, ed. Jon Hutton and Barnabas Dickson (London: Earthscan Publications Ltd., 2000), 106–22.

[3] Max Abensperg-Traun, "CITES, Sustainable Use of Wild Species and Incentive-Driven Conservation in Developing Countries, with an Emphasis on Southern Africa," *Biological Conservation* 142, no. 5 (May 1, 2009): 949, https://doi.org/10.1016/j.biocon.2008.12.034.

[4] Saskia Young, "Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," *Colorado Journal of International Environmental Law and Policy* 14 (2003): 168.

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The species protected under the CITES regime is listed in its famous three Appendices. The Appendix I lists species threatened with extinction. Commercial trade in these species is banned and limited trade is permitted only in exceptional circumstances (e.g. personal use or use for research). In such circumstances, when carrying out non-commercial trade in species listed under Appendix I, both the exporting and importing states would require permits. The species covered under Appendix II are not necessarily threatened with extinction, yet their survival may still be uncertain. Therefore, the trade in these species is controlled in order to ensure that their usage will not bring them to extinction. In this case, only the exporting states would need a permit. Appendix III has the most lenient standards. It includes species that are protected in at least one country (or several countries) that has asked other CITES parties help control trade in such species.[5] While there is a formal procedure to add species to Appendices I and II, each party may make unilateral amendments to Appendix III.

Although state parties have the final say in this classification process, NGOs play an important role in amending the lists in these three Appendices.[6] They also help secure compliance with the CITES provisions and the COPs' decisions.[7] The CITES regime allows them to join meetings as observers, which gives them opportunities for agenda setting and influencing the state parties' position.[8] Hence by design, the system is open for input from NGOs and IGOs.

Despite being a central institution in controlling trade in endangered species, the CITES Secretariat does not have any regulatory or enforcement power.[9] The enforcement of the

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[5] Michael Bowman, Peter Davies, and Catherine Redgwell, *Lyster's International Wildlife Law*, 2nd ed. (Cambridge: Cambridge University Press, 2010), chapter 15.

[6] Daniel W. S. Challender and Douglas C. MacMillan, "Investigating the Influence of Non-State Actors on Amendments to the CITES Appendices," *Journal of International Wildlife Law & Policy* 22, no. 2 (April 3, 2019): 90–114, https://doi.org/10.1080/13880292.2019.1638549.

[7] Karen N. Scott, "Non-Compliance Procedures and the Implementation of Commitments under Wildlife Treaties," *Research Handbook on Biodiversity and Law*, April 29, 2016, 419, https://www.elgaronline.com/view/edcoll/9781781004784/9781781004784.00025.xml.

[8] See generally, Challender and MacMillan, "Investigating the Influence of Non-State Actors on Amendments to the CITES Appendices." See also, Hans Bauer et al., "Lions in the Modern Arena of CITES," *Conservation Letters* 11, no. 5 (2018): e12444, https://doi.org/10.1111/conl.12444.

[9] Young, "Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 174.

Electronic copy available at: https://ssrn.com/abstract=4430270

treaty itself completely relies on individual states' efforts.[10] While the CITES Secretariat coordinates regulatory frameworks and encourages cooperation, it leaves ample room for sovereign prerogative. Moreover, the CITES permits states to enter a specific reservation concerning any species covered under any of its Appendices.[11] While this setup was beneficial in attracting a diverse range of member states, the eclecticism later on became a source of concern with different parties preferring different ways of conservation.[12] The main competing camps were preservationists (who advocated total cessation of trade of endangered species) and sustainable use camp (who suggested the use of a portion of endangered species in order to fund and facilitate the conservation of the rest of their population).[13] While the former composed of wealthy nations, the latter were made up of "cash-poor but resource-rich developing nations."[14]

The main clash between these two logics and camps showed itself the most when it comes to the protection of African elephants. This was not because African elephants were the first species to be classified under one appendix and then moved to another. Before elephants, two other species were transferred from Appendix I to Appendix II in 1979 and 1983 respectively: crocodiles and leopards.[15] Rather, the issue became politicized and it became single most controversial episode in the history of the CITES.[16] There was also "cuteness" and likeability factor – as in species such as elephants and whales attract public attention, while others such as crocodiles or spiders do not receive similar attention or

[10] John Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," *Pace Environmental Law Review* 12, no. 1 (September 1, 1994): 311.
[11] Jess Hemmings, "Does CITES Conserve Biodiversity," *Asia Pacific Journal of Environmental Law* 7 (2002): 108–9.
[12] Young, "Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 173.
[13] For more on this tension, see Michael Bowman, "A Tale of Two CITES: Divergent Perspectives upon the Effectiveness of the Wildlife Trade Convention," *Review of European, Comparative & International Environmental Law* 22, no. 3 (2013): 228–38, https://doi.org/10.1111/reel.12049.
[14] Qtd. in Catharine L. Krieps, "Sustainable Use of Endangered Species under Cites: Is It a Sustainable Alternative," *University of Pennsylvania Journal of International Economic Law* 17 (1996): 484.
[15] See Annex for other species that were classified under Appendix I and then moved to Appendix II. Abensperg-Traun, "CITES, Sustainable Use of Wild Species and Incentive-Driven Conservation in Developing Countries, with an Emphasis on Southern Africa," 951.
[16] Challender and MacMillan, "Investigating the Influence of Non-State Actors on Amendments to the CITES Appendices," 95.

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support.[17] While "'Save the whale! can summon a crusade. 'Save the manatee! Summons a question: 'What's a manatee?"[18]

In 1989, the Conference of Parties (COPs) of the CITES added African elephants in Appendix I, and this spurred a huge resistance from the southern African countries and conservation groups, who portrayed the Global North's conservation logic as an extension of colonialism. Later on, east African nations also began aligning with the southern African countries around the sustainable utilization logic. Their main argument was that some controlled trade in African elephants was necessary to sustain their conservation efforts. This was necessary because supporting the costs of conservation of elephants disproportionately felt on the shoulders of African nations.[19] They argued that "Southern Africans in particular often emphasize that if conservation is to be successful it must provide tangible benefits to those who live closest to the wildlife."[20] Therefore, they advocated for down-listing African elephants to Appendix II. Over time the Global North countries and main conservation groups (but not animal rights or welfare NGOs) also warmed up to this idea, and began considering the social justice and right to development elements.[21] Then in June 1997, the COPs to CITES down-listed African elephants to Appendix II during its 10th meeting.[22] From this point onwards, sustainable use logic became part and parcel of the CITES regime.[23] Some even claimed that the main purpose of the treaty shifted from preservation to a "sustainable use-based conversation philosophy".[24]

The change traced here concerns interpretive change, and more specifically, the interpretation of Article 2 under the CITES. This is the provision which sets the fundamental

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[17] Michael J. Hickey, "Acceptance of Sustainable Use within the Cites Community," *Vermont Law Review* 23 (1999 1998): 882.
[18] Krieps, "Sustainable Use of Endangered Species under Cites," 489.
[19] Charis Thompson, "Co-Producing CITES and the African Elephant," in *States of Knowledge: The Co-Production of Science and Social Order*, ed. Sheila Jasanoff (Routledge, 2004), 83.
[20] Jon Hutton and Barney Dickson, "CITES—Does It Offer Wild Species a Future?," *Oryx* 34, no. 1 (2000): 1, https://doi.org/10.1046/j.1365-3008.2000.3ed341.x.
[21] Thompson, "Co-Producing CITES and the African Elephant," 81.
[22] Peter H. Sand, "Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment," *European Journal of International Law* 8, no. 1 (January 1, 1997): 29–58, https://doi.org/10.1093/oxfordjournals.ejil.a015561.
[23] See for example, Hickey, "Acceptance of Sustainable Use within the Cites Community."
[24] Hickey, 861.

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principles of the regime and defines the types of species to be listed under Appendices I, II and III. Over time the interpretation of which species should go under which category changed and the constraints of the protection regime loosened.

2. CITES Text and Tensions

Written in the 1960s and the early 1970s, the text of CITES carries strong ties to preservationism. Its preamble defines its *raison d'être* as "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come." In so doing, it emphasizes on their aesthetic value and also embraces their "scientific, cultural, recreational, and economic" values.[25] This understanding was advocated by the Global North countries, conservation groups, and NGOs. Jon Hutton and Barney Dickson expressed this dilemma as follows: "For the original treaty was largely developed by conservationists from the North and reflected their conception of the problem."[26] However, over time "the sustainable use" logic emerged and permeated the CITES system. This logic which largely emphasized on these species' economic value, was largely supported by the Global South countries – in particular southern African countries.[27]

The sustainable use principle is a part of sustainable development concept[28] – which is generally known as "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs," as established in the 1987 Brundtland Report.[29] More specifically, the sustainable use principle is one of the components of sustainable development concept – the others being intergenerational equity, equitable use, and integration.[30] Although the sustainable use logic was not around when the CITES was drafted, its parent organization the International Union for the Conservation of

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[25] CITES text is available at https://cites.org/eng/disc/text.php#texttop
[26] Hutton and Dickson, "CITES—Does It Offer Wild Species a Future?," 1.
[27] Thompson, "Co-Producing CITES and the African Elephant."
[28] Hickey, "Acceptance of Sustainable Use within the Cites Community," 866.
[29] Report of the World Commission on Environment and Development: Our Common Future, *A/42/427*, 1987, §27.
[30] Hickey, "Acceptance of Sustainable Use within the Cites Community," 868.

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Nature (IUCN) was one of the first institutions to promote it.[31] The IUCN defined sustainable use with an analogy to "spending the interest while keeping the capital" in its 1980 *World Conservation Strategy*.[32]

The CITES text itself does not have its own definition of sustainability,[33] albeit a notion that is akin to sustainability can be found under Article IV (which regulates the trade in species under Annex II if trade is "not detrimental to the survival").[34] Therefore, accommodating these two competing logics began creating tensions. This tension was not resolved through a formal amendment of the treaty text, however. The CITES allows for amendment, which can be secured by the votes of two-thirds of the present and voting parties. Indeed, the CITES text itself was amended twice in its history – once in 1979 (Bonn amendment)[35] and then in 1983 (Gaborone amendment).[36] While these two amendments concerned technical additions to the text, they did not seek to introduce the sustainable use logic into the treaty text or criteria to determine which under what circumstances species should be listed under one of the three Appendices.

The discussions about sustainable use and the classification criteria were held at the meetings of the Conference of Parties (COPs),[37] where parties may amend the contents of the Appendices once they secure the support of 2/3 of the majority. This debate is also known as species listing debate and it has four components: (a) *listing* species under one of the Appendices, (b) *down-listing* (moving species from Appendix I to Appendix II), (c) *up-listing* (moving species from Appendix II to Appendix I) and (d) *de-listing* species from these

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[31] David Favre, "Debate within the CITES Community: What Direction for the Future," *Natural Resources Journal* 33, no. 4 (1993): 877.

[32] The Union for the Conservation of Nature (IUCN), *World Conservation Strategy* (1980) (available at http://www.environmentandsociety.org/mml/iucn-ed-world-conservation-strategy-living-resource-conservation-sustainable-development)

[33] Abensperg-Traun, "CITES, Sustainable Use of Wild Species and Incentive-Driven Conservation in Developing Countries, with an Emphasis on Southern Africa," 950.

[34] Article IV of CITES: "Trade of a specimen of a species included in Appendix II may only take place if it is not detrimental to the survival of the species and its population in the wild. That the trade is non-detrimental has to be certified by the relevant Authority of the exporting country."

[35] Bonn amendment refined Article XI, and added Secretariat may "adopt financial provisions"

[36] Gaborone amendment revised Article XXI to allow accession by regional economic integration organizations.

[37] The discussions at the COPs are influential in deciding the future directions of the regime. See more, Ravi Sharma Aryal, "CITES towards Its Future Regime," *NJA Law Journal* 13 (2019): 57.

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Appendices. Although this may appear to be purely technical adjustment, as Saskia Young describes, the listing process is "a political decision, not merely a mechanical task".[38]

How could one carry out the listing process then? The CITES text does not provide any clear guideline. Nevertheless, the COPs produced several solutions to facilitate the classification process. It is through resolutions they offered different interpretations into Article II and the applicable classification scheme within the CITES regime.

II. From Bern to Kyoto and then to Fort Lauderdale: Evolving Criteria to List Endangered Species: A Timeline

1. *The Bern Criteria and the Quest for Exceptions (1976 - 1992)*

The first classification scheme was the Bern Criteria. In 1976, the COPs in their first ever meeting in Bern, Switzerland decided on a set of criteria.[39] These classification criteria revolved around the species' biological and trade status. More specifically, the Berne Criteria envisaged that species *threatened with extinction* should be covered under Appendix I, without defining what "threaten" or "extinction" mean.[40] What is more, the Bern Criteria set a low bar for up-listing species and a high bar for down-listing species. That is to say, while it was easy to transfer species from Appendix II to Appendix I; it was difficult to transfer them from Appendix I to Appendix II. In line with precautionary principle, the Bern Criteria required a heavy burden of scientific proof from the party that request down-listing. That is, the party had to prove with positive scientific evidence that the species concerned can "withstand the exploitation." The COPs in Berne justified this reasoning as follows:

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[38] Young, "Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 188.
[39] COP to CITES, Resolution Conf. 1.1 (Berne, 1976) - Criteria for the Addition of Species and Other Taxa to Appendices I.
and II and for the Transfer of Species and Other Taxa from Appendix II to Appendix I;
[40] *Criteria for the Addition of Species and Other Taxa to Appendices I and II and for the Transfer of Species and Other Taxa from Appendix II to Appendix I*, CITES, 1st mtg., Conf. 1.1 (Berne, 1976) and *Criteria for the Deletion of Species and Other Taxa from Appendix I and Appendix II*, CITES, 1st mtg., Conf. 1.2 (Berne, 1976).

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> The addition to and deletion from the appendices [are] different problems requiring different approaches by the Conference. If an error is made by the Conference by unnecessarily placing a plant or animal on an appendix, the result is the imposition of a documentation requirement. If, however, it errs in prematurely removing a plant or animal from protection, or lowering the level of protection afforded, the result can be the permanent loss of the resource. If it errs it should be therefore toward protection of the resource.[41]

In a nutshell, drawing inspiration from the precautionary principle, the drafters of the Bern Criteria, placed "the burden of proof" on parties that wished to trade in wild fauna and flora. The Bern criteria restricted the options for consumer and range states (i.e. states that exercise jurisdiction over the area the species concerned inhabit). This restrictive trend was remarked by the conservationists NGO community as well. For example, Ronald Orenstein, on behalf of the NGO working group on CITES Revision Criteria, expressed that "CITES has become a vehicle, not for regulating the wildlife trade, but for stopping the use of wildlife altogether."[42]

The Bern criteria definitely channeled the preservationist logic that the founders of the CITES had in mind. The Bern Criteria was also produced in an international environment, where the sustainable use logic was not the dominant paradigm. It is also noteworthy to that at the composition of the COPs that adopted the Bern Criteria was different from the composition of the COPs today. The following countries were state parties at the time (in chronological order): the US, Nigeria, Switzerland, Tunisia, Sweden, Cyprus, Ecuador, Chile, Uruguay, Canada, Mauritius, Nepal, Peru, Costa Rica, South Africa, Brazil, Madagascar, Niger, Morocco, Ghana, Papua New Guinea, Germany, Pakistan, Finland, India, DRC, Norway, Australia, the UK, and Iran.

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[41] *Criteria for the Deletion of Species and Other Taxa from Appendix I and Appendix II*, CITES, 1st mtg., Conf. 1.2 (Berne, 1976), also in Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 314.

[42] Letter from Dr. Ronald I. Orenstein, International Wildlife Coalition, on behalf of the NGO Working Group on CITES Revision Criteria, to Dr. John G. Robinson, Director, Wildlife Conservation International (Oct. 2, 1992) and accompanying report; Dr. Ronald I. Orenstein et al, CITES and the Revision of the Berne Criteria (Oct. 1992) (unpublished material on file with the Pace Environmental Law Review). Cited in Garrison, 315.

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However, as the Bern Criteria began to be employed, its restrictiveness became more visible, and some parties sought exceptions in the next meetings of the COPs. To do so, they sponsored resolutions at the COPs meetings, asking for exceptions for (i) captive breeding (or farming), (ii) ranching, (iii) the use of quotas, and (iv) the adoption of specific criteria to down-list African elephants.

The first kind of exception, captive breeding, was advocated by Argentina to promote its chinchilla captive breeding in the 2nd COPs meeting in San Jose, Costa Rica in 1979.[43] The condition for this exception was that the breeding would be done in a "controlled environment ... maintained without augmentation from the wild ... [and] managed in a manner designed to maintain the breeding stock indefinitely."[44] The second exception was ranching – rearing species taken from the wild in a controlled environment. This exception was introduced in the third meeting in New Delhi in 1981.[45]

Third and more comprehensive exception was the request for quotas. This came in two forms. The specific quota requests for leopards in sub-Saharan countries were approved during the 4th meeting in Gaborone in 1983. This was particularly favored by Botswana, Malawi, Zambia, and Zimbabwe.[46] In the next three meetings – in Buenos Aires, in Ottawa, and in Lausanne – the member states discussed and adopted a more general quota system to temporarily down-list species in Appendix I to Appendix II.

There were several conditions to request this transfer. The requesting parties would demonstrate that (i) it is hard to meet the Bern Criteria, (ii) the species are not migratory and can be managed by a single party, (iii) the species are "capable of withstanding a certain level of exploitation."[47] Down-listing through the quota system was not permanent, however. The requested parties could only use this in interim while securing down-listing through the Bern

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[43] Garrison, 326.
[44] Specimens Bred in Captivity or Artificially Propagated, CITES, 2d mtg., Conf. 2.12 (San Jose, 1979)
[45] According to Garrison, "ranching differs considerably from captive breeding or farming because it relies directly on the wild population for its stock (eggs and young), while captive breeding programs are self enclosed and function independently from the wild population." Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 329.
[46] Garrison, 332.
[47] Special Criteria for the Transfer of Taxa from Appendix I to Appendix II, CITES, 7th mtg., Conf. 7.14 (Lausanne, 1989).

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Criteria or ranching option. If the party cannot manage to secure the transfer after "two intervals between regular meetings," then the species would move back up to Appendix I.[48] This new quota system was beneficial for Botswana, Malawi, Mozambique, and Zambia as well as Ethiopia and Kenya. They could successfully transfer their Nile crocodile populations first through the quota system and then through the ranching program. However, three crocodile populations, namely "the African slender-snouted crocodile and the West African Dwarf crocodile in the Congo and the Nile crocodile in the Congo, Cameroon, and Sudan" were moved back up to Appendix I. Since the requesting states could not prove that their trade would not lead to this species' extinction.[49]

While these down-listing attempts were isolated and sought creating loopholes for state parties interested in wildlife trade, they did not entirely satisfy those who wished to introduce a full-blown sustainable use logic.[50] There was a momentum gathering towards a more substantive change since the preference around classification of animals shifted by 1990s.[51]

2. *Challenge in Kyoto (1992)*

The most comprehensive challenge to the Berne Criteria came in the 7th meeting in Kyoto, and it revolved around African elephant populations. Initially the African elephants were listed under Appendix III by Ghana then it was transferred to the Appendix II in 1976.[52] However, their numbers were "reduced by nearly half" within ten years. The greatest reason for this reduction was poaching and trade in ivory tusks – which are used for "dice, jewelry, trinkets, ornaments, billiard balls, piano key and knife handles".[53] According to John Garrison, "approximately 78% of all the ivory on the market during the late 1970's and early

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[48] Special Criteria for the Transfer of Taxa from Appendix I to Appendix II, CITES, 7th mtg., Conf. 7.14 (Lausanne, 1989).
[49] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 335.
[50] Garrison, 338.
[51] Young, "Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 172.
[52] Challender and MacMillan, "Investigating the Influence of Non-State Actors on Amendments to the CITES Appendices," 95.
[53] Michael J. Glennon, "Has International Law Failed the Elephant?," *The American Journal of International Law* 84, no. 1 (1990): 3, https://doi.org/10.2307/2203015.

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1980's came from illegally poached elephants."[54] This situation began receiving global attention. For example, Kenya called for an ivory trade ban in 1988 and the UK, France, the US, West Germany and the European Community issued moratorium in 1989.[55]

Then, in 1989, Austria, Gambia, Hungary, Kenya, Somalia, Tanzania and the US proposed to transfer African elephants to Appendix I at the 7th COPs meeting in Lausanne. The NGOs initiatives played an important role in (indirectly) facilitating this transfer.[56] For example, African Wildlife Foundation (AWF) – an NGO based in the US – declared 1988 the year of the elephant and launched awareness-raising campaigns in the US. The Environmental Investigation Agency (EIA) sought support from American NGOs to persuade the US to support Tanzania's proposal, and the agency distributed its extensive report on ivory trade to the participants of the COPs meeting in Lausanne.[57] There was a parallel "Elefriends" initiative, run by the African Elefund, Zoocheck (now the Born Free Foundation), the World Society for the Protection of Animals (WSPA – now World Animal Protection), and Care for the Wild International. Finally, the Ivory Trade Review Group composed of representatives from IUCN, TRAFFIC, Wildlife Trade Monitoring Unit (WTMU), and the CITES Secretariat also supported the ban.[58]

While there was a strong global movement supporting the ban on ivory trade, the African countries had a nuanced view on the fate of the African elephants. While Kenya, Tanzania, and other east African countries suggested up-listing the African elephants to Appendix I, southern African countries such as Zimbabwe, Botswana, and South Africa opposed this. Other countries that traditionally engage in wildlife trade such as China and Japan also voiced opposition.[59] The latter group sought to continue to trade in ivory simply

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[54] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 339.
[55] Garrison, 340.
[56] Challender and MacMillan, "Investigating the Influence of Non-State Actors on Amendments to the CITES Appendices," 96–97.
[57] Challender and MacMillan, 96.
[58] Challender and MacMillan, 96–97.
[59] Krieps, "Sustainable Use of Endangered Species under Cites," 475.

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because their elephant populations were not as badly affected.[60] They had asked for split-listing African elephant population – keeping a part of the population in Appendix I and a part in Appendix II – in the previous meeting in Lausanne. Although this request was rejected, the COPs decided to appoint a panel of experts to evaluate the state of African elephant populations in the region.[61] Despite this development, South Africa, Zimbabwe, Zambia, Botswana, Namibia, and Malawi decided to enter into reservations concerning this species, and to continue trading in ivory. What is more, these countries (except South Africa) signed a treaty to create the Southern African Center for Ivory Marketing (SACIM).[62] In 1991, SACIM members plus South Africa met in Zimbabwe to discuss the future of the CITES and drafted a series of resolutions to present the following year at the meeting in Kyoto.

These five resolutions, known as the Zimbabwe Resolutions, were the most serious challenge that the CITES regime had faced to that day. They sought to challenge the Bern Criteria, and to alter the principles of the CITES regime. They also re-requested down-listing African elephants.[63] The first two resolutions concerned reinterpretation of Article III in a way to allow commercial trade under Appendix II.[64] For example, the first resolution made a case for commercial trade thorough sustainable use logic as follows:

a) that trade be viewed as beneficial when it is based upon sustainable use and the financial returns are used:
   i) to provide income to rural wildlife-producer communities; or
   ii) to meet the costs of protected-area maintenance; or
   iii) to further invest in wildlife development by landholders; or
   iv) to provide income at a national level to developing countries; or

[60] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 340.
[61] Terms of Reference for the Panel of Experts on the African Elephant and Criteria for the Transfer of Certain African Elephant Populations from Appendix I to Appendix II, CITES, 7th mtg., Conf. 7.9 (Lausanne, 1989)
[62] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 342.
[63] Garrison, 343.
[64] Recognition of Benefits of Trade in Wildlife, CITES, 8th mtg., Doc. 8.48 at 5 (Kyoto, 1992); Reconsideration of "Primarily Commercial Purposes", CITES, 8th mtg., Doc. 8.49 at 5 (Kyoto, 1992).

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v) for any combination of these purposes.[65]

In response, the CITES Secretariat pointed out that "An affirmation that there are circumstances in which wildlife trade can be beneficial to species conservation is in accord with modern conservation thought, such as was expressed in the 1990 IUCN Resolution on 'Conservation of wildlife through wise use as a renewable natural resource'.... The Secretariat is broadly in agreement with the recommendations in the draft resolution."[66] The US supported this position in principle and pushed back arguing "although economic values are no greater weight that scientific, aesthetic, cultural and recreational values, as stated in the CITES preamble."[67] Striking even a stricter tone, the Greenpeace spoke on behalf of several NGOs and opposed to the proposal arguing that "the resolution provides a mechanism whereby detrimental trade could occur because some trade was beneficial."[68] After this debate, the authors of the resolution changed the language and added trade *may* be beneficial.[69] They withdrew the second resolution in view of the fact that the resolution was opposed by Algeria, Germany, Japan, Kenya, the UK, the US, Zambia, and the Secretariat.

The third resolution sought to replace the Bern Criteria with new standards (Kyoto Criteria).[70] The proposed criteria in particular called for recognizing the importance of trade for conservation and adopting less stringent conditions to down-list species from Appendix I.[71] The criteria would also allow split-listing species. Split-listed species would be covered under Appendix II – not Appendix I.[72] The resolution also attempted to shift the burden of proof towards those who wish to up-list species. That is, the proposed criteria would require them to show the trade is harmful (instead of showing that trade is safe).[73] Adopting this

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[65] Recognition of Benefits of Trade in Wildlife, CITES, 8th mtg., Doc. 8.48 at 5 (Kyoto, 1992) at 5.
[66] Interpretation and Implementation of the Convention, Comments of the Secretariat on Documents Doc. 8.48 to Doc. 8.52, CITES, 8th mtg., Doc. 8.52.1 at 1 (Kyoto, 1992).
[67] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 346.
[68] Garrison, 347.
[69] Garrison, 347.
[70] Criteria for Amendment to the Appendices, CITES, 8th mtg., Doc. 8.50 (Kyoto, 1992).
[71] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 351.
[72] Criteria for Amendment to the Appendices, CITES, 8th mtg., Doc. 8.50 (Kyoto, 1992) at 13.
[73] Criteria for Amendment to the Appendices, CITES, 8th mtg., Doc. 8.50 (Kyoto, 1992) at 16.

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approach would certainly repeal the influence of the precautionary principle in the classification process.[74]

Both the Secretariat and the other parties opposed to this proposal. Yet they agreed that Bern Criteria *may need to be amended*. The COPs assigned the Standing Committee and the Plants and Animals Committee to work with the Secretariat and the IUCN to develop new criteria.[75] The US was one of the supporters of revised criteria, whereas the Species Survival Network, a coalition of NGOs based in Washington, D.C., strongly opposed it urging other NGOs around the world to oppose it.[76]

The fourth resolution asked for greater autonomy for range states (i.e. states who exercise jurisdiction over the areas where these species live) over amending Appendix I and II for species residing in their territories.[77] The fifth and the final resolution suggested that states may enforce even stricter measures than the CITES envisages.[78] These two resolutions were also not widely supported. While the fourth resolution was redrafted in a softer tone (calling for including range states in formal consultation processes), the fifth resolution was withdrawn.[79]

Although the Zimbabwe Resolutions did not manage to achieve what they had aimed, they certainly served well in expressing southern African countries' frustration. They also paved the way for revising the Bern Criteria. Moreover, the other parties continued to oppose down-listing African elephants to Appendix II. In order to alleviate the situation, Botswana, Malawi, Namibia, and Zimbabwe proposed a compromise and promised to put raw ivory sales on moratorium. Reviewing the situation, the Secretariat found that Botswana and Zimbabwe to have met the biological criteria to down-list. Switzerland, departing from its

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[74] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 355.
[75] Garrison, 356.
[76] Garrison, 356.
[77] Support of the Range States for Amendments to Appendices I and II, CITES, 8th mtg., Doc. 8.51, at 3 (Kyoto, 1992).
[78] Stricter Domestic Measures, CITES, 8th mtg., Doc. 8.52, at 5 (Kyoto, 1992).
[79] Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 358–61.

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preservationist camp, also supported the southern African countries' proposal.[80] There was still sizeable opposition. Countries such as Tanzania, Kenya, the UK, and the US expressed their doubts about the measures to prevent illegal trade. They were also concerned that poachers would read this as an encouragement to hunt elephants and stockpile ivory products.[81] Faced with such a strong opposition Botswana and South Africa withdrew their proposals, respectively. Yet, this was not the end of the story for African elephants.

3. *Fort Lauderdale Criteria (1994) (also known as Everglades Criteria)*

Although the southern Africans countries left the meeting at Kyoto without attaining their goals, they planted the seeds of a larger transformation which sprouted in Fort Lauderdale, Florida. It was the confrontation in Kyoto that preluded the change. The Kyoto Conference triggered a constitutional crisis, so to speak, at the CITES.[82] Having all its proposals rejected or opposed, Zimbabwe threatened to withdraw from the CITES. It then attempted to draft a new CITES – a version that is modern and in line with sustainable development and equity. But, then it decided to stay within the regime and turn its disappointment into action. A Zimbabwean official explained their change of heart as follows: "[We have discovered that it is] better to work on CITES from within. It doesn't end with elephants; once you are an outsider you have no input or involvement ...... We realize we will benefit from staying in [CITES], and now we are hosting [the next COP]." [83]

The 9th meeting in Fort Lauderdale was held against this background. Understanding the limitation of the Bern Criteria, the COPs *unanimously* decided on a different set of criteria to determine whether a species should be added to Appendix I or II. This new set of criteria was built upon the draft prepared by the Standing Committee, the Plants and Animals Committee as well as the Secretariat and the IUCN. The Fort Lauderdale Criteria could gather unanimous support by an otherwise divided COPs because everyone agreed on the importance of injecting "objectivity into what previously operated only as policymaking by

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[80] Garrison, 365.
[81] Garrison, 368.
[82] Mofson, "Zimbabwe and CITES: Influencing the International Regime," 112.
[83] Nhema, Claudius, Counsellor, Embassy of Zimbabwe. Interview with Mofson. October 1994. Qtd. in Mofson, 112.

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utilizing principles of population biology."[84] According to Saskia Young, these new criteria also attempted to minimize the conflict between two camps, and in particular appease the sustainable use camp.[85]

The Fort Lauderdale Criteria do not directly mention sustainable use. Yet, they can be associated with sustainable use. Overall, they are considered as a more lenient and clearer set of classification rules. For example, for a species to be considered for Annex 1 (i.e. threatened with extinction), at least one of the criteria had to be met: 1) "the wild population is small," 2) "the wild population has a restricted area of distribution," or 3) "a marked decline in the population size in the wild."[86] For a species to be considered for Annex II, the criteria to be followed are: 1) "It is known, or can be inferred or projected, that the regulation of trade in the species is necessary to avoid it becoming eligible for inclusion in Appendix I in the near future;" (2) "It is known, or can be inferred or projected, that regulation of trade in the species is required to ensure that the harvest of specimens from the wild is not reducing the wild population to a level at which its survival might be threatened by continued harvesting or other influences."[87] In addition, the Fort Lauderdale Criteria also allows for split-listing – whereby a part of species is listed in Appendix I while another part is listed in Appendix II. Yet at the same time, it discourages split-listing due to the problems it creates for enforcement.

Although the precautionary principle was always implicit in the CITES text and especially in the Bern Criteria, it was the Fort Lauderdale Criteria that referred to this principle for the first time.[88] Nevertheless, one can also observe that as the word was added in the text (of the Fort Lauderdale Criteria) its influence weakened somewhat. The Fort

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[84] Scott Hitch, "Losing the Elephant Wars: CITES and the Ivory Ban Note," *Georgia Journal of International and Comparative Law* 27, no. 1 (1999 1998): 180.
[85] Young, "Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use," 183.
[86] Cop to CITES, Criteria for Amendment of Appendices I and II, Conf. 9.24 (Rev. CoP17), § Biological criteria for Appendix I.
[87] Cop to CITES, Criteria for Amendment of Appendices I and II, Conf. 9.24 (Rev. CoP17), § Criteria for the inclusion of species in Appendix II in accordance with Article II.
[88] Owen McIntyre and Thomas Mosedale, "The Precautionary Principle as a Norm of Customary International Law," *Journal of Environmental Law* 9, no. 2 (1997): 227.

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Lauderdale Criteria encourage "measures that are proportionate to the anticipated risks to the species."[89] Yet, different from the Bern Criteria, these new classification rules arguably weaken the application of the precautionary principle by easing the conditions of down-listing species and shifting the burden of proof to preservationists (i.e. the criterion now is to prove that trade is harmful).

Why did the COPs unanimously decide to revise the Bern Criteria in line with the sustainable use logic? Several external developments prepared the grounds for such a change. Most importantly, the sustainable development concept gained traction within the UN system. The UN Conference on Environment and Development (the Earth Summit) produced several key documents concerning international environmental law which included sustainable development concept. These were the UN Framework Convention Climate Change; the Convention on Biological Diversity; the Authoritative Statement of Forest Principles; Rio Declaration on Development and Agenda 21.[90]

More specifically, three documents increased the relevance of sustainable use and its link to development. First, the 1972 Stockholm Declaration brought together the environment and development. Second, the 1982 Montreal Protocol introduced the idea of Global North/South equity logic. Third, the Rio Declaration – in particular Principle 2 – emphasized the sovereign right to exploit resources:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

As David Favre explains, "by the time of the Earth Summit in June of 1992, sustainable development was the accepted principle from which all international environmental

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[89] Cop to CITES, Criteria for Amendment of Appendices I and II, Conf. 9.24 (Rev. CoP17), § Annex 4 (Precautionary measures)

[90] Hickey, "Acceptance of Sustainable Use within the Cites Community," 868.

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discussions started."[91] Hence, it is likely that the new criteria (the Fort Lauderdale Criteria) helped the CITES regime remain compatible with broader developments in the field of environmental law. This would also bring the regime closer to the principles of the IUCN. As mentioned before, although the sustainable use logic was not mentioned in the CITES text, one of the promoters of this concept was the CITES' parent organization the IUCN.[92]

More fundamentally, this change allowed the CITES regime to resolve some of its inherent limitations. It became apparent that the regime had to reflect on "the complexity of the interactions between wildlife and human society" and "the linkage between environmental and social concerns."[93] John Hutton and Barney Dickson explain the regime's deficiency and its limited solutions as follows:

> "The original Articles almost totally ignore the human element of conservation and its structure allows little flexibility in the face of uncertainty. There are only two ways in which CITES can deal with the situation where the fundamental threat to an endangered species is habitat loss and where its conservation status might be improved as a result of the economic incentives provided by a limited, controlled commercial trade. The first is to follow the Articles and prohibit commercial trade, irrespective of its consequences. The second is to cheat by listing the species on Appendix II despite the fact that it is endangered."[94]

The second option is precisely how the COPs to the CITES sought to accommodate the right to development and sustainable conservation logic without amending the treaty.

Another motivating factor was the distribution of costs for preservation programs. Catharine Krieps explains the proportions with an example. "African nations with elephants estimated that they required $500 million merely for the capital needs involved in protecting their elephants, without considering recurring expenses.(…)When the United States pledged

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[91] Favre, "Debate within the CITES Community," 882.
[92] The Union for the Conservation of Nature (IUCN), *World Conservation Strategy* (1980) (available at http://www.environmentandsociety.org/mml/iucn-ed-world-conservation-strategy-living-resource-conservation-sustainable-development)
[93] Hutton and Dickson, "CITES—Does It Offer Wild Species a Future?," 1.
[94] Hutton and Dickson, 2.

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$2 million for elephant conservation throughout Africa, a representative from Zimbabwe's wildlife department responded that this amount only would support his department for two years."[95] She reports that Kenya received $150 million from the international community for preservationist-style programs.[96] Introducing sustainable use principle appeared to be a way to diminish these nations' dependence and encourage local solutions. This shift in thinking was also because of the southern African nations success in showing the link between "conservation and local livelihoods" and how these two can mutually benefit each other.[97]

4. ***Down-listing the African Elephants***

When the Fort Lauderdale Criteria was introduced, everything came undone. It was then not too complicated to down-list the African elephant populations in Botswana, Zimbabwe, and Namibia at the 10th meeting in Harare, Zimbabwe in 1997.[98] Down-listing had a few conditions for range states such as withdrawing their reservations, and establishing a monitoring and a tracking system together with the CITES Secretariat and TRAFFIC International.[99] This request was uniformly supported by all range states, which was crucial in securing support from other states as well.[100] Other states, including Japan and Pacific Island Nations (such as Solomon Islands and Vanuatu) and ex-Soviet Union states also showed support.[101] The initiative was also supported by countries that "philosophically endorse wildlife trade under any circumstances" such as Norway, Argentina, Indonesia and Canada.[102] Moreover, fifteen members of the EU abstained, which tilted the balance to obtain two/thirds majority.[103] The US and Australia remained as the most vocal – albeit outnumbered – opponents.[104]

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[95] Krieps, "Sustainable Use of Endangered Species under Cites," 482.
[96] Krieps, 482.
[97] Joseph R. Berger, "The African Elephant, Human Economies, and International Law: Bridging a Great Rift for East and Southern Africa," *Georgetown International Environmental Law Review* 13 (2001 2000): 460.
[98] Thompson, "Co-Producing CITES and the African Elephant," 82.
[99] Hitch, "Losing the Elephant Wars," 182.
[100] Mofson, "Zimbabwe and CITES: Influencing the International Regime," 115.
[101] Hitch, "Losing the Elephant Wars," 184.
[102] Hitch, 184.
[103] Hitch, 184.
[104] Barnabas Dickson, "Cites in Harare: A Review of the Tenth Conference of the Parties Land and Resource Management: I," *Colorado Journal of International Environmental Law and Policy* 9 (1998): 60.

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Two structural changes which took place at the preceding meeting in Fort Lauderdale facilitated this change. First, they introduced secret ballots, which according to one Zimbabwean delegate was needed "to allow poor African countries to vote freely without fear of pressure from the wealthy Western donor countries.[105] Second novelty was the change in the composition of the CITES's Standing Committee – the most important organ of the regime.[106] Prior to Fort Lauderdale, it would be composed of one party from each geographical region (Africa, Asia, Europe, North America, Oceania, and South and Central America and the Caribbean). This make-up would certainly give higher representation to North America and Oceania. Upon Malawi's proposal the parties decided to change the composition allowing three representatives for Africa; two representatives for Asia, Europe, South and Central America; and one representative to North America and Oceania.

Such structural changes not only facilitated down-listing elephants but also secured the dominant position of the sustainable use camp.[107] The attention of the CITES regime began to shift to consider the link between trade, local livelihood, and poverty.[108] Already during the 8th meeting, the COPs adopted the *Recognition of the benefits of trade in wildlife* resolution, where it underlined "that the sustainable use of wild fauna and flora, whether consumptive or non-consumptive, provides an economically competitive land-use option."[109] This was revised at the 13th meeting, where the COPs added that ''implementation of CITES-listing decisions should take into account potential impacts on the livelihoods of the poor."[110]

5. ***Post-Harare Developments***

The US continued its strong preservationist approach after the meeting in Harare. For example, at the 15th meeting in Doha, Tanzania and Zambia presented proposals to transfer the African elephant and other species of elephant from Appendix I to Appendix II. The US,

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[105] Dickson, 63.
[106] Mofson, "Zimbabwe and CITES: Influencing the International Regime," 117.
[107] Hickey, "Acceptance of Sustainable Use within the Cites Community," 881.
[108] Rosie Cooney and Max Abensperg-Traun, "Raising Local Community Voices: CITES, Livelihoods and Sustainable Use," *Review of European, Comparative & International Environmental Law* 22, no. 3 (2013): 303, https://doi.org/10.1111/reel.12038.
[109] Cop to CITES, Recognition of the benefits of trade in wildlife, Conf. 8.24 (Rev COP13).
[110] Ibid. See also, Cooney and Abensperg-Traun, "Raising Local Community Voices," 303.

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the European Union, Tunisia, Rwanda, Liberia, India, Kenya, the Democratic Republic of Congo rejected the proposal.[111] At the 17th meeting in Johannesburg, the US supported the EU's proposal to list European eels in Annex II. They were initially not covered under CITES. New Zealand, Mexico, Sri Lanka, Senegal, Dominican Republic, Morocco, Peru and China also supported proposal.[112] In the same meeting, the US supported Canada's proposal to de-list wood bison from Appendix II. The initiative was also supported by the EU, Qatar, Brazil, Norway, Kenya, Chile and China.[113] Yet, the US withdrew its support from another Canadian proposal and abstained from voting. The Canadian proposal to transfer Florida and Eastern puma from Appendix I to II was supported by the EU, Mexico and Switzerland.[114] While it is beyond the scope of this case study to determine whether these decisions were supported with facts about the species survival rate and the success of sustainable use programs, we can see that overall the US tends to favor up-listing (over down-listing) and adding species to Appendices (rather than de-listing them).

III. Trajectory of the case (SCR framework)

This case can be characterized as an instance of norm adjustment. This is a good example of how the COPs' secondary lawmaking silently modifies the treaty text instead of going through a formal amendment procedure.[115] It is also a story about how a treaty text written in the late 1960s and the early 1970s can adapt to the contemporary understanding of conservation, biodiversity, and equity.[116] The principle of sustainable use (a sub-principle of sustainable development) was not the dominant understanding at the time CITES was drafted.

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[111] "Summary of the 15th Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 13-25 March 2010", *IISD Earth Negotiations Bulletin*, 21(67), (2010), p.13. Available at: https://enb.iisd.org/download/pdf/enb2167e.pdf

[112] Summary of the 17th Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 24 September – 4 October", *IISD Earth Negotiations Bulletin*, 21(97), (2016), https://enb.iisd.org/download/pdf/enb2197e.pdf, p. 10.

[113] Summary of the 17th Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 24 September – 4 October", *IISD Earth Negotiations Bulletin*, 21(97), (2016), https://enb.iisd.org/download/pdf/enb2197e.pdf, p. 18.

[114] Ibid.

[115] Bowman, "A Tale of Two CITES."

[116] Mofson, "Zimbabwe and CITES: Influencing the International Regime."

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The authors of the text had a strong allegiance to preservationism. The small number of state parties that initially made up the COPs of the CITES also shared this vision. Yet, as time passed, the membership diversified and the sustainable use principle (alongside the sustainable development notion) gained traction in International Law. Some COPs members wanted to bring the CITES regime in line with sustainable use logic, and, as a corollary, to increase the volume of regulated trade in some endangered species.

This was a long arduous process. It required the change agents (pro sustainable use COPs members) to ask for exceptions and changes in the classification criteria under Article II in incremental fashion between 1976 and 1994 (from Bern Criteria to Fort Lauderdale Criteria). Then in 1994, they convinced the other members to adopt the Fort Lauderdale Criteria, which lowered the bar to down-list species to Appendix II. As a result, more species could be used – ideally in a sustainable manner. The profit made from this trade would be used for conservation programs. While change came as a result of the sustainable use camp's persistent efforts, their change proposal became hard to oppose since it was congruous with the shifting ideational environment (i.e. the sustainable development became the dominant paradigm in International Environmental Law).

Selection stage

Change Agent(s)

The main change agents were the pro-sustainable use COPs members, in particular southern African nations. Of these, perhaps the most influential one was Zimbabwe. This relatively small African nation served as a spokesperson of the southern African nations and assumed the leadership role for the sustainable use camp.[117] When its change proposals were rejected at the Kyoto Conference, Zimbabwe considered withdrawing and operating outside of the CITES regime. Then, it changed heart. It decided to stay and change the system from within. To do so, together with Malawi and Botswana, it proposed several substantive and structural changes structural (e.g. secret ballots, representative membership at the Standing Committee,

[117] Mofson.

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and down-listing elephants).[118] The Secretariat also played a role. Yet, it is worth noting that the Secretariat did not appear as powerful as the ISA Secretariat – the main gatekeeper of the deep seabed mining. This could be because amendments are mostly member-state driven processes.

Institutional availability & Pathway of Change

The change agents operated through the COPs mechanism, which was both available and receptive. They selected the multilateral pathway within the CITES regime to present and argue for their change vision. The change agents briefly considered establishing their own multilateral trading system by signing a treaty to create the Southern African Center for Ivory Marketing (SACIM). But they used this forum to strategize their change attempts, and perhaps to show the rest of the COPs memberships the degree of their frustration with the existing rules within the CITES regime.

Construction stage

Opening

The opening that allowed change agents to argue for incorporating sustainable use principle into the CITES regime was the shift in the ideational environment. The opening was created particularly by the 1972 Stockholm Declaration and 1992 Rio Declaration, which helped mainstream sustainable development in International Environmental Law.

Stability

The strict preservationism was already unstable with the advent of sustainable development notion expressed in key international environmental treaties. The sustainable use principle was already endorsed by the IUCN, the parent organization of the CITES as early as 1980.

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[118] See generally Mofson.

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Hence, it was only a matter of time for the CITES COPs to let this idea permeate through the system.

Salience

The issue was highly salient for east African states (such as Kenya and Tanzania that preferred strict conservation programs) and southern African states (such as Zimbabwe, Malawi, and Namibia that preferred to use their species). The issue was arguably salient for the US as well since this was one of the areas where the US actively engaged. The US was the first country to ratify the treaty and it even hosted the meeting of the COPs. In addition, several US-based conservationist and animal welfare NGOs often called for the US government's support, which they often responded.[119] Therefore, the US has been an active party to the debates on sustainable use. The EU, on the other hand, had less of an interest in the field. The EU member states even abstained from voting for the proposals for down-listing African elephants in 1997, the meeting in Harare.

Support and opposition

The text above makes ample references to the parties that supported and opposed to the change proposal. In a nutshell, there were two main camps. The first group composed of preservationists including the US, Australia, European countries, as well as east African nations such as Tanzania and Kenya. The second group was the sustainable use camp, which included Zimbabwe, Malawi, Botswana, Namibia, as well as Japan and China. In addition, countries such as Canada, Argentina, and Norway supported liberal but regulated trade. They were not consistently in one of the camps; yet they supported some of the proposals of the sustainable use camp. For example, they voted for down-listing elephants in Harare.

In addition, the NGOs also play a role in listing and up-listing these species. The most important and influential NGOs were preservationist. They were based in the Global North and received their funding from the Western countries. Although the NGOs were influential, their influence had to be channeled through the state parties. NGOs and IGOs can attend the

[119] Krieps, "Sustainable Use of Endangered Species under Cites."

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meetings as observers and join the discussions, but they could not introduce proposals or vote. According to Daniel Challender and Douglas MacMillan, NGOs have used their informal networks with country officials, and influenced the classification decisions.[120] They, for example, give an account of how African scorpions made it to Appendix II in 1994, relying on interviews they carried out with an anonymous expert. The expert explains that "[they] made a point of actually telephoning the head of the management authority in Ghana at the time, whom [they] knew, and asked if he would be interested. He was very interested, so [they] drafted the proposal and sent it to him, and it actually went through unopposed".[121] Stories like this show the influence of the preservationist NGOs, which arguably slowed down the change process by galvanizing opposition against trade in endangered species.

Factors

The shift in the ideational environment was one of the most important factors that facilitated the change process – despite the opposition from the powerful states and NGOs. The sustainable use principle gained more and more recognition starting from the 1972 Stockholm Declaration and then the 1992 Rio Declaration. This made it difficult to oppose the sustainable use camp. Their argument about the link between conservation and local livelihood found resonance even in some countries in the West (within the EU members for example). Hence, the changing understanding around the right to development and modern conservation opened the path for this change proposal. In addition, the change also required strategic use of the CITES regime. When the sustainable use camp began working with the system – not against it – they increased their influence and ensured the success of their change proposal.

Reception stage

Outcome

[120] Challender and MacMillan, "Investigating the Influence of Non-State Actors on Amendments to the CITES Appendices," 103.
[121] Quted in. Challender and MacMillan, 103.

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The change proposal was successfully internalized. Classifying species in light of the sustainable use principle became the dominant paradigm within the CITES community, as Michael Hickey shows in his study.[122] While only nearly 2.8% all CITES-listed species are covered under Appendix I, the clear majority of them, namely 96.6% of the species, are listed under Appendix II.[123] Hence, the sustainable use became the main way of conservation – except for cases where a total cessation of trade is the only way to ensure the survival of the species. Moreover, the sustainable use concept has gained recognition in International Law. It was included in several other legal instruments such as the 1983 International Tropical Timber Agreement, the 1985 ASEAN Agreement and the Biodiversity Convention.[124] This is not to say that the sustainable use concept is now incontrovertible. As a matter of fact, some conservationists do not believe sustainable use is the way to protect species.[125] Some others, on the other hand, find it to be the only viable way to ensure the burden of preservation of wildlife does not entirely depend on the developing nations.[126] Although it appears that the sustainability camp won the battle, it is important to underline that the real sustainable conservation programs are the ones that involve and empower local communities.[127]

Pace and mode of change

This change proposal materialized in an accumulated fashion. It had a long prelude but the change itself materialized relatively quickly. The persistent requests for exceptions to the Bern Criteria led to the introduction of new set of classification criteria in Fort Lauderdale in 1994. The transformation from the Bern Criteria to Fort Lauderdale Criteria appears to be a long process (over nearly two decades). The accumulated frustration with the Bern Criteria and its underlying preservationist ideals sparked the confrontation in Kyoto in 1992. The real

[122] Hickey, "Acceptance of Sustainable Use within the Cites Community."
[123] Challender and MacMillan, "Investigating the Influence of Non-State Actors on Amendments to the CITES Appendices," 92.
[124] Hickey, "Acceptance of Sustainable Use within the Cites Community," 870.
[125] See for example, Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use."
[126] Krieps, "Sustainable Use of Endangered Species under Cites"; Hickey, "Acceptance of Sustainable Use within the Cites Community," 869–70.
[127] Hickey, "Acceptance of Sustainable Use within the Cites Community," 872.

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transformation came after Kyoto in the shape of a set of new classification criteria to be introduced in the next COPs meeting in Fort Lauderdale.

IV. Particular features of the case

“Crisis as a prelude to change”[128]

This case showed that political confrontation might be a prelude to change. It is hard to carry out a full-fleshed counter-factual analysis in this case study. Yet it appears that Kyoto was the breaking point. On the surface, it looked as if the change agents lost the battle and got their proposals rejected. Another look at the situation shows, however, that breaking point make it possible for the change proposal to succeed in the next two meetings. That confrontation made it clear that the preservationist camp’s insistence on cessation of trade might provoke the sustainable use camp to withdraw from the regime. This move would be quite costly for the preservationists because they would lose their leverage over these range states’ conservation or trade policies. This was enough to convince the preservationists to offer a compromise. Compromise in this case came in the shape of new classification criteria as well as the rubber stamp on the southern African nations’ proposal to down-list the African elephants.

Changing the system within the system: Strategies for small powers

This is one of the few examples, where small states could generate change despite the resistance from powerful states. This case shows well what it takes for small states to succeed. Primarily, they need persistent strategies, and support from a group of like-minded states. They also need to try to make changes with both structural and substantive change proposals to shift the balance to their favor. Well-timed threats of withdrawals might be useful to convince that a compromise (albeit limited) is the only way to ensure their continued

[128] Mofson, “Zimbabwe and CITES: Influencing the International Regime,” 112.

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cooperation. Finally, their strategies are likely to be more successful if they are in line with the broader ideational environment as we see in this case.

Broader ideational shift permeating into the microcosm of an institution

One of the interesting findings is that the broader ideational shifts may not automatically permeate into the microcosm of an institution. What we see here that although the sustainable use (and sustainable development) logic was becoming the dominant paradigm, it did not immediately change the international objective of the CITES regime. There was a delay of more than 20 years from the 1972 Stockholm Declaration to the 1994 Fort Lauderdale Criteria. This lag can be explained by the influence of powerful Western states that dominated the CITES up until the meetings in Fort Lauderdale and Harare – where the majority could no longer keep out the sustainable use principle.

When automatic permeation is blocked, change has to be intentional

This is one of the cases, which shows the importance of intentional change proposals. Indeed, in some cases change might materialize once the favorable factors are in place. Yet, here, we see that this is not nearly enough. One might still need the persistent and well thought of change proposals to bring the broader ideational shift into an otherwise secluded regime.

Example of how a broader ideational change translates into concrete interpretation of a norm

This case exemplifies how a broader ideational shift can be translated into concrete interpretation and the difficulties of achieving such a translation.

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Case Study 19

The Precautionary Principle: Ubiquitous Yet Hollow and Marginal

(April – August 2021)

Ezgi Yildiz[1]

I. Synopsis & Typical Story

The precautionary principle originated in German and Swedish law. The concept came to International Law through the World Charter for Nature (UNGA, 1982), and German proposals for the Conference on the Protection of the North Sea in 1984 and 1987.[2] It was then incorporated into the International Environmental Law via 1992 Rio Declaration on Environment and Development.[3] The principle then traveled to various subfields of International Environmental Law such as oceans, seabed, environment, watercourses, climate change and biodiversity; as well as different fields of International Law such as Law of the Sea, Human Rights, Trade, and Investment.[4] Despite its frequent appearance in legal instruments and presence in debates, the principle's legal nature (i.e. its customary nature) is

[1] I would like to thank Carlos Carlos Antonio Cruz Carrillo for his valuable input and research support.
[2] Meinhard Schröder, "Precautionary Approach/Principle," in *Oxford Public International Law*, accessed February 23, 2021, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1603.
[3] Peter H. Sand, "The Precautionary Principle: A European Perspective," *Human and Ecological Risk Assessment: An International Journal* 6, no. 3 (May 1, 2000): 445–58.
[4] D. Vander Zwaag, "The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Jousting," University of Hawai' International Law Review 35(2) (2013), pp. 617-632

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still uncertain.[5] Some scholars describe the precautionary principle (or approach) as an emerging rule of international law, which is not fully supported by the *opinio iuris*.[6]

The precautionary principle—an under-defined yet widely applicable principle—entered the field of international law in the late 1980s and the early 1990s through a series of international agreements.[7]

Since this highly aspirational (and revolutionary) principle has quickly appeared in many sites of International Law, it can be described as a principle of a highly 'fluid nature,' so to speak. While its fluidity has allowed it to travel to different fields, it has left a mark mostly only on marginal spaces—in preambles, dissents, and footnotes. Various actors, such as the EU or Latin American states, chose to push for the acceptance of this principle through a variety of authority structures in a variety of fields to the scale that we have not seen in our previous cases. This has resulted in the over-application of the norm, which did not necessarily increase its precision or ensure its widespread acceptance. There remain islands of acceptance, ignorance, silence and rejection—sometimes even co-existing within the same jurisdictions.

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[5] See: P. Birnie, A. Boyle and C, Redgwell, *International Law and the Environment*, (Oxford University Press, 2009), pp. 154-164.

[6] P.M. Dupuy, "Le Principe de Précaution, Règle Emergénte du Droit International General" at C. Leben and J. Verhoeven*, Le Principe de Precaution: Aspect de Droit International et Commounautaire*, (Éditions Panthéon-Assas, 2002), pp. 95-11; M. Bennouna, *Le Droit International entre la Lettre et l`espirit*, The Pocket Books of The Hague Academy of International Law (Brill/Nijhoff, 2017), para. 535-536.

[7] 1991 Bamako *Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, article 4(3)(f); 1992 UN *Framework Convention on Climate Change*, article 3(3); 1992 *Convention on Biological Diversity*, preamble; 1992 UN/ECE *Convention on the Protection and Use of Transboundary Watercourses and International Lakes,* article 2(5)(a), and its 1999 *London Protocol on Water and Health*, article 5(a); 1992 Paris *Convention for the Protection of the Marine Environment of the North-East Atlantic,* article 2(2)(a); 1992 Helsinki *Convention for the Protection of the Baltic Sea Area*, article 3(2); 1994 *Oslo Protocol* (on sulphur emission reductions), the two 1998 *Aarhus Protocols* (on heavy metals, and on persistent organic pollutants), and the 1999 *Gothenburg Protocol* (on acidification, eutrophication and ground-level ozone) to the 1979 UN/ECE Convention on Long-Range Transboundary Air Pollution, preambles; 1995 *Agreement* implementing the 1982 UN Convention on the Law of the Sea, *relating to Straddling Fish Stocks and Highly Migratory Fish Stocks*, article 6(2); 1996 *Syracuse Protocol* (to the 1976 Barcelona Convention) *for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources*, preamble; and 1996 *London Protocol* to the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, article 1(3).

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What is also interesting to underline that while the norm is overly applied to several fields, it rarely makes it to the center of the debate or the discourse in most of these fields, with the exception of human rights in the Americas and trade. Oftentimes, it is seriously marginalized. This indicates two things: first, the principle at least enjoys support from the minority to make into the discourse in the first place. Second, even if the norm reaches more central authority structures, it often does not solidify since it is generally pushed to the margins. The principle has enjoyed more acceptance and solidified in Europe and Latin America, where there seems to be a more regional acceptance. There is less certainty about the principle's international standing, however. Two of the most authoritative sources of support for this principle came in two advisory opinions issued by the International Tribunal of the Law of the Sea (ITLOS) Seabed Disputes Chamber and the Inter-American Court of Human Rights (IACtHR). It is uncanny that such a degree of support was only expressed in advisory opinions, whereas most of the courts and tribunals under study often sidelined the principle in contentious proceedings.[8]

Overall, this case study will show that the story of the precautionary principle carries the characteristics of the environmental law field. Without a central authority structure to turn to, this norm's advocates carried their fight to other authorities in different fields. And this choice led to frustrated or semi-successful change attempts in some fields, and more consolidation in some others – depending on the receptivity of the authority structures concerned as well as the degree of contestation the change proposals met. The change attempts had uneven success, which certainly did not help the norm become a customary norm securing a high degree of legality. However, they collectively changed the burden of argument making it impossible for actors to ignore the precautionary principle in debates or regulations even in the fields where it is still contested (e.g., food or public health regulations or general international law). Another point that should be underlined here is that actors'

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[8] This strategy of endorsing or clarifying environmental norms mostly when stakes are lower (commercially or procedurally lower stake rulings such as advisory opinions or provisional measures orders) is observed in a study on the WTO, the IACtHR, the ITLOS, and Arbitral Tribunals. Ezgi Yildiz, Chanya Punyakumpol and Carlos Antonio Cruz Carrillo, "Rulings with Lower Stakes and Higher Authority: An Analysis on Jurisprudential Leaps for Environmental Norms" (working paper).

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support for and opposition against the principle is not consistent across fields, which adds to the principle's uneven acceptance. While one actors may support the principle's application in one field, it can attempt to seriously undermine the norm in another field, as we will see below.

II. The Development of the Principle

1. Precautionary Principle: A Background

Although the term precautionary principle was coined in international legal debates in the late 1980s, the idea behind it was already captured in oral tradition of Indigenous People of Eurasia, Africa, the Americas, Oceania, and Australia, as well as the earliest scriptures of Buddhist tradition.[9] The same logic was also captured in "safe minimum standard of conservation" debate of the 1950s,[10] and the stringent consumer and the environmental policies in the US between the 1960s and the mid-1980s, which predates the universal recognition of precautionary principle in the 1990s.[11] What gave momentum to this process was the environmental catastrophes of the 1980s, Bhopal tragedy, Exxon Valdez spill, or the Chernobyl disaster.[12] However, while these events ensured the principle's universal recognition, they could not secure its universal acceptance. For example, before this critical turning point in the 1990s, the US had reversed its precautionary principle-friendly stance. As a matter of fact, the US transitioned to less stringent public health and environmental policies from the mid-1980s onwards. The European countries, on the other hand, moved to adopting more stringent regulatory politics in the 1990s in light of precautionary principle.

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[9] Philippe H. Martin, "'If You Don't Know How to Fix It, Please Stop Breaking It!' The Precautionary Principle and Climate Change," *Foundations of Science* 2, no. 2 (November 1, 1997): 276, https://doi.org/10.1023/A:1009619720589.
[10] Martin, 264.
[11] David Vogel, "The Politics of Risk Regulation in Europe and the United States," *The Yearbook of European Environmental Law* 3 (2003).
[12] Martin, "'If You Don't Know How to Fix It, Please Stop Breaking It!' The Precautionary Principle and Climate Change," 264–65.

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According to scholars, one of the reasons behind this principle's under-popularity in some fields or jurisdictions is its restrictive nature and perceived impact on innovation.[13] This ultimately does not sit well with countries that follow deregulatory trends.[14] For example, Daniel Bodansky argues that:

> Not only has the precautionary principle [in the United States] not produced the expected result; it has led to a backlash. During the last decade, US environmental law has increasingly stressed risk assessment and cost-benefit analysis, both of which, unlike the precautionary principle, presume that we have sufficient knowledge to measure risk and calculate the appropriate responses. Thus, just as international institutions . . . have begun to discover the precautionary principle, US environmental law has moved away from it. In part, this resulted from the Reagan-era opposition to environmental regulation generally. But in part it reflects a more widespread concern about the perceived over-stringency and inefficiency of many precautionary standards.[15]

The downsides of extreme risk aversion or the excessive application of the precautionary principle are also vehemently discussed in the current debate about some of the suspended COVID-19 vaccines, namely Oxford/AstraZeneca in Europe and Oxford/AstraZeneca and (temporary suspension of) Johnson & Johnson in the US. Although the US government did not make an explicit reference to the precautionary principle, the EU and the European governments did.[16] But both sides of the Atlantic reacted more or less the same way, however. Prior to the Johnson & Johnson incident, the US followed Europeans and had not approve Oxford/AstraZeneca due to its potential to create blood clots. Although there seems to be a convergence of practice in this area, the current debate is likely to be

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[13] For example, this edited volume explores the ways in which risk is actually beneficial for innovation and the downsides of the precautionary approach, see Julian Morris, *Rethinking Risk and the Precautionary Principle* (Elsevier, 2000).

[14] Rupert Read and Tim O'Riordan, "The Precautionary Principle Under Fire," *Environment: Science and Policy for Sustainable Development* 59, no. 5 (September 3, 2017): 4, https://doi.org/10.1080/00139157.2017.1350005.

[15] Daniel Bodansky, "The Precautionary Principle in US Environmental Law," in *Interpreting the Precautionary Principle*, ed. Timothy O'Riordan and James Cameron (Routledge, 2013), 205.

[16] Edward Segal, "How Johnson & Johnson Could Regain Public's Trust In Covid Vaccine Crisis" 16 April 2021, available at https://www.forbes.com/sites/edwardsegal/2021/04/16/how-johnson--johnson-could-regain-publics-trust-in-vaccine-crisis/?sh=4f08914b3935

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highly damaging for the precautionary principle. Headlines such as "Revenge of the precautionary principle,"[17] criticized their decision to suspend these vaccines with an explicit reference to the precautionary principle.[18] Scientists, in particular, warn against the repercussions of invoking the precautionary principle in instances such as excessive school closures or vaccine suspension since it could send mixed messages and diminish the trust in this principle.[19]

The second issue is the precautionary principle's vagueness and aspirational nature with little to no guidance. Some scholars find this combination counter-productive.[20] The precautionary principle is not a specific norm; rather a broader guideline or an operational concept that requires actors to take measures to prevent irreparable damage.[21] In a nutshell, it calls them to "give more weight to risk avoidance over cost/risk-benefit analysis."[22] While the principle itself reveals no information about "the threshold degree of uncertainty, the magnitude of harm threatened, and the type of response," it requires states to reflect on their legal obligations through the lenses of precaution against irreversible damage.[23] In this regard, it is different from prevention principle, which concerns imminent significant damage, and it calls for a different proportionality analysis. The precautionary principle is meant to be activated even in the absence of scientific certainty about the damage. Its threshold is lower than that of prevention principle because the scale of the menace is higher.

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[17] Sarah Wheaton, "Revenge of the precautionary principle," 18 March 2021, available at https://www.politico.eu/article/revenge-of-the-precautionary-principle/

[18] Anthony R Cox, "Blood clot fears: how misapplication of the precautionary principle may undermine public trust in vaccines" 16 March 2021, available at https://theconversation.com/blood-clot-fears-how-misapplication-of-the-precautionary-principle-may-undermine-public-trust-in-vaccines-157168

[19] David Isaacs, "The Precautionary Principle, the AstraZeneca COVID-19 Vaccine and Mixed Messaging," *Journal of Paediatrics and Child Health* 57, no. 4 (2021): 472–73, https://doi.org/10.1111/jpc.15468.

[20] Marchant Gary E, "From General Policy to Legal Rule: Aspirations and Limitations of the Precautionary Principle.," *Environmental Health Perspectives* 111, no. 14 (November 1, 2003): 1799–1803, https://doi.org/10.1289/ehp.6197; Marjolein B. A. van Asselt and Ellen Vos, "The Precautionary Principle and the Uncertainty Paradox," *Journal of Risk Research* 9, no. 4 (June 1, 2006): 313–36, https://doi.org/10.1080/13669870500175063.

[21] Martin, "'If You Don't Know How to Fix It, Please Stop Breaking It!' The Precautionary Principle and Climate Change," 264.

[22] Vogel, "The Politics of Risk Regulation in Europe and the United States."

[23] Daniel Kazhdan, "Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle Annual Review of Environmental and Natural Resources Law," *Ecology Law Quarterly* 38, no. 2 (2011): 529.

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It is a more ambiguous and ambitious principle than prevention principle, which is almost universally unopposed. The precautionary principle does not enjoy a similar support. Its legal status—whether it is a principle or an approach; or whether it is a customary norm or not—is still debated.[24] According to Sven Ove Hansson, "No other safety principle has been so vehemently contested as the precautionary principle."[25]

One of the main controversial issues surrounding the precautionary principle is whether the burden of proof should be shifted to the party conducting the activity. Who should bear the burden to prove that the said operation will not cause significant environmental damage? Is it the party that is undertaking the operation? According to Caroline Foster, this shift concerns adjudicative burden of proof.[26] The perception of who should bear this burden seems to change over time. However, there is not a full consensus around it, neither in state practice nor within academic circles. Even though a total reversal of burden of proof may not be unequivocally accepted, the review of the debate on precautionary measures reveals that the standard of proof has been relaxed over time.

For example, Daniel Bodansky considers that some versions of the precautionary approach would reverse the burden of proof, placing the burden on proponents of an activity to prove that the activity is safe.[27] Conversely, Christopher Stone and Peter Sand suggest that demanding prior proof that an action will cause no harm is extreme.[28] Jorge Viñuales also considers the possibility of shifting the burden of proof. He then concludes that the burden should be on the party making the claim but the standard for proving the claim should be relaxed. Likewise, he suggests that the burden of proof may be shifted by agreement of the

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[24] Schröder, "Precautionary Approach/Principle."

[25] Sven Ove Hansson, "How Extreme Is the Precautionary Principle?," *NanoEthics* 14, no. 3 (December 1, 2020): 245, https://doi.org/10.1007/s11569-020-00373-5.

[26] Caroline E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2011), 244, https://doi.org/10.1017/CBO9780511973680.

[27] Daniel Bodansky, "Deconstructing the Precautionary Principle," in *Bringing New Law to Ocean Waters*, ed. David Caron and Harry Scheiber (Brill Nijhoff, 2004), 390–91, https://brill.com/view/title/11045.

[28] Sand, "The Precautionary Principle"; Christopher D Stone, "Is There a Precautionary Principle? | Environmental Law Reporter," *The Environmental Law Reporter* 31, no. 7 (2001): 10791, https://elr.info/store/product/file_download/there-precautionary-principle.

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parties.[29] Arie Trouwborst considers that the precautionary approach does not shift the burden of proof. Rather, it relaxes the standard of proof.[30] In a similar vein, Aline Jaeckel considers that, regardless of who carries the burden of proof, the precautionary principle affects the standard of proof in that neither side is required to prove absolute harmfulness or harmlessness of a project.[31]

The disagreement about what precautionary principle is and when it can be applied is not limited to the academic debate, states also have diverse understandings of what it is and when it should be applied.[32] Therefore, many change agents sought to obtain an authoritative statement from institutions and interpretive bodies. What complicates matters more is that actors enforcing or arguing for the precautionary principle might have different definitions in mind. For example, Julian Morris divides the precautionary principle into two types: the strong precautionary principle requires actors to "take no action unless [they] are certain that it will do no harm," the weak precautionary principle, on the other hand, implies "lack of full certainty is not a justification for preventing an action that might be harmful".[33] Morris finds that although environmentalists push for the strong precautionary principle, only the weak version was endorsed in several international agreements and declarations such as the Rio Declaration.[34] According to Rio Declaration, "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Principle 15).

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[29] Jorge Vinuales, "Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law," *Vanderbilt Journal of Transnational Law* 43, no. 2 (2020): 479–80.
[30] Arie Trouwborst, *Precautionary Rights and Duties of States*, *Precautionary Rights and Duties of States* (Brill Nijhoff, 2006), 194–227.
[31] Aline Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Leiden: Brill Nijhoff, 2017), 54–55, https://brill.com/view/journals/ocyo/34/1/article-p568_28.xml.
[32] Vogel, "The Politics of Risk Regulation in Europe and the United States."
[33] Julian Morris, "Defining the Precautionary Principle," in *Rethinking Risk and the Precautionary Principle*, ed. Julian Morris (Elsevier, 2000), 1.
[34] Morris, 15.

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Hence when actors invoke this principle, they do not necessarily mean to endorse or apply the same standards. There is also a difference between actors that prefer the precautionary principle (i.e. hard liners for risk-averse action) and those that use the precautionary approach (i.e. flexible ones that are willing to entertain economic concerns). While the EU prefers the term 'the precautionary principle,' the US and Australia prefer to use 'the precautionary approach,' and Canada does not make a distinction between the two.[35]

With these caveats and differences in mind, one can still trace through which paths the precautionary principle traveled. As the analysis below will show, the main pathways of change are *state action path* and *judicial path,* and in some areas *multilateral* and *bureaucratic paths* are also engaged. Several states such as Australia, New Zealand,[36] Argentina,[37] India,[38] as well as the EU did not only integrate the precautionary principle in their domestic policies,[39] but also several of them sought to clarify state obligations deriving from this principle by bringing cases before international courts and tribunals in different fields. There is a wide range of cases dealing with or touching upon precautionary principle/approach in General International Law, Law of the Sea, Trade Law, Human Rights, and Investment.

This pattern fits the characteristics of the International Environmental Law field. Since there is virtually no centralized institution to review environmental claims, they naturally flow into different fields. In what follows, I will revisit these sites and assess the use of different pathways in each. Revisiting each site, I believe, promises an important analytical edge to unearth the reservoirs of support and to identify the sites of contestation and silence:

- General International Law and environment – the ICJ as a site of contestation
- Conservation – the ITLOS, the ISA, the FAO & the CITES as sites of construction

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[35] Rosie Cooney, *Biodiversity and the Precautionary Principle: Risk, Uncertainty and Practice in Conservation and Sustainable Use* (Earthscan, 2012), 5.
[36] Elizabeth Fisher, "IS THE PRECAUTIONARY PRINCIPLE JUSTICIABLE?," *Journal of Environmental Law* 13, no. 3 (2001): 315–34.
[37] Kazhdan, "Precautionary Pulp."
[38] Sand, "The Precautionary Principle."
[39] Giandomenico Majone, "The Precautionary Principle and Its Policy Implications," *JCMS: Journal of Common Market Studies* 40, no. 1 (2002): 89–109, https://doi.org/10.1111/1468-5965.00345.

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- Trade, environment, and public health – the WTO as a site of contestation
- Human Rights – the ECtHR as a site of silence and the IACtHR as a site of construction
- Investment – Arbitral Tribunals as sites of silence

As the analysis shows, the strength of the principle varies from one site to another.[40] While in some sites it is highly contested, in some others it receives support from unlikely actors such as the US and its support for the precautionary approach in conservation related agreements. Overall, this multi-sited analysis also demonstrates that although the precautionary principle has not become custom yet, it has traveled to many sites and shifted the discourse in such a way that states now feel compelled to take a position for or against it. As Arie Trouwborst remarks, "There is no escaping the precautionary principle… In the environmental field, there is practically no multilateral treaty or intergovernmental declaration from the last 15 years in which the principle is lacking.[41] But again as Trouwborst highlights "Whether in spite or because of the vast attention it has been receiving, the precautionary principle continues to be prone to considerable misgivings. In particular, its legal status and consequences are subject to a confusion of tongues of Babylonian proportions."[42] In what follows, I will take a look at the use of the precautionary principle in several sites of International Law, where it is endorsed, clarified, or contested.

In this study I will use the terms "zone of viscosity" and "zone of fluidity" to explain the degree to which the precautionary norm (a highly fluid and indeterminate norm) interacts with different socio-legal environments and transforms as a result. Zone of viscosity are the fields in which the principle can take hold and congeal into a more solid form due its interaction with the existing authority structures in that particular field. When these authority structures endorse the principle and issue authoritative statements determining its scope or contents, the norm solidifies and become stickier (viscos). Once a fluid norm becomes more

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[40] Cooney, *Biodiversity and the Precautionary Principle*, 10.
[41] Arie Trouwborst, "The Precautionary Principle in General International Law: Combating the Babylonian Confusion," *Review of European Community & International Environmental Law* 16, no. 2 (2007): 185, https://doi.org/10.1111/j.1467-9388.2007.00553.x.
[42] Trouwborst, 185.

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viscos, it begins leaving mark on the actors and existing understandings or interpretations. However, the same norm can meet a zone of fluidity, where it does not receive a similar support and does not congeal into something more solid with a potential to have a similar influence on actors and understandings. These are the zones of fluidity. The same norm can remain fluid in one field while reaching a certain degree of viscosity in another field, where it receives support.

Sites of contestation, where authority structures attempt to construct or solidify a norm, are the zones of viscosity, which is an intuitive formulation. Sites of silence, where the authority structures are not available or receptive, are the zones of fluidity, which is also in line with our common expectation about influence of silence on norm construction (or lack thereof). Sites of contestation are the one in the middle and they can be either, a zone of viscosity or fluidity. This is because the contestation might have a differing effect of the norm. If the contestation is encouraging actors to clarify their understandings then the norm solidifies as a result and that site becomes a zone of viscosity. However, if contestation is unresolved and the solution is pushed for another day, it does the opposite affect and the norm stays fluid. In what follows, I will explain how the precautionary principle changed in each field when it encountered the zones of viscosity and fluidity.

2. ***General International Law and Environment – ICJ a Site of Contestation***

There is not a central authority structure that is solely dedicated to tackling environmental disputes in General International Law. The ICJ attempted to undertake this task and established a special seven-member Chamber for Environmental Affairs in 1993 with the expectation that there will be a surge of cases concerning the environment. Yet, no state submitted a case to this chamber and the ICJ eventually decided to dissolve the chamber in 2006.[43] The ICJ (i.e. the full court) had a chance to review cases related to the environment

[43] Basile Chartier, "Chamber for Environmental Matters: International Court of Justice (ICJ)," in *Oxford Public International Law*, 2018, https://doi.org/10.1093/law-mpeipro/e3339.013.3339.

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and had an opportunity to review claims concerning the precautionary principle's application.[44]

The main contestation on this site concerned setting a threshold for 'serious and irreversible harm' and establishing whether the precautionary principle reverses the burden of proof. The ICJ has shown a great dedication to avoiding engaging with and elaborating on the precautionary principle. A few judges, in particular Judges Cançado Trindade, from Brazil, and Judge Weeramantry, from Sri Lanka, have actively supported the principle through their separate opinions and acted as change agents in minority. Although their opinions may not have weight of a judgment, they have contributed towards clarifying the principle and endorsing it in the margins.

The first case, the *1995 Nuclear Test Case*, concerned the re-interpretation of the *1974 in the Nuclear Tests* case.[45] New Zealand, relied on precautionary principle and asked the Court to issue an order and to direct France to cease their nuclear tests in the South Pacific Region. More specifically, New Zealand argued that "the 'precautionary principle' [is] very widely accepted in contemporary international law" and France would have the burden of proof to show the harmlessness of its activities.[46] France presented a procedural counter-argument and denied the Court's jurisdiction to review the claim.[47] It also emphasized that France "very actively endorsed the latest requirements of international law in the field of environmental protection" without a reference to the precautionary principle.[48] While the case was dismissed due to lack of jurisdiction, the European Parliament called on France to cancel the remaining tests.[49]

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[44] Stephen Tokarz, "A Golden Opportunity Dismissed: The New Zealand v. France Nuclear Test Case," *Denver Journal of International Law & Policy* 26, no. 4 (May 5, 2020): 748, https://digitalcommons.du.edu/djilp/vol26/iss4/9.

[45] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court S Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case, I. C. J. Reports 1995, p. 288, paras. 5 and 64.

[46] *Nuclear Tests case,* para.5, and para. 34.

[47] *Nuclear Tests case*, paras 22-24.

[48] *Nuclear Tests case*, para 38.

[49] Tokarz, "A Golden Opportunity Dismissed."

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The jurisdictional hurdles of re-opening a case aside,[50] what is important about this ruling is that the Court did not use the opportunity to clarify the precautionary principle or its scope. Judge *ad hoc* Sir Geoffrey Palmer, in his dissent argued that this was a missed opportunity. Concerning the precautionary principle, in particular, he argued that "the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to the environment."[51] Judge Weeramantry also issued a separate opinion to underline that key principles of environmental law – such as "the precautionary principle, the principle of trusteeship of earth resources, the principle that the burden of proving safety lies upon the author of the act complained of, and the polluter pays principle…" – are part of the customary international law. They "do not depend for their validity on treaty provisions…. They are part of the *sine qua non* for human survival."[52]

The second missed opportunity came with *Gabcíkovo-Nagymaros Project* (1997). In this case Hungary invoked the precautionary principle and argued for suspending its involvement in a joint investment project with Slovakia due to ecological necessity.[53] More specifically, Hungary underlined that "the previously existing obligation not to cause substantive damage to the territory of another State had… evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle'"[54] Slovakia did not refer to the precautionary principle or deny its requirements but it simply disagreed on the alleged environmental impact.[55] What is more important is that the Court did not engage with Hungary's assertion. The majority of the Court, while noting that "vigilance and prevention are required on account of the often-irreversible character of damage to the environment," avoided any detailed analysis of the precautionary principle and took a procedural way out.[56] Judge Weeramantry issued an opinion in this case as well and argued that "development can only be prosecuted in harmony with the reasonable demands of

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[50] New Zealand had no other option but to re-open this case because in 1974, France withdrew from the ICJ's compulsory jurisdiction.
[51] *Nuclear Tests case,* at 412, §91 (Palmer, J., dissenting).
[52] *Nuclear Tests case,* at 502-504 (Weeramantry, J., dissenting).
[53] *Gabcíkovo-Nagymaros Project case* (Hungary/ Slovakia), Judgment, I.C.J. Reports 1997, p. 62, para. 97
[54] *Gabcikovo-Nagymaros Project case.*
[55] *Gabcikovo-Nagymaros Project case,* para. 113.
[56] *Gabcikovo-Nagymaros Project case.*

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environmental protection" and referred to the precautionary principle in a footnote to support his claims about changing state practice around environmental protection.[57]

In the next case, the 2010 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Argentina argued that the precautionary principle places the burden on Uruguay to prove that the pulp mills would not cause significant damage to the environment.[58] Uruguay's counter-argument underlined that the precautionary principle is not applicable since there was not "serious or irreversible harm" and the precautionary principle would not shift the burden of proof from Argentina to Uruguay.[59] The majority of the ICJ avoided any detailed discussion of the precautionary principle's scope or the burden of proof requirements. They simply concluded that "while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that [the precautionary approach] operates as a reversal of the burden of proof."[60] According to, David L. VanderZwaag, "The judgment has left considerable uncertainty over whether the Court was limiting its burden of proof conclusion to the specific treaty in question or was articulating a broader statement on precaution."[61] Judge Cançado Trindade, dissented and stated that "it escapes [his] comprehension why the ICJ has so far had so much precaution with the precautionary principle."[62] He further added that "The Hague Court . .. is not simply the International Court of Law, it is the International Court of Justice, and, as such, cannot overlook principles."[63] Short of accepting the reversal of burden of proof, Judge Cançado Trindade clarified the obligations derived from precautionary measures in his separate opinion:

> "For the first time in human history, human beings became aware that they had acquired the capability to destroy the whole of humankind. In so far as the environment

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[57] *Gabcíkovo-Nagymaros Project case*, at 91 (Weeramantry, J., sepate opinion)

[58] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, 2010 I.C.J. 14 (Apr. 20) [hereinafter *Pulp Mills*]

[59] *Pulp Mills on the River Uruguay* (Uruguay's counter-memorial), paras 1.44 and 1.45.

[60] *Pulp Mills,* § 164.

[61] David L. VanderZwaag, "The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Jousting Panel 2: International Environmental and Nuclear Law," *University of Hawai'i Law Review* 35, no. 2 (2013): 621.

[62] *Pulp Mills* separate Opinion of Judge of Judge Cancado Trindade, para. 67.

[63] *Pulp Mills* separate Opinion of Judge of Judge Cancado Trindade, para. 220.

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is concerned, the emergence of the precautionary principle brought about the requirement to undertake complete environmental impact assessments, and the obligations of notification and of sharing information with the local population (and, in extreme cases, even with the international community). Moreover, the reckoned need of consideration of alternative courses of action, in face of probable threats or dangers, also contributes to give expression to the precautionary principle, amidst the recognition of the limitations in scientific knowledge on ecosystems."[64]

The ICJ's hesitation about this principle continued in the next case, the 2016 *Whaling in Antarctica* (*Japan v. Australia*, and New Zealand intervening). Australia argued that the obligations derived from the Whaling Convention should be read considering the three main pillars of contemporary international environmental law: intergenerational equity, the principle of prevention and the precautionary approach. Japan's counterargument underlined that the precautionary principle is engaged only when the threat is serious or irreversible; not when it is only 'significant.'[65] Japan also added that the precautionary principle does not reverse the burden of proof. Yet, the Court punted again and found it unnecessary to elaborate on these contested points. In his separate opinion, Judge Cançado Trindade stressed this situation and recognized that: "Despite the hesitation of the ICJ (and of other international tribunals in general) to pronounce and dwell upon the precautionary principle, expert writing increasingly examines it, drawing attention to its incidence when there is need to take protective measures in face of risks, even in the absence of corresponding scientific proof."[66] Similarly, Judge Charlesworth suggested; "treaties dealing with the environment should be interpreted wherever possible in light of the precautionary approach, regardless of the date of their adoption."[67]

The Court's general approach did not change in the 2015 *Certain Activities Carried Out by Nicaragua in the Border/ Construction of a Road in Costa Rica along the San Juan*

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[64] *Pulp Mills* separate Opinion of Judge of Judge Cancado Trindade, para. 71.
[65] *Pulp Mills* (Japan's counter memorial) para 9.34.
[66] *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), separate Opinion of Judge of Judge Cancado Trindade, para. 71.
[67] *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), separate Opinion of Judge Ad Hoc Charlesworth, para. 9.

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River. Nicaragua alleged that Costa Rica had not adhere to the precautionary principle and did not address the pollution arising from its construction project. It thereby violated Article 3 of the Regional Agreement on the Transboundary Movement of Hazardous Wastes.[68] Costa Rica countered these allegations on evidentiary grounds by claiming that there is no proof of significant harm.[69] The ICJ rejected this claim since it found that Nicaragua had the burden of proof to show that the Costa Rican activities caused a significant transboundary harm.[70] Judge Cançado Trindade issued a separate opinion on this case as well and elaborated on the link between the precautionary principle and the prevention principle. He concluded that the precautionary principle engages states' due diligence obligations even when there are scientific uncertainties.[71] Judge Cançado Trindade's persistent attempts have clarified the scope of this principle, they have not shifted the majority's approach to the precautionary principle.

Due to the ICJ's overall reluctance to seriously consider the precautionary principle and to endorse it in some shape or form, the norm has arguably remained highly fluid in this site (zone of fluidity). The construction attempt took place only in the margins (i.e. separate opinions). However, this attempt was not enough to solidify the norm's legal nature (its customary status or the degree to which it reverses the burden of proof), which is still highly contested. Another point to remark is that the contestation on this site does not aim at obliterating the norm by arguing that it does not exist. Rather, it seeks to hollow it out by blocking the ways in which irreversible harm can be defined or the burden of proof can be shifted. The ICJ's reluctance to endorse the principle perpetuates the norm's contestation and prevents it from ever solidifying in this field.

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[68] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665.

[69] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica) para. 210 and 216.

[70] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica) para. 218 and 220.

[71] *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Separate Opinion of Judge Cancado Trindade, para. 56 and 57.

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3. ***Conservation – CITES, FAO, ISA & ITLOS as Sites of Construction***

Conservation is one of the areas in which the precautionary principle perhaps enjoyed the most reception and the least contestation (zone of viscosity). The principle therefore could congeal and shape the rules and practices in this field. Even the US, which is normally against the precautionary principle, strongly supported this principle when it comes to conservation. The most telling example of this is the US's support for adding the precautionary principle in the 1994 Fort Lauderdale Criteria under the CITES regime. The south African countries which campaigned for the sustainable use such as Zimbabwe, Namibia, and Zambia also did not oppose the inclusion of the precautionary principle in the Fort Lauderdale criteria—albeit requesting its soft application (see the separate case for the use of precautionary principle and sustainable use). The CITES regime has been a zone of construction, where the precautionary principle has been integrated with the sustainable use-principle.

In addition, the principle has found its place in other biodiversity related agreements. For example, it is included in the Preamble of the Convention on Biodiversity, and it is strongly affirmed in its 2000 Cartagena Protocol, which covers international trade in living genetically modified organism (see the trade section below). Although the principle is not included in the 1971 Ramsar Convention on Wetlands and the 1982 Convention on Migratory Species (CMS), it is referred in the subsequent agreements concluded under the auspices of the CMS such as the Agreement on Conservation of Cetaceans of Black Sea, Mediterranean Sea and contiguous Atlantic Area (ACCOBAMS, 1996), the African-Eurasian Waterbird Agreement (1995), and the Agreement on the Conservation of Albatrosses and Petrels (2001). It is also mentioned in the subsequent resolutions to the Ramsar Convention such as the Ramsar Guidelines on Management Planning for Wetlands,[72] and the Resolution on Allocation and Management of Water.[73] Another example is the revised African Convention on the Conservation of Nature and Natural Resources adopted in 2017. Finally, the principle

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[72] Resolution VIII.14 Chapter VI.
[73] Resolution VII.1 Article 10.1

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has been employed to address biodiversity concerns in domestic legislations of several countries such as Australia, Costa Rica, Argentina, South Africa, and Cameroon.[74]

The precautionary principle has also been employed in preserving marine environment. For example, the UN Convention on the Law of the Sea (UNCLOS) and especially Part XII—which includes a series of provisions concerning the protection and preservation of the marine environment—served as the basis of the precautionary principle's introduction to this issue area. In addition, the principle is also included in the 1995 UN Fish Stock Agreement and in several regional fisheries agreements such as the North Atlantic Salmon Conservation Organization (NASCO) and the International Commission for the Conservation of Atlantic Tunas (ICCAT).

The principle's addition to the Fish Stock Agreement was particularly promoted by Argentina, Canada, Chile, Iceland, and New Zealand through their submission which called for increased precaution at the 1992 UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in New York.[75] The FAO also played an entrepreneurial role in this regard.[76] The FAO included the principle in its 1992 Code of Conduct for Responsible Fisheries and submitted information papers on the application of precautionary principle in fisheries management at the 1993 session of the UN Conference on Straddling Fish Stocks. The FAO also developed a Technical Guidelines on the Precautionary Approach in Fisheries with the support of government of Sweden in 1995. These guidelines are to support the Code of Conduct (more on the FAO's role in promoting responsible fishing see the separate case).[77] The inclusion of the principle in the fisheries management field was also supported by the NGOs such as the World Conservation Union (IUCN) or the International Center for the Living Aquatic Resources Management (ICLARM).[78]

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[74] Cooney, *Biodiversity and the Precautionary Principle*, 11.
[75] FAO, "Precautionary Approach to Fisheries Part 2: Scientific Papers," FAO FISHERIES TECHNICAL PAPER, 1995.
[76] S.M. Garcia, "Ocean Fisheries Management: The FAO Programme," in *Ocean Management in Global Change*, ed. Paolo Fabbri (London; New York: Elsevier Applied Science, 1992), 381–418.
[77] FAO, "Precautionary Approach to Fisheries Part 2: Scientific Papers."
[78] FAO.

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Another important authority structure that specifically dealt with the application of precautionary principle is the International Tribunal for the Law of the Sea (ITLOS). The issue was brought to the ITLOS's attention first with the 1999 *Southern Bluefin Tuna Cases.* This case was initiated by New Zealand and Australia. They asked the ITLOS to issue provisional measures to prevent Japan from unilaterally increasing its southern bluefin tuna catch levels. Their main argument was that Japan's activities were not compatible with the precautionary principle. The ITLOS did not directly address the question. Instead, it mentioned "in the view of the Tribunal the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna."[79] Both Judge *ad hoc* Shearer and Judge Laing, in their separate opinions, argued that the fact that the Tribunal is issuing provisional measures orders means that the Tribunal is influenced by the precautionary approach.[80] In addition, Judge Laing highlighted that "in my view, while the Tribunal has drawn its conclusions and based its prescriptions in the face of scientific uncertainty, it has not, per se, engaged in an explicit reversal of the burden of proof."[81]

The issue was raised again in two other provisional measures orders. In *Mox Plant,* Ireland attempted to stop MOX fuel facility in the UK by invoking the precautionary principle. While doing so, Ireland also argued that the burden of proof should be on the UK to establish that the facility would not cause serious environmental harm.[82] Without specifically discussing the precautionary principle, the Tribunal emphasized the need for caution and ordered several provisional measures – though not those specifically requested by Ireland.[83] Judge Wolfrum delved into the core of the matter in his dissent:

> "There is no general agreement as to the consequences which flow from the implementation of this principle other than the fact that the burden of proof concerning the possible impact of a given activity is reversed. A State interested in

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[79] *Southern Bluefin Tuna cases* (New Zealand v. Japan; Australia v. Japan), Case Nos. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, §77.
[80] *Southern Bluefin Tuna cases* (Shearer, J., sep. op.)
[81] *Southern Bluefin Tuna cases* (Laing, J., sep. op. §21)
[82] The MOX Plant Case (Ireland v. U.K.), Case No. 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 95
[83] VanderZwaag, "The ICJ, ITLOS and the Precautionary Approach," 623.

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undertaking or continuing a particular activity has to prove that such activities will not result in any harm, rather than the other side having to prove that it will result in harm".[84]

In a similar vein, in *Straits of Johor (Malaysia v. Singapore)*, the ITLOS avoided dealing with the precautionary measures directly.[85] The Tribunal called for caution and invited Malaysia and Singapore to cooperate and address any potential adverse harm to the marine environment in the disputed region.

The first time the ITLOS showed real engagement with the principle was the 2011 *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons or Entities with Respect to Activities in the Area.* Following Nauru's request, the Council of the International Seabed Authority (ISA) called on the Seabed Disputes Chamber to issue an advisory opinion concerning the liability of sponsoring states when conducting deep seabed mining activities.[86] The Chamber directly addressed this matter and highlighted that precautionary approach is a part of sponsoring states' due diligence obligations. The Chamber also added that:

> "This obligation applies in situations where scientific evidence covering the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligations of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach."

Although the Chamber's pronouncement was the strongest support for precautionary measures until that moment, the Chamber stopped short of acknowledging that the precautionary principle is a customary norm. It did mention, however, that the principle has been incorporated by a growing number of treaties and instruments, and it underlined the

[84] MOX Plant case (Wolfrum, J., sep. op.).
[85] Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore), Case No. 12, Order of Oct. 8, 2003, 7 ITLOS Rep. 10,
[86] Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10

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existence of trend towards its customary status.[87] The support for including a pronouncement on the precautionary principle was also reflected in the pleadings submitted by Mexico,[88] the Netherlands,[89] the International Seabed Authority (ISA),[90] the IUCN,[91] and Greenpeace and WWF.[92] The ITLOS reiterated the importance of the precautionary principle in its 2015 advisory opinion, *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*. The Tribunal underlined the states obligation to conserve and manage fish stocks following a precautionary approach.[93]

The ISA is another authority structure that supported the precautionary principle. Beyond recognizing the principle, the ISA, in a way, also facilitated the ITLOS's first pronouncement on the matter in its 2011 advisory opinion. The ISA refers to the precautionary principle in its mining codes: exploration regulations for polymetallic nodules (PMN), polymetallic sulphides (PMS) and cobalt-rich crusts (CRC). It specifically mentions that "Prospectors and the Authority shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development. Prospecting shall not be undertaken if substantial evidence indicates the risk of serious harm to the marine environment."[94] When distilling sponsoring states' due diligence obligations, the ITLOS

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[87] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 135.
[88] *Responsibilities and obligations of States with respect to activities in the Area*, Written Submissions of the United Mexican States, 17 August 2010, paras. 87, 97 and 110.
[89] *Responsibilities and obligations of States with respect to activities in the Area*, Written Submissions of The Netherlands, 11 August 2010, para. 2.8.
[90] *Responsibilities and obligations of States with respect to activities in the Area*, Written Submissions of The Netherlands, 19 August 2010, para. 4.26.
[91] *Responsibilities and obligations of States with respect to activities in the Area*, Written Submissions of the International Union for Conservation of Nature and Natural Resources, 19 August 2010, paras. 122, 132-137.
[92] *Responsibilities and obligations of States with respect to activities in the Area*, Written Submissions of Greenpeace and the World-Wide Fund for Nature, 13 August 2010, pp. 12-13.
[93] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 208.
[94] This statement is repeated in all regulations confirmed by the ISA's Council, namely ISBA/19/C/17 (22 July 2013), ISBA/16/A/12/Rev.1 (15 November 2010), ISBA/18/A/11 (22 October 2012).

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specifically referred to these regulations,[95] and the fact that the precautionary principle is included in contractual clauses issued by the ISA.[96]

Although the institutions regulating conservation are rather dispersed (diffuse authority), they are overall more willing to include the precautionary principle in different areas in which they work. As a result, the precautionary principle is less hollow in this field and it is legal status is less contested. Rather, it is employed and concretized by many hands. Overall, there is also not a significant opposition even from states that are normally against the employment of the precautionary principle such as the US. Therefore, it is fitting to identify the field of conservation as a zone of viscosity, where this highly fluid norm could congeal and become sticky – effecting existing understandings and institutions.

4. ***Trade, Environment, and Public Health – WTO as Site of Contestation***

When it comes to the application of the precautionary principle to trade and public health regulations, the EU is clearly the most vocal advocate. The principle is enshrined in Article 174 of the Treaty establishing the European Community (1999 Amsterdam Treaty) and it shapes the EU's environmental policies. Germany played a central role in promoting the precautionary principle within the EU and lobbied intensively to use the principle in defining the EU-wide environmental standards.[97] Scholars defined this move as a "drive to 'Germanize' European environmental policy."[98] While the EU incorporated the principle, it never provided an authoritative definition. The Court of Justice of the EU (CJEU) filled this gap to a limited extent. In the 1998 *National Farmers' Union and Others,* the CJEU argued that "where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and

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[95] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, paras. 125-131

[96] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 134.

[97] Ragnar Lofstedt, "The Precautionary Principle in the EU: Why a Formal Review Is Long Overdue," *Risk Management* 16, no. 3 (August 1, 2014): 139, https://doi.org/10.1057/rm.2014.7.

[98] Lofstedt, 139. For example, S. Boehmer-Christiansen and J. Skea, "Acid Politics: Environmental and Energy Policies in Britain and Germany," January 1, 1991, https://www.osti.gov/etdeweb/biblio/5317798.

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seriousness of those risks become fully apparent."[99] The CJEU reiterated this position in *United Kingdom v. Commission.*[100] Ragnar Lofstedt argues that the European Environment Agency offered the closest European definition: "The precautionary principle provides justification for public policy actions in situations of scientific complexity, uncertainty and ignorance, where there may be a need to avoid, or reduce, potentially serious or irreversible threats to health and the environment, using an appropriate strength of scientific evidence, and taking into account the pros and cons of action and inaction."[101]

The EU's commitment to this principle, however under-defined it is, led to a rupture in the transatlantic trade relations and resulted into high-profile EU-US trade disputes.[102] There are sharp differences in the way the US and the EU view this principle. However, this is not to say that the US has always categorically refused the principle. Scholars argue that the US's anti-precautionary principle stand is a legacy of the Reagan era policies.[103] However, it seems like these deregulatory trends have not permeated in all departments of the US government in the same way or speed. As mentioned above it supported it in the context of the CITES regime. In addition, the US also recognized the importance of the precautionary principle in the context of the 1985 Vienna Convention on Ozone Depleting Substances and the 1990 London Amendments.[104] In a similar vein, during the Uruguay Round negotiations in the 1990s, the US argued for changes in the Sanitary and Phytosanitary Measures (SPS Agreement) in a way to make sure that WTO dispute panels could scrutinize regulatory standards.[105] The US's insistence on more stringent oversight in a way reflected its own health, safety, and environmental regulations. The US's attempts fell short of including the precautionary principle in the SPS Agreement since this could "allow countries to block imports on environmental or health grounds in the absence of any scientific evidence

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[99] CJEU, *Case C-157/96, National Farmers' Union and Others*, [1998] ECR I-2211, para. 63.
[100] CJEU, *Case C-180/96, United Kingdom v. Commission,* [1998] ECR I-2265, para. 99.
[101] Lofstedt, "The Precautionary Principle in the EU," 141.
[102] Lofstedt, 141.
[103] See for example, Vogel, "The Politics of Risk Regulation in Europe and the United States"; David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 2009).
[104] Vogel, "The Politics of Risk Regulation in Europe and the United States."
[105] Vogel.

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of significant risk."[106] Since then the strictness of the EU regulations far surpassed the ones in the US.[107]

This divergence lies at the root of this transatlantic contestation over the application of the precautionary principle for regulating GMO-based food products. The core of the issue was that while the EU had been categorically against the genetically modified organisms due to the potentially irreversible danger they pose (in accordance with the precautionary principle), the US was the largest producer of the GMO based food products – with Argentina and Canada coming in a distant second and third, respectively.[108] Other countries that produce GMO crops are Brazil, China, Australia, Colombia, the Czech Republic, France, Germany, Honduras, Iran, Mexico, Paraguay, the Philippines, Portugal, Spain, South Africa, and Uruguay.[109] While GMO's popularity increased across the globe, the US was clearly the leading producer that accounted for 54% GMO based crops in 2006.[110]

The US's heavy reliance of GMO-based foods—such as soybeans, corn, cotton and canola—and their overall tendency to rely on cost-benefit analysis meant that the EU and the US were locked in a irreconcilable disagreement.[111] For example, the US Coordinated Framework for the Regulation of Biotechnology outlines that "when the environmental risks of a [genetically modified plants] are more desirable than the risk they replace, the plant should be authorized for commercial use."[112]

The EU, on the other hand, does not entertain such a cost-benefit analysis. The EU's position on GMO started with a 1990 Directive which expressed the Commission's desire to develop a regulatory policy on GMOs, with a particular focus on the way crops were

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[106] M. Weinstein and S. Charnowitz, 'The Greening of the WTO' Foreign Affairs, Nov/Dec 2001, published on the Internet at: http://www.foreignaffairs.org/Search/results.asp?fi=greening*of*the*WTO&sinc=1
[107] Vogel, "The Politics of Risk Regulation in Europe and the United States."
[108] Laylah Zurek, "The European Communities Biotech Dispute: How the WTO Fails to Consider Cultural Factors in the Genetically Modified Food Debate Comment," *Texas International Law Journal* 42, no. 2 (2007 2006): 350.
[109] Debra M. Strauss, "Feast or Famine: The Impact of the WTO Decision Favoring the U.S. Biotechnology Industry in the EU Ban of Genetically Modified Foods," *American Business Law Journal* 45, no. 4 (2008): 778.
[110] Strauss, 778.
[111] Zurek, "The European Communities Biotech Dispute," 348.
[112] Edward Soule, "Assessing the Precautionary Principle," *Public Affairs Quarterly* 14, no. 4 (2000): 320.

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grown.[113] The Commission placed the regulatory power in the hands of the DG Environment, rather than DG Agriculture. This move in a way determined the content of the policy since the DG Environment had a predisposition towards the precautionary principle.[114] What gave further momentum to anti-GMO policies was also the mad cow scare in Europe. Due to the scandal, the European public became distrustful of the European food regulators, and public began associating GMO with the EU's incompetent regulatory framework.[115] This concern was shared by consumer groups, environmentalists, organic farmers. Together they began lobbying against GMOs, which was at the time described as "Frankenstein foods."[116] This was reflected in the public opinion as well: 56% of Europeans viewed GMO-based food as dangerous, and 71% expressed preference against GMO-based crops.[117] This outcry led to the adoption of Directive 2001/18/EC in 2001. The Directive was based on the precautionary principle, and it effectively allowed the European governments to halt the importation of GMO-based products.[118] This move against GMO products happened despite the growing scientific evidence that GMO-based food does not cause harm.[119] This was confirmed by the European Academies of Science Advisory Council and the Chief Scientific Advisor to European Commission, Professor Anne Glover, who stated: "There is no evidence that GM technologies are any riskier than conventional breeding technologies, and this has been confirmed by thousands of research projects. Food produced with GM technology is very common in other parts of the world, without any evidence that this has been harmful to people that consumed it or to the environment at large."[120]

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[113] Lofstedt, "The Precautionary Principle in the EU," 150.
[114] Sheila Jasanoff and Pforzheimer Professor of Science and Technology Studies Sheila Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton University Press, 2005).
[115] Mark A. Pollack and Gregory C. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods*, 1st edition (Oxford ; New York: Oxford University Press, 2009).
[116] Lofstedt, "The Precautionary Principle in the EU," 151.
[117] Lofstedt, 151.
[118] Lofstedt, 151.
[119] Daniel W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (Princeton University Press, 2008).
[120] This was expressed in an interview with Euractiv, available at https://www.euractiv.com/section/science-policymaking/interview/eu-chief-scientist-it-is-unethical-not-to-use-gm-technology/ (29 September 2013).

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Despite these subtleties, both sides (EU-US) were locked into diverging tracks. Since the European public's opinion was set on the issue and was not likely to budge, this meant that this time it would be the EU that would try to argue for more stringent regulatory standards before the WTO. The EU sought to get the WTO to accept the precautionary principle through judicialized contestation.

The first round took place in the context of the *EC-Hormone* case. The EU had banned the importation of hormone-treated beef and GMOs.[121] The US viewed this as a protectionist measure and brought a complaint.[122] Specifically, the case concerns the Agreement on Sanitary and Phytosanitary Measures (SPS) and Articles III (4), XX (b) and (g) of the GATT Agreement.[123] The EU defended its ban by invoking the precautionary principle to justify its ban on hormone-treated beef, in accordance with Article 5.1 and 5.2 of the SPS. More specifically, the EU argued that the precautionary principle is a general principle of international law and therefore it influences the way the SPS Agreement should be interpreted. The US and Canada in return argued that the precautionary principle was 'just' an approach and not a principle of international law. The WTO Appellate Body (AB) decided not to address this point and refused to determine whether the precautionary approach was a principle of international law.[124] Instead, it asserted that the precautionary principle, still a debated concept, cannot override the explicit wording of the SPS Agreement.[125]

This ruling created a ripple effect especially within the EU and encouraged them to define the precautionary principle in the context of risk management. The European Commission issued a Communication in 2000 in an attempt to introduce a coherent guideline. This was also necessary in the aftermath of the WTO AB decision that hormone-treated beef is safe and the use of the precautionary principle was unjustified in that case.[126] The

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[121] Vogel, *Trading Up*.
[122] Lofstedt, "The Precautionary Principle in the EU," 141.
[123] I. Cheyne, "Gateways to the Precautionary Principle in WTO Law", *Journal of Environmental Law* 19(2) (2007), 157.
[124] WTO Appellate Body*, European Communities – Measures Concerning Meat and Meat Products (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 13 February 1998, DSR 1998:I, 135, at para 120-125.
[125] Vogel, "The Politics of Risk Regulation in Europe and the United States."
[126] Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, Illustrated edition (Oxford: Oxford University Press, 2009).

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Communication underlined that the precautionary principle is "a part of risk management, where scientific uncertainty precludes a full assessment of the risk when decision makers consider that the chosen level of environmental protection of human, animal, and plant health may be in jeopardy."[127] Scholars argue that the Commission's formulation of the precautionary principle as a pillar of risk assessment was surprising since the Commission had never associated this principle with risk assessment until that moment. Yet, they also highlighted that this choice was most likely to be intentional, since it allowed the Commission to remain complaint with the WTO SPS Agreement.[128]

The CJEU also weighed in on the matter and clarified the precautionary principle further with two important rulings from 2002 and 2003. In *Pfizer Animal Health*, the CJEU, emphasized that the precautionary principle should not be activated on purely hypothetical scenarios of risk assessment. Rather, it should be founded upon the best available scientific evidence.[129] The CJEU repeated this reasoning in a 2017 ruling as well (*Fidenato and others*).[130] In *Monsanto Agricotura Italia*, the CJEU interpreted Article 12 of Regulation No. 258/97 in light of the precautionary principle and concluded that protective measures can be taken even when it is not possible to carry out a full risk assessment in areas where there is limited scientific data.[131] What it interesting to note here is that due to European institutions' active engagement the precautionary principle got further clarified within the EU's regulatory space. This is an example of how contestation can clarify and, in certain circumstances, even strengthen a norm.

In parallel to these, the Cartagena Protocol on Biosafety of the Montreal Convention on Biological Diversity was being drafted. This protocol was an attempt to fill a governance gap surrounding biotechnology and its trade relevant provisions were important in this field. In 1995, an open-ended Working Group on Biosafety was gathered. This Working Group

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[127] European Commission (2000) Communication from the Commission on the Precautionary Principle. Brussels: European Commission, (COM 2000-1 Final), p. 13.
[128] Majone, *Dilemmas of European Integration*.
[129] CJEU, *Case T-13/99, Pfizer Animal Health SA and others v. Council of the European Union*, [2002] ECR II-03305 paras. 139-144.
[130] CJEU, *Case C-111/16, Fidenato and others*, [2017], paras. 44, 49-50.
[131] CJEU, *Case C-236/01, Monsanto Agricoltura Italia*, [2003] ECR *I-08105* para. 111.

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met six times until 1999, yet it failed to reach an agreement.[132] The disagreement was largely between the GMO-exporting countries and developing countries supported by environmental groups. While the former argued for a limited scope, the latter sought to cover all biotechnology products. Moreover, while the GMO-exporting countries wished to subject the Protocol to the WTO's legal order, the EU and the developing countries argued for a Protocol with more teeth and clear exemptions from the existing WTO obligations.[133] The negotiations resumed in 2000 and negotiated among five groups: (i) the Miami Group of GMO-exporting countries (Argentina, Australia, Canada, Chile, the United States, and Uruguay); (ii) the EU; (iii) the Central and East European countries; (iv) the Compromise Group (Japan, Mexico, Norway, South Korea, and Switzerland); and (v) the Like-Minded Group, representing the majority of developing countries.[134] While the EU wished to add the precautionary principle in the text, the Miami Group strongly rejected this proposal.[135] The US especially took a strong position concerning the addition of the precautionary principle in the Cartagena Protocol.[136] However, in the end the Miami group agreed to add references to the precautionary principle without mentioning the term in the text (under Article 10.6), and gave up on clause which would directly subordinate the Biosafety Protocol to the WTO regime.[137] The Protocol, which entered into force in 2003, currently has 173 state parties, including the EU and its member states. The US is not a party, while Canada and Argentina are only signatories.[138]

The second round of judicialized contestation transpired against this background with the *EC-Biotech* case.[139] In 2003, the US joined by Canada and Argentina filed a complaint

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[132] Robert Falkner, "Regulating Biotech Trade: The Cartegena Protocol on Biosafety," *International Affairs* 76, no. 2 (April 1, 2000): 302–4, https://doi.org/10.1111/1468-2346.00135.
[133] Falkner, 304.
[134] Falkner, 305.
[135] Falkner, 309.
[136] Vogel, "The Politics of Risk Regulation in Europe and the United States."
[137] Falkner, "Regulating Biotech Trade," 309.
[138] See the current list of state parties, https://bch.cbd.int/protocol/parties/
[139] More on the compatibility of the WTO and Biosafety Protocol regime, see Sarah Lieberman and Tim Gray, "The World Trade Organization's Report on the EU's Moratorium on Biotech Products: The Wisdom of the US Challenge to the EU in the WTO," *Global Environmental Politics* 8, no. 1 (February 1, 2008): 33–52, https://doi.org/10.1162/glep.2008.8.1.33.

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against the EU's five-year moratorium on approving GMO based products.[140] With this complaint, the US sought to open markets to its GMO-based products and break down trade barriers.[141] The US Congress supported the administration "in its efforts within the [WTO] to end the European Union's protectionist and discriminatory trade practices of the past five years regarding agriculture biotechnology."[142] This was a high-stakes case that had repercussions in other jurisdictions and the future case law. It also deeply concerned the proper role and functions of the WTO as a body.[143]

In its defense, the EU once again relied on the precautionary principle to justify the moratorium.[144] The EU further argued that since the ban concerned the environment rather than health, it should fall under the Cartagena Protocol on Biosafety rather than the SPS Agreement. The EU also emphasized that even if the WTO agreements are applied to the case, they should be interpreted in light of the general international law.[145] The US, Canada, and Argentina contested this and claimed that the precautionary approach is not a general principle of international law. The WTO AB once again refused to determine the legal nature of the precautionary principle. It ruled against considering the Cartagena Protocol, since it was not binding on all parties (the US was not a signatory) and decided instead to apply the SPS Agreement. It also found that the EU had not offered acceptable justifications for its ban on GMO-based food under the SPS Agreement.[146] In so doing, the WTO passed on a great opportunity to elaborate on the application of the precautionary principle in the context of environmental or public health regulations.

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[140] More on the details of the application, see Ilona Cheyne, "Life after the Biotech Products Dispute: WTO Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R," *Environmental Law Review* 10, no. 1 (February 1, 2008): 52–64, https://doi.org/10.1350/enlr.2008.10.1.005.

[141] Strauss, "Feast or Famine," 782.

[142] 28H.R. Res. 252, 108th Cong. (2003); S. Res. 154, 108th Cong. (2003).

[143] Strauss, "Feast or Famine," 783.

[144] WTO Appellate Body*, European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Biotech)*, WT/DS291/R WT/DS292/R WT/DS293/R, adopted on 29 September 2006, paras. 7.76-7.89.

[145] First Written Submission by the European Communities, European Communities-Measures Affecting the Approval and Marketing of Biotech Product, at 64, DS/291, DSl292, DS/293 (May 17, 2004).

[146] Zurek, "The European Communities Biotech Dispute," 346.

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The ruling generated mixed reactions. While the US claimed victory, environmental and consumer groups[147] and academics criticized the ruling on account of its failure to take non-market related considerations into account.[148] The EU, on the other hand, had ended the moratorium in 2004 but it announced it would continue its stringent policies on GMOs.[149] According to Peter Power, spokesman for EU Trade Commissioner Peter Mandelson, "Nothing in this panel report will compel us to change that framework. Europe will continue to set its own rules on the import and sales of GM foods."[150] While this may appear to be a stalemate, according to some, the US's real target was developing countries such as India, Russia, or Sri Lanka.[151] This ruling sent them a strong signal for not invoking the precautionary principle under the Biosafety Protocol to enforce bans on GMO-based products.[152] Dennis Olson, Director of the Institute for Agriculture and Trade Policy, rightly underlined that:

> "There is already a broad international consensus on how to handle [GMO] crops at the international level established at the Cartagena Protocol. This consensus acknowledges that each country has the right to regulate GE crops based on precautionary principles, to require labeling of GE crops, and to protect farmers and others from unfair liability arising from the release of GE crops into the environment and food distribution system. Now, the WTO's unelected legal tribunal, at the request of the U.S. government, has chosen to pre-empt a strong democratic international consensus."[153]

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[147] Strauss, "Feast or Famine," 804.
[148] See for example, Zurek, "The European Communities Biotech Dispute."
[149]Gilbert R. Winham, "The GMO Panel: Applications of WTO Law to Trade in Agricultural Biotech Products," *Journal of European Integration* 31, no. 3 (May 1, 2009): 409–29, https://doi.org/10.1080/07036330902782261.
[150] Qtd in. Strauss, "Feast or Famine," 805.
[151] "EU to Hold Firm on Modified Seeds Despite WTO" The New York Times (11 May 2006), https://www.nytimes.com/2006/05/11/business/worldbusiness/11iht-wto.html
[152] See for example, James Bacchus, "Groping Toward Grotius: The WTO and the International Rule of Law Essay," *Harvard International Law Journal* 44, no. 2 (2003): 533–50.
[153] Press Release, Institute for Agriculture and Trade Policy, WTO Ruling on Genetically Engineered Crops Would Override International, National and Local Protections: Preliminary Ruling Favors U.S. Biotech Companies Over Precautionary Regulation (7 February, 2006), qtd in, Strauss, "Feast or Famine," 815,

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The internationalization of the contestation around the precautionary principle—before the WTO—may have encouraged the EU to clarify its own regulatory framework. In so doing, it certainly helped the principle to solidify within the EU's regulatory space (zone of viscosity). However, this contestation has arguably created the opposite effect outside of the EU with less powerful countries being warned against invoking the precautionary principle to raise similar trade barriers. Moreover, the WTO's overall unwillingness to apply and develop the precautionary principle has significantly reduced this principle's potential in the field of international trade,[154] and it has arguably undermined "the authority of the Biosafety Protocol."[155] Therefore, the legal status of this principle in still contested and the field of international trade remains a site of contestation with little to no opportunities for the precautionary principle to solidify (zone of fluidity) – although the EU appears to be an exception in this regard with its continuous determination to use this principle in its trade and public health related principles.

5. ***Human Rights – ECtHR as a Site of Silence & IACtHR as a Site of Construction***

Human Rights is another site that the precautionary principle visited. The principle had varying success in this site, however. While its reception was highly positive at the Inter-American Court of Human Rights (IACtHR), its European counterpart (the ECtHR) did not show a serious attempt to further this principle. This is despite the fact that the EU and the European governments seem to promote this principle nationally, regionally, and internationally for public health and environment regulations as the discussion above shows.

Complaints touching upon the precautionary principle were brought before the ECtHR in the late 1990s onwards. Yet, the ECtHR never properly engaged with this principle with a view to clarify it. Similar to what happened at the ICJ, the precautionary principle has so far been taken up by the minority of judges in their separate opinions. In the 1997 *Balmer-Schafroth and Others v. Switzerland*[156]—a case concerning the protection of the applicant's

[154] See for example, Robyn Eckersley, "A Green Public Sphere in the WTO?: The Amicus Curiae Interventions in the Transatlantic Biotech Dispute," *European Journal of International Relations* 13, no. 3 (September 1, 2007): 329–56, https://doi.org/10.1177/1354066107080126.
[155] Strauss, "Feast or Famine," 815.
[156] *Balmer-Schafroth and Others v. Switzerland*, application no. 67\1996\686\876, Judgment (26 August 1997)

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physical integrity from the use of nuclear energy—the Grand Chamber did not engage with the precautionary principle. This was picked up by the Judges Pettiti, Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha, and Jambrek who in their dissenting opinion criticized the majority. They specifically drew attention to the fact that "the majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle."[157]

Later in *Fretté v. France* (2002), where the ECtHR found France was justified in discriminating on the basis of sexual orientation in its adoption procedures, the precautionary principle was invoked once again in a separate opinion.[158] In its reasoning the majority argued in a way resembling the precautionary principle: "the scientific community... is divided over the possible consequences of a child's being adopted by one or more homosexual parents."[159] Judges Costa, Jungwiert and Traja called on this and claimed that "the most of the majority have based their decision, without saying so, on the precautionary principle"[160] Some academics described this case as the ECtHR's "implicit use of the precautionary principle."[161]

The precautionary principle was invoked by applicants or in separate opinions in four other judgments. In *Léger v. France*,[162] the application argued for the precautionary principle and the Court refused to engage with that part of the claim. *Neulinger and Shuruk v. Switzerland*, Judge Steiner referred to the precautionary principle in their dissenting opinion.[163] In 2010 *Dolhamre v. Sweden* (2010), Judge Zupancic surprisingly claimed that the "precautionary principle is well-established in [the ECtHR] case-law" in their dissenting

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[157] *Balmer-Schafroth and Others v. Switzerland*, application no. 67\1996\686\876 (26 August 1997) (dissenting opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha, and Jambrek).
[158] *Fretté v. France*, application no. 36515/97, Judgment (26 February 2002)
[159] *Fretté v. France,* para 42.
[160] *Fretté v. France* application no. 36515/97 (26 February 2002) (partly concurring opinion of Judge Costa joined by Judges Jungwiert and Traja).
[161] Thomas Willoughby Stone, "Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in Frette v. France to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation," *Connecticut Public Interest Law Journal* 3 (2004 2003): 271.
[162] *Léger v. France*, application no. 19324/02, Judgment (11 April 2006).
[163] *Neulinger and Shuruk v. Switzerland*, application no. 41615/07, Judgment (8 January 2009).

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opinion.[164] Finally, in *Georgia v. Russia (II)* (2021), in their jointly partial dissents, Judges Yudkivska, Pindo de Albuquerque, and Chanturia underscored a different characteristic of the precautionary principle by maintaining that "according to the precautionary principle, the State has an obligation to protect civilians from the risks of fire from State agents and enemy forces."[165]

As the aforementioned analysis shows, the ECtHR's showed almost an ICJ-like resistance in engaging with the precautionary principle and passed on the opportunities to clarify this principle as the judges in the minority caught in their separate opinions. This is despite the fact that European countries and institutions have been pro-precautionary principle. It is therefore all the more puzzling to see the ECtHR's unwillingness to engage with the principle and to apply it in European human rights law—creating a zone of exception within otherwise a precautionary principle-friendly continent. However, this might not be the end of the precautionary principle at the ECtHR. The Court is currently reviewing some complaints concerning climate change and the Court might finally rise to the occasion while reviewing these complaints.[166]

The IACtHR is the first human rights tribunal to fully engage with the precautionary principle. In 2016, Colombia requested the advisory opinion and called upon the IACtHR to elaborate on the link between states obligation concerning the environment and the right to life and personal integrity. In 2018, the Court issued an advisory opinion in which it recognized the precautionary principle as an integral part of state obligations to guarantee human rights and requested states to take effective measures to prevent severe or irreversible damage.[167] The Court also included a reference to the precautionary principle in the operative part of the advisory opinion as follows:

> "States must act in accordance with the precautionary principle to protect the rights to life and to personal integrity in cases where there are plausible

[164] *Dolhamre v. Sweden*, application no 67/04, Judgment (8 June 2010).
[165] *Georgia v. Russia (II),* application no. 38263/08, Judgment[GC] (29 January 2021).
[166] Ole W Pedersen, "The European Convention of Human Rights and Climate Change – Finally! *EJIL:Talk!* 22 September, 2020, available at https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally.
[167] IACtHR, *Human rights and the environment*, Advisory Opinion OC-23/17, Series A, No. 23, para. 242.c.

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indications that an activity could result in serious or irreversible environmental damage, even in the absence of scientific certainty."[168]

In arriving at this conclusion, the IACtHR signaled an existence of a regional consensus around the principle. It highlighted that a reference to the precautionary principle can be found in the domestic law and the case law of the highest courts of various members of the Organization of American States (OAS): The principle "has been explicitly incorporated into the laws of States such as Antigua and Barbuda, Argentina, Canada, Colombia, Cuba, Ecuador, Mexico, Peru, Dominican Republic, and Uruguay. Likewise, the high courts of Chile and Panama have recognized the applicability and obligatory nature of the precautionary principle."[169] In addition, the Court highlighted that the principle can be found in various international treaties that the OAS states are party to. It mentioned examples such as "the United Nations Framework Convention on Climate Change, which has been ratified by all OAS Member States,[170] the Stockholm Convention on Persistent Organic Pollutants ratified by 32 OAS Member States,[171] and the Biological Diversity Convention ratified by 45 OAS Member States.[172]

What is interesting to note also is the timing of Colombia's request and its contents. Colombia made a specific reference to "the severe degradation of the marine and human environment in the Wider Caribbean Region that may result from the acts and/or omissions of States that border the Caribbean Sea in the context of the construction of major new

[168] IACtHR, *Human rights and the environment*, Advisory Opinion OC-23/17, Series A, No. 23, para. 180
[169] *Human rights and the environment,* para 178.
[170] Ratified by Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States of America, Uruguay and Venezuela.
[171] Ratified by Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.
[172] Ratified by Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

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infrastructure projects."[173] What is remarkable about this request is that it has implications for Colombia's ongoing disputes with Nicaragua before the ICJ, both of which moved to the merits stage.[174] Especially for the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections,* Colombia's counter argument is built upon Nicaragua's failure to protect and preserve the marine environment, and it is no doubt that the IACtHR's advisory opinion will be useful in this regard.[175]

Another interesting observation to note is that the IACtHR's own agency and actorness and willingness to apply and further develop the precautionary principle. Colombia might have activated the IACtHR with a different intention in mind (i.e. scoring a point before the ICJ) – thereby serving as perhaps a non-intentional change agent. But it is sure that the IACtHR is the intentional change agent here. The Court took Colombia's request to another level by launching the right to a healthy environment as an autonomous right and then using this opportunity to elaborate on the precautionary principle.

Leaving aside the motivations behind this request, it has high jurisprudential value. With this opinion, the IACtHR expressed a strong endorsement for the principle and connected it to states due diligence obligations. The opinion also served as a reference point to map out state practice in Americas (Latin America mostly). By documenting the extent to which Latin American countries had already incorporated the precautionary principle in their domestic systems, the IACtHR demarked the region as one of the zones where the precautionary principle congealed and solidified in domestic practice (a zone of viscosity). As a result, in the field of human rights, while the precautionary principle has more legal backing in Americas, it seriously lacks this in Europe or Africa (as well as Asia, where there is no standing regional human rights court).

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[173] *Human rights and the environment,* para 2.

[174] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections,* Judgment, I.C.J. Reports 2016, p. 3. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia),* Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 100

[175] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Counter-Claims*, Order of 15 November 2017, I.C.J. Reports 2017, p. 289

Electronic copy available at: https://ssrn.com/abstract=4430270

6. ***International Investment Law – Investor-State Arbitration as a Site of Silence***

The precautionary principle has not been greatly integrated in the International Investment Law field, which is often characterized as "the most self-contained" field of law.[176] There are few examples in which the precautionary principle is included in treaties. For example, the 2008 Economic Community of West African States (ECOWAS) Supplementary Act, which entered into force in 2009, refers to the precautionary principle: "Prior to establishment, the Investors and Investments are required to carry out environmental and social impact assessments, while applying the precautionary principle."[177] There are also other examples that showed how the precautionary principle could be a point of contention for investment treaties. For example, this was a serious consideration during the Transatlantic Trade and Investment Partnership (T-TIP) negotiations between the EU and the US. While the EU has formally integrated the principle in its internal laws and regulations, the US does not adhere to the principle. This meant harmonizing environmental standards would be nearly impossible.[178] While the negotiations were halted since 2018, neither side has changed their position on the precautionary principle to this day.

When it comes to investor-state arbitration, the precautionary principle comes into the picture rarely and only when it relates to the domestic measure under review. Overall, investor-state arbitral tribunals refrained from making references to the precautionary principle as a rule of international law when reviewing claims. As Andreas Kulick rightly argues "Investment arbitration Tribunals, whether established under ICSID, NAFTA, or any other arbitration mechanism, exhibit a sweeping reluctance to refer to international

[176] Caroline E. Foster, "Adjudication, Arbitration and the Turn to Public Law 'Standards of Review': Putting the Precautionary Principle in the Crucible," *Journal of International Dispute Settlement* 3, no. 3 (November 1, 2012): 533, https://doi.org/10.1093/jnlids/ids013.
[177] Klara Polackova Van der Ploeg, "Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design," *International Lawyer* 51, no. 1 (January 1, 2018): 116.
[178] Sarah Ben-Moussa, "A Tale of Two Trade Powers: Balancing Investor-State Dispute Settlement and Environmental Risk Between the EU and US in a Changing Political Climate," *Fordham Environmental Law Review* 29, no. 1 (2017): 95–124.

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environmental law instruments."[179] Scholars, such as Caroline Foster, underline the future benefits of integrating the precautionary principle in the "'standards of review' in health and environmental disputes" or when assessing the host states' conduct.[180]

There are also few examples in which the precautionary principle is tangentially engaged when reviewing domestic environmental law. For example, in *Windstream Energy LLC v. Government of Canada* (2016), the investor claimed that the Canadian government's imposition of a moratorium on wind projects is an illegal expropriation. Canada argued that their decision to enforce a moratorium was based on the precautionary principle and they sought to collect evidence on the impact of wind projects. The Tribunal did not elaborate on this principle; rather it simply determined that there were no grounds to claim an expropriation.[181] *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* is another example. In this case, Ecuador pointed out that the precautionary principle is one of the pillars of its environmental legislations and regulations. The Tribunal again without engaging with this principle found that the investor is in violation of Ecuadorian environmental laws.[182] This pattern was repeated in *Burlington Resources Inc. v Republic of Ecuador,* where the Tribunal relied on the Ecuadorian law to held the investor liable. [183]

Overall, it is safe to argue that the international investment law field has remained as a site of silence, which meant that the precautionary principle could not take hold here until now.

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[179] Andreas Kulick, *Global Public Interest in International Investment Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2012), https://doi.org/10.1017/CBO9781139128971.
[180] Foster, "Adjudication, Arbitration and the Turn to Public Law 'Standards of Review.'"
[181] *W*indstream Energy LLC v. Government of Canada, PCA Case No. 2013-22, Award 27 September 2016, para. 207.
[182] *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, paras. 70, 374-379 and 593.
[183] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

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7. ***Other Sites of Silence***

Climate change is another potentially interesting field, which is not fully active yet. There are not enough statements from international authority structures to meaningfully trace the principle's development in this field. The recently instituted the Paris Agreement Implementation and Compliance Committee (PAICC) is likely to be an interesting authority structure to turn to—once it begins issuing authoritative statements. Another potentially interesting authority structure is the UNESCO. Following the UN Framework Convention on Climate Change (UNFCCC),[184] the UNESCO adopted the *Policy Document on the Impacts of Climate Change on World Heritage Properties* in 2007. The document suggests that the precautionary principle should be incorporated by the World Heritage Committee (WHC) through the Operational Guidelines for the Implementation of the World Heritage Convention, especially concerning the effects of climate change on World Heritage properties.[185] For example, the WHC requested that Japan and Russia reconsider the current level of culling of the Western Steller Sea Lion in line with the precautionary principle in its the *Shiretoko (Japan) (N 1193)* decision.[186]

Another site of silence is Asia and Oceania, where there are not regional courts to trace the application or the contestation of the precautionary principle at the regional level. However, there are states in this region strongly supporting the principle such as Australia[187] or Indonesia.[188] There is relatively little information about Africa as well, except the above-mentioned revised African Convention on the Conservation of Nature and Natural Resources

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[184] Article 3 establishes that "the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects" *United Nations Framework Convention on Climate Change*,; D. Bodansky, J. Brunèe and L. Rajamani, *International Climate Change Law*, (Oxfor University Press, 2017), pp. 128

[185] UNESCO - World Heritage Centre, *Policy Document on the Impacts of Climate Change on World Heritage Properties, (*UNESCO, 2008), p. 8 Available at: https://whc.unesco.org/uploads/activities/documents/activity-397-2.pdf; A.M. Carstens and E. Varner, Intersections in International Cultural Heritage Law, (Oxford University Press, 2020), pp. 282-283.

[186] UNESCO-WHC, *Shiretoko (Japan) (N1193),* Decision 43 COM 7B.10, Adopted at the 43rd Session of the WHC, (2019), p. 91, paras. 4 and 5. Available at: https://whc.unesco.org/archive/2019/whc19-43com-18-en.pdf

[187] Jacqueline Peel, "Interpretation and Application of the Precautionary Principle: Australia's Contribution," *Review of European, Comparative & International Environmental Law* 18(1), (2009), pp. 11-25

[188] A. G. Wibisana, "The Development of the Precautionary Principle in International and Indonesian Environmental Law," *Asia Pacific Journal of Environmental Law* 14 (1-2), (2011), pp. 190-201.

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adopted in 2017 and the 2008 Economic Community of West African States (ECOWAS) Supplementary Act.

III. The SCR Framework

The aforementioned analysis shows how the precautionary principle, which appeared in International Law in the late 1980s and the early 1990s, came to influence different fields of International Law. I have argued that this highly aspirational principle's impressive spread across so many fields has been due to its fluidity (which was a factor of its under-definition combined with its broad application potential). However, this spread has been unequal, with the principle leaving little to no visible traces in some areas, and congealing into more solid interpretations and regulations in some others (zone of viscosity). While the case study cannot provide a determinate answer to the general legal status of the precautionary principle (i.e. its customary status), it can show the different paths through which it traveled and the extent to which these paths have served as sites of construction, silence, or contestation. This case study would probably require the application of the SCR framework for each sub-field since each issue area had its own change agents, authority structures, and contextual factors facilitating or hindering the broader acceptance of the precautionary principle. However, in the interest of time and space, I will present an overall analysis and mention how different stages transpired in each field.

Selection Stage

1. *Actors and agency*

The relevant actors in each subfield of the study varies. For General International Law (GIL), the main change actors are states that argue for the precautionary principle such as New Zealand (*Nuclear Test case*), Hungary (*Gabcíkovo-Nagymaros Project)*, Argentina (*Pulp Mills*), Australia and New Zealand (*Japan v. Australia),* and Nicaragua (*Construction of a Road in Costa Rica along the San Juan River)*. They have chosen the ICJ to bring their complaints and to seek clarification about the applicatory threshold of the precautionary principle and its customary nature.

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For the conservation field, the main change agents are states and international institutions such as the COPs to the CITES, the ISA, or the FAO itself in the course of the negotiations for the Fish Stock Agreement. In addition, the list of change agents includes several states such as the US (*for CITES*), Argentina, Canada, Chile, Iceland, New Zealand (*for the Fish Stock Agreement*), and Australia, New Zealand, Mexico, the Netherlands (*for preserving marine environment under UNCLOS*). There is also a visible NGO activism in support of the precautionary principle in this field (*e.g. the IUCN, and Greenpeace and WWF for the preservation of marine environment*).

For trade and public health, the most noticeable entrepreneur is the EU and its member states, especially Germany. The US, Argentina, and Canada, on the other hand, serve as determinant blockers. Each side attempted to promote and push for their own interpretation about the degree to which the precautionary principle overrides their existing obligations within the trade regime. These two groups had several episodes of contestation before the WTO and when adopting the Biosafety Protocol.

For human rights, while the applicants before the ECtHR can be considered as ignored change agents, Colombia was an accidental change agent. Its request for an advisory opinion from the IACtHR had a different calculation. It simply sought to strengthen its hand against Nicaragua in an ongoing judicialized dispute before the ICJ. The IACtHR took this request to another level and seized this opportunity to pronounce the link between the precautionary principle, and states' obligation to protect right to life and personal integrity rights. Hence, this is one of the fields where we observe a clear agency of an authority structure.

Finally, for investment, there are no consistent change agents. While ECOWAS made a visible attempt to include the precautionary principle in its investment-related regulations, this became one of the points of contestation during the TTIP negotiations. In addition, Canada and Ecuador argued for the application of the precautionary principle to investment-related disputes before Arbitral Tribunals, which showed a great resistance to this line of argument.

2. Pathways & Institutional Availability

For all the fields under study state action pathway was engaged. In addition, for the GIL the judicial pathway (the ICJ) played a dominant role. For conservation, the most actively

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engaged pathways were the judicial (the ITLOS), multilateral (the COPs to the CITES, UN Fish Stock Agreement, the ISA Council) and bureaucratic (the FAO and the ISA Secretariat). For trade and public health, the main pathway was judicial (the WTO). For human rights as well as investment, judicial pathway was also the one that was predominantly engaged (ECtHR, IACtHR, Arbitral Tribunals). While these pathways were all available, their receptiveness towards the precautionary principle varied. While the ICJ, the ECtHR, the WTO and the Arbitral Tribunals were overall the least receptive authority structures; the ITLOS, the IACtHR, the ISA, the FAO, and the CITES were the most receptive authority structures.

Construction Stage

1. *Type of Change & Stability*

The precautionary principle is a new norm. The previous understanding around the norm comes from domestic systems such as German and Swedish domestic law. Although the precautionary principle is closely related to prevention principle, it has its own logic and scope of application. Therefore, the construction attempts around this principle were not competing against or relying on established understandings. This principle might have paradigm shifting consequences by changing the traditional cost-benefit analysis. However, since the principle is still highly indeterminate and hollow it is serving less of paradigm shifting function.

2. *Salience*

The principle salience is likely to depend on the fields under study. It had certainly high salience for trade and GIL, which is evident in the way it became a subject of several high-profile judicialized contestations. This is because the principle (no matter how vague it is) has serious repercussions on countries' public health, environment, food, and trade regulations. It had low to medium salience in conservation and human rights and no to low salience in investment law.

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3. *Opening and influential factors*

While the principle was already introduced in the context of the Conference on the Protection of the North Sea in 1984 and 1987, the real opening came with the 1992 Rio Declaration (Principle 15). Several agreements, statements, reports, and rulings referred to the Rio Declaration as a point of reference and inspiration when advocating for the precautionary principle. In addition, environmental disasters such as Bhopal tragedy, Exxon Valdez spill, and the Chernobyl disaster served as influential factors – opening a discursive space for the precautionary principle. In the context of the EU, the mad cow disease gave impetus to the EU's precautionary principle inspired regulations. Finally, technological developments, especially in the field of biotechnology and the move away from the traditional ways of growing food also fed into the uncertainties and created opportunities for the wide application of the precautionary principle. The recent COVID-19 vaccination episode is going to be another event which is likely to urge governments and the public to reconsider the costs and benefits of a strict application of the precautionary principle, especially in the EU and perhaps in the US as well.

4. *Pathways of construction, contestation, and silence*

As mentioned before, not each path served the purpose of construction; some became sites of contestation and silence. For the GIL, the ICJ served as a site of contestation, in which several states argued for the customary status or the reversal of burden of proof. While this contestation did not really aim at canceling the principle or arguing against its existence, it certainly sought to hollow it out by contesting its applicatory scope. The ICJ chose not to settle this contestation. It did not even address these concerns and effectively pushed the debate to the margins. The real construction attempt came from the judges in the minority. Judge Cançado Trindade and Judge Weeramantry have shown a consistent attempt to clarify the applicatory scope of the principle and made a case for its customary status. However, since their opinions do not have the weight of a judgment, their influence on solidifying the principle is limited. With the ICJ's persistent reluctance to elaborate on the principle or endorse it in some shape or form, the principle has remained fluid in this site without leaving a significant mark (zone of fluidity).

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For conservation, the norm received support from several authority structures (the ITLOS, the CITES, the ISA, and the FAO), all of which served as sites of construction. With their specific endorsements, the precautionary principle became part and parcel of the conservation regimes and efforts. In particular, these interventions clarified that the trade and use of species should be halted when there is scientific uncertainty concerning the survival of species. We also observe less of a contestation in this field even from notorious opposers such as the US. Therefore, this field can be identified as a zone of viscosity.

When it comes to international trade, the field was demarked by the high-profile contestation between the EU and the US before the WTO. The WTO rejected the EU's construction attempts to re-interpret existing trade provisions under the WTO framework in light of the precautionary principle. This outcome has certainly undercut the application of the principle as well as the Biosafety Protocol in the field, rendering it a zone of fluidity. The internalization of the contestation had a positive influence within the EU, however. It encouraged the EU institutions to refine and clarify the way they use precautionary principle and helped solidify the norm within European legal space.

For human rights, while the IACtHR was a site of construction, the ECtHR was a site of silence. The ECtHR showed no attempt to further this principle despite the fact that the precautionary principle is fully embraced by the EU and its member states. Demonstrating an ICJ-like resistance to the principle, it pushed it to the margins and separate opinions. The ECtHR's unwillingness to address and endorse the norm has arguably created a zone of exception within European legal space. The IACtHR, on the other hand, went beyond being a "site" and became a full actor. It showed a remarkable willingness to engage with the precautionary principle (going beyond what Colombia intended in its advisory opinion request) and labelling the continent as a zone of viscosity.

Finally, investment field has remained a site of silence with little to no activity to elaborate on the application of the precautionary principle. The only exception was ECOWAS that attempted to employ the precautionary principle in its investment regulations.

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Reception Stage

1. *Support and opposition*

What is interesting about this case is that the actors' support for and opposition against the principle is not consistent across fields. For example, while the US supports it in conservation-related regimes, it is strongly against it when it comes to international trade. Similarly, Argentina argued for the customary status of the principle in the *Pulp Mills* and then advocated for adding it in the 1995 Fish Stocks Agreement, yet it joined the US when arguing against the principle at the WTO in the *EC-biotech* case. It is also difficult to identify regions as unequivocally for or against the principle. For example, while the EU institutions and the CJEU have purposefully developed the norm, the ECtHR passed on multiple opportunities to join their efforts.

2. *Outcome & Degree of success*

The principle's acceptance varies from field to field with different zones (zones of fluidity and viscosity) overlapping in several regions. While the norm might be more accepted in one field or region but it can be completely contested or ignored in another field or region. As a result, the norm remains indeterminate. For example, in GIL and trade, its acceptance has been incomplete at the global level – though it is successful at the regional level as we see in the case of Europe. The norm has been most developed and accepted in the field of conservation and human rights in the Americas – but not Europe. Finally, for investment the norm change has been perhaps the most unsuccessful with no clear uptake except the ECOWAS's regulations. Therefore, the outcome can be characterized as partially successful change attempt.

While the norm in its vague form is more or less accepted across these fields and regions, it is hard to say that it evolved into something more solid. There are serious questions about its applicatory threshold (i.e. the degree of scientific uncertainty required, or who bears the burden of proof to show whether an activity is not going to cause irreversible damage). Therefore, while we can talk about the principle's spread or overall acceptance, it is hard to talk about its change or transformation into a concrete set of standards. The principle perhaps can be considered as hollow construction, or a work-in-progress in that regard.

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Despite its hollowness and indeterminacy, the principle had generated a discursive change and shifted the burden of argument. That is to say, it became a central part of the debate in many fields, forcing states to take a position for or against it. As a result, it became nearly impossible to ignore the principle even in fields, in which it meets silence or contestation such as trade, investment or general international law.

3. *Pace and mode of change*

It is hard to make a single assessment that is applicable to the pace of change, since this varied a lot across fields and sometimes the principle's development was stopped in its tracks. However, the principle's spread transpired rather fast. Only a few years after the Rio Declaration, the principle was invoke in the context of (i) GIL (with the 1995 *Nuclear test case*); (ii) conservation (the submissions of Argentina, Canada, Chile, Iceland, and New Zealand at the 1992 UN Conference on Straddling Fish Stocks and the 1994 Fort Lauderdale Criteria); (iii) trade (the 1998 *EC-Hormones* case), (iv) human rights (the 1997 *Balmer-Schafroth and Others v. Switzerland* case); and (v) a bit later in investment (the 2008 Economic Community of West African States (ECOWAS) Supplementary Act).

IV. Particularities of the case:

Exemplifies particularities of International Environmental Law

One of the particularities of the case is that it very well demonstrates the general dynamics of International Environmental Law. Since the field does not have a centralized authority structure substantial change attempts have to seek alternative authority structures in different fields. Moreover, the principle is of highly fluid and aspirational (almost revolutionary) nature, which is a characteristic we can see in different environmental norms such as prevention principle or sustainable development. This fluidity increased the principle's ease in spreading to different fields. However, travelling through different authority structures in different fields meant that the norm encountered different constellation of actors pursuing different interest calculations in each field. This resulted in the norm's uneven success in taking a hold in these different issue areas.

Hollowness of a widely used principle

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One of the most interesting characteristics of this case is the lack of a positive correlation between the degree of the principle's invocation (with some contestation) and its clarification. As explained above, the principle travelled to several fields, it is brought before several central authority structures, yet somehow it remained hollow. This is likely because it has been pushed to the margins, and often there was only conditional support for the principle – e.g., the US's position that it is applicable in conservation but not acceptable in trade. The principle's initial vagueness and highly aspirational (even revolutionary) nature could be the reason behind its high degree of spread. However, its spread and later use should have clarified it further in line with the meaning-in-use theory.[189] The attempts that resulted in the principle's hollowness could be international to prevent the principle's revolutionary (or paradigm shifting) impact or to undercut its potential to be misused and broadly interpreted. But the reasons of hollowness could also be unintentional arising from the difficulties in reaching an agreement that make all sides content. Alternatively, it could be a bit of both. No matter what the causes are what appears that despite its frequent usage and the degree of attention the norm gathered, it remained hollow.

Influence of contestation

The norm's judicialized contestation in multiple sites is an interesting finding of the study. Judicialized contestation encouraged the EU to refine the principle within its own legal space to a certain extent – although scholars argue that it is still not entirely clear even within Europe.[190] But especially outside of Europe, the judicialized contestation did not lead to any meaningful clarification of the principle. The other instances where the principle got clarified with the endorsement from the ITLOS and the IACtHR took place in the context of advisory proceedings (i.e. non-contentious cases). These are arguably low-stakes situations for courts to endorse a principle or flesh it out. When the stakes were higher, namely in contentious

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[189] Antje Weiner and Antje Wiener, "Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations," *Review of International Studies* 35, no. 1 (2009): 175–93.

[190] See for example, Julian Morris, "Defining the Precautionary Principle," in *Rethinking Risk and the Precautionary Principle*, ed. Julian Morris (Elsevier, 2000), 1–21; Ragnar Lofstedt, "The Precautionary Principle in the EU: Why a Formal Review Is Long Overdue," *Risk Management* 16, no. 3 (August 1, 2014): 137–63, https://doi.org/10.1057/rm.2014.7.

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cases, the courts downplayed the principle. Even the ITLOS that supported the principle in its advisory opinion, ignored it in regular contentious cases. Hence, contestation had a blocking effect, most likely because the authority structures rarely intended to resolve the contestation. Rather, they left it for another day.

Frustration of limited judicial construction and dissents as relief

The unavailability of institutions to offer an interpretive change concerning the precautionary measures meant that the change agents had to resort to either general jurisdiction or other specialized courts and tribunals – a characteristics of the field of international environmental law. However, not all of these courts and tribunals were particularly receptive to this attempt. The IACtHR and the ITLOS (Seabed Disputes Chamber) were certainly the most receptive one of all. The majority of the judgments analyzed above shows high degree of reluctance. Interestingly, the frustration of the limited judicial construction flew through dissenting opinions. There have been consistent dissents referring to the precautionary principle. Especially, Judges Cançado Trindade from Brazil, and Judge Weeramantry from Sri Lanka have actively supported the principle. In addition, Judge Wolfrum from the ITLOS also endorsed a similar position.

Agency of Authority Structures

Several of the authority structures located on these paths fully embraced their actorness. For example, the IACtHR seized an opportunity to develop the precautionary principle – going beyond Colombia's initial request that meant to score another point before the ICJ. The FAO is another authority structure that actively advocated for the precautionary principle during the negotiations for the 1995 UN Fish Stock Agreement.

Overlapping and co-existing zones of acceptance and non-acceptance

This case provides a great example of legal change's messiness. There are overlapping and co-existing zones of acceptance, contestation, and silence in different fields and regions. One of the downsides of this feature is that it is highly difficult to pin down state positions in absolute terms. While some states such as New Zealand or Australia seem to give unconditional support, some states such as the US, Canada, and Argentina are inclined to provide conditional support that is limited to certain fields. For example, Canada relied on

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this principle when defending its policies in the field of investment, but it back away from it the field of trade.

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Part VII.

INTERNATIONAL TRADE LAW

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Case Study 20

General exceptions under GATT Article XX and the incorporation of non-trade considerations into decision-making

(February - June 2019, Rev. May 2022)

(Pilot case)

Nina Kiderlin

I. Methods

In order to trace how interpretations of GATT Article XX have changed over time and particularly in the late 1980s/1990s it is important to gain a better overview of the internal institutional debates and discussions on the subject during that time period. To this end documents dealing with the matter in the GATT/WTO archive have been obtained to analyse and trace a variety of processes that could have contributed to a change in interpretation of Article XX. The case law has been considered. Key actors will have to be interviewed for background information and in order to contribute their view on events that are not reflected in the case law.

Two almost parallel developments and potential pathways for change and norm adjustment, the space in-between norm emergence and norm death, will be traced. Firstly, the building of a body of case law relating to GATT Article XX through adjudicatory decisions, and secondly the increased institutionalised salience of environmental concerns related to trade in the GATT and WTO. Both constitute gradual change, although the second option has not previously been explored much in the legal literature. The selected case interacts with other areas of change in international environmental and human rights law.

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The calibrating factors of salience and institutional availability for change are analysed. Particularly the increasing salience of environmental concerns related to trade within the GATT/WTO and member states has an important role to play in this case study.

II. Typical story

Synopsis

The changing interpretation of GATT Article XX over time, and particularly why the interpretation has changed, has been a marginal issue in most trade law textbooks, even though the progressive shift in the last three decades to include non-trade considerations had great impact in panel and Appellate Body decision-making. Generally, the interpretation has shifted from a high-threshold test of necessity of a measure in the late 1980s and early 1990s to a framework allowing for the balancing of trade and non-trade interests since the creation of the WTO. This transition has generally allowed for the opening of the regime to non-trade considerations. As this pilot case study will show, this development cannot be completely credited towards the nature of WTO, but it will be demonstrated how institutional awareness of the importance of non-trade considerations, particularly those pertaining to environmental concerns, has begun in the late GATT years already in a development parallel to changes in adjudicatory practice. Beyond the specifics of this case the case study will provide insights into how different potential pathways for change interact with each other.

The context of GATT Article XX

GATT Article XX provides for general exceptions to any GATT obligation, the most-favoured-nation principle (Article I:1), tariff concessions (Article II:1), national treatment (Articles III:2 and III:4), quantitative restrictions (Article XI:1), or any other obligation under the GATT 1994. Its text was left unchanged after the Uruguay round and the 1994 creation of WTO. Article XX of the GATT does not justify inconsistencies with any other WTO agreement unless another agreement incorporated Article XX expressly or implicitly. The panel in *United States Section 337 of the Tariff Act of 1930* noted that Article XX provides for limited exceptions, as the list of justification grounds mentioned in Article XX is exhaustive and conditional. Article XX only provides a justification of otherwise GATT inconsistent measures when the conditions stated in Article XX are met. It has been defined

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as a balancing provision – negotiating trade liberalisation and other societal values and interests.

Paragraphs (a-j) of Article XX of the GATT set out grounds for justification of inconsistency and its requirements. Some of the measures that can be justified under Article XX are outlined in the following. Paragraph (a) justifies measures that are necessary for the protection of public morals, paragraph (b) relates to measures that are necessary for the protection of the life or health of humans, animals, or plants, paragraph (d) justifies inconsistencies that are necessary to secure compliance with national law (e.g. customs law, consumer protection law, intellectual property law) that are in themselves inconsistent with the GATT, paragraph (e) is concerned with products that result from prison labour, paragraph (f) deals with measures imposed for the protection of national treasures of artistic, historic, or archaeological value, and paragraph (g) relates to necessary measures dealing with the conservation of exhaustible natural resources. The meaning and interpretation of the word 'necessary' was crucial in the development of adjudicatory decisions and will be discussed in the sections below. To this day there are no relevant cases discussed under paragraphs (e) and (f).

Important interpretive developments have taken place in the last four decades of practice around these provisions. In the late years of the GATT the test for exception granting was a test of "necessity". This test had been developed by the panel in 1989 in the *United States Section 337 of the Tariff Act of 1930* case.[1] The necessity test itself draws on criteria of review used in other legal fields and institutions such as the European Court of Justice. The panel defined that one of the contracting parties "cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it". This threshold – requiring GATT member states to prove that no other measure was available to protect a non-trade consideration – left little leeway for

[1] *United States Section 337 of the Tariff Act of 1930 (Panel Report)* [1989] GATT L/6439 - 36S/345 [5.26].

Electronic copy available at: https://ssrn.com/abstract=4430270

non-trade considerations. Venzke also argues that this definition was aimed at protecting the GATT system from policy consideration of member states that had trade-distortive potential.[2]

In addition to this understanding of "necessity", another element setting a high threshold for the application of Article XX developed during the pre-WTO era: narrow territorial jurisdiction. As will be seen below, panels interpreted that states could not adopt restrictions that would imply production requirements for goods in other jurisdictions, something thought at the time as putting in risk the whole multilateral trade system.

Under the late GATT panels and the successive WTO panel and Appellate Body jurisprudence, however, a less stringent threshold for applying Article XX emerged, consisting mainly of a two-step test. The first step states that the measure in question can be justified under the grounds listed in Article XX (a) to (j). The second step states that the application of the measure meets the requirements of Article XX's chapeau – namely that the measure cannot be arbitrary, cannot constitute an unjustifiable discrimination, and cannot be a disguised restriction on international trade.[3] This change in interpretation has enabled the Appellate Body to weigh different societal concerns and values and take them into consideration when making decisions. In *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, for instance, it based its decision on the importance of the societal value achieved through the measure in question, its impact on trade, and the extent to which the measure contributes to protection and promotion of the value.[4]

The purpose of Article XX's chapeau is to prevent misuses and abuse in the application of the justified exceptions specified in Article XX. Interpreting and subsequently applying the chapeau requires a careful weighing between the right of member states imposing trade-restrictive measures to pursue certain societal values and the right of other member states to

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[2] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012).
[3] Thomas Cottier, Thomas M Fischer and Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments* (Staempfli ; Cameron May 2005) 429; David Luff, *Le Droit de l'organisation Mondiale Du Commerce: Analyse Critique* (Bruylant ; LGDJ 2004) 147.
[4] Peter Van den Bossche and Denise Prévost, *Essentials of WTO Law* (Cambridge Univ Press 2016).

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market access and non-discriminatory treatment.[5] One of the key criteria in determining the arbitrariness of a measure in this regard is whether the discrimination should have been foreseen and was not inadvertent or unavoidable. For example, if there was a failure to negotiate seriously and in good faith a multilateral solution first. As *United States – Shrimp (1998)* has established and following cases (e.g. *EC – Seal Products (2014)*) have confirmed, the analysis of arbitrariness has to be established by uncovering the *cause* or *rationale* of the discrimination. It has to be assessed if the discrimination can be reconciled with, or is rationally related to, the non-trade policy objective with respect to which the measure has been justified under a paragraph of Article XX(a-j).

For the purpose of this case study the focus will be on paragraphs (b) and (g) as they have been particularly important for re-interpretation of Article XX over the years. They either directly or indirectly refer to environmental concerns and conservation policies. Environmental engagement and increased institutional awareness of issues pertaining to conservation are traced in a later section as there is clear development in the 1980s and 1990s, parallel to many of the landmark Article XX cases.

For measures to be justified under Article XX(b) the policy objective by the measure in question has to be the protection of the life or health of humans, animals, or plants and the measure must be necessary to fulfil that policy objective. The first condition for determining if a measure has been designed to achieve a health or environmental health objective is considered not to be too difficult to meet.[6] The issue lies more with the second condition of demonstrating if a measure is necessary to achieve this outcome. In the case *EC – Asbestos (2001)* the measure at issue was the French ban of the importation and sale of asbestos which was aimed at the protection of public health – a view the Appellate Body agreed with by arguing that the measure was necessary to uphold the level of public health protection chosen by the French state (zero risk level).[7] Canada as the complainant argued that the controlled use of asbestos products constituted a possible alternative measure whilst still protecting

[5] ibid.
[6] ibid.
[7] *European Communities – Measures Affecting Asbestos and Asbestos-containing products* [2001] WTO-Appellate Body AB-2000-11, WT/DS135/AB/R (01-1157).

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public health but as that would have interfered with the French risk level determination the Appellate Body did not agree.[8]

Yet, most arguments revolve around Article XX(g) as this was the paragraph many of the transitional cases (1980s and 1990s) were assessed under. Under it, three requirements have to be met for the measures to be justified. Firstly, the policy objective of the measure must be the conservation of exhaustible natural resources, secondly the measure must 'relate to' this policy objective, and thirdly the measure must be made effective 'in conjunction with' restrictions on domestic production and consumption.

Whilst the original meaning of the first condition was aimed at exhaustible resources such as oil, gas, or minerals, the Appellate Body has over time, most importantly in *Unites States – Shrimp (1998)*, interpreted it as having a broader meaning and including living resources, particularly endangered species. In the second condition the debate has emerged around the exact meaning of a measure 'relating to' and its difference to 'being necessary for' a positive policy objective outcome. Case law over the years established that measures can only 'relate to' conservation of exhaustible natural resources if the relationship between the measure and conservation is real and close, meaning in practice that the Appellate Body has to assess the closeness of a trade restrictive measure to a policy goal or outcome. The last condition was viewed as imposing a requirement of balance in the imposition of a restriction on imported and domestic goods. It is important to note that Article XX(g) does not demand the exact same treatment of imported and domestic goods as such, but that the emphasis is on the equal imposition of restrictions related to the protection of exhaustible natural resources on both groups of goods. The weight of the measures imposed to conserve cannot only be on imported goods.

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[8] ibid.

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III. Jurisprudential evolution

1. Art. XX exceptions during the GATT era (pre-1994)

There are multiple examples for public policy considerations restricting trade going back to 1906 when states agreed on prohibiting the trade with matches containing white phosphorus. The potential for conflict between trade issues and other policy concerns had been persistent below the surface of the border separating normal trade policies from trade policies considered as unjustified – John Ruggie coined this understanding 'embedded liberalism'.[9] There were arguments that trade liberalisation should and would be embedded in the established workings of interventionist welfare states and in that context provide the conditions and framework for GATT experts to follow a narrow focus on trade liberalization – at the time it was the agreed consensus that redistribution issues would be managed first and foremost by the welfare state.[10]

At the GATT the notion of embedded liberalism was translated into an economic free trade ideology, increasingly detached from the preconditions that the original argument was built on.[11] With political shifts in the global landscape in the 1970s that resulted in deregulation and restrictions on welfare policies, the consensus at the GATT as to which measures were justifiable and which measures illegitimately restricted international trade disintegrated. As Howse argues, the GATT panels nonetheless aimed at strictly isolating trade and policy objectives in order to maintain continuity in interpretation and meaning in regards to treaty interpretation.[12] This network of insiders, a sort of epistemic community in and of itself, established an echo chamber working to maintain the status quo of a strict isolation of trade from other public policy concerns and could, in its function as main interpretive authority, successfully establish a high threshold for policies to qualify under Article XX.

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[9] Ruggie, J. (1982) "International Regimes, Transactions, and Change : Embedded Liberalism in the Postwar Economic Order", *International Organisation*, 36(2), pp.379-415.
[10] Venzke (n 2).
[11] Howse, R. (2002) "From Politics to Technocracy- and Back Again: The Fate of the Multilateral Trading Regime", *American Journal of International Law*, 96(1), pp.94-117.
[12] ibid.

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Two main interpretive elements in particular developed during this period, setting the bar for exceptions high. The first was the interpretation of different words in the text of Article XX, like "necessary" in subparagraph (b) or "relating to" in subparagraph (g), as requiring the measure to be the least trade restrictive measure possible for the achievement of the non-trade objective. The second consisted in considering that measures aiming at matters outside the state's jurisdiction were as a general rule not justified.[13] A review of this jurisprudential evolution is conducted herewith.

a) US—Prohibition of Imports of Tuna and Tuna Products from Canada (1982)

This was the first case giving an indication of where the interpretation of GATT Article XX could lead. As the panel report states, Canada filed a complaint against the United States as the United States government had taken actions in order to prohibit the import of albacore tuna and related products from Canada.[14] On assessment of the surrounding circumstances it transpired that the United States were responding to the Canadian seizure of 19 fishing vessels and numerous arrests of US national fishermen. Canada alleged that they had fished within its fisheries jurisdiction (200 miles of its coast), constituting illegal fishing. These events were disputed by the United States. The GATT panel made it clear in its report that it was not to discuss the border dispute in the case, but would focus solely on assessing the events under GATT provisions. The panel found that the embargo by the United States was in violation of the prohibition of quantitative restrictions[15]. Both countries had expected this outcome and the US had lifted the embargo prior to the decision, but they both argued that the panel should also consider the far-reaching and potentially consequential question if a contracting party should have the right to disregard obligations under the GATT in order to use trade measures to bring bilateral pressure to bear on non-trade issues[16]. The panel did not see itself in a position to answer this question in principle and just argued that in this specific case the US did not have grounds to argue that the embargo was due to tuna conservation

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[13] Venzke (n 2).
[14] *United States – Prohibition of Imports of Tuna and Tuna Products from Canada (Panel Report)* [1982] GATT L/5198 – 29S/91.
[15] *ibid*. para 41
[16] *ibid* para 3.4

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efforts as no other US policy pursued this aim domestically, proving that the measure was not aimed at the "conservation of exhaustible natural resources" under Article XX(g).[17]

b) Herring—Salmon (1988)

This line of argumentation was later used by Canada and the United States in *Herring and Salmon* as precedent, making *Herring and Salmon* a landmark case with regard to Article XX(g)[18]. The US argued that a Canadian prohibition of export of certain unprocessed herring and salmon was not consistent with the GATT. Canada justified its actions under Article XX(g) by arguing that the panel report from United Stated-Tuna had set up a four criteria test to determine if a state action could be justified under the GATT. Canada argued that their prohibition was due to stock management and as Article XX(g) just required a demonstration that measures are related to conservation (not essential or necessary) their actions were in line with regulations.[19] The panel therefore concentrated on the clarification of the phrase 'related to' in Article XX(g) and found that it does not precisely state how trade measures are related to conservation aims and ultimately can be justified even if they are not necessary or essential[20]. The panel went as far as stating that a requirement that actions had to be primarily aimed at conservation had to be considered as relating to conservation within the meaning of the article[21]. It ruled that Canada's actions were not covered under this as Canada could have employed other means to reach the goal of herring and salmon conservation and this served as proof of Canada's ulterior motive. The panel did not consider previous Canadian legislation, or the internal decision-making process on the issue.

Herring and Salmon was the new legal reference point, particularly the 'primarily aimed at' standard. Even though the original treaty text stated that measures had to be 'related to' in order to be justified under Article XX(g), legal interpretation post *Herring and Salmon* almost exclusively referred to the newly created standard of 'primarily aimed at'. This

[17] *ibid*.
[18] *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the Panel adopted on 22 March 1988 (L/6268 – 35S/98), 20 November 1987.
[19] *Ibid*. para 3.31
[20] *Ibid*. para 4.5
[21] *Ibid*. para 4.6

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constituted an important shift in interpretation of the article, but as the panel did not provide any reasoning or referenced any authority on the subject, it is difficult to establish how exactly the panel reached this influential conclusion.

This decision and re-interpretation immediately gained traction and was solidified in other agreements and panel reports. A panel under the Canada – Unites States Free Trade Agreement, which incorporated GATT Article XX, had to decide in October 1989 if a Canadian measure requiring all salmon and herring caught on its West Coast to be brought onto land in Canada first was justifiable under the new basis for Article XX(g).[22] Both states referred to 'primarily aimed at' as the new relevant standard for the case at hand. The panel report followed this interpretation, citing *Herring and Salmon* at length and treating it as precedent establishing that 'primarily aimed at' was indeed the new threshold to be adhered to[23]. In the report the panel found Canada's measure unjustifiable under Article XX(g) as there would have been alternative measures which would have been less trade restrictive[24].

c) *US—Section 337 of the US Tariff Act of 1930 (1989)*

The ultimate decision on the meaning of 'necessary' was reached in a dispute between the European Commission and the United States on the application of *Section 337 of the US Tariff Act of 1930* which subjected imported goods to distinct procedures which purportedly constituted a violation to Article III GATT and was unjustified under Article XX(d) according to the EC.[25] The main argument emerged to be on the definition of 'necessary' – the EC argued that it was to be interpreted as not being justified if there were other measures available, the United States insisted that this requirement could not be interpreted into the GATT.[26] The panel agreed with the EC line of argument stating that the word 'necessary' required a least restrictive trade measure test, and if there were other less trade-restrictive measures at disposal these had to be chosen instead.[27] As Venzke noted this might have been

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[22] *In the Matter of Canada's Landing* Requirement *for pacific Coast Salmon and Herring*, Final Report, 16 October 1989, paras 5.03-5.04.
[23] *Ibid*., paras. 7.04-7.05.
[24] *Ibid*., paras.7.04-7.11, 7.38.
[25] *United States Section 337 of the Tariff Act of 1930 (Panel Report)* (n 1).
[26] *Ibid*, para 3.59.
[27] Ibid, para 5.26

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influenced by a former Judge at the European Court of Justice – Pierre Pescatore – who was on the panel and was more inclined to follow the EC argumentation in a legal regime familiar to him.

d) *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes (1990)*

In *Thai-Cigarettes*, the US complained about Thailand's restrictive measures on imported cigarettes, justified by the Thai government through a claim of public health concerns falling under Art. XX(b). The panel followed the reasoning in *US—Section 337 of the US Tariff Act of 1930* in arguing that Thailand's measures were inconsistent with Article XX because there were still alternative measures available it could have pursued. The term "necessary", according to this interpretation was taken to mean the unavailability of any alternative measure to pursue the non-trade related aim under Article XX.[28]

e) *Tuna—Dolphin I and II (1991 and 1994)*

The two *Tuna—Dolphin* cases added a second element to the high threshold for exceptions under Article XX developed so far, this time by constraining the possibility of non-trade related policies territorially.

In *Tuna – Dolphin I* Mexico filed a complaint against the United States prohibitions of imports of tuna which was harvested in a way that the United States argued was harmful to dolphins[29]. The panel found that the restrictions were unjustified under Article XX(b) or (g)[30]. The question posed by the panel was whether Article XX(b) also covered measures necessary to protect outside the jurisdiction of the member state imposing the measure and the panel concluded that in Article XX(b) did indeed not cover such cases[31]. As the article itself did not give a clear answer to the question the panel resorted to the construction of historical meaning at the time of drafting, establishing that the original intent was not to provide

[28] GATT Panel Report, Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R, adopted 7 November 1990, BISD 37S/200, paras. 75, 77.
[29] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155.
[30] *Ibid*.
[31] *Ibid*. paras 3.31, 3.58.

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member states with the authority to take unilateral action influencing trade outside its own jurisdiction[32]. The panel proceeded to strengthen the link between concrete policy and objective, requiring that all other reasonably available options for the policy to qualify as justified[33]. Whilst this report was heavily criticised by environmentalists it once more aided the GATTs' understanding of itself as being responsible primarily for trade issues, and setting a high threshold for applying exceptions under Article XX. .

In *Tuna – Dolphin II* the European Communities challenged United States import prohibitions of tuna that had been imported and then exported by third countries without these individual countries having a primary embargo themselves. The panel noted that both states had emphasised the question whether a policy could aim beyond one party's territorial jurisdiction, but the panel could not find any historical or other support of the argument that there was a jurisdictional limitation[34]. This was another important change to the interpretation of Article XX. The panel suggested that questions of pressuring states to bear on non-trade issues should be discussed in political fora[35]. As has been noted by the literature none of the cases were adopted by the contracting parties, but nevertheless both panel reports had great impact on discussions in the early WTO days and the reports have arguably shaped legal discourse on trade and environment.

2. ***Art. XX exceptions during the WTO era (post-1994)***

In the early WTO days the GATT precedents still shaped the debate but over time they were replaced by the force of the newly created Appellate Body. Discussion shifted back to the meaning of 'necessary' in the mid-1990s with the main issue being whether assessing necessity of a policy implies a proportionality test and what that were to entail. The newly established Appellate Body developed into a centrepiece of the WTO regime, being mostly composed by international lawyers, establishing authority over the years and building a consistent body of case law, whilst aiming to strike a balance between trade and other public

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[32] *Ibid*., para 5.27.
[33] Ibid., para 5.28.
[34] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted
[35] Ibid para 5.34.

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policy considerations.[36] Under the Appellate Body the general question whether non-trade issues should be discussed and incorporated into the decisions was not heavily debated anymore.[37] It seemed clear that the Appellate Body would consider non-trade policy concerns in its reports and this view was supported by the practice of the Appellate Body. The WTO secretariat has stated that it may be possible to say that there has been evolution in the interpretation of the necessity requirement in paragraphs (b) and (d) of Article XX.[38] The Appellate Body placed emphasis on a two-tier test – a measure has to fall under one paragraph of Article XX and does not violate the chapeau. The consistent body of case law along these lines was a significant step towards consolidation of norms regarding non-trade considerations under Article XX. In addition, the Appellate Body introduced more nuanced approaches to the requirement of 'necessity' under paragraph (b).

a) United States–Gasoline (1996)

The US-Gasoline case shows very neatly the jurisprudential shift concerning Article XX. The panel's decision, largely following the GATT-era paradigm, was promptly overturned by the AB. Indeed, the panel, dealing with Brazilian and Venezuelan complaints against the United States under Article XX(g), followed the interpretation in *Herring and Salmon* confirming that the main issue to be assessed was whether a measure is 'primarily aimed at the conservation of natural resources' and whether it is the least restrictive available.[39] The AB, in contrast, used the idea of 'primarily aimed at' to assess, much more leniently, whether a relation could be established between the purpose of the measure and the ground for justification invoked under the list of exceptions under Article XX, but not requiring it to be

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[36] Marceu, G.; Wyatt, J. (2013) "The WTO's Efforts to Balance Economic Development and Environmental Protection" Latin American Journal of International Trade Law 1(1), pp.291-314; Van der Bossche, P. (2006) „From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System" In: Sacerdoti, G; Yanovich, A.; Bohanes, J. (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System*, Cambridge: Cambridge University Press.

[37] Andersen, H. (2015) "Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions" Journal of International Economic Law, 18, pp.383-405.

[38] Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice relating to GATT Article XX, paragraphs (b), (d), and (g), Note by the Secretariat, WT/CTE/W/203, 8 March 2002, para 42.

[39] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (96-0326), 29 January 1996, para 6.40.

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the least restrictive one.[40] More importantly, the AB considered that this assessment was only the first tier of the test required by Article XX, the second one being that the measure is not an arbitrary or disguised restriction of trade under Article XX's chapeau. This, the AB argued, gave effect to the entire provision, something that the panel's interpretation failed to do, skipping a key element of assessment of Article XX. This two-tiered analysis opened a new interpretive avenue on the issue, that the AB would in future follow and cement.[41]

b) United States–Shrimp (1998)

US–Shrimp, certainly a landmark case when it comes to GATT Exceptions, cemented the new interpretation of Article XX set by the AB in *US—Gasoline* two years earlier. The case concerned a ban by the United States on the import of shrimp harvested through means that resulted in the killing of sea turtles. The specific controversial measure imposed the obligation to utilise a specific type of net which would prevent turtle entrapment.

A first important finding of the AB was that animals can be treated as an exhaustible resource under Article XX(g) if they are threatened by extinction.[42] The AB determined in this regard that the text of the article was drafted more than fifty years ago and therefore had to be interpreted in the light of present condition and not strictly within the original boundaries of meaning.[43] Having said that, the AB went on to apply the two-tiered test it had developed in *US—Gasoline*. It ruled in this regard that the disputed measure was closely related to the environmental protection policy objective, as the United States had not generally prohibited import, but imposed a requirement on the mode of harvesting the imported shrimp.[44] This was regarded as a close and real relation between the policy objective under Article XX(g) and the measure. Moreover, the AB determined that the pursuance of this policy objective was further validated by the fact that United States did not just restrict imported shrimp

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[40] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R (96-1597), 29 April 1996.
[41] Venzke (n 2) 175.
[42] *Ibid*.
[43] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB – 1998 – 4, WT/DS58/AB/R (98-3899), 12 October 1998.
[44] *Ibid*.

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caught with the detrimental nets, but also prohibited American shrimp harvesters from utilizing these type of nets.

Then, moving to the analysis of the measure under Article XX's chapeau – the second tier of the test – the AB restated its interpretation that the Article XX is concerned, not only with the objectives pursued by a measure, but also with the manner in which they are pursued.[45] On the facts of the case, it found the measure to be arbitrary because it was applied rigidly and without regard to the situation in exporting countries. According to the AB, the measures had been imposed unilaterally and not attempting to enter into dialogue with the other countries so as to induce compliance in good faith.[46] The measures had also lacked transparency and had been procedurally unfair. Thus, the AB found, they did not meet the requirements of the chapeau.

Finally, with regard to the issue raised in *Tuna–Dolphin I* concerning the jurisdictional limitations of the measures adopted under Article XX, the AB noted in iyts report that sea turtles migrate to or traverse waters which are subject to the United States' jurisdiction and therefore there was a 'sufficient nexus' between sea turtles and territorial jurisdiction, fulfilling the conditions under Article XX(g)[47].

c) The interpretation of "necessary" in other cases

Parallel to these developments, the AB has also developed an interpretive approach to the requirement of necessity in Article XX (b) that allows considerably more policy scope than the narrow 'least trade restrictive measure' approach of the GATT era. Here, two cases are particularly noteworthy. The first of these is *EC—Asbestos*, of 2001, in which the AB considered that the assessment of whether other less restrictive measures could have been adopted should only take into account 'reasonably available' measures. In the specific case, the AB upheld a ban on the imports of asbestos by France, deeming that, where a risk to public health is scientifically proven, "WTO members have the right to determine the level of protection of health that they consider appropriate (…)", and adopt policies accordingly.

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[45] Venzke (n 2) 177.
[46] *Ibid*.
[47] *Ibid*.

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Thus the AB found that, given the gravity of the values at stake, and the decision of France to implement a zero-risk policy, no alternative means of addressing the issue short of a ban of imports was reasonably available.[48] In the second case, *Brazil—Retreaded Tyres*, of 2007, the AB went even further and used a three-tier test to assess necessity under paragraph (b). It held that the legality a ban on imports depended on an assessment of the importance of the interests or values furthered by the measure; the contribution of the ban to the goal pursued; and finally, the impact on international trade.[49] Taken as a whole, these developments have progressively enabled states to compatibilize non-trade objectives to their GATT obligations.

IV. Other institutional developments

In the Uruguay Round the text of Article XX remained unchanged. But as becomes evident through minutes of meetings prior to the Uruguay round and in later meetings of the negotiation group on GATT articles, there was indeed a significant amount of debate around Article XX during the Uruguay Round.[50]

At the 22nd and last meeting of the negotiation group on GATT articles Austria circulated a statement,[51] sharing their concerns related to environmental protection. She argued that environmental protection issues had only increased in urgency in the last years, and referred to the increased international awareness and cooperation on the issue in other international fora. The Austrian delegation framed the argument in environmental terms, defining the environment itself as a scarce and precious good, acknowledging the increasing costs of sustaining the environment. They called for North-South cooperation on the issue. Their key demand was to include "the environment" specifically in GATT Article XX (b), so it would read "necessary to protect the environment, human, animal or plant life or health". According to them, as the relationship between trade and environment would only increase in the coming years – which turned out to be correct prediction – it became of utmost importance that this

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[48] Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (3rd ed, Oxford University Press 2015) 727.
[49] ibid 728.
[50] Note by the Secretariat, MTN.GNG/NG7/W/75, 18 August 1987.
[51] *Ibid*.

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was reflected in the GATT. They called for the European Union to support their advances, as they aimed for pushing for momentum of inclusion of environmental, non-trade concerns. A 'Decision on Trade and Environment' was reached, but it just vaguely stated that there should not be any policy contradiction between upholding the multilateral trading system and acting in favour of environmental protection and sustainable development.[52] This was not particularly helpful as the past years had shown that there are quite a few cases in which environmental protection and trade priorities clash. The Decision also established a Committee for Trade and Environment under the new WTO and tasked it with deliberating a more sustainable solution to the issue.

The newly established Committee for Trade and Environment had lively debates and ambitious ideas around reforms to Article XX, but always struggled to find consensus.[53] Therefore, many of the questions were ultimately handed back to the Appellate Body to decide in individual disputes, as seen in the previous section.

Another element to consider is the 1992 report on trade and environment by the GATT secretariat on the occasion of the Rio Summit of the United Nations Conference on Environment and Development.[54] In it, it argued that trade liberalisation in and of itself does not have a negative impact on the environment. As long as governments take action to protect the environment, the report goes on, trade will not do any harm. This view echoes arguments made by the GATT experts in relation to welfare commitments that have been referenced above: as long as the government actively regulates environmental/welfare/health etc. issues, these are not of primary concern to the GATT/WTO. This report argued against unilateral action and stated that states should not impose their own environmental policies on other states. It came out in favour of multilateral environmental action and standard setting, possibly also in an attempt to avoid having to take a decisive stance themselves.

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[52] CTE (1994) Decision on Trade and Environment, 15 April 1994.
[53] *Report of the Meeting held on 15-16 September 1994*, PC/SCTE/M/3 (94-2032), 10 October 1994; *Report of the Meeting Held on 26-27 October 1994*, PC/SCTE/M/4 (94-2405), 14 November 1994; *Report of the Meeting Held on 23-24 November 1994*, PC/SCTE/M/5 (94-2799), 15 December 1994; *WTO Committee on Trade and Environment*, WT/L/42 (95-0376), 23 February 1995.
[54] *Note on the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil from 3 to 14 June 1992,* L/6892/Add. 3, 2 July 1992.

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In the mid-1990s the WTO also saw itself confronted with a growing body of international environmental law, increasing the risk of an actual legal dispute between environmental law and trade. One could make the argument that this also forced WTO's hand to a certain extent –feeling the necessity to not lose its authority over what they considered to be predominately trade issues. In the internal GATT/WTO magazine ("News and Views"), reports on environmental considerations are increasing around 1994, also coinciding with the other developments addressed above. In 1994, the GATT also convened a symposium on Trade, Environment and Sustainable Development with NGO participation whose main goal seemed to have been the education of participants on the issue and concluding that the WTO should have a leading role in shaping rules and principles regarding trade and environment. It should also be noted that UNEP began addressing WTO more directly as early as 1988 and continued through much of the 1990s – it aimed for GATT/WTO to have a close relationship with UNEP and prior to the Uruguay round lobbied for the inclusion of environmental objectives.[55]

V. Analysis

Type of change

Overall, this case has to be regarded as a possible paradigm shift in relation to the WTO structure away from diplomatic negotiation toward adjudicatory practice and building a body of case law on precedents, something that would have not been possible pre-1990. Otherwise there are mainly norm adjustments, re-interpretation of meaning and definitions cumulating in the emergence of a new two-tier test and a norm strengthening the place of non-trade objectives in WTO.

Pace and Mode of Change

As demonstrated above the main change episode took place in the 1980s and 1990s. The establishment of WTO in general and the Appellate Body in particular have potentially acted

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[55] *Adverse Trade Effects on Environmental Measures- Communication from United Nations Environment Programme*, L/6437, 15 November 1988.

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as catalysts in pushing the change forward. Environmental concerns were pertinent at the time with the Rio Conference in 1992 and surrounding events could have also contributed to the sudden increase in pace of change in the mid-1990s. The Appellate Body also had a rich selection of cases to work on, further giving off the impression that many decisions were made in a short amount of time.

Salience

In terms of public salience measurement, the coding of the documents mentioned above should addresses some of these concerns. The timeframe that is most important for this case study is firmly outside Google Trends capabilities and whilst a combination search of "trade and environment" generates some hits with google trends past 2004, it is clearly not necessarily a topic of broad lay interest.

Institutional availability

This pilot case confirms initial thoughts on the field during the case selection process (8.b) – international trade law is almost exclusively driven through GATT/WTO. In most scholarly writing and textbooks, world trade law today is identified with the texts of the WTO Agreements and the jurisprudence of the panels and the Appellate Body which this pilot clearly demonstrates. Whilst the institutional availability for change is clearly limited, the available options are strong and have a trade law-making capability. This makes for a narrow, but powerful path of change through adjudication.

Pathways of change

There has been a gradual acceptance of incorporating non-trade policies into GATT/WTO panel reports and Appellate Body decisions. The key pathway to change in this pilot case is through the judicial option mainly due to the institutional structure, paired with the general changes in epistemic communities as well as organisational shifts. This pilot study shows that if one wants to achieve tangible change of legal norms and interpretation it has to go through adjudication to have a chance of successfully changing a norm. Prior to the machine coding of delegations statements and GATT internal documents regarding trade and environment, it is difficult to state how much influence the pathway of private authority had

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– judging from the amount of available documentation it must definitely be considered as an important pathway of increasing salience and pressure for change in other pathways.

Preconditions

As we can see by the way subsequent Appellate Body reports go to great length to establish the new threshold of 'primarily aimed at' over the previous 'related to' or 'necessary' the Appellate Body did consider the previous high threshold of interpretation a strong legal norm that had to be significantly modified. Prior to *Herring and Salmon* the norm had been stable for decades and was viewed as the prevalent law on the issue. This certainty was overruled through *Herring and Salmon* and reinforcements of following panels and Appellate Body reports treating it as precedent in a field that traditionally did not know the concept of precedent in adjudicatory procedures. Clearly subsequent panels felt the need to strongly support the new threshold and make it the new strong norm and applicable law in regards to Article XX(g).

VI. Conclusion

There seem to be multiple processes at play in the changes of interpretation of GATT Article XX in the 1980s and 1990s. Firstly the shift in trade dispute settlement from diplomatic discussion to a legal mode of adjudication. At the same time the topic of the relationship between environment and trade had gained in salience within the institution of the WTO. The WTO was reacting to developments outside its realm such as the Rio Conference and UNEPs policies on environment and trade.

The Appellate Body remains the central adjudicatory organ within the international trade law field, resulting in limited, but strong institutional availability for change via the judicial path. It is uncertain if without the establishment of the Appellate Body under the new WTO, the views on non-trade considerations would have changed so extensively, even though they had started to shift under the late GATT panels. Clearly, the judicial path as identified by Krisch

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and Yildiz is the most successful and had the greatest impact in terms of actually changing the law.[56]

Another important factor in changing the interpretation was that adjudicators began to treat previous reports as precedent in a larger shift in how panel reports are viewed in international dispute settlement. Adjudicators have strengthened their own position by considering previous reports to be precedent. Possibly this could be viewed as an example of a paradigm shift, but the exact circumstances of how and why that shift took place in the trade law context have to be carefully investigated.

GATT and WTO adjudicators have shaped and developed Article XX GATT in their interpretive everyday practice. Whilst at some point the threshold to justify trade restrictions through general exceptions seemed almost too high to succeed, this interpretation has thoroughly changed. In the 1980s and 1990s various GATT panels based their interpretations the condition that to be justifiable measures had to be the least trade restrictive amongst reasonably available alternatives. Non-trade considerations in the GATT panels were considered a threat to the multilateral trading system and had to be restricted. Under the Appellate Body, in contrast, the two-tier test was developed, shifting the focus away from the policy objective as such and towards the arbitrariness of the measure. As a result, today Article XX is a broader provision enabling considerably more policymaking by member states. The whole discourse has shifted from considering whether non-trade considerations should actually be addressed by the GATT/WTO to how they should be balanced.

[56] Nico Krisch and Ezgi Yildiz, 'Framing Paper' [2019] PATHS Project.

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Case Study 21

Subsidies: A Changing Approach to "Public Bodies"

(July – December 2019, Rev. May 2022)

Nina Kiderlin

Synopsis

Subsidies have long been the subject of regulation in international trade law. Under the WTO, they are subject particularly to the Subsidies and Countervailing Measures (SCM) Agreement, which states that only financial contributions from 'a government or any public body' constitute subsidies. Yet, there have been shifting views on how to distinguish a public from a private body, especially with a view to state-owned enterprises and banks, with a particularly radical shift taking place in 2008 to 2012 with the *US – AD/CVDs (China)* case at the WTO. Panels initially focused primarily on a test based on 'control' – on whether a body was not only legally but in fact controlled by the government. The Appellate Body, too, used a somewhat formal test initially, relying on whether a body had its authority delegated from the government and exercised governmental functions. Over time however, these somewhat clearer standards turned out to be problematic and both over and underinclusive when dealing with economies, such as the Chinese, with a large sector of state-owned enterprises. In 2010, the panel in *US – AD/CVDs (China)* again emphasized the control element, but the Appellate Body overturned its decision and opted for a more indeterminate, flexible test which focuses on the question of whether an entity exercises 'governmental authority'. This latter test became the standard for the years to come, until the Appellate Body – under broad political pressure – took a modest step back towards the US position.

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I. Chronology

First phase: Non-definition and Stability

The 1947 GATT did not define the term subsidy. A subsidy code was originally developed by the Tokyo Round 1973-79, but it also did not contain a precise definition of a subsidy. The Uruguay Round, then, elaborated on the original Subsidies Code and incorporated it into the WTO. The subsequently developed WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) was more specific than any of the previous documents. The SCM Agreement, however, does not define the term 'public body'. Withal, the SCM Agreement was the first WTO agreement defining the term 'subsidy'. In broad terms it defined that a 'subsidy' exists wherever there is a financial contribution by a 'government or any public body' which provides a benefit to the recipient. Government support for business is a common occurrence in all types of economies, but if it is labelled as subsidization, it entails legal and consequences. It is very difficult to differentiate between government support and subsidization as it requires limiting the scope of governmental autonomy in supporting its citizens.[1] The United States understood the SCM Agreement as an opportunity to form a body of rules cementing the transatlantic agreement under United States hegemony and influence the manner in which other states engaged in privatizations.[2] Over time it emerged that the United States and Europe acted as partners in trade regulation against developing countries. The meaning of 'public body' has continued to be a battleground where transatlantic concepts of subsidy regulation have been challenged by China and to some extent India and the approaches they developed. This debate has contributed to subsidy regulation turning from a merely unilateral instrument in forms of CVDs sought for by specific producers to be able to compete fairly with foreign competitors to a more profound influence on how States are structured.[3]

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[1] Gregory Messenger, *The Development of World Trade Organization Law: Examining Change in International Law* (Oxford University Press 2016) 160.
[2] Sarooshi, D. (2004) 'Sovereignty, Economic Autonomy, the United States, and the International Trading System', *European Journal of International Law*, 15(4), pp.656-658.
[3] *Ibid*.

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The definition of 'subsidy' under Article 1.1 of the SCM Agreement is firstly that a financial contribution by a government or any public body within the territory of a member (referred to as 'government') through a direct transfer of funds or liabilities, government revenue, a government providing goods and services beyond general infrastructure, a government making payments to a funding mechanism directly or through a private body, or secondly the conferring of a benefit.[4] The three key elements are the 'financial contribution' by 'government or public body' which confers a 'benefit'. This was subject to no fundamental contestation from the adoption of the SCM Agreement and up until 2001.

This paradigm is particularly challenging for economies in developing and developed countries alike in which State-Owned Enterprises hold an important role. Therefore, the Agreement seems to give preference to states that do not involve governmental bodies in the market. Many questions arose in relation to these countries, namely the circumstances under which their business model and transactions could be subject to regulation under the SCM Agreement. Ultimately the Agreement intends to draw a line between government/public bodies and private bodies which can restrict the scope of market structure and State involvement. This arguably results in a normative and institutional framework influencing the domestic order of Member States.[5] The SCM Agreement attempts to condition the way States make choices through limiting their ability to interfere with economic markets.

Second phase: Questioning of the concepts and Chinas accession to the WTO[6]

The initial disturbance point can be identified as China's accession to the WTO in 2001. They began to lobby for changes in the wider WTO framework to accommodate their policies instead of adopting already existing trade norms and regulations. The initial expectation upon accession was that China would adapt to the WTO regulations and frameworks. However,

[4] SCM Agreement Article 1.1
[5] Wendt, A. (1999) *Social Theory of International Politics*, Cambridge: Cambridge University Press.
[6] This section relies on the same primary sources and largely follows the ideas and argument of Messenger, G. (2016) *The Development of World Trade Organization Law: Examining Change in International Law*, Oxford: Oxford University Press. See footnote 1.

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this expectation was not fulfilled and instead China began lobbying efforts to mold WTO frameworks in order to adapt them to their own economic understandings.[7]

The Chinese Accession Protocol refers to the 'right to trade' related to the import and export of goods.[8] It was interpreted in a narrow sense meaning that in practice the extension of obligations to non-discriminatory and non-discretionary treatment extends the obligation from mere border measures and applies to all enterprises – whether private, State-owned, or joint-ventures.[9] This applies in an international sense, but the interpretation limited China's ability to utilize the exception provisions the GATT had originally given unless specifically referred to.[10] This of course was not in the best interest of China, and it is a good example of how states use interpretation of provisions to utilize WTO law to contest specific terms in question – e.g. 'public body' – whose definitions are important for the system as a whole.[11]

China has privatized a large number of former State-owned enterprises, but the government has retained ownership of some strategically important companies.[12] Many of these enterprises have been performing economically well – in large part due to their close relation to government and its support as well as the possibility of retaining financing through State-owned Commercial Banks.[13] Particularly this access to financing streams has led to the argument that these enterprises have an unfair advantage. Especially the United States have argued that many of the State-owned enterprises and State-owned Commercial Banks are 'public bodies' under Art. 1.1(a)(1) SCM Agreement, and are therefore subject to WTO

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[7] Messenger (n 1) 174.
[8] Article 5.1, Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432 (23 November 2001)
[9] Article 5.2, Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432 (23 November 2001)
[10] *China—Measures Related to the Exportation of Various Raw Materials*, Report of the Appellate Body (30 January 2012) WT/DS394-5-8/AB/R, 293, excluding the possibility of China's recourse to Art. XX GATT for its obligation to
eliminate export duties under Art. 11.3 of the Accession Protocol as (unlike Art. 5.1), there was no *specific* reference to 'China's right to regulate in a manner consistent with the WTO Agreement'.
[11] Messenger (n 1) 170, 171.
[12] Nolan, P. (2014) 'Globalisation and Industrial Policy: the Case of China' *The World Economy* 747.
[13] *Ibid*.

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law.[14] This resulted in the introduction of countervailing duties on many goods from China.[15] As such, a question of pressing concern to China was how far the 'government or public body' provision of the SCM Agreement should extend, particularly with regard to State-owned enterprises.

Multiple cases arose previously to China's accession or shortly thereafter on the matter of scope and the panels generally applied a test focusing on control as the key determining issue to be considered by investigation authorities of member states.[16]

In the *Korea-Commercial Vessels* case of 2005, the Korean export-import bank had offered financing and loan guarantees to support domestic businesses.[17] The panel did not focus on whether a commercial or governmental purpose was pursued through this, or whether the bank acted on the basis of governmental authority – Korea argued that the bank was not a public body as it pursued commercial interests.[18] Instead they argued that the SCM Agreement envisioned a straightforward approach in distinguishing between public and private bodies. In their view, the entity constitutes a 'public body' if it is controlled by the government, in which case any action by that entity is attributable to the government and falls under Article 1.1(a)(i) of the SCM Agreement.[19] The same test was pursued in *EC – Large Civil Aircraft.*[20] There was an issue however with focusing the test on whether an entity is controlled by the government or other public bodies: how would anyone know if the body controlling the entity is a public body if that is not clear from the onset?[21]

The Appellate Body had originally looked into the question of definition of 'governments and their agencies' under the Agreement on Agriculture in the *Canada – Dairy* dispute in

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[14] Messenger (n 1) 174, 175.
[15] US DOC, 'Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China—Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy' (29 May 2007).
[16] *Korea—Measures Affecting Trade in Commercial Vessels*, Panel Report (7 March 2005) WT/DS273/R, ('*Korea–Commercial Vessels* (panel)')
[17] *Korea–Commercial Vessels* (panel), para. 7.35.
[18] Messenger (n 1) 172.
[19] *Korea–Commercial Vessels* (panel), paras 7.49–50.
[20] *European Communities and Certain Member States—Measures AffectingTrade in Large Civil Aircraft* (30 June 2010) WT/DS316/R.
[21] Messenger (n 1) 173.

Electronic copy available at: https://ssrn.com/abstract=4430270

1999.[22] The Appellate Body upheld the panel's argument that provincial milk marketing boards could constitute government agencies as they both performed governmental functions and were delegated these powers through a governmental authority.[23] The Appellate Body defined government agency as an entity "which exercises powers vested on it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens".[24] Needless to say that many government functions do not depend on any of these actions – e.g. transport, healthcare.[25] The Appellate Body's views were thus problematic in multiple members' jurisdictions. Despite this, overall the test seemed to have settled on control as the key criterion.[26]

China sought to obtain a different interpretation of the meaning of the term 'public body' in the definition of a subsidy according to Article 1.1 (a) (i) SCM Agreement, in its appeal before the Appellate Body in *US – AD/CVDs (China)*. It argued that earlier rulings should not be followed and presented its own interpretation. A key issue was to determine to which extent State-owned enterprises and State-owned Commercial Banks are public bodies under Article 1.1 (a) (i) of the SCM Agreement.[27] Should they not be public bodies, they would both merely be private actors in the market place. But, should they be public bodies, the goods exported by them can be targets for protective measures, as the loans and raw materials become potential subsidies. The United States' investigating authority argued that some of the State-owned enterprises and State-owned Commercial Banks were public bodies, which was upheld in the panel. However, the panel stated that there was no definition for 'public body'.[28] The panel also pointed out that it would be challenging to come up with a definition

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[22] *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Appellate Body (13 October 1999)
WT/DS103-113/AB/R.
[23] Messenger (n 1) 173.
[24] *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Appellate Body (13 October 1999) WT/DS103-113/AB/R, para. 97.
[25] Messenger (n 1) 174.
[26] ibid.
[27] ibid 175.
[28] *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report (22 October 2010) WT/DS379/R.

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as different jurisdictions would define 'public bodies' differently in their own law, and "some of these go well beyond government agencies or similar organs of government, and include, inter alia, government-owned or controlled corporations providing goods and/or services".[29] The panel reviewed the provisions in French in Spanish and came to the conclusion that the main question that had to be answered was if State-owned enterprises and State-owned Commercial Banks are public or private bodies specifically under the SCM Agreement.[30] The panel focused on the relationship between public and private, not on the one between 'public body' and 'government', departing from the Appellate Body's framing in *Canada – Dairy*, which had focused on governmental and non-governmental functions. The panel centered on control – the public sector as being under State control, the private enterprise being privately controlled.[31] This aided the panel in avoiding the need for the body to exercise governmental functions, concluding "We consider that interpreting 'any public body' to mean any entity that is controlled by the government best serves the object and purpose of the SCM Agreement".[32]

The Appellate Body did not dismiss the entire approach by the panel, as it did agree that there are times when governmental control could indicate that the body in question should be viewed as a 'public body' for the purposes of the SCM Agreement.[33] It was cautious about this statement, making it clear that this was relevant if it was demonstrated that there was a governmental function exercised.[34] However, the element of control was deemed necessary, but not sufficient; it was important in the determination of whether the body exercises a *governmental function*, which was deemed to be the central element that should define 'public body'.[35] In this sense, it attempted to utilize dictionary definitions of 'public body' resulting in a focus on the exercise of functions that would be considered of governmental

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[29] *Ibid*.
[30] Ibid.
[31] Messenger (n 1) 175.
[32] *Ibid*.
[33] *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, para 318.
[34] Messenger (n 1) 176.
[35] See also: *United States—Countervailing Measures on Certain Hot- Rolled Carbon Steel Flat Products from India*, Report of the Appellate Body (8 December 2014) WT/DS436/AB/R, para. 4.37

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nature.[36] As the definition hinged on defining governmental authority it has created great difficulty for judicial bodies, policy makers, and administrative investigators. The Appellate Body stated that governmental control or delegation may, but need not, be indicators of the public nature of a body: "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[37]

The Appellate Body ultimately destabilized the control test with their decision in *US – AD/CVDs (China)*. Whilst the panel again emphasized the control element, the Appellate Body turned to a more indeterminate, flexible test which focuses on the question of whether an entity exercises 'governmental authority'.[38] The Appellate Body's interpretation was influenced in this point by the ILC Articles on State Responsibility.[39] Article 5 does not attempt to identify the scope of 'governmental authority' for the purpose of attribution of the conduct of an entity to the State. As stated in the commentary to the ILC Articles: "beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances."[40] There is no guidance on how exactly 'governmental' is to be defined, but it clearly depends on each case.[41] Thus, whilst the panel aimed at providing greater clarity, the Appellate Body arguably created greater uncertainty.[42]

This has led to heightened tensions between states in multiple fora within the WTO. They key point of contention is the case-by-case analysis of what is governmental.[43] There has

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[36] *US–AD/CVDs* (*China*), Appellate Body, para. 285.
[37] Ibid.
[38] Messenger (n 1) 176.
[39] *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, para. 310. Also: See note 1.
[40] General Commentary to Articles on Responsibility of States of Internationally Wrongful Acts (2001), p. 43.
[41] Messenger (n 1) 177.
[42] Pauwelyn, J. (2013)'Treaty Interpretation or Activism? Comment on the AB Report on *United States—ADs and CVDs on Certain Products from China*', *World Trade Review* 12(2), 235–7.
[43] Messenger (n 1) 177.

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been severe criticism as to the judgement providing less guidance to states on how to act, especially on when they may enact countervailing duties. Not just the US have opposed this approach, but also the EU, Canada, Mexico and Turkey, among others,[44] As was to be expected, the AB decision was strongly contested by the US Trade Representative as it destabilized the control test set forth in previous decisions and challenged existing US countervailing duty practice.[45] If implemented, it would have largely removed benefits provided by SOEs from the remit of countervailing duties as the burden of evidence to demonstrate actual exercise of governmental authority was too high[46], and especially because SOEs in China are mostly intransparent with regards to their governance structure which will often make it impossible for an investigating authority to provide the evidence required.[47]

The United States then also did not shift its approach and continued to rely on "meaningful control" as the core criterion. Yet even despite this lack of implementation, the AB decision represented a victory for China in terms of pushing forward its own views and agenda. Several important countries – among them Brazil, India and Saudi Arabia – had supported the Chinese position in the proceedings. And even governments that disagreed on substance recognized that the Appellate Body finding would "serve as a reference for the conduct of any investigating authority", and that no grounds existed to call into question the legitimacy of the decision.[48]

Instead of interpreting the Appellate Body decision as a decisive shift towards China, one could also argue that actually all tests used in the 'public body' debate were problematic in some way, and that this is a transition from one choice to another. The control test benefitted states that do not maintain financial interests in the market and might be more aligned with

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[44] See hereafter *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* WT/DS379/R (n84) para. 8.42-8.52.
[45] Melissa Lipman, 'WTO Rejects US Duty Double-Counting in China Fight' (*LAW360* 11 March 2011) < https://www.law360.com/articles/231712/wto-rejects-us-duty-double-counting-in-china-fight > accessed 09 August 2021
[46] Weihuan Zhou, Henry Gao, and Bai, Xue, ' Building a Market Economy through WTO-Inspired Reform of State-Owned Enterprises in China' (2019) 68 International and Comparative Law Quarterly 977
[47] Chad Bown, Hillman, Jennifer, 'WTO'ing a Resolution to the China Subsidy Problem' (2019) 22 Journal of International Economic Law 557
[48] See, e.g., the statement by Mexico and the European Union, in WTO, Dispute Settlement Body, Minutes of Meeting, 9 June 2011, WT/DSB/M/294, paras. 103 and 112.

Electronic copy available at: https://ssrn.com/abstract=4430270

the original intention of the SCM Agreement as a tool to structure public-private relationships. The choice made by the Appellate Body in *US-AD/CVDs (China)* focusses on examining different factors which can indicate or demonstrate governmental authority is less clear and certain for members but it does accommodate more states as it accepts that governmental involvement in the market is not always harmful.[49]

Third phase: Discussion post Appellate Body decision in US-AD/CVDs (China) 2012, what happened since?

In *US-Carbon Steel (India*) 2014 the Appellate Body elaborated on the issue of the meaning of 'public body'.[50] The Appellate Body reiterated again that no two situations are the same, and that the picture of what constitutes a public body can be complex and clarity might be difficult to establish. They argued that the mere ownership or control over an entity by a government is not sufficient to establish that this entity is a public body, in order to establish 'governmental authority' over the body. Ownership can however be interpreted as evidence in conjuncture with other elements. The Appellate Body also stated that the investigating authority must "avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant". It also argued that "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case"[51]. This confirms that determining whether an entity is indeed a public body will require a very fact-specific case-to-case analysis.

By the mid-2010s, therefore, the legal standard applied in such cases had clearly changed compared to what it was a decade earlier. The shift in the understanding of "public body" under the SCM Agreement may not have become fully consolidated, as contestation and instances of non-compliance continued, especially on the part of the US. It nevertheless resulted in a new balance of argument and provided a new reference point for the legal debate, reflected, for example, in the way in which the law came to be presented in trade law

[49] Messenger (n 1) 177.
[50] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (DS436) 2014
[51] Ibid.

Electronic copy available at: https://ssrn.com/abstract=4430270

textbooks.[52] Even though the typical threshold for 'subsequent practice' – with a concurring practice or agreement of the parties to a treaty – had not been met, the law had, for all practical purposes, changed, and it would have been unprofessional to restate the law on the basis of the previous control test.[53]

A few years later, some reports by panels and the Appellate Body after 2018 were somewhat more deferential to US views and further added to the uncertainty about the applicable standards.[54] Still, they kept generating friction. In 2018, for instance, a panel issued a ruling in the case *US – Countervailing Measurers (China)* (Article 21.5 – China)[55]. This was following up on a dispute from 2014 in which the panel had decided that the US acted inconsistently with the SCM Agreement as the 'USDOC found that SOEs were public bodies based solely on the grounds that these enterprises were (majority) owned, or otherwise controlled, by the Government of China'. The dispute ultimately hinged on which entities are 'public bodies. In the 2018 proceedings China made multiple claims against the US implementation of the ruling, including that the US did not make valid 'public body' determinations. China argued that investigating authorities should focus on whether an entity is performing a government function when providing a financial contribution. The USDOC would have been therefore required to determine if the enterprises in the CVD investigations "were performing a 'government function' when they sold the *specific inputs* at issue to particular downstream purchasers".[56] This was rejected by the panel, as they argued that the SCM Agreement did not require a 'particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue'. The panel also stated that 'we do not agree with China's understanding of the legal standard for public body determinations insofar as it would require a particular degree or nature of connection in all cases between an identified government function and the particular financial

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[52] See, eg, Joost Pauwelyn, Andrew Guzman and Jennifer Hillman, *International Trade Law* (Wolters Kluwer 2016) 507; Peter van den Bossche, and Zdouc, Werner, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2017) 783
[53] Nico Krisch, 'The Dynamics of International Law Redux' (2021) 74 Current Legal Problems 269.
[54] See Ahn, 'Why Reform is Needed' 64 (n 8)
[55] *US – Countervailing Measurers (China)* 2018 WT/DS437/AB/RW
[56] *Ibid*.

Electronic copy available at: https://ssrn.com/abstract=4430270

contribution at issue'. The panel referred to the Appellate Body's earlier statement that "formal indicia of control" are "insufficient on their own to establish that an entity is a public body, such as government ownership interest, appointment and nomination of directors, and other formal statements of 'control'". A year later, in 2019, the Appellate Body confirmed the Panel's decision in saying that "while the conduct of an entity may constitute relevant evidence to assess its core characteristics, an investigating authority need not necessarily focus on every instance of conduct in which that relevant entity may engage, or on whether each such instance of conduct is connected to a specific government function". However, while this decision favored the US, it did not revert back to the previous governmental control standard.

These decisions were adopted already in the midst of the crisis surrounding, and eventually incapacitating, the Appellate Body. The "public body" jurisprudence also features prominently among the points of concern of the US regarding the Appellate Body[57], and it is likely to have contributed to the US challenge of the AB and its decision to block the appointment of new members. The European Union, too, has raised concerns about the "narrow interpretation" of the notion of "public body" and identified subsidies through SOEs as one of the areas in which a "rebalancing of the rules" of the WTO is necessary.[58]

II. SCR Framework

1. Selection stage

Institutional Availability

Institutional Availability for changes within trade law are naturally delimited by the field to the WTO. The WTO is the main institution in the field and the Appellate Body as its judicial

[57] US Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), 82–89 <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf > (accessed 24 November 2021)

[58] EU, 'Concept Paper: WTO Modernisation'. <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf > (accessed 24 November 2022).

Electronic copy available at: https://ssrn.com/abstract=4430270

body holds key powers in terms of changing law and policy. It is the main authority in the field and all significant changes will go through it.

Actors and Agency

Some states emerge as instrumental actors in the process. For one, China became a powerful actor in the trade law field post her accession to the WTO. China displayed a lot of agency by pushing for amending the 'old' rules in order to align them with their own interests. China found an ally in India, as well as other less influential states, which were not satisfied with the hegemonic position of the United States in the trade law cosmos. The United States voiced the strongest vocal opposition to the proposed changes with the argument of them potentially causing a ripple effect in other areas of WTO policymaking[59]. There was a concern that if China would succeed in its lobbying with the Appellate Body in one issue favoring the Chinese political and economic order, it might become easier for China to replicate this successfully with other contentious issues.

The United States, for its part, issued a 'Public Bodies Memorandum' in 2012 in order to facilitate implementation of the *US – AD/CVDs (China)*[60]. The content was challenged by China in 2018 and the panel agreed that the Memorandum could be subject to a challenge as such as it provides 'administrative guidance and creates expectations among the public and among private actors', particularly as the USDOC relied heavily on it in their Chinese investigations. China argues that 'the Public Bodies Memorandum is premised on the U.S. view that the 'government function' does not have to relate to the conduct at issue' which was rejected by the Panel. The Panel ruled instead that 'the nature of the Public Bodies Memorandum is that of a resource available to the USDOC for use in making public body determinations, but it does not restrict the USDOC's discretion to supplement the record or take into account and rely on additional information that is provided in a particular investigation'. The United States in general have attempted to shift the debate from technical details to a wider questioning of the system, and the legitimacy of the Appellate Body

[59] US Statement on adoption of the reports, WT/DSB/M/294, paras 97-99.
[60] DS379

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processes. Particularly their responses to the recent US – AD/CVDs (China) has been a scathing attack on the core of the Appellate Body's interpretation of its own operations.[61] It is an indication of the frustration of the United States who expected to be the ones who determine how the law should work[62].

China's decision to complain under the DSU in *US – AD/CVDs (China)* can also be interpreted as a response to the policy changes implemented by the US in 2006 relevant to nonmarket economies (NME) treatment. Whilst it had been a longstanding US policy not to apply countervailing duty law to countries the US considered NMEs (such as China), this changed in 2006 with significant ramifications to the Chinese economy. In this light the interpretation of 'public body' by the Appellate Body is particularly interesting- it did not equate it with a state-owned or state-controlled entity, and this could be of assistance to Chinese exporters in future countervailing duty investigations[63]. India has supported the push from China, as the State is involved in a number of national entities which provide raw materials and are therefore possibly affected by CVDs. This has resulted in a shift from the traditional transatlantic axis to a more globalized view on WTO law. China and India have continuously challenged the United States on countervailing duties.[64] It is also interesting that countries such as Canada, a traditional United States ally, have been recorded in Dispute Settlement Minutes as supporting the Chinese/Indian position[65]. This could be indicative of a wider feeling of support from western countries for the new, more globalized view.

Whilst it used to be mainly the United States who used subsidy regulation to legitimize their preferred economic and political State structure, China is now also taking full advantage of the Appellate Body system in order to shape international trade policy according to their interests.

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[61] Minutes of Meeting, Dispute Settlement Body (16 January 2015) WT/DSB/M/355, 1.11–13.
[62] See note 1.
[63] Kennedy, M. (2012) China's role in WTO dispute settlement, *World Trade Review*, 11: 4, 555-589.
[64] *US—Countervailing Duty Measures on Certain Products from China*, dispute DS437; and *United States—Countervailing Measures on Certain Hot- Rolled Carbon Steel Flat Products from India*, dispute DS436.
[65] Minutes of Meeting, Dispute Settlement Body (16 January 2015) WT/DSB/M/355, 1.11–13.

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The Appellate Body's unique positioning in the WTO structure in terms of influencing wider frameworks and discussions becomes apparent in this case. The Appellate Body is the ultimate authority which made the change possible and established it in WTO jurisprudence. This case very much demonstrates that the Appellate Body is not just a dispute settler, but also a lawmaker. The judicial pathway has ultimate authority in this case at the WTO, and it does not matter that some states, including the United States, are opposed to the change.

The Appellate Body has a strong interest in issuing decisions by consensus as it reinforces their legitimacy.[66] Opinions are anonymous according to the Dispute Settlement Understanding Article 17.11, therefore it is quite difficult to draw any sort of conclusions from the body composition. In the *US – AD/CVDs (China)* 2012 case there was no dissenting opinion. Therefore, we can assume that the ruling was reached either through consensus or majority vote. The Appellate Body has clarified some aspects in the subsequent *US-Carbon Steel (India)* dispute- responding to some of the United States criticism, but also manifesting its role as a lawmaker and world trade court, and not just a review body. However, in the latest *US – AD/CVDs (China)* case there was a separate opinion,[67] mainly focused on the lack of definition of 'public body' in the previous rulings and the difficulties that arise from that. The strong United States contestation might also be part of the larger tension at the WTO as to who controls the institution, lawmaking, and dispute settlement[68]. There have been arguments for a while now between the 'official' stakeholders such as the diplomats of member states and the tightly established circle of technocrats, lawyers, and experts that move between the different WTO bodies and outside parties concerned with trade law developments. The second group controls most WTO mechanisms and the running of the secretariat, the ways of which they function are often difficult to grasp for perceived outsiders, such as some state officials, but the latter might want some more control over the proceedings back. The tensions reaching fever pitch in the Dispute Settlement Body could also be read as part of this argument between the two groups.

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[66] Flett, J. (2010) Collective Intelligence and the Possibility of Dissent, Anonymous Individual Opinions in WTO Jurisprudence, Journal of International Economic Law, 13 : 287-320.
[67] *US – Countervailing Measurers (China)* 2018 WT/DS437/AB/RW.
[68] Soave, T. (2020) „Who controls WTO dispute settlement?" *EJIL Talk*.

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The Dispute Settlement Body is an important actor in its function as a forum of discussion and voicing opinions. It adopts the Appellate Body reports and many of the more explicit discussions between states are recorded in the meeting minutes. This makes the Dispute Settlement Body a crucial actor in this case study as the heightened tension and debate all play out here, as demonstrated above with the arguments the United States raised against the Appellate Body in general and not just the specific ruling.

2. ***Construction stage***

(In)stability of the previous norm

The previous norm (not challenging the subsidy agreements and later the control test) seemed to be quite stable and the neither the Appellate Body nor states contested it over many years. The norm was particularly stable over the Cold War due to the prevalent position that the United States held in dominating Western trade policy-making at the WTO. There is definitely a pre-existing norm: the understanding of public body as dependent on a test of control. The norm was one of those that did not fit with a Chinese (/or non-western) understanding of economy and politics, so there would have been lobbying for changing it from the Chinese and other similarly inclined member states. Prior to China's accession to the WTO, there was no direct contestation. The end of the Cold War would have possibly provided the first critical juncture for considering non-US centric economic models as possible, as the prevalent political ideologies were less pronounced. China's accession to the WTO then provided the ultimate opening for the change as their views had to be considered. The norm shift does not present a paradigm shift at the current time as the change is still ongoing. If it ultimately consolidates it could be part of a shift to include more non-western views but currently this trend is not clear.

3. ***Reception stage***

Salience

The issue became increasingly salient over time, with the decision in *US – AD/CVDs (China) 2012*, the Appellate Body has made it even more salient. The discussions following the ruling demonstrate that the issue goes to the very core of what WTO members understand as 'governmental authority'. The intensity of the debate also suggests that members are aware

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that this ruling could be a general turning point in how the Appellate Body interprets WTO frameworks in order to allow for more inclusivity of economic systems that are not US-centred.

Particularity of the Case

The WTO is quite a confined institutional space as there is just one forum available for the discussions surrounding trade law and policy. The limitedness of institutions, pathways, and actors make this case particular as there are no outside actors that influence the proceedings and it all plays out within the bodies of the WTO. It is also a case that demonstrates how seemingly technical challenges can rattle a system to the core and challenge perceptions that had remained the central to an institution over decades.

Exclusivity of pathway

The main pathway of change is the judicial pathway through the Appellate Body. The Dispute Settlement Body, representing the multilateral path, is one of the forums in which the change is debated and certain arguments are lobbied for post-rulings. This path has so far not resulted in significant changes though, but is important as it records contestation and support through the minute meetings.

Pace and mode of change

There are multiple moments of change identifiable. The earliest would be the SCM Agreement, and then the successive panels, moving from *Canada – Dairy*, to *Korea – Commercial Vessels*, to the Appellate Body decisions on *US – AD/CVDs (China)*. The last one is quite a sudden change as it is breaking with previous decisions. The points prior to that can be considered as attempts to provide some structure on what subsidies exactly are. However, another inflection happened in the *US – Countervailing Measures (China) (Article 21.5 – China)* case, where the Appellate Body blurred its jurisprudence on the matter by ruling that the central point in defining a public body is not in the nature of the particular activity in question but rather the characteristics and the relationship of the entity with the government. Thus change in this case has clearly not been linear.

Type of Change

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This is an example of norm adjustment at the core of the norm with far reaching consequences. The shift from a focus on control to a focus on governmental authority is substantial and destabilized/possibly changes the original norm.

Outcome

The clearest visible, legal outcome is that the Appellate Body shifted the test from control to governmental authority, although it nuanced this stance in 2019. Unsurprisingly then, the shift is perceived in academia still as unsettled. In that sense, it is fair to say that the trajectory of this case is still running[69] – even more so considering the paralysis of the Appellate Body in the last years, which has prevented any further decision on the matter.

The extent to which this interpretation of the Appellate Body is more broadly accepted in other venues, for instance in academic circles, is difficult to establish. Most authors writing about subsidies in textbooks simply refer to the AB decisions without truly questioning them or going deeper into the matter.[70] This makes the issue untraceable beyond the scope of the Appellate Body – or rather, there is not much to trace beyond its jurisprudence. This reflects the concentration of the field of trade law around the WTO and in particular the Appellate Body. This is shown by the conclusion of one of the few articles available dealing exclusively with the shifting approaches to "public body": "There is not yet a clear answer to this 'public body' issue. Whether a certain Chinese SOE is a public body or a private body depends on the AB's further clarification of the governmental authority approach".[71]

In any case, the shift of tests has a clear political dimension. The decision is a clear sign that China is gaining authority in the different WTO bodies. It is also important to consider the general power politics at the WTO and how they are influenced by this. The Appellate Body has to defend itself from challenges by the United States, but has so far mainly stuck to its line on changing the norm. China might have at some point become too strong a player to

[69] Ru Ding, 'Public Body or Not: Chinese State-Owned Enterprise' (2014) 48 Journal of world trade 167.
[70] Mitsuo Matsushita and others, *The World Trade Organization: Law, Practice, and Policy* (3rd ed, Oxford University Press 2015) 315; Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th Edition, Routledge 2013) 370, 371; Marc Bénitah, *The WTO Law of Subsidies: A Comprehensive Approach* (Wolters Kluwer 2019) 11.
[71] Ding (n 69) 189.

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not accommodate some of their views, and as the ‘new’ Appellate Body test allows for more flexibility it was a feasible way of signaling acceptance to countries with non-western market policies. As this is not just China, but also other major countries such as India, it might have been an important consideration to keep these countries engaged with the WTO and therefore allow for more flexibility on the terms of ‘governmental authority’ and ‘public body’.

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Case Study 22

Differentiated treatment and the Generalized System of Preferences in the GATT system

(November 2020 – March 2021)

Pedro Martínez Esponda

Synopsis

Originally conceived as a temporary agreement meant to govern international trade during the transition towards a permanent and institutionalized trade regime, the original GATT excluded any consideration or exception to MFN intended to benefit developing countries. Rather, it left the matter of preferential treatment – sought by some developing countries after WWII – to the impending Havana Charter and the soon-to-be International Trade Organization (ITO). But when in 1950 it became clear that the US Congress would block the creation of the ITO, GATT was left as the only agreement regulating international trade, leaving the issue of development out of its normative scope. Then, from 1958 to 1964, the situation started to change. Key institutions gave voice to the ideas of development economists who argued for special trade arrangements in order to foster development in non-industrialized countries. Moreover, the creation of UNCTAD in 1964 as challenge to GATT led to the mainstreaming of the topic of preferential treatment and to the increase in the leverage of developing countries for demanding change in GATT. This provoked subsequent reactions within the GATT sphere, seeking to accommodate to some extent the demands of developing countries. Most notably, in 1971, developed countries accepted two ad hoc waivers allowing for temporal preferential schemes of tariffs for developing countries – the Generalized System of Preferences – which in 1979 were made permanent through the adoption of the Enabling Clause. This was the high watermark of the developing country movement in international trade. After this, however, the goal of expanding preferential treatment towards compulsory exceptions failed. This was evident in the Uruguay Round that ended up with the establishment of the World Trade Organization and again in the aborted Doha Round, where the topic of preferential treatment as a noncompulsory exception to MFN

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was fully acknowledged, but the move towards an obligatory mechanism became impracticable.

I. Chronology

First phase: Original GATT Regime (1947-1958)

The original text of GATT, as agreed upon in 1947, excluded any specific arrangement acknowledging the disadvantaged position of developing countries vis-à-vis developed countries. It also omitted any special consideration regarding the need to promote their development or the pertinence of schemes of differentiated treatment. Its original formulation thus took full equality among the contracting parties as its cardinal premise, even if the states entering the agreement found themselves in very different stages of economic development and had very different commercial concerns.[1] While some developing countries such as India, Brazil and Chile argued for a small measure of preferential treatment in view of these differences – especially with regard to the MFN rule – their attempts did not come to fruition.[2]

This uncompromised equality in the original GATT was due mainly to two factors. The first was that GATT was initially conceived as a temporary agreement meant to govern international trade in the interim before the creation of a permanent institutional structure – the envisioned International Trade Organization (ITO) – which was expected to address more explicitly the concerns of developing countries. Indeed, during the negotiations of the Havana Charter, developing countries had managed to get developed country negotiators to accept the inclusion of certain provisions allowing for limited protectionist measures and preferential agreements for developing economies, reflected in allowances for protection to infant industries and measures for stabilization of balance-of-payments.[3] Developed countries, and specially the US, agreed to their inclusion in the draft charter as a necessary

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[1] Edwini Kessie, 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in George A Bermann and Petros C Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007) 15, 16.
[2] Andrew Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (Oxford University Press 2011) 26.
[3] ibid.

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compromise to secure universal membership to ITO.[4] In this context, the refusal by developed countries to include similar provisions in the GATT appeared to be only a temporal sacrifice for developing countries, to be remedied once the ITO was finally set up.

The second factor leading to the exclusion of development in GATT was perhaps more evident: developing countries were the minority within a liberal club of richer, industrialized countries, leaded by the US. Out of 23 founding members, only 10 were developing countries: Brazil, Burma, China, Ceylon, Chile, Cuba, India, Pakistan, Syria and Lebanon.[5] This made the bargaining complicated, especially in view of the US' open opposition to transposing the benefits attained by developing countries in the Havana Charter to the text of GATT.[6] Thus, the initial text with which GATT entered into force in January 1948 excluded any provision of special and differentiated treatment. This was reflected in the first tariff negotiations undertaken under the aegis of GATT between 1948 and 1955, where developing countries were treated fully as equals.[7]

However, soon after the entry into force of GATT in January 1948, it became clear that the US Congress would not agree with the terms of the Havana Charter, and that this would mean the stillborn death of the ITO project and the perpetuation of the GATT regime.[8] Behind this reversal was the strong lobbying of the business community in the US, which among other things rejected the provisions granting preferential treatment to developing countries.[9] This failure to set up the ITO evidenced that the main interest pursued by the US as the hegemonic global economic power was the "hard-headed mercantilist desire to open foreign markets to [its] exports", without having to give up its discretion to protect domestic industries.[10] An agreement premised on unqualified equality – as the original GATT – allowed for this.

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[4] Robert E Hudec, *Developing Countries in the GATT Legal System* (Cambridge University Press 2010) 34.
[5]https://www.wto.org/english/theWTO_e/minist_e/min96_e/chrono.htm#:~:text=On%201%20January%201948%2C%20GATT,Kingdom%20and%20the%20United%20States.
[6] Hudec (n 4) 35.
[7] Kessie (n 1) 16.
[8] Lang (n 2) 28.
[9] Massoud Karshenas, 'Power, Ideology and Global Development: On the Origins, Evolution and Achievements of UNCTAD' [2016] Development and Change 664, 670.
[10] Lang (n 2) 25.

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This original set-up was unsuccessfully challenged in the revision conference held by GATT members in Geneva during 1954 and 1955. While some of the developing-country members called for preferential measures and some minor concessions were granted to them – a rather equivocal flexibility regarding the requirements for implementing emergency measures in times of balance-of-payments disequilibrium and a weak relaxation of reciprocity in tariff negotiations[11] – developed countries clearly kept the upper hand in the negotiations. Crucially, the US and the European Communities (EC) gained for themselves a waiver of its GATT obligations concerning agricultural subsidies – a measure still in force to this day – that ran patently counter to the interests of developing countries.[12] This achievement largely outweighed the concessions made to developing countries. Moreover, developed countries perceived there to be little at stake in making mild compromises allowing a certain degree of protectionism to developing countries, given that their main interest at the time was not to access their markets, but those of other developed countries. The same went for the balance-of-payments flexibility measures, where the rules of GATT were already becoming obsolete in face of the emergence of the International Monetary Fund.[13] And more generally, even if these minor compromises did grant a small degree of manoeuvre for developing countries to implement protectionist measures, they left unattended their main demand: preferential access developed country markets.[14]

During this phase, therefore, developed countries managed to impose their terms in the creation of international trade institutions and in the ensuing first rounds of global trade negotiations, making no allowance for significant preferential treatment to developing states. Developing countries, for their part, not acting as a consolidated bloc and still agreeing in principle to the idea of equality, were not ready to take the matter further. This evidences

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[11] Hudec (n 4) 42.
[12] Douglas A Irwin, *Clashing over Commerce : A History of US Trade Policy* (The University of Chicago Press 2017) 516; Karshenas (n 9) 669.
[13] Hudec (n 4) 43, 44.
[14] Kessie (n 1) 17.

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that, on the whole, the narrative of preferential treatment among developing states was secondary to the generalized enthusiasm for free trade in the first years of the GATT era.[15]

Second phase: Challenge by developing countries and compromised expansion of differentiated treatment (1958-1979)

Partly as a result to the growing frustration of developing countries in the aftermath of the GATT review of 1954-1955, the late 1950s and the first years of the 1960s witnessed the emergence of a new narrative in certain circles of economic thought which attempted to challenge the post-war liberal paradigm of free trade. The core idea behind it was that the liberal international economic order not only benefitted developed countries more than it benefitted developing ones, but that the former were growing prosperous at the expense of the latter.[16] In the words of Karshanas, the new narrative posited the "international trading system [of] the era of American dominance […] as a system of post-colonial domination by selective protection and limiting market access".[17] Moreover, the new approach placed the concept of development at the center of its analysis, and attempted to assess the merits of trade only in terms of whether it fostered or hindered the development of nations.[18] Among others, scholars such as Gunnar Myrdal, Michal Kalecki, Simon Kuznets, Hans Singer, Nicholas Kaldor, Arthur Lewis, Raúl Prebisch and Paul Rosenstein-Rodan advocated for these views.[19]

This emerging narrative saw its first and perhaps most ground-breaking expression in the *Haberler Report* of 1958. Commissioned by the GATT contracting parties themselves at the insistence of developing members, the report clearly attributed some of the economic difficulties faced by developing countries to the recurring denial of market access by industrialized countries to some of the most significant exports of developing countries,

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[15] ibid 16.
[16] Lang (n 2) 42, 43.
[17] Karshenas (n 9) 669.
[18] Oswaldo de Rivero B., *New Economic Order and International Development Law* (Pergamon Press ; Centro de estudios éconómicos y sociales del tercer mundo 1980) 9–12.
[19] Karshenas (n 9) 670.

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including agricultural goods.[20] The report resounded loudly among the GATT membership, and led to the creation of a committee – Committee III, later the Committee on Trade and Development – specially focused on issues of trade and development.[21] Through its subsequent reports, the Committee made calls for loosening reciprocity demands in tariff negotiations and brought to the table the topic of access to developed country market by developing countries.[22] Simultaneously, the idea of import substitution as a means for inducing the industrialization of less-developed countries – known as the *Singer-Prebisch* thesis – also gained traction within GATT and strengthened the call for differentiated treatment with regard to the permission of some measure of protectionism also to developing countries.[23]

These ideas were endorsed and adopted by an emerging block of developing countries, strengthened within GATT partly by the fact that the size of the membership had grown significantly since its creation, and that developing countries had an ever-increasing number of votes among the contracting parties.[24] Inspired by these ideas and developments, Uruguay filed in 1961 a landmark legal complaint under Article XXIII challenging the overall imbalance of benefits and obligations in the GATT system. The outcome, on the whole favorable to Uruguay, helped strengthening the case for preferential treatment for developing countries within GATT, even if it did not materialize in substantial changes in trading conditions among the parties.[25] As a result, a solid and now majoritarian group of states within the GATT membership started realizing that changes in the terms of international trade could be achieved through more active and collective diplomatic mobilization.

This diplomatic movement manifested even more strongly outside the institutional scope of GATT with the creation of the United Nations Conference on Trade and Development

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[20] Gottfried Haberler, 'Report by a Panel of Experts: Trends in International Trade' (GATT 1958) <https://www.wto.org/english/res_e/booksp_e/gatt_trends_in_international_trade.pdf>; see also Lang (n 2) 45.
[21] Lang (n 2) 46.
[22] Hudec (n 4) 54, 55.
[23] GATT, 'Report of the Working Party on Commodities: Impact of Commodity Problems on International Trade (Doc. L.1656)' (1961) <https://docs.wto.org/gattdocs/q/GG/L1799/1656.PDF>.
[24] Hudec (n 4) 39.
[25] ibid 57.

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(UNCTAD) by the UN General Assembly in 1964.[26] UNCTAD was the product of an effort led mainly by the USRR and the Communist bloc that sought to establish an alternative forum of universal membership for discussing trade issues, where Western countries would not be able to impose their preferences and liberal narrative.[27] UNCTAD, in this sense, emerged as a critique of GATT, and in particular of the fundamental principle of most favored nation (MFN) enshrined in its article I, giving an institutional voice to the emerging trend of thought linking development and economics.[28] As reflected by a report of an ECOSOC meeting in preparation for the first UNCTAD conference, UNCTAD was founded on the idea that MFN, by treating unequal nations equally, reflected "a marked lack of understanding of the interest of underdeveloped and developing countries".[29] The first report by its Secretary General – Raúl Prebisch – further illustrates this original critique to GATT: starting from the universally agreed premise that global trade required to be governed by the rule of law, it denounced the unequal benefits of a system premised on non-discrimination and made a call for a "law that recognizes diversity of levels of economic development and differences in economic and social systems".[30]

In this context, UNCTAD's first conference adopted, in 1964, a set of principles "conducive to development" and meant to govern "international trade relations and trade policies". Among them, Principle Eight established the idea of preferential treatment by stating that "developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions from developing countries".[31] While this principle sharply divided the vote and led developed countries to vote against or abstain in block, four years later, at the time of UNCTAD II in 1968, there was a unanimous vote in

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[26] United Nations Conference on Trade and Development (ed), *The History of UNCTAD, 1964-1984* (United Nations 1985) 54–55.
[27] Hudec (n 4) 51.
[28] Gilbert Rist, *The History of Development : From Western Origins to Global Faith* (New ed, revised and expanded, Zed Books 2002) 72, 73.
[29] Cited in: Abdulqawi Ahmed Yusuf, *Legal Aspects of Trade Preferences for Developing States : A Study in the Influence of Development Needs on the Evolution of International Law* (M Nijhoff 1982) 14.
[30] UNCTAD I, 'The Developing Countries in GATT' (1964) Proceedings Vol. V 468.
[31] United Nations Conference on Trade and Development (n 26) 107.

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favor of preferential treatment expressed in Resolution 21 (ii), which laid the foundations of the idea behind the Generalized System of Preferences.[32] A number of factors explain this change in attitude of developed countries during these years. Firstly, there was growing perception that some trade benefits could be gained by developed countries by allowing preferential schemes to operate with developing countries.[33] Secondly, in the case of the US, there was an expectation that by generalizing preferential treatment, many Mediterranean and African countries would lose interest in the special agreements they had with the EC – which placed European countries, former colonial powers, in a better position to engage in trade with them – and would in consequence lead them to turn towards the US for trading purposes.[34] Thirdly, developed countries perceived there to be a risk of losing developing countries to the influence of the USSR and the Communist bloc by taking a rigid attitude on the matter, and thus meeting their demands in UNCTAD was seen as a necessary geopolitical concession.[35] And finally – perhaps above all of the previous points – policy makers in developed countries knew that the general principles suggested by UNCTAD would in practice not imply any mandatory rule requiring them to open their markets to developing countries, and that preferential treatment at an operational level would ultimately be left to their discretion.[36] This indulging attitude was also reflected in the adoption without a vote at the UN General Assembly of the Declaration on the Establishment of a New International Economic Order (NIEO) in 1974, which addressed most of the trade concerns of developing countries, not least the call for "preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation, whenever possible".[37]

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[32] Gene Grossman and Alan Skyes, 'A Preference for Trade: The Law and Economics of GSP (Chapter 10)' in George A Bermann and Petros C Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007) 255.
[33] Yusuf (n 29) 81.
[34] Hudec (n 4) 69.
[35] ibid 51.
[36] ibid 70.
[37] UNGA, 'Declaration on the Establishment of a New International Economic Order (A/RES/3201(S-VI))' para 4(n).

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All of these developments led to a series of steps within GATT that would eventually lead to the establishment of the Generalized System of Preferences. In reaction to UNCTAD I in 1964, as well as to the *Haberler Report* and its sequel reports by the Committee III, the GATT contracting parties agreed on annexing a whole new part to the agreement: Part IV. This addition, which nominally acknowledged the importance of development as an objective of trade, had mostly a symbolic value. It contained merely "best endeavor clauses" opening the door to preferential treatment, but not legally altering the rigid MFN regime.[38] Yet, it was the first concrete demonstration that the GATT diplomatic machinery was in fact receptive to the demand of developing countries.

Seven years later, in 1971 – after the shift in position by developed countries in UNCTAD described in the previous paragraph – the contracting parties of GATT adopted a decision that was consequential with the commitments adopted in UNCTAD II in 1968: they agreed on implementing a 10 year-long waiver under the procedure of article XXV(5) allowing – but not obliging – developed countries to disregard the MFN obligation so as to allow for preferential schemes for developing-country exports.[39] Then, as the expiry of these waivers approached, the contracting parties adopted on 28 November 1979 the decision on *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, better known as the Enabling Clause.[40] This decision made the previous waivers permanent by allowing developed GATT members to legitimately accord tariff preferences to developing countries through national Generalized System of Preferences (GSP) schemes.[41] The Enabling Clause[42] thus responded to one of the main claims of the developing-country movement: a permanent regime of preferential access to

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[38] Mitsuo Matsushita (ed), *The World Trade Organization: Law, Practice, and Policy* (3rd ed, Oxford University Press 2015) 698, 699.
[39] Yusuf (n 29) 88.
[40] Md Islam and Shawkat Alam, 'Preferential Trade Agreements and the Scope of Gatt Article XXIV, Gats Article V and the Enabling Clause: An Appraisal of Gatt/WTO Jurisprudence' [2009] International Law, Conflict of Laws 1, 21.
[41] Matsushita (n 38) 699.
[42] Legally, the legal nature of this decision was that of being part of the GATT acquis: a rule adopted by the states parties in plenary, but lacking the character of a formal treaty rule – given the absence of broader endorsement through ratification procedures.

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developed-country markets.[43] However, it stayed short of securing a binding system of preferences not subject to the discretion of developing countries.

In sum, the adoption of the Enabling Clause instituted the Generalized System of Preferences as a permanent facultative exception to MFN within GATT. In principle it represented a milestone for developing countries in their quest for placing development as one of the core elements of discussions on global trade.[44] Yet, it was clear that developed countries were careful not to adopt hard rules which would oblige them to give preferential treatment to developing country exports. Therefore, while the governments of developing countries congratulated themselves with the nominal achievement, those of developed countries saw themselves as having entered merely voluntary commitments.[45] This was reflected by the fact that during the Tokyo Round – from 1973 to 1979 – tariff negotiations involved nearly exclusively developed countries, and few developing countries made any tangible achievements.[46] Thus the US, for instance, concentrated its efforts on getting the EC and Japan to reduce its tariffs vis-à-vis American exports, sidelining the establishment of the Generalized System of Preferences with developing countries.[47]

<u>Third phase: Consolidation and stagnation (1980-present)</u>

The high-water mark of the developing country diplomatic movement for special and differentiated treatment was without any doubt the adoption of the Enabling Clause and the Generalized System of Preferences in 1979. After it, its cohesion and the strength of its advocacy started to diminish significantly. This led to the stagnation of the original pretentions of the developing country group and, in hand to that, to the decline of UNCTAD as an institution. While the premise of differential treatment framed as a noncompulsory exception to MFN – the Enabling Clause – became largely uncontested in the following

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[43] Kessie (n 1) 18.
[44] Nicolas Lamp, 'The "Development" Discourse in Multilateral Trade Lawmaking' (2017) 16 World Trade Review 475, 476.
[45] George A Bermann and Petros C Mavroidis, 'Introduction' in George A Bermann and Petros C Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007).
[46] Lang (n 2) 46, 47.
[47] Irwin (n 12) 555.

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decades, the greater goal of achieving binding obligations to give developing-country exports preferential treatment stagnated and eventually died out.

The immediate test for the achievements of the Generalized System of Preferences was the Uruguay Round, which kicked-off in 1986 and ended with the creation of the World Trade Organizations (WTO) in 1994. Although the Ministerial Declaration launching the round formally reiterated the Generalized System of Preferences and placed the expansion of special and differential treatment as one of the items in the agenda, on the whole such expansion never took place. True, in the host of new agreements that resulted from the Uruguay Round, special and differential treatment was present, much in the same logic as the Enabling Clause of 1979.[48] Prove of it was its formal incorporation to GATT through article 1 (b)(iv) of the Introductory Note to GATT 1994 – a conventional norm proper – as well as the replication of preferential treatment in many of the other WTO agreements.[49] Yet, on the whole, this incorporation to other agreements left the discretion of developed countries untouched, and in most cases provided differential treatment only on a temporal basis. Furthermore, the requirement for states joining the newly created WTO to accept all of the new agreements as a single undertaking reduced the capacity of developing countries to negotiate for differentiated treatment.[50] This left, according to Maureen Irish, little "policy space […] to address development needs on a continuing basis for so long as the need lasted".[51] Therefore, the final balance of the Uruguay Round for developing countries was rather disappointing.

Equally telling, throughout the 1980s UNCTAD's role in international trade politics greatly diminished. The weakening of the Communist Block and the global turn to neoliberalism lowered the relevance of UNCTAD as a forum and made of GATT – later the WTO – the

[48] Matsushita (n 38) 710.
[49] WTO, 'Special and Differential Treatment Provisions in WTO Agreements and Decisions (WT/COMTD/W/239)'.
[50] Maureen Irish, 'Special and Differential Treatment, Trade and Sustainable Development' [2011] The Law and Development Review 72, 73.
[51] ibid 72, 73.

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gravitational center of international trade.[52] The very need for its existence came to be questioned by the US at some point, and only thanks to the support of the G77 group it still managed to avoid closing down. Yet, by its VIII Conference in 1992, it was clear that an "accommodation of UNCTAD to the policy priorities of the North" had taken place, veiled as a "convergence of policy perspectives".[53] UNCTAD officially turned towards seeing economic growth as the central objective of trade policy, and recognized private enterprise and the free market as its main drivers.[54] As a consequence, the final communiqué of UNCTAD VIII established that the role of the institution would be, from then on, limited to provision of technical assistance, policy research and information provision.[55] This was an unambiguous sign of capitulation in face of the increasing influence of GATT.

The reasons behind these shifts lie, first, as mentioned above, in the major geopolitical readjustment that the end of the Cold-War meant for international trade. The fact that the Communist bloc virtually dissolved towards the end of the 1980s explains in good part the acute shrinking of UNCTAD's influence. The original illiberal UNCTAD agenda – which had been "either ignored […] or treated […] with the annoyance one might direct towards a fly" by Western developed countries up to the 1980s – had little prospect of surviving the apparent triumph of capitalism over communism.[56] On top of that, the neoliberal wave of the 1980s was also in part the effect of the development of new technologies, forms of production, and multinational capital ordering, all of which drew attention over concerns that required forms of governance exceeding the capabilities of UNCTAD, such as protection of investments, trade in services and the protection of intellectual property.[57] Thus the economic realities of the day shifted global trade priorities away from UNCTAD.

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[52] Karshenas (n 9) 679.
[53] John Toye, 'UNCTAD at 50: A Short History' (2014) UNCTAD/OSG/2014/1 81, 82 <https://unctad.org/en/PublicationsLibrary/osg2014d1_en.pdf>.
[54] ibid 82.
[55] Karshenas (n 9) 679.
[56] Robert Wade, 'The Fight over the Global Development Agenda: How the West Tries to Marginalise UNCTAD' [2012] Review of European Economic Policy 304, 5.
[57] Karshenas (n 9) 676.

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But besides these tectonic shifts in global economy and politics, the stagnation of the development agenda in trade fora during the 1980s and beginning of the 1990s was to a large extent also the result of the erosion during the Uruguay Round of the formerly unified bloc of developing countries. This was in part due to the growing diversity among these countries, which now found themselves divided along the categories of "large/small, middle-income/least-developed, industrialised/commodity exports, agricultural importers/exporters", and so on and so forth.[58] The outcome was that developed countries suddenly realized that they had very contrasting interests, and that pursuing negotiations with developed countries made more sense on a bilateral rather than collective basis. To be sure, this did not mean that the banner of special and differentiated treatment was completely dropped by developing countries, but it certainly had the implication of making it less likely for them to privilege symbolic bloc milestones – as the Enabling Clause had been back in 1979 – over tangible individual or regional trade benefits with world trade powers.[59]

In connection to this, another liberal global trend that rendered pointless the advocacy for deeper special and differential treatment within GATT was the popularization of bilateral or trilateral preferential trade agreements (PTAs) during the 1990s. Valid derogations of MFN by virtue of article XXIV of GATT, PTAs became one of the main forms of trade engagement between developed and developing countries in these years and in the decades to come. This reflected the weaknesses of the Generalized System of Preferences. While indeed these schemes made the terms of trade non-reciprocal, the fact that they were wholly discretional for developed countries made it a recurring reality that whenever a certain trade preference started to harm in any serious way an industry within a developed country, this industry would effortlessly lobby for the removal of the measure – in detriment of developing countries.[60] In this sense, the Generalized System of Preferences facilitated protectionist

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[58] John Whalley, 'Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries' (1990) 100 The Economic Journal 1318, 1318.
[59] ibid 1327.
[60] Mark S Manger and Kenneth C Shadlen, 'Trade and Development (Chapter 25)' in Lisa L Martin (ed), *The Oxford Handbook of the Political Economy of International Trade* (1st edn, Oxford University Press 2015) 484 <http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199981755.001.0001/oxfordhb-9780199981755> accessed 1 October 2020.

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attitudes by developed countries.[61] In contrast, by engaging in PTAs, developing countries were at least able to secure privileged access to the markets of developed countries on a stable basis, even if the agreements required a much more demanding liberalization.[62] This made it a seemingly rational decision for developing countries to pursue PTAs with developed countries instead of relying on the now outdated Generalized System of Preferences of the 1970s. Moreover, behind the façade of developing state policy, it was often the strong lobbying of exporters within these countries that drove their governments to enter into PTAs.[63] Therefore, the interests of private business groups also played a role in the ascendence of PTAs. Similarly, the political mobilization of multinational companies seeking to facilitate and protect investments in developing countries through PTAs and investment treaties, also played a role in downgrading the level of preference accorded by developing countries to the quest for special and differentiated treatment in trade negotiations.[64]

The last chapter in story of stagnation of special and differentiated treatment and the Generalized System of Preferences was the Doha Round, which was launched in 2001 and got stalled in recurrent failures up to its last meeting in Nairobi in 2015. At the beginning of the round, developing countries gathered behind the banner of development and called for revisiting issues of implementation and special and differential treatment, especially with regard to the elimination of agricultural trade barriers.[65] From the outset, however, the negotiations reached a dead-end. Unlike the old GATT trade rounds where developing countries played a marginal role, the emergence of countries like Brazil and India as

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[61] W Max Corden, 'The Revival of Protectionism in Developed Countries' in Dominick Salvatore (ed), *Protectionism and World Welfare* (1st edn, Cambridge University Press 1993).
[62] Manger and Shadlen (n 60) 484, 485.
[63] ibid 485; see also: Andrew Schrank, 'Export Processing Zones in the Dominican Republic: Schools or Stopgaps?' (2008) 36 World Development 1381.
[64] Michael Plouffe, 'Heterogeneous Firms and Policy Preferences (Chapter 11)' in Lisa L Martin (ed), *The Oxford Handbook of the Political Economy of International Trade* (1st edn, Oxford University Press 2015) 197 <http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199981755.001.0001/oxfordhb-9780199981755> accessed 1 October 2020; see also: John Dunning, 'Theories and Paradigms of International Business Activity' in John Dunning (ed), *The Selected Essays of John H. Dunning, Volume I* (Edward Elgar 2002) <https://www.e-elgar.com/shop/gbp/theories-and-paradigms-of-international-business-activity-9781840647006.html> accessed 6 October 2020.
[65] Stuart Harbinson, 'The Doha Round: "Death-Defying Agenda" or "Don't Do It Again"?' No. 10/2009 ECIPE Working Paper 3 <https://ecipe.org/publications/the-doha-round-a-death-defying-act/>.

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economic powers, as well as the accession of China to the WTO in 2001, fundamentally changed the stakes in the Doha negotiations. For one, these emerging powers were not out to content themselves with cosmetic concessions by developed countries as in the past: they aimed at the historical stronghold of agricultural protectionism of developed countries and expected concessions in that front. Developed countries, for their part, were not willing to play the game of preferential treatment anymore – at least not with the emerging heavy weights of the developing world. They demanded increased access to their ever-growing markets and the reduction of industrial tariffs.[66] This, in addition to the "new" topics of labor and environmental standards that were tabled by developed countries and participating NGOs, led the round to the failure of the Doha Round.[67]

In this scenario, it was basically impossible to advance the agenda of special and differentiated treatment beyond the achievements of the 1970s. Largely outside the program of developing countries and left to the realm of low politics, the Generalized System of Preferences saw only a few signs of vitality in this last stage. One of these was the adoption by the contracting parties of WTO of a "special Enabling Clause" meant to operate between developing countries and a subcategory of these: less developed countries. This happened in 1999.[68] Then, the second endorsement of the Generalized System of Preferences worth mentioning was the landmark case of *EC – Tariff Preferences* in 2004 before the Appellate Body, where it ruled that the Enabling Clause was an integral part of the GATT 1994 and that it constituted a valid exception to the MFN obligation.[69] These two developments confirmed the embeddedness of the Generalized System of Preferences as originally conceived: noncompulsory exceptions from MFN. Beyond this, however, not much could be done to advance special and differentiated treatment.

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[66] Sungjoon Cho, 'The Demise of Development in the Doha Round Negotiations' (2010) 10 *Texas International Law Journal* 575.
[67] Matthew Stephen, 'Contestation Overshoot: Rising Powers, NGOs, and the Failure of the WTO Doha Round' in Matthew Stephen and Michael Zürn (eds), *Contested World Orders* (Oxford : Oxford University Press 2019) 53–56.
[68] Matsushita (n 38) 707.
[69] Islam and Alam (n 40) 22.

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II. Trajectory of the case (SCR framework)

This case is best described as one of norm emergence. The rule of MFN as stated in Article I of GATT 1947 contemplated no exception based on development criteria. Yet, through the diplomatic efforts of developing countries both within and without GATT, starting in the mid-1950s, an exception allowing developed countries to treat the exports of developing countries in a preferential way came to be fully recognized by 1979, with the adoption of the Enabling Clause and the ensuing Generalized System of Preferences. As such, while in point A (1947) no rule providing for such exception existed, by point B (1979) that exception was unambiguously established by the contracting parties, and by point C (1994) the exception was vested with conventional value through article 1 (b)(iv) of the Introductory Note to GATT 1994. However, it must be said that this seemingly successful outcome was in truth only partial, considering that it materialized only half of the original expectations of its advocates. The unaccomplished second half – stalled in the Uruguay and Doha rounds – was the transit from differentiated treatment as a noncompulsory exception – the Enabling Clause – to a compulsory Generalized System of Preferences, where developed states would be legally obliged to give preferential tariff treatment to developing country exports. This component of the norm change attempt was never attained, and rather tended to die out after 1979.

1. *Selection stage*

Actors and agency

The main agency behind the push for the Generalized System of Preferences came from developing countries acting collectively. The diplomatic cluster of developing countries behind this effort, however, varied in cohesion and number throughout time. Up until the end of the 1950s, developing states bargained for special treatment mostly without forming a bloc, and with differing levels of intensity. During the negotiations of the ITO Charter, India, Brazil, Chile and Lebanon were particularly active in advocating for differentiated measures

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that would enable the development of their industries.[70] Then, during the first years of GATT – the years when developing countries generally acted more passively, and when they constituted a minority within the membership – only sporadically and on an individual basis did developing states contest the system of MFN in the GATT. Ceylon and later Uruguay were examples of this.[71] Is was not until the beginning of the 1960s, with the gradual increase of developing members in GATT, and with the growing threat of the USSR creating a competing institution, UNCTAD, that developing countries gain leverage and started to act as a consolidated bloc. This happened mainly through the Group of the 77 (G77), a diplomatic cluster comprising most of the newly independent African and Asian states, plus some Latin American and Eastern bloc countries, which embraced the ideas put forward by Haberler, Prebisch and other economists, and began advocating more strongly for special and differentiated treatment in the GATT system.[72] While not all of the members of the G77 formed part of GATT, their control of UNCTAD, their closeness to the USRR, and the threat of collective defection from GATT constituted their main negotiating cards.[73] Hence, the cohesion of this group and its persistent agency largely explain the changes accepted by the GATT contracting parties from 1964 to 1979. Then, as seen before, when the political and economic tides began to change again in the 1980s, the cohesion of the G77 within GATT began to erode, and with it its negotiating capital.

Institutional availability

The institutional availability in this case is, overall, high. Having the change attempt been directed towards a specific rule of the GATT system – namely MFN – it seems obvious that the main institutional framework through which it transited was precisely the venues provided by GATT: the trade rounds and the meetings of the contracting parties. In this sense, the multilateral institutional framework in which the change attempt was launched was a pre-

[70] Lang (n 2) 26.
[71] Hudec (n 4) 43.
[72] ibid 52; see also: Karl P Sauvant, *The Group of 77 : Evolution, Structure, Organization* (Oceana Publ 1981).
[73] Keisuke Iida, 'Third World Solidarity: The Group of 77 in the UN General Assembly' (1988) 42 International Organization 375.

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existing condition of the normative system in question. However, as reflected by the chronology of the case, the GATT fora were during the first 15 years of the system somewhat unresponsive to the attempts by developing countries. In this context, the diplomatic cluster that pushed for change had to make use and strengthen a parallel institutional framework to gain leverage within GATT: UNCTAD. As such, it appears that this change attempt rode on these two parallel institutions at its convenience. In addition, another multilateral institution that showed a certain degree of receptiveness to the norm change attempt was the UN General Assembly, which through its resolutions on the NIEO supported the diplomatic campaign of developing countries. Driving all of these institutional openings was the same principle: diplomatic mobilization and voting majorities, all made possible by the process of decolonization and the enlargement numerical advantage this gave developing countries.

2. Construction stage

Opening and Factors

Although there was no one single crucial event providing an opening for the change in question, two main factors explain its accretion in the second phase of its chronology – from 1958 to 1979. The first, mentioned above, was the process of decolonization. Decolonization meant the numerical enlargement of the community of developing states, which greatly shifted the voting balances in GATT and in the UN – enabling for instance the creation of UNCTAD by the General Assembly. However, as numbers were clearly not the only relevant element for achieving political goals, developing countries found themselves in the need of joining efforts and presenting a common front, which they did mainly through the G77. This allowed for the increasing numerical preponderance of developing states to translate into real leverage in multilateral settings. But together in addition to this, the process of decolonization inherited a potent rhetorical tool to the newly independent states: the narrative of emancipation, which certainly did not efface after independence. Developing countries made the recurring argument in multilateral fora that through the prevailing global economic system, the former inequalities of colonialism were being perpetuated despite its formal

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abolishment, and that a change was needed.[74] This rhetoric, which gave way in multilateralism to the NIEO during the 1970s, also played a role in legitimizing the demand for differentiated treatment in international trade.

The second important factor that enabled the campaign for differentiated treatment within GATT was the Cold War. A byproduct of the process of decolonization was the struggle between the US and the USSR to bring the newly independent countries under their sphere of influence. As explained by Hudec, "Cold War competition for the loyalty of these emerging countries intensified when the Soviet Union began to press for the creation of a global trade organization, within the United Nations, that would provide an alternative to the Western-dominated GATT".[75] Thus developed countries in the GATT family realized that they had a big geopolitical incentive to make the GATT system attractive for developing countries, and that required accommodating to a certain extent their demands for change. These concessions by developed countries in GATT thus took place precisely in the aftermath of the high points of activity in UNCTAD: the adoption of Part IV of GATT was a clear response to UNCTAD I in 1964, where the *Principles Governing International Trade* has been adopted; and the enacting of MFN waivers in 1971 happened after UNCTAD II had called for the establishment of the Generalized System of Preferences in 1968.

Pathways

The chronology of this case evidences the extent to which the norm change in question transited primarily and almost exclusively through the multilateral path. This need not be elaborated much further. The reasons for it lie, first and foremost, in the fact that the setting in which the challenged norm operated was itself multilateral. MFN was and still is a rule operating in a strictly multilateral regime: GATT. Therefore, changing it required primarily multilateral engagement. This was especially true in an international trade regime that, at the time, had a very low degree of judicialization – something that would radically change with

[74] Paul P Streeten, 'The New International Economic Order' (1982) 28 International Review of Education 407, 411.
[75] Hudec (n 4) 51.

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the creation to the WTO in 1994.[76] As the episode of the Uruguayan legal complaints under Article XXIII in 1961 shows, the adjudicatory channels that the GATT regime offered at the time were uncapable of providing a transitable avenue for the type of normative change sought by developing countries.

The two parallel pathways with which the multilateral pathway interacted in the present case were the bureaucratic and the private authority pathways. In fact, the two found themselves deeply entangled. As seen in the second phase of the chronology, the ideas of leading economic thinkers found their way to multilateral/diplomatic constituencies through the bureaucratic channels of both GATT and UNCTAD. The Haberler Report of 1958 and the following works of GATT Committee III and the Committee on Trade and Development are an example of this, where prominent economists where working behind the scenes. So are the initial reports of UNCTAD, highly influenced – where not openly authored – by people like Raúl Prebisch. This provided a strong academic authority to the diplomatic efforts of developing countries. While probably not of critical importance, this certainly strengthened the change attempt.

The absence of unilateral agency through the state action pathway is also telling. The fact that no big power backed the efforts for differential treatment within GATT, made the state action path useless, and the multilateral pathway a necessity for developing countries. As seen before, in order to make themselves heard, developing states had to act in bloc, leading to coalitions such as the G77 that would in other circumstances have been unlikely.

Stability

The stability of the rule challenged in this case was on the whole high. As seen in the first phase of the chronology, a hard and unqualified MFN rule got locked in in the GATT regime when the ITO project crumbled. While unintended – negotiators had agreed to this mainly because of the belief that GATT would be temporal and that the Havana Charter would

[76] Ingo Venzke, *Adjudication in the GATT/WTO: Making General Exceptions in Trade Law* (Oxford University Press 2012) 148, 149.

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provide for special and differentiated treatment – this had the effect of setting the threshold for change on the higher end of the scale. MFN without exceptions for preferential treatment became the chief rule of a multilateral conventional regime, the formal amendment of which was virtually impossible to attain for developing states – and did not happen until nearly 50 years later, when the Generalized System of Preference had already consolidated. Thus, the starting position of the entrepreneurs in this case was very unfavorable.

Salience

The salience of the Generalized System of Preferences within GATT can be considered to have been medium to high, although this assessment is subject to number of caveats. First of all, seemingly high salience is evidenced by the fact that developing states had to mobilize a maximum of diplomatic capital to achieve it. Proof of this was the need to build a major diplomatic common front – the G77 – in order to be heard. In addition, preferential treatment was seen as a crucial factor in the development of their economies. Trade represented for developing states a very high portion of their national GDP, making access to foreign markets crucial. In addition, breaking the principle of reciprocity in tariffs was all the more important given that revenue of taxes to imports – i.e. tariffs – was and still is a fundamental source for income for governments.[77] Therefore, there was an acute need by developing countries to obtain low tariffs for exports while at the same time being able to maintain high tariffs for imports. To this, the additional symbolic value of third world development as a banner of emancipation has to be added. All of this signals a high salience on the side of the norm entrepreneurs.

On the side of developed states, however, this assessment is more nuanced. First of all, as reflected by accounts of the history of trade in developed countries, the real commercial interests of these countries during the 1960s and 1970s involved other developed countries, and to a much lesser extent developing countries. Douglas Irwin's *Clashing over commerce: a history of US trade policy* reflects this in that he spends long sections explaining the stakes

[77] Manger and Shadlen (n 60) 476.

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involved in the bargaining of the US with the EC and Japan during the Kennedy and Tokyo rounds over market access, subsidies, and tariffs, and only dedicates a minor paragraph to explain the negotiation over the Generalized System of Preferences with developing countries.[78] In this sense, it seems granted to suppose that for developed countries, at the time, the matter did not entail very high stakes. That said, it is also known how powerful the labor, industrial, and agricultural lobbies in developed countries were, and how strongly they reacted to trade agreements that had a real potential of endangering their business.[79] This certainly made developed-country governments warry of conceding too much in negotiations, which could explain why the struggle for preferential treatment of developing countries never actually got further than the Generalized System of Preferences functioning as a noncompulsory exception to MFN. On the whole, this would signal that the salience of the matter was, also for developed states, perhaps medium.

Pace and mode of change

This case is one of punctuated (yet steadily incremental) equilibria, at least from 1947 to 1994. From a point zero (original GATT in 1947), the MFN rule was slightly contested in the 1954/1955 GATT revision and then by the Haberler Report in 1958. Then, it faced major contestation in 1964 by UNCTAD, which advocated for preferential treatment, and this in turn led to the temporal exception of the 1971 GATT waivers, then the adoption of the Enabling Clause in 1979, and lastly the formal endorsement of the Generalized System of Preferences in GATT 1994.

3. ***Reception stage***

Outcome

The outcome of this case was partially successful. In principle, the Generalized System of Preferences was by 1979 fully accepted within the GATT system as well as within UNCTAD. Other institutions such as the International Law Commission came to recognize it too as a

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[78] Irwin (n 12) 522–555.
[79] ibid 513.

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rule of general international law.[80] So did institutions of private character, such as the International Law Association and the Institut de droit international.[81] As already discussed, however, this seemingly universal recognition was limited to the Generalized System of Preferences understood as a permission for developed countries to grant preferential treatment to imports of developing countries without it implying a breach to MFN. On the broader scheme of things, therefore, this success was only partial, given that its advocates never managed to get beyond its noncompulsory character, something which they had set out to accomplish originally but became virtually impossible during the Uruguay and Doha rounds. Precisely because of these limitations, the Generalized System of Preferences has been strongly criticized in recent times by authors identified with the cause of development.[82]

As explained in the third phase of the chronology, a big part of the stagnation and eventual demise of the quest for binding and compulsory special and differentiated treatment is explained by the change in the configuration of the group of developing countries. The increasing gap between rising powers – fundamentally the BRICS; Brazil, Russia, India, China, and South Africa – and the so called "less developed states", broke the cohesion in the developing country movement, and made it even more clear to developed countries that, at least with the BRICS, graceful preferential treatment as originally sought in the 1970s was simply off the table. Furthermore, specially in the case of less developed states, collective bargaining was derailed by the shift in trade towards PTAs and bilateral negotiation, which by definition excluded schemes like those of the Generalized System of Preference. In this, the hand of national and transnational private interest also made itself be felt, as their

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[80] ILC, 'Draft Articles on Most-Favoured-Nation Clauses' (1978) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_3_1978.pdf>. See article 23.

[81] International Law Association, 'Third Report of the International Committee on Legal Aspects of a New International Economic Order' (1965) Report of the Sixty-first Conference 107–156; Institut de droit international, 'The Most Favoured Nation Clause in Multilateral Conventions' (1969) Session of Edinburgh <https://www.idi-iil.org/app/uploads/2017/06/1969_edi_02_en.pdf>.

[82] See, for example: Yong-Shik Lee, *Law and Development Perspective on International Trade Law* (Cambridge University Press 2011); Bs Chimni, 'Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations', *Developing Countries in the WTO Legal System* (Oxford University Press 2009).

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lobbying power made it all the more easier to get governments to abandon the old rhetoric of the NIEO and opt for free trade agreements.

III. Particular features of the case

Borderline formality – ad hoc legal nature

Because of the institutional setting in which this change attempt took place – mainly GATT – the normative nature of the whole discussion in terms of international legal theory was not always clear. To begin with, the norm targeted by the attempt was clearly a conventional one: MFN in article I of GATT. The means through which it was contested, however, were not aimed at conventional amendment, which would have been impossible to achieve during the 1960s or 1970s – and which was in fact not possible until the major overhauling of the whole system in 1994. Rather, developing countries sought to get the GATT contracting parties to agree during their periodical meetings on decisions materially but not formally amending MFN – as was the Enabling Clause in 1979. This procedure – the only one at hand, given the irrelevance of the judicial means provided by the system – was based on article XXV of the GATT, under which the contracting parties can take "joint action" with the purpose of "facilitating the operation and furthering the objectives" of GATT. Yet, the legal nature of this "joint action" fits uneasily within the sources of international law traditionally understood. While under article 31(3)(a) of the Vienna Convention on the Law of Treaties these decisions would fall into the category of "subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions", in practice "joint action" in GATT went beyond mere interpretative action, functioning rather as shortcut to amendment treaty provisions without having to undergo the formalities of proper conventional amendment, which would have required renegotiation and re-ratification by all members. In this sense, a good part of the norm change in this case was made possible by this *ad hoc* multilateral mechanism running along the borders of formal law-making but not crossing them.

Multilateral pathway excluding State Action and Judicial pathways

Another particular feature of this case concerns the notorious predominance of the multilateral pathway, in exclusion of the state action and judicial pathways. With regard to

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unilateral state action, it could not be employed because none of the states pushing for differential treatment and the Generalized System of Preferences had the power to pull it off on individually. Thus, it was fundamental for developing states, first, to cluster into a well-defined diplomatic front; and second, to make use of institutional channels. With regard to the absence of meaningful transit through the judicial pathway, it is noteworthy that, even if the primitive dispute settlement mechanism of GATT was successfully employed by Uruguay, this was not regarded as having done the job. As explained by Ingo Venzke, the pre-WTO international trade system privileged diplomatic action over other means of decision-making,[83] so the change envisioned by developed countries had no option but to go through the meetings of contracting parties, where the bargaining could translate into a political decision proper.

The weak against the strong

This case is to a remarkable extent an example of norm change done at against the will of great powers, the US and its allies first and foremost. While these powers were not the only ones in the picture of global politics, they did enjoy a quasi-hegemonical position given their economic preponderance during the 1960s and 1970s, which made it the attempt a complicated endeavor to say the least. To be sure, the other notable power of the time, the USSR, had an interest in the success of the attempt by the developing countries in so far as it promised to diminish the geopolitical influence of the West. In that sense, the USSR joined forces with the G77 in creating UNCTAD, and all of this triggered a reaction within GATT. However, the USSR was not a member of the G77 and did not directly share its interests. As such, the success of developing countries in achieving the Generalized System of Preference owes more to their own capacity of coordination and group strategizing, than to the compatibility of its interests with those of the USSR. That said, it is unlikely that the G77 would have achieved what they did had the USSR actively opposed them.

All of this apart, it also needs to be admitted that in this fight of the weak against the strong, the success achieved by the weak, as already discussed, did not seriously jeopardize key

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[83] Venzke (n 76).

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interest of the strong. All they achieved was a noncompulsory exception to MFN, subject to the discretion of the developed state granting preferential tariffs. In this sense, the change attempt only achieved partial success.

Change as a result of bargaining (and not so much persuading)

More than in other cases – or perhaps only more openly than in other cases – the change attempt here consisted of a political exercise of bargaining between two camps. Although the claim for differentiated treatment in GATT had an important rhetoric dimension – consisting in the antihegemonic, post-colonialist, call for development as a form of emancipation – the struggle in this case consisted less in an effort to *persuade*, and more in an effort to bicker and to bend the opposing camp. The success of the Enabling Clause in 1979, for instance, was perceived more as a concession by developed countries than as developing countries having proven their argument right. This is the result of the nature of challenged norm itself: rather than seeking to impose a different interpretation of the MFN rule, developing countries were attempting to institute a new exception to it. The struggle was not over the meaning of MFN, but on its formal limits. In this sense, the fact that this was a case of norm emergence and not one of norm adjustment becomes clear. In addition to that, GATT was perceived – specially before the 1980s – more as a framework for trade negotiation than a stage for political discourse. It therefore seems only natural that states would conduct themselves in the logic of bargaining rather than of persuasion, as they would have done in another setting.

Institutional "battle": UNCTAD as a tool to "open up" GATT

Another interesting feature of this case is the institutional dynamic through which it manifested. In particular, the instrumental creation and use of UNCTAD as a tool to "threaten" the GATT system and to get developed countries to yield is remarkable. This could be attributed to the level of multilateral coordination that developing states had to engage in in order to launch their change attempt and make their claims heard. On their own, this would not have been possible. In contrast, the most powerful state in GATT – namely the US – would not have needed to do any of this to get its way in the design of rules. It would have sufficed for them to threaten to leave the system, in order to bring the other countries to the table of negotiation. Interestingly, this was the case during the 1960s and 1970s, but in the more fragmented power structure of the contemporary international trade system, it is less

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easy for great powers to unilaterally determine its fate, and more difficult for less developed states to navigate it without aligning to the interests of the big players.

Pyrrhic victory

This case is a good example of situations in which a lot of political and diplomatic capital is spent by the norm entrepreneurs, yet the outcome, even if favorable, is normatively very weak. This happened with the Enabling Clause and the Generalized System of Preferences, which were acclaimed as milestones of third-world diplomacy in 1979, but meant little in practice and evaporated as soon as the political and economic context changed.

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Part VIII.

INTERNATIONAL INVESTMENT LAW

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Case Study 23

Legal change of the definition of 'investment' within the ICSID framework

(November 2020 – March 2021, Rev. November 2021)

Dorothea Endres

I. Chronology

1. 1944 – 1990ies: Un-reflected use of the term 'investment'

While there is a long history of diplomatic protection of foreign property, it was only the end of the Second World War that provided the impetus for multilateral international economic regulation. Within this development, four international organizations became particularly important: The International Monetary Fund (IMF), World Bank, The Organisation for European Economic Cooperation (OEEC) and United Nations Conference on Trade and Development (UNCTAD).

IMF and the World Bank were both created at the Bretton Woods conference July 1944. The goal of the conference was to establish a framework for economic cooperation and development that would lead to a more stable and prosperous global economy. While this goal remains central to both institutions, their work is constantly evolving in response to new economic developments and challenges. [1] Both institutions vigorously promoted free market economics which led to pressures being exerted on developing countries to liberalise their regimes on foreign investment.[2]

[1] See: https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/31/IMF-World-Bank.
[2] M. Sornarajah, *The International Law on Foreign Investment* , 3 ed. (Cambridge University Press, 2010) p. 2.

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As far back as 1947, the World Bank had identified a need for some sort of international machinery to address such disputes.[3] Moreover, during the 1950s and early 1960s, the Bank, under the initiative of its president EUGÈNE BLACK, had itself become involved in assisting in the settlement of investment disputes.[4] The Banks' president EUGÈNE BLACK and General Counsel ARON BROCHE drew on this experience in order to convince the Executive Directors of the Bank to systematically pursue the dispute settlement approach to the encouragement of foreign investment.[5] On this basis, the first sketch of what would later become the International Centre for the Settlement of Investment Dispute (ICSID) emerged.[6] This centre and its convention remain the most centralizing focal point in the very de-centralized field of international investment law. While the first draft of the Convention contained the definition of investment as "any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years", [7] this became the source of a dispute that could find its solution only in a blurry compromise.[8]

The drafters explicitly decided to refrain from formulating a definition of 'investment' [9] They argued that:

> *"since any such definition would have been too broad to serve a useful purpose [or] might have arbitrarily limited the scope of the Convention by making it impossible for the parties to refer to the*

[3] IBRD 1946–1947 Ann. Rep. 13 (raising the possibility of setting up an "impartial body of technical experts" to recommend settlements of investment disputes).
[4] See for a detailed account: A. R. Parra, *The History of ICSID* (Oxford University Press, 2012) pp. 21–24.
[5] Parra, *The History of ICSID*, pp. 24–26.
[6] ICSID, *History of the ICSID Convention - Documents Concerning the Origin and the Formulation of the Settlement of Investment Disputes between States and Nationals of Other States - Analysis of Documents* (1970), vol. I p. 2. For the detailed convention-making history see: https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention.
[7] ICSID, *History of the ICSID Convention - Documents Concerning the Origin and the Formulation of the Settlement of Investment Disputes between States and Nationals of Other States - Analysis of Documents*, p. 116; See also: C. Schreuer, *The ICSID Convention: A Commentary* , 2 ed. (Cambridge Univ. Press, 2009) pp. 114–15; J. M. Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End' (2016) 85 *Fordham Law Revie* 1243–79 at 1254–55; S. Rubins, 'Notion of Investment' in B. Sabahi, N. D. Rubins, D. Wallace Jr. (eds.), Investor-State Arbitration, (Oxford: Oxford University Press, 2019), pp. 335–66 pp. 342–43.
[8] See for a detailed elaboration on that: J. D. Mortenson, 'The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law' (2010) 51 *Harvard International Law Journal* 257–318.
[9] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1, ICSID Reports, 23-33, at p. 25. Explaining that the Convention is motivated by «the desire to strengthen the partnership between countries in the cause of economic development».

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> *Centre a dispute which would be considered by the parties as a genuine 'investment' dispute though such dispute would not be one of those included in the Convention."*[10]

The only indicators for a definition remain in the preamble and in the Report of the Executive Directors.[11] Both highlight that 'investment' should contribute to economic development. The Preamble holds: "Considering the need for international cooperation for economic development, and the role of private international investment therein";[12] and the report of the Executive Directors holds that "the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development".[13] That same report, however states also that

> *"no attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they desire, the classes of dispute which they would or would not consider submitting to the Centre."*[14]

In 1961, the Development Assistance Committee (DAC) of the Organisation for Economic Co-operation and Development (OECD) asked the World Bank to undertake a study of possible multilateral investment guarantee schemes. The Bank completed its study in early 1962 and transmitted it to the DAC.[15] In announcing at the 1961 Annual Meeting of the International Bank for Reconstruction and Development (IBRD) Board of Governors that the Bank would be carrying out the study, the President of the Bank made it clear that the Bank was doing so without any "preconceived ideas about [...] [the] usefulness or feasibility" of

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[10] G. R. Delaume, 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1966) 1 *The International lawyer* 64–80 at 70.

[11] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1, ICSID Reports, 23-33, at p. 25; See for more detail: B. Legum and W. Kirtley, 'The Status of the Report of the Executive Directors on the ICSID Convention' (2012) 27 *ICSID Review - Foreign Investment Law Journal* 159–71.

[12] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) (14 October 1966) 575 UNTS 159.

[13] 'Report of the Executive Directors of the INternational Bank for Reconstruction and Development on the ICSID Convention' ICSID Reports, (Cambridge: Grotius Pulications, 1992), pp. 23–33 p. 25.

[14] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1, ICSID Reports, 23, at p. 25. Explaining that the Convention is motivated by «the desire to strenthen the partnership betwen countries in the cause of economic development».

[15] Parra, *The History of ICSID*, p. 18.

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the various multilateral investment guarantee proposals.[16] The following process within the World Banks' Board of Governors remained entangled with OECD and UNCTAD feedbacks and requests.[17] The common concern driving this entanglement was the promotion foreign investment in order to advance economic development – in particular the economic development of the newly independent states.[18]

While the OECD was involved in feedback loops with the drafting of the ICSID Convention, the OECD produced its own Draft Convention on the Protection of Foreign Property. Two versions were advanced in 1962 and 1967.[19] However it ultimately lacked enough support to progress beyond the draft stage.[20] In its resolution on the draft, the OECD Council reaffirmed that members nonetheless adhered "to the principles of international law embodied in the Draft Convention" and commended it "as a basis for further extending and rendering more effective the application of these principles."[21]

Already at the first UNCTAD conference, states recognized in a rather positive light that Foreign Direct Investment (FDI) plays a role in economic development.[22] While the term is used frequently, there seems to have been not much concern with defining what it precisely

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[16] World Bank, 1961 Board of Governors Annual Meetings IBRD-IDA- IFC Proceedings, 8.

[17] For a detailed overview on drafting history see: A. R. Parra, 'Origins of the Convention' The History of ICSID, (Oxford: Oxford University Press, 2012), pp. 11–26.

[18] The Organisation for European Economic Cooperation (OEEC) was established in 1948 to run the US-financed Marshall Plan for reconstruction of a continent ravaged by war. By making individual governments recognize the interdependence of their economies, it paved the way for a new era of cooperation that was to change the face of Europe. Encouraged by its success and the prospect of carrying its work forward on a global stage, Canada and the US joined OEEC members in signing the new OECD Convention on 14 December 1960. The OECD was officially born on 30 September 1961, when the Convention entered into force. Since then the sphere of participants and influence has gone far beyond the European space. See: https://www.oecd.org/about/history/.

[19] Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, October 12, 1967 (OECD Publication 1967) (1967 OECD Draft Convention and OECD Council Resolution). The modifications of the 1967 draft included the omission of a requirement in the 1962 draft article on expropriation (Art. 3 in both drafts) that the expropriating measure not be "contrary to any undertaking" of the expropriating party

[20] C. F. Dugan, B. Sabahi, N. D. Rubins, and D. Wallace Jr., 'The Modern System of Investor-State Arbitration' in D. Wallace Jr., N. D. Rubins, B. Sabahi, C. F. Dugan (eds.), Investor-State Arbitration, (Oxford: Oxford University Press, 2008), pp. 45–76 p. 49.

[21] OECD Council Resolution 1967, paras. I and II.

[22] T. Fredriksson, 'Forty years of UNCTAD research on FDI' (2003) 12 *Transnational corporations* 1 at 3.

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covers.[23] What was of interest was the establishment of international standards for the protection of FDI.[24] UNCTAD was then established in 1964 as permanent organ of the United Nations (UN) General Assembly in order to promote trade, investment, and development in developing countries. It has since then developed into a focal point for "matters related to International Investment and their development implications."[25]

In the 1970ies the increasing power of transnational corporations (TNCs) became striking. In response, UNCTAD focused on means to control them. In 1972, at UNCTAD III, Resolution 56(III) on Foreign private investment in its relationship to development was adopted emphasizing the right of developing countries to regulate in order to protect their nation from FDIs adverse impacts.[26] While this points to an important shift in focus, there is still no discussion on what exactly constitutes an FDI.[27] Discussions were concerned with the effects of FDI. Explicitly, the "United States voted against this resolution because it was unbalanced, failing to reflect the positive contributions of foreign private investment",[28] The Swiss and the Danish delegation abstained from the vote since they considered the text unbalanced,[29] while

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[23] Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March – 16 June 1964, Vol. I, Final Act and Report, at p. 49-50 (in particular); Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March – 16 June 1964, Vol. II, Policy Statements, UN, New York, 1964

[24] Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March – 16 June 1964, Vol. II, Policy Statements, UN, New York, 1964, p. 252 (Kenya) and p. 272 (Mali).

[25] See: https://unctad.org/fr/node/2871.

[26] UNCTAD, proceedings og the United Nations Conference on Trade and Developments, Third Session, Santiago de Chile, 13 April to 21 May 1972, Vol. I, report and annexes, United Nations, New York, 1973, Annex I, p. 88-89. Adopted with the amendments indicated at the 118thmeeting, by 73 votes to 3, with 23 abstentions. Report, p. 143 and Annex I;

[27] UNCTAD, proceedings of the United Nations Conference on Trade and Developments, Third Session, Santiago de Chile, 13 April to 21 May 1972, Vol. I, report and annexes, United Nations, New York, 1973, Annex I, p. 89; Fredriksson, 'Forty years of UNCTAD research on FDI', 4.

[28] UNCTAD, proceedings of the United Nations Conference on Trade and Developments, Third Session, Santiago de Chile, 13 April to 21 May 1972, Vol. I, report and annexes, United Nations, New York, 1973, report, p. 134. Similarly, the UK voted against it because it failed to draw attention to the merits of private investment and because insufficient time was available for discussion of it ". UNCTAD, proceedings of the United Nations Conference on Trade and Developments, Third Session, Santiago de Chile, 13 April to 21 May 1972, Vol. I, report and annexes, United Nations, New York, 1973, report, p.132.

[29] UNCTAD, proceedings of the United Nations Conference on Trade and Developments, Third Session, Santiago de Chile, 13 April to 21 May 1972, Vol. I, report and annexes, United Nations, New York, 1973, report, p. 122 and 130.

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"The Government of Chile considers that foreign private investment should not be regarded as assistance or reckoned as part of financial co-operation for development. Foreign private investment, being subject to national decisions and priorities, should promote the mobilization of internal resources, lead to an inflow and not an outflow of foreign exchange, encourage savings and national technological research, represent a real technological contribution, and serve as a supplement to national investment, preferably in association with the latter—which has not always been the case."[30]

Beyond those multilateral developments, many other initiatives emerged, resulting in a decentralized net entangling diverse international and national and bilateral regulations on the protection of foreign investment.[31] Those multilateral approaches provided much impetus to the field. For the detailed regulation states relied however on bilateral investment treaties (BIT).[32]

The (arguably) first BIT,[33] between Germany and Pakistan, defines investment in Art. 8 as:[34]

"capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term "investment" shall also include the returns derived (rom and ploughed back. into such "investment"."

Typically, before 2004, United States of America (US) BIT's held that investment is "every kind of investment owned or controlled directly or indirectly."[35] With time, increasingly,

[30] UNCTAD, proceedings of the United Nations Conference on Trade and Developments, Third Session, Santiago de Chile, 13 April to 21 May 1972, Vol. I, report and annexes, United Nations, New York, 1973, report, p. 121.

[31] For a good overview see: Sornarajah, *The International Law on Foreign Investment*, pp. 234–76. In particular the more trade focused regimes provide piecemeal approaches to investment law that would add more confusion than enlightenment to the current research undertaking.

[32] Parra, *The History of ICSID*, pp. 20–21.

[33] See: K. Miles, *The Origins of International Investment Law : Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013) p. 19.

[34] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Germany/ Pakistan BIT 1959, BGBl II 1961, 793, UNTS Bd 457 S 23 (28 April 1962/25 November 1959), https://investmentpolicy.unctad.org/inter national-investment-agreements/treaties/bit/1732/germany---pakistan-bit- 1959-.

[35] Treaty between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investment (1994), art. I(d); See:C. F. Dugan, B. Sabahi, N. D. Rubins, and D. Wallace Jr., 'The Concept of Investment' in D. Wallace Jr., N. D. Rubins, B. Sabahi, C. F. Dugan (eds.), Investor-State Arbitration, (Oxford: Oxford University Press, 2008), pp. 247–89 p. 250.

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BITs contained lists as to what constitutes an investment. For instance, the 1994 Ecuador-United Kingdom of Great Britain and Northern Irland (UK) BIT provided that:[36]

(a) 'investment' means every kind of asset and in particular, though not exclusively, includes:

i. Movable and immovable property and any other property rights such as mortgages, liens and pledges;

ii. Shares, stock and debentures of companies or interests in the property of such companies;

iii. Claims to money or to any performance under contract having a financial value;

iv. Intellectual property rights and goodwill;

v. Business concessions conferred by law or under contract, including concessions to search for, cultivate, or exploit natural resources.

Article 1(1) of the 1993 Italy-Cuba BIT provides a typically broad definition of what constitutes an investment:[37] "any kind of asset invested by a natural or juridical person of a contracting Party in the territory of the other Contracting Party, in accordance with the latter's laws and regulations."[38] In the following enumeration "claims to money or to any performance having an economic value," and "any economic right accruing by law or by contract" are included.[39]

If an agreement between two states contains a clause submitting disputes to the ICSID Centre, this can be considered as a strong indication that the transactions covered by the agreement

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[36] Ecuador - United Kingdom BIT (1994, unilaterally denounced on 18 May 2018), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1336/ecuador---united-kingdom-bit-1994-, Art. 1; See: Dugan, Sabahi, Rubins, and Wallace Jr., 'The Concept of Investment', p. 250.

[37] Accordo sulla promozione e protezione degli investimenti, Cuba-It., 7 May 1993, at http://www.unctad.org/sections/dite/iialdocs/bits/italy-cuba-it.pdf; See: M. Potesta, 'Republic of Italy v. Republic of Cuba International Decisions' (2012) 106 *American Journal of International Law* 341–47 at 341.

[38] Accordo sulla promozione e protezione degli investimenti, Cuba-It., 7 May 1993, at http://www.unctad.org/sections/dite/iialdocs/bits/italy-cuba-it.pdf; See also: Potesta, 'Republic of Italy v. Republic of Cuba International Decisions', 343.

[39] Accordo sulla promozione e protezione degli investimenti, Cuba-It., 7 May 1993, at http://www.unctad.org/sections/dite/iialdocs/bits/italy-cuba-it.pdf; See also: Potesta, 'Republic of Italy v. Republic of Cuba International Decisions', 343.

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can be considered to be an investment.[40] However, already the 1992 ICSID Model Clause 3 held that: “It is hereby stipulated that the transaction to which this agreement relates is an investment.”[41] And this has not changed since.[42]

2. 1990ies – 2004: Insecurities and questioning of the definition of investment

2.1. Structural changes

In the 19990ies UNCTAD started its World Investment Reports, which have become a standard and reference point for identifying the main stream in the regulation of FDI.[43] Until quite recently, the focus of those reports was on the capacity of FDI as an activity of transnational corporations that can be a catalyst for host country development.[44] The reports from 1991 and 2003 promote investor friendly measures, in particular through recommendations “to maximize benefits and minimize costs of FDI”.[45]

With regard to ICSID, in 1990, the award *AAPL v Sri Lanka*,[46] the tribunal argued that appropriately worded dispute- settlement provisions in treaties create jurisdiction in arbitral tribunals at the unilateral instance of the foreign investor.[47] Following this argument, the number of arbitral awards based on standards of treaty protection of foreign investment increased substantially. While little dispute arose on the very question that such jurisdiction may be created, the actual scope of jurisdiction, the very definition of investment remains subject to much controversy and divergence up to date.

In the ICSID framework, the existence of ‘investment’ is required by Art. 25(1) ICSID in order to establish jurisdiction *rationae materiae*.[48] At the same time, consent of the parties,

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[40] Schreuer, *The ICSID Convention: A Commentary*, p. 119.
[41] ICSID, ‘ICSID Model Clauses: Doc. ICSID/5/Rev. 2 February 1, 1993’ (1993) 8 *ICSID Review - Foreign Investment Law Journal* 134–51 at 139. [previous model clauses?]
[42] http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/8.htm.
[43] Fredriksson, ‘Forty years of UNCTAD research on FDI’, 10–11.
[44] N. M. Perrone, ‘UNCTAD’s World Investment Reports 1991-2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights’ (2018) 19 *The journal of world investment & trade* 7–40 at 9.
[45] Perrone, ‘UNCTAD’s World Investment Reports 1991-2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights’, 13–14.
[46] *Asian Agricultural Products Ltd v. Sri Lanka* (27 June 1990) ICSID Case No. ARB/87/3.
[47] Sornarajah, *The International Law on Foreign Investment*, p. 3.
[48] Art. 25 (1) ICSID: ‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an **investment** (…)’ (emphasis added).

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as set forward in the BIT's definition of investment ought to be met as well.[49] While the existence of this double barrel test is widely recognized, in practice, the relation between ICSID and BIT as relevant for the establishment of jurisdiction remains unsettled.[50] The drafters of the ICSID convention decided not to provide a definition of 'investment' in order to leave it to state consent.[51] While States do define 'investment' through BITs and the procedures set out by the ICSID Convention, a considerable number of arbitrators resolved to the necessity of providing an objective test as to whether something can be regarded as 'investment'.[52]

However, at first, the definition of investment was not exactly a hot topic in the early case law of ICSID. "In most […] cases, the objection as to the existence of an investment was not even raised by the parties."[53] The decision on jurisdiction in *Fedax v Venezuela*, in 1997, was the first instance where parties disputed the existence of an investment.[54] The tribunal spilled quite some ink on the existing definitions of investment and concluded that a loan could be considered as an investment.[55] In 1999, in *CSOB v Slovak Republic*, the tribunal relied on the findings in *Fedax v Venezuela* in order to confirm a loan being FDI, despite a BIT that did not mention loans in its list defining FDI.[56]

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[49] *Mala*ysian Historica Salvors v. Malaysia, ICSID Case No. ARB/05/10, Award (17 May 2007), par. 55; Schreuer, *The ICSID Convention: A Commentary*, p. 117, at par. 224; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) pp. 60–61.

[50] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) p. 151.

[51] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Bank for Reconstruction and Development, 1965, pp. 23-33, at p. 28.

[52] GRABOWSKI ALEX, The Definition of Investment under the ICSID Convention: A Defense of Salini (2014) *Chicago Journal of International* Law, (15)1, pp. 287-309, at p. 289.

[53] E. Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in C. Binder, U. Kniebaum, A. Reinisch, S. Wittich (eds.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, (Oxford: Oxford University Press, 2009), pp. 402–15 p. 404.

[54] *Fedax N.V. v. The Republic of Venezuela*, (11 July 1997) ICSID Case No. ARB/96/3, Decision on Jurisdiction, par. 24.

[55] *Fedax N.V. v. The Republic of Venezuela*, (11 July 1997) ICSID Case No. ARB/96/3, Decision on Jurisdiction, par. 25 - 29.

[56] *Ceskoslovenska Obchodni Banka a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, (24 May 1999), Decision on Objections to Jurisdiction, par. 71-91, in particular par. 77, 90.

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"that these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention."[57]

So, towards the end of the 1990ies the definition of investment became increasingly the target of discussion.

2.2. National legislations

The 1990ies saw not only an increase in investment arbitration, but also considerable legislation activity on the national level. Indeed, national legislations that offer consent to the ICSID jurisdiction often provide their own definition of investment. For instance, Art. 1 of the Albania Law on Foreign Investment (1993) states that:[58]

"'Foreign investment' means every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, consisting of

(a) Moveable and immoveable, tangible or intangible property and any other property rights;

(b) a company, shares in stock of a company and any form of participation in a company;

(c) loans, claim to money or claim to performance having economic value

(d) intellectual property, including literary and artistic works, sound recordings, inventions, industrial designs, semiconductor mask works, know how, trademarks, service marks and trade names; and

(e) any right conferred by law or contract, and any license or permit pursuant to law"

Similarly, the Georgia Investment Law (1996) provides in Art. 1:[59]

"(1) Investment is any kind of property or intellectual value or right to be contributed and used in the entrepreneurial activity carried out on the territory of Georgia for earning of possible income.

(2) Such value or right may be:

(a) funds, shares, stocks and other securities;

(b) movable and immovable property – land, buildings, equipment and wealth;

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[57] *Ceskoslovenska Obchodni Banka a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, (24 May 1999), Decision on Objections to Jurisdiction, par. 90.

[58] *Tradex v Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, par. 105; See: Schreuer, *The ICSID Convention: A Commentary*, p. 121.

[59] *Zhinvali v Georgia*, Award, 24 January 2003, ICSID Case No. ARB/00/1, par. 377; See: Schreuer, *The ICSID Convention: A Commentary*, pp. 121–22.

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(c) land tenure or right to use other natural resources (concessions, as well), patent, license, "know-how", experience and other intellectual value;

(d) other legally recognized property and intellectual value or right."

Art. 3 of the Tanzania Investment Act (1997) holds that:[60]

> *"'investment' means the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise"*

2.3. From economic to legal definition

Attempts to change the definition of investment are connected with general shifts in the understanding of investment, regarding the question of an autonomous understanding of the term in the ICSID Convention, [61] and regarding underlying economic understandings.

In 1982, DELAUME identified a new conceptualization of 'investment':

> *"[à] cette notion classique relevant d'une conception économique et juridique étroite se substitute aujourd'hui un autre concept, essentiellement économique dans sa nature et juridiquement malléable dans sa formulation, qui repose non plus sur l'apport en propriété mais, au contraire, sur la contribution escomptée, sinon toujours effective, de l'investissement au développement économique du pays intéressé".[62]*

At the same time, DELAUME pointed out that:

> *"Sans chercher à épiloguer sur ce phénomène contemporain, il convient néanmoins d'en tirer, pour les besoins de la Convention CIRDI, la seule conclusion qui s'impose, à savoir qu'à la suite de cette évolution, le champ d'application de l'article 25 (1) se trouve considérablement élargi et offre aux intéressés de nouvelles occasions d'avoir recours au CIRDI en vue di règlement des différends éventuels." [63]*

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[60] See: Schreuer, *The ICSID Convention: A Commentary*, p. 121.

[61] Dolzer and Schreuer, *Principles of International Investment Law*, pp. 65–76.

[62] G. Delaume, 'Le Centre international pour le règlement des différends relatifs aux investissements (CIRDI)' (1982) *Journal de droit international* 775- at 801; See: Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', p. 406. Tr.: The traditional concept, which is inspired by a narrow economic and legal conception, is today substituted by another concept, which is essentially economic in nature and legally flexible in its formulation, that is not based on contribution in the form of ownership but, to the contrary, on the expected – if not always actual – contribution of the investment to the economic development of the country in question.

[63] Delaume, 'Le Centre international pour le règlement des différends relatifs aux investissements (CIRDI)', 802; Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', p. 406. Tr.: Without going on at length about this contemporary phenomenon, it is still appropriate to deduce from it, for the purposes of the ICSID Convention, the sole consequence that follows, namely that as a result of this evolution, the scope of application of Art. 25 (1) is considerably enlarged and offers to those interested new opportunities for recourse to ICSID for the purpose of the settlement of their potential disputes.

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In 1990, in a textbook on 'Droit international économique', CARREAU, FLORY and JUILLARD, discussing 'the concept of investment, under the heading 'search for criteria' held that:

> *"Ces critères s'articulent autour de trois idées. En premier lieu, il ne saurait y avoir investissement sans apport – quelle que soit, par ailleurs, la forme que prend cet apport. En deuxième lieu, il ne saurait y avoir d'investissement dans le court terme: l'opération d'investissement présente un caractère de "durabilité" qui ne peut se satisfaire que d'un apport à moyen ou à long terme. En troisième lieu, il ne saurait y avoir investissement sans risque, en ce sens que la rémunération différée que l'investisseur perçoit doit être fonction des profits ou des pertes de l'entreprise. Ces trois critères ne sont pas d'application alternative, mais d'application cumulative."*[64]

In 1996, SCHREUER published in the ICSID Review a piece titled 'A commentary on the ICSID Convention'. There, regarding the definition of investment he stated that:[65]

> *"it seems possible to identify certain features that are typical to most of the operations in question. The first such feature is that the projects have a certain duration. Even though some break down at an early stage, the expectation of a longer term relationship is clearly there. The second feature is a certain regularity of profit and return. A one-time lump sum agreement, while not impossible, would be untypical. Even where no profits are ever made, the expectation of return is present. The third feature is the assumption of risk usually by both sides. Risk is in part a function of duration and expectation of profit. The fourth typical feature is that the commitment is substantial. This aspect was very much on the drafters' minds although it did not find entry into the Convention. A contract with an individual consultant would be untypical. The fifth feature is the operation's significance for the host State's development. This is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Directors' Report suggest that development is part of the Convention's object and purpose. These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."*

In 1999, EMMANUEL GAILLARD commented on the *Fedax . Venezuela* case, one of the then few judgments concerned with the definition of investment.[66] His elaborations draw particularly on the economic definition put forward in the 1990 textbook of CARREAU, FLORY, JUILLARD and GAILLARD, holding that "investment is […] a mid-term or long-term

[64] D. Carreau, P. Juillard, and T. Flory, *Droit international économique* , 3e éd., refondue et augmentée ed. (Librairie générale de droit et de jurisprudence, 1990) p. 560, par. 935.
[65] C. Schreuer, 'Commentary on the ICSID Convention' (1996) 11 *ICSID Review - Foreign Investment Law Journal* 318–492 at 372, par. 122. (references omitted); In 2001, this would be transformed into the CUP ICSID Convention Commentary. See section 0
[66] GAILLARD EMMANUEL, Fedax v. Venezuela (1999) JDI, 278.

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transaction – that is to say, according to the most generally accepted definition, transaction whose duration is not less than three years (mid-term) or seven years (long-term)”.[67],[68]

From these elements, in 2001, ROBERT BRINER, BERARDO CREMADES and IBRAHIM FADLALLAH, in the Decision on Jurisdiction of the well-known case *Salini Costruttori S.P.A. and Italstrade S.P.A. v Morocco* inferred that four common criteria provide the parameter to determine the existence of an investment.[69]

3. 2000 – 2018: Defining investment

3.1. The Salini test

Salini Costruttori S.P.A. and Italstrade S.P.A. v Morocco

From the elements set forth in section 2.3, in 2001, ROBERT BRINER, BERARDO CREMADES and IBRAHIM FADLALLAH, in the Decision on Jurisdiction of the well-known case *Salini Costruttori S.P.A. and Italstrade S.P.A. v Morocco* inferred that four common criteria provide the parameter to determine the existence of an investment.[70] From this, the so-called Salini-test emerged. The tribunal thus transformed into a legally binding condition what had been presented in the scholarly literature as a mere description of the typical duration of mid-term investments.[9]

In Salini, the arbiters cite CARREAU and SCHREUER, transforming the “scholarly description of a typical duration” of three years into a two-year requirement, and turning a certain type of investment, mid-term investments, “into the archetype of what was supposed to fall within

[67] Gaillard, ‘Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice’, pp. 404, FN 9. Translating the French original.
[68] French original: Carreau, Juillard, and Flory, *Droit international économique*, para. 939. L’investissement est donc une operation à moyen terme ou à long terme – c’est à dire, dans la conception la plus généralment admise, une operation dont le terme ne saurait être inférieur à trois ans (moyen terme) ou à sept ans (long terme).”
[69] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16.07.01.
[70] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16.07.01.

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the jurisdiction of the Centre."[71] What is particularly ironic is that the arbiters cite the outdated edition, and the passage they use no longer existed in the fourth edition published in 1998.[72],[73]

At the same time, according to GAILLARD's analysis, the Salini arbiters merge this approach of certain criteria (as set forth by SCHREUER/GAILLARD) with GEORGE DELAUME's approach.[74] So, in the Salini case, the arbiters retain that there exist fix criteria for an investment, they add to the three criteria of CARREAU et al. a fourth criterion taken from DELAUME (highlighting the malleability of the definition as well as the fundamental importance of an economic impact in the host country).[75] This is however a bit of an interpretation. Word by word, the decision only holds that:[76]

> *"The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf commentary by E. Gaillard, cited above, p. 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition."*

In sum, we can find an academic comment (in French and not available online) on an investment arbitration award triggering a framework for defining 'investment' in ICSID-based arbitration. This framework then spills into other investment arbitration areas as well. However, depending on whose account of the developments one follows, this test solidified more or less.

The Salini-test provides that in order to qualify as 'investment', four conditions ought to be fulfilled: the activity in question must (1) involve the transfer of funds or the contribution of

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[71] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16.07.01, at par. 54; Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', pp. 404-405 (FN 9).

[72] D. Carreau, P. Juillard, and T. Flory, *Droit international économique* , 4 ed. (Librairie générale de droit et de jurisprudence, 1998) pp. 396–416; See: Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', p. 405 (FN10).

[73] In the most recent edition, the section is again present. D. Carreau and P. Juillard, *Droit international économique* , 5 ed. (Dalloz, 2013) pp. 446–67, par. 1225–28.

[74] Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', p. 406; Carreau, Juillard, and Flory, *Droit international économique*, pp. 396–416.

[75] Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', p. 406.

[76] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16.07.01, at par. 52.

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money assets; (2) be of a certain duration; (3) have the participation of the individual transferring the funds in the management and risks associated with the project; and (4) bring economic contribution to the host state. Hence, an investment is more than a simple money transfer: not any asset that comes from a foreign state is worthy of protection – a durable, economically beneficial link to the host country has to be established.[77]

This being said, arbitrators' definitions vary widely. Sometimes additional requirements are discussed. More often, the necessity of the fourth requirement, contribution to the host states' development, is questioned. For instance, it has been rejected on the grounds that it is too ambiguous to constitute an enforceable legal obligation.[78] This argument has been expanded to the other elements of the test, as well: looking at the Salini-test, some arbitrators take those elements as judicial requirements, some as characteristics that have to be considered in a more or less flexible way, adapted to circumstances.[79] Relying on the Investor State Law Guide, one can identify four currents:

(1) Some awards apply the full Salini-test and rely on all four requirements – as judicial test or as naming criteria.[80] (2) Some awards one use 3 criteria, and apply the Salini-test without the fourth requirement, the contribution to the development of the host state. (3) Some awards rely on the Salini-test but see the requirements very flexibly adaptable to the circumstances

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[77] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16.07.01, at par. 52.

[78] See for instance: Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27.09.12, at par. 220.

[79] See for instance: *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Award I, 08.05.08, at par. 231: "qu'il existe au moins deux conceptions de la notion d'investissement au sens de la Convention CIRDI. La première se contente d'identifier un certain nombre de 'caractéristiques' qui permettraient de conclure à l'existence d'un investissement. Il suffirait, dans cette conception, que certaines de ces 'caractéristique' habituelles de l'investissement, pas nécessairement toutes, se rencontrent au cas d'espèce pour que l'on puisse conclure que l'on se trouve en présence d'un investissement. C'est la solution qu'ont retenue les tribunaux arbitraux dans les affaires Fedax c. Venezuela, CSOB c. Slovaquie et, plus récemment, MCI c. Equateur. Cette conception peu exigeante de l'investissement est également défendue par certains auteurs. D'autres tribunaux arbitraux retiennent au contraire une véritable définition de l'investissement qui suppose la satisfaction de critères spécifiques. Si l'ensemble de ces critères ne sont pas cumulativement satisfaits, ils en concluent qu'il ne saurait y avoir d'investissement au sens de la Convention CIRDI." See also: GAILLARD EMMANUEL, Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice, in: *Essays in Honour of Christoph Schreuer*, OUP, 2009, pp. 403-416, at pp. 407-411.

[80] In this category included are the cases in which additional requirements are imposed.

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of the case.[81] (4) Some awards consider the Salini-test, but refuses to apply it. The majority of cases relies on the Salini test – as a characteristics or judicial test, or flexibly adapted to the circumstances, but the fourth requirement, the contribution to the host states' economic development is considerably questioned.[82]

Many arbitrators and textbooks elaborating on the definition of investment reference 'trends' in one way or another.[83] However, the use of the test throughout time has been fairly inconsistent. The Salini test continues to be considered, and to be refused, the flexible and 3 criteria version remain on the table as well. What can be established, is that the four criteria that the *Salini v Morocco* case provided for, remain a core element of the discourse determining the definition of investment.[84] Whether the arbitration court will then uphold it in one or the other form remains largely within the arbitrators' discretion. [85] The arbitrators' attempt to situate a given case within a larger set of similar cases is nevertheless not a futile exercise. It is a crucial technique to substantiate the judicial authority of the decision or award

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[81] This concerns the cases that extends 'criteria'-approach to even more flexibility. This is a distinction made in a gradual argumentation, based on the subjective analysis of the researcher. The distinction is based on the categorization provided by the Investor State Law Guide.

[82] Other criteria, in particular the requirement of duration, have been contested as well. Here presented is the requirement of 'contribution to the host States economic development' as the most contested one.

[83] See for instance: *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, par. 317: "The Arbitral Tribunal notes in this regard that, over the years, many tribunals have approached the issue of meaning of 'investment' by reference to the parties' agreement, rather than imposing a strict autonomous definition, as per the Salini Test."; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19.08.13, par. 352: "It is readily apparent that the project meets the criteria which normally are identified as constitutive of an investment, as they have been discussed by learned writers and arbitral tribunals."; COLLINS DAVID, *An Introduction to International Investment Law*, CUP, 2017, at pp. 77-78, SORNARAJAH M., *The International Law on Foreign Investment*, 3rd edn, 2010, at pp. 17-18.

[84] See Endres, Definition of Investment, Data presented at ILA Conference in Braga 2019.

[85] See for instance : *AES v Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/02/17, 26 April 2005, par. 30-31: "An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution … precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration".

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in question. Often it is even used with interests beyond the single case in order to push for legal change in one or the other direction.[86]

Also, the test has spilled over into awards beyond the ICSID framework. For instance, in *Romak v Uzbekistan*, under the United Nations Commission On International Trade Law (UNCITRAL) Arbitration Rules found that the word investments in the governing Swiss-Uzbek BIT has "an inherent meaning" or "plain meaning" that corresponds with the first three prongs of *S*alini.[87] The arbiters were "comforted ... by the reasoning adopted by other arbitral tribunals," including Salini.[88] It argued that the same constraints should apply to the word investments in the BIT regardless of whether claimant chose to pursue its claim inside or outside ICSID.[89]

GAILLARD has explained diverging developments with two different methods: the intuitive method, following DELAUME's approach, and the deductive method, following CARREAU ET AL.'s approach.[90] However, contrasting SCHREUER with CARREAU, he runs into some contradiction, because the Salini judgment sides SCHREUER with CARREAU.

Institutional fragmentation

[86] See for instance: *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, par. 317: "The Arbitral Tribunal notes in this regard that, over the years, many tribunals have approached the issue of meaning of 'investment' by reference to the parties' agreement, rather than imposing a strict autonomous definition, as per the Salini Test". *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Decision on Jurisdiction and Liability, 07.12.10, par. 56 : "Cependant, comme indiqué précédemment, le Tribunal souhaite apporter certaines inflexions aux critères Salini, car il estime qu'en réalité le critère de la contribution au développement est trop subjectif et qu'il doit être remplacé par le critère de la contribution à l'économie, lui-même considéré comme présumé inclus dans les trois autres critères. Le Tribunal suit en cela d'autres tribunaux qui ont manifesté leur scepticisme à l'égard de ce quatrième critère, comme par exemple le tribunal dans l'affaire LESI SpA c. Algérie, où il a été énoncé que …".

[87] *Romak S.A. v. Uzbekistan*, Case No. AA280, Award, (Perm. Ct. Arb. 2009), para. 207–208; See: A. Grabowski, 'The definition of investment under the ICSID Convention: a defense of Salini' (2014) 15 *Chicago journal of international law* 287 at 158.

[88] *Romak S.A. v. Uzbekistan*, Case No. AA280, Award, (Perm. Ct. Arb. 2009), para. 207; See: Grabowski, 'The definition of investment under the ICSID Convention: a defense of Salini', 158.

[89] *Romak S.A. v. Uzbekistan*, Case No. AA280, Award, (Perm. Ct. Arb. 2009), para. 192-195; Grabowski, 'The definition of investment under the ICSID Convention: a defense of Salini', 158.

[90] Gaillard, 'Identify of Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice', pp. 407–11.

Electronic copy available at: https://ssrn.com/abstract=4430270

In 2001, the first edition of SCHREUER's commentary on the ICSID Convention was published. Basically reproducing his publication of 1996,[91] and in ignorance of the Salini test, he puts forward five typical elements of most operations under ICSID procedures: (1) duration, (2) regularity of profit and return, (3) risk, (4) substantial commitment, (5) significance for the host state's development.[92] A considerable amount of judgments has been following his conceptualization.[93] Interestingly, in the 2nd edition of 2009, this enumeration disappears, and emphasis is laid on the double barrel test (the requirement that investment has to be existing in terms of the BIT and in terms of ICSID).[94] Without any engagement with the judgment, or any precise definitional requirements for the Convention's definition of investment, Salini is cited in support of the statement that "Other tribunals have endorsed this approach."[95] Reviewing *Malaysian Historical Salvors v Malaysia, CSOB v Slovakia, Byandir v Pakistan, Mittchell v Democratic Republic of Congo (DRC),* and *Salini v Morocco*, SCHREUER later engages critically with the claims to tests for the existence of an investment, and concludes that a "rigid list of criteria that must be met in every case is not likely to facilitate the task of tribunals or to make decisions more predictable",[96] and warns particularly against a test that looks at the contribution to the hots State's economic development.[97] In other words, SCHREUER is reluctant to acknowledge legal change in the definition of investment through the Salini-test.

In contrast, in 2015, EMMANUEL GAILLARD and YAS BANIFATEMI argue that the Salini-test was crucial in establishing a jurisprudential constant in investment arbitrations' definition of investment.[98] However, two years later, JEREMY MARC EXELBERT still argues that the

[91] Schreuer, 'Commentary on the ICSID Convention'.
[92] C. Schreuer, *The ICSID Convention - A commentary* (Cambridge University Press, 2001) p. 140, par. 122.
[93] See for instance: *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award, 16.11.12, par. 257.
[94] Schreuer, *The ICSID Convention: A Commentary*, p. 117, par. 122–28.
[95] Schreuer, *The ICSID Convention: A Commentary*, p. 118, par. 127.
[96] Schreuer, *The ICSID Convention: A Commentary*, p. 133, par. 172.
[97] Schreuer, *The ICSID Convention: A Commentary*, p. 134, par. 173.
[98] E. Gaillard and Y. Banifatemi, 'The Long March towards a Jurisprudence Constante on the Notion of Investment r, Geraldine R. Fischer' in Meg Kinnea, G. R. Fischer (eds.), Building International Investment Law: The First 50 Years of ICSID, (2015), pp. 97–125.

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qualification of 'investment' under Art. 25 (1) ICSID remains "consistently inconsistent".[99] He concurs however with GAILLARD and BANIFATEMI to the extent that he admits that the 4 pronged Salini test "has become the standard from which most tribunals begin their analysis.".[100] RUBINS holds for instance explicitly that the Salini test is the test to be applied in order to establish whether a dispute is arising out of an investment in the sense of the ICSID Convention.[101]

To some extent, divergence in ICSID-based judgments is due to the institutional setting of the investment arbitration field. Arbiters are appointed on an ad hoc basis, typically by the parties.[102] So, every tribunal entails possibilities for entire reshuffling of the individual perspectives involved in the award's decisions. Decisions are also rendered on a n ad hoc basis, in the sense that each tribunal established its own jurisdiction and is not bound by precedent. [103] The ICSID Convention provides for some mechanisms to "mitigate concerns over inconsistency", first and foremeost that an award be exhaustive and reasoned (Rule 47).[104]

This institutional dispersal leads to challenges in the establishment of jurisdiction. Art. 25 ICSID requires that the dispute 'arises out of an investment'. In order for the ICSID Convention to become applicable, parties have to consent to ICSID jurisdiction.[105] This consent can arise out of (1) a contract between investor and host state, (2) "a provision in the host state's investment legislation that has been accepted by the investor", and (3) through treaties.[106] So, within the ICSID framework, the establishment of jurisdiction rationae

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[99] Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End'.
[100] Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1258.
[101] Rubins, 'Notion of Investment', pp. 345–47.
[102] Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1250.
[103] Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1250.
[104] Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1250–51.
[105] Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1254–55.
[106] Schreuer, *The ICSID Convention: A Commentary*, p. 119.

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materiae requires two steps. Firstly, to establish the parties' consent to the applicability of ICSID, and secondly, to demonstrate that the conflict arises out of an investment (Art. 25 ICSID).[107] Tribunals have approached this quite inconsistently.

In 1999, the Salini tribunal based their test on ICSID "precedent".[108] In 2006, the Quiborax tribunal dropped the contribution to economic development criterion, and based the now three-pronged test on the 'ordinary meaning' of investment.[109] In contrast to Quiborax, but also in 2006, the Mitchell tribunal focused on and emphasized the fourth criterion, the contribution to economic development as the crucial one,[110] stressing the ICSID Conventions' aim as stated in the preamble.[111]

In 1999, in the same year as Salini, *CSOB v Slovakia*, the tribunal relied on the reference to economic development in the Convention's preamble in order to define investment.[112]

A year before Quiborax, in 2005, *Consorzio Groupement L.E.S.I.-Dipenta v People's Democratic Republic of Algeria*, held that the fourth criterion, the contribution to economic

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[107] Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1256–57; Schreuer, *The ICSID Convention: A Commentary*, p. 117; Dugan, Sabahi, Rubins, and Wallace Jr., 'The Concept of Investment', p. 345.

[108] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16.07.01. See: Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1261.

[109] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27.09.12; See also: Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1260–61.

[110] *Mitchell v. Democratic Republic of Congo*, ICSID Cas No. ARB/99/7 Decision on Annulment, 1 November 2006, par. 33: "The ad hoc Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host state as an essential […] characteristic […] of [an] investment."

[111] *Mitchell v. Democratic Republic of Congo*, ICSID Cas No. ARB/99/7 Decision on Annulment, 1 November 2006, par. 28: «The Preamble of the Washington Convention sets forth a number of basic principles as to its purpose and aims, which imbue the individual provisions of the Convention, including Article 25, which makes it needless to mention that the Convention was concluded under the auspices of the International Bank for Reconstruction and Development itself.». See also: Exelbert, 'Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End', 1261–64.

[112] *CSOB v. Slovakia, Decision on Jurisdiction,* ICSID Case No. ARB/97/4, 24 May 1999, para. 64. See: Schreuer, *The ICSID Convention: A Commentary*, p. 131.

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development is implicit in the other three criteria, and therefore must not be examined separately.[113]

In 2007, in *Malaysian Historical Salvors v Malaysia*, the arbiters held that

> *"The classical Salini hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an 'investment'. If any of these hallmarks are absent, the tribunal will hesitant (and probably decline) to make a finding of 'investment'. However, even if they are all present, a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID 'investment'."*[114]

So, based on this judgment SCHREUER identifies a "development in practice from a descriptive list of typical features towards a set of mandatory legal requirements".[115] He emphasizes that the Salini-test criteria are "interrelated and should not be looked at in isolation."[116] Furthermore, in particular a "test that turns on the contribution to the host State's development should be treated with particular care".[117] SCHREUER sees the reference in the Convention's Preamble to economic development as indicative of an international transaction with the purpose to promote the host states development to benefit of a presumption to be an investment.[118] At the same time, he concludes that "it does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention's protection."[119]

In 2012, *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* dropped the fourth criterion (contribution to development), and was highly flexible in the interpretation of the other 3 criteria.[120] That tribunal rejected the criterion of contribution to economic development as "unworkable owing to its subjective nature" and emphasized that "the

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[113] *Consorzio Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, part. II, par. 13.
[114] *Malaysian Historica Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award (17 May 2007) para. 44.
[115] Schreuer, *The ICSID Convention: A Commentary*, 133.
[116] Schreuer, 133.
[117] Schreuer, 134.
[118] Schreuer, 134.
[119] Schreuer, 134.
[120] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012). See also: Exelbert, "Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End," 1264–66.

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existence of an investment must be assessed at its inception and not with hindsight".[121] So, their approach is basically reversal of the perspective taken by the Mitchell tribunal.[122] The arbiter MAKHDOOM ALI KHAN (appointed by the respondent,[123] the Democratic Socialist Republic of Sri Lanka) dissents on exactly this point, holding that the requirement of a contribution to the economic development "preserves a vital link between an investment and the intended purpose of the Convention" that is "emphasized not only in the preamble to the Convention but also in the Report of the Executive Directors of the World Bank accompanying the Convention".[124]

EXELBERT identifies a shift in the definition of investment linked to a shift in ICSID arbitration from the original purpose of the Convention towards investor expectations:[125] While the Convention's original purpose was the enhancement of economic development in the host states, the way in which investment is defined now favors investors' expectations.[126]

Arbitrators will regularly base their definition of investment on narratives of 'developments'. In 2012, in *Elsamex, S.A. v Republic of Honduras*, for instance, the arbiter considered that the concept of 'investment' was not defined in the Convention, and consequently the interpretation of this term has been formed through jurisprudence and ICSID doctrine.[127] The arbitrator, ENRIQUE GÓMEZ PINZÓN, elaborates further how historically, ICSID courts analyzed the existence of an investment in each case, adopting a highly deferential position to the will expressed ex ante by the States receiving the investments.[128] He then emphasizes that in the last decade, a significant current within jurisprudence ICSID adopted a much stricter position in its analysis of whether an activity economic, a business or certain assets,

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[121] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012), par. 305 -306. See also: Exelbert, 1266.
[122] Exelbert, 1266.
[123] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012), par. 69
[124] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012), Dissenting Opinion, par. 46. See also: Exelbert, "Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End," 1267.
[125] Exelbert, 1271.
[126] See on that point re the development of int. investment law more generally: Miles, *The Origins of International Investment Law : Empire, Environment and the Safeguarding of Capital*, 23.
[127] *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award, 16.11.12, par. 254-256.
[128] *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award, 16.11.12, par. 256.

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constitute an investment, using scrupulous parameters and, in some cases, restrictive for this purpose.[129]

While developments were never limited or focalized in the ICSID framework, assessment of legal change outside ICSID is limited to case-by-case analysis.[130]

BIT-ICSID relation

It is already subject to diverging opinions whether this ICSID requirement restrains more expansive or restrictive definitions of investment in BITs. Some will consider that ICSID constrains BIT-definitions, for others, the will of the parties, as expressed in the BITs will trump the ICSID definition.[131] A negligible part will not reflect on the relation of those instruments at all. The predominant view seems to be that the action in question has to pass both tests, the BIT-definition and the ICSID-definition.

Within that dominant strand, the Salini-test has been used to interpret BITs in a light that hardly was predictable at the time of their conclusion. For instance:

Article 1(1) of the 1993 Italy-Cuba BIT provides a typically broad definition of what constitutes an investment:[132] "any kind of asset invested by a natural or juridical person of a contracting Party in the territory of the other Contracting Party, in accordance with the latter's laws and regulations."[133] In the following enumeration "claims to money or to any

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[129] *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award, 16.11.12, at par. 256.
[130] See: Rubins, "Notion of Investment," 363–66.
[131] *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/05/14, Award, 13.03.09, Dissenting opinion of Santiago Torres Bernárdez, at par. 249: "One must therefore ask first: what was the prevailing ordinary meaning of the term 'investment' when in 1965 it was inserted in Artile 25 (1) 250: Good faith requires indeed to take duly into account, as appropriate, the temporal element in the interpretation of Article 25(1) of the Convention by distinguishing between any eventual meaning of the term 'investment' in current financial or other contexts unconnected with any economic activity in the host State, on one hand, and on the international 'investment' that the ICSID Convention seeks in 1965 to protect in order to encourage economic development, by providing a neutral international forum for the settlement of investment disputes that counter-balance the host Stat's regulatory authority over investments in it territory, on the other hand."
[132] Accordo sulla promozione e protezione degli investimenti, Cuba-It., 7 May 1993, at http://www.unctad.org/sections/dite/iialdocs/bits/italy-cuba-it.pdf; See: Potesta, "Republic of Italy v. Republic of Cuba International Decisions," 341.
[133] Accordo sulla promozione e protezione degli investimenti, Cuba-It., 7 May 1993, at http://www.unctad.org/sections/dite/iialdocs/bits/italy-cuba-it.pdf; See also: Potesta, 343.

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performance having an economic value," and "any economic right accruing by law or by contract" were included.[134] From this, the 2005 interim award went on to hold that:

> *"sauf dispositions contraires spécifiques d'un Traité Bilatéral de protection des Investissements, trois éléments sont requis pour que l'on se trouve en présence d'un investissement : un apport, la durée et une prise de risque de la part de l'investisseur (ce dernier doit, au mains en partie, participer aux aléas de l'opération économiques)".*[135]

In other words, in order to define investment, the tribunal read the 3-pronged Salini-test (considering the fourth element as implicit in the three explicit criteria) into the BIT concluded before the Salini-test existed.

The notion 'contribution to development' as element of the definition of investment?

One particular uncertainty concerns the question whether 'investment' is limited to those investments that contribute to the economic development of a country.[136] On the one side, in the reading of case-law contesting the 'contribution to development' requirement, investment is in need of protection – i.e. activity by the host state, even if no economic contribution of that activity to the host state is discernible. Arguments against this condition often relate to ideas that the first three conditions 'obviously' will contribute to the host states' economic development, and that a manifestation of this contribution is hard to prove and unpredictable.

For instance, in 2008, the award on *Victor Pey Casado and President Allende Foundation v Republic of Chile* held:[137]

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[134] Accordo sulla promozione e protezione degli investimenti, Cuba-It., 7 May 1993, at http://www.unctad.org/sections/dite/iialdocs/bits/italy-cuba-it.pdf; See also: Potesta, 343.

[135] Republic of Italy v. Republic of Cuba, Interim Award, 15 March 2005; Republic of Italy v. Republic of Cuba, Final Award, 15 January 2008. See: Potesta, 343.

[136] See for instance: Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16.07.01, at par. 52; Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27.09.12, at par. 220.

[137] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May par. 232.

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« L'exigence d'une contribution au développement de l'Etat d'accueil, difficile à établir, lui paraît en effet relever davantage du fond du litige que de la compétence du Centre. Un investissement peut s'avérer utile ou non pour l'Etat d'accueil sans perdre cette qualité. Il est exact que le préambule de la Convention CIRDI évoque la contribution au développement économique de l'Etat d'accueil. Cette référence est cependant présentée comme une conséquence, non comme une condition de l'investissement : en protégeant les investissements, la Convention favorise le développement de l'Etat d'accueil. Cela ne signifie pas que le développement de l'Etat d'accueil soit un élément constitutif de la notion d'investissement. C'est la raison pour laquelle, comme l'ont relevé certains tribunaux arbitraux, cette quatrième condition est en réalité englobée dans les trois premières. »

The presentation of the definition in this award is particularly interesting, since Emmanuel Gaillard was appointed for the dispute,[138] and yet, neither his scholarly contributions and positions held therein nor the Salini decision are cited.

Similarly, in 2012, the tribunal of *Quiborax S.A. v Bolivia* held:[139]

"The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment. This evolution is illustrated by the following four decisions."

On the other side, a second strand of awards continuously puts the requirement of a contribution to the development of the host state front and centre. For instance, *Mitchell v Democratic Republic of Congo,* in 2006 held:

"The Preamble of the Washington Convention sets forth a number of basic principles as to its purpose and aims, which imbue the individual provisions of the Convention, including Article 25, which makes it needless to mention that the Convention was concluded under the auspices of the International Bank for Reconstruction and Development itself."[140]

Similarly, in 2007, *MHS v Malaysia*, the tribunal held that the contribution to the economy of the host state, as last criterion, was "of considerable, even decisive, importance".[141] When

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[138] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May par. 35. Gaillard was only appointed in 2005, after several changes in the arbiter's chairs. He took the place oft he defendant-appointed arbiter, but he was appointed by the adminstratif council.

[139] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, par. 220.

[140] *Mitchell v. Democratic Republic of Congo*, ICSID Cas No. ARB/99/7 Decision on Annulment, 1 November 2006, par. 28.

[141] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 14 June 2005, par.123 and 130.

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overturning this decision in 2009, the annulment committee held that it was unacceptable that the Salini Characteristics had been elevated to jurisdictional conditions.[142] In 2012, MAKHDOOM ALI KHAN very pointedly summarizes the arguments in support of that condition:

> *While this characteristic is arguably subjective, it is not devoid of all utility and in fact preserves a vital link between an investment and the intended purpose of the Convention. This link, between investments and economic development, is emphasized not only in the preamble to the Convention but also in the Report of the Executive Directors of the World Bank accompanying the Convention.*[143]

It is interesting to note that this fourth element is the most controversial, but also the most successful for the respondent to oppose existence of jurisdiction: it is mainly on the basis of this fourth element, that tribunals will decline jurisdiction.[144] It is also the only element that finds explicit bases in preamble and in the Report of the Executive Directors. [145] Beyond that, SORNARAJAH stands quite alone in arguing that "the World Bank would have no mandate to run an arbitration facility like ICSID unless it is connected to economic development."[146]

So, while this is a serious contestation that has been repeatedly put forth, there is clearly a stream of the case law continues to require a contribution to the host state's development.[147] Hence, the contestation of the requirement of a contribution to the economic development of the host state reveals an attempt to shift the discourse that has not entirely succeeded.

Looking beyond ICSID complicates the picture. The World Investment Reports of UNCTAD from 2004 to 2011 shift their focus "from macro to sectoral analysis".[148] Their underlying narrative remains however, that FDI, in the specific sectors, can promote development.[149]

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[142] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, par. 80.
[143] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Dissenting Opinion of Makhdoom Ali Khan, 31 October 2012, at par. 46.
[144] Dugan et al., "The Concept of Investment," 260.
[145] ICSID Convention, preamble: "Considering the need for international cooperation for economic development, and the role of private international investment therein"; Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, ICSID Report 1993, p.23-33, at 25; See for more detail: Legum and Kirtley, "The Status of the Report of the Executive Directors on the ICSID Convention."
[146] Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, 2015, 152 and 161–62.

[148] Perrone, "UNCTAD's World Investment Reports 1991-2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights," 23.
[149] Perrone, 23.

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What has changed is a decrease in caution towards public regulation.[150] The 2012 – 2015 Reports then try to reorient foreign investment policies adding sustainability to the notion of development.[151] In other words UNCTADs reports expand the notion of development, while ICSID arbitration struggles with the very existence of that element.

3.2. Expanding categories

The in section 2.2 identified shift towards investor-benefitting definitions of investment finds support in the continuous expansion of categories covered as investment. While originally foreign investment covered only foreign direct investment, and not portfolio investment and indirect investment, more recent protection instruments as well as some strands of arbitration awards have expanded the legal definition of investment to cover those formerly excluded categories, too.[152]

Previously, portfolio investment was identified as having split between management and control of the company.[153] SCHREUER's proposed typical characteristics of investment under the ICSID Convention do not include participation in management – making the inclusion of portfolio investment possible.[154] Requiring the participation in management ensured the investor's constructive involvement in the host states economic development.[155] However, this is not a uniform trend. The 1992 Denmark-Lithuania BIT, for instance, excludes portfolio investments.[156]

Another way to expand the definition has relied on the concept of unity of investment, highlighting that "investment typically consists of several interrelated economic activities each of which should not be viewed in isolation."[157] For instance, in *Duke Energy v Peru*,

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[150] Perrone, 23.
[151] Perrone, 30.
[152] Dugan et al., "The Concept of Investment," 248.
[153] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 2nd ed. (Cambridge: Cambridge University Press, 2004), 7, https://doi.org/10.1017/CBO9780511617027; Sornarajah, *The International Law on Foreign Investment*, 2010, 8.
[154] Schreuer, *The ICSID Convention: A Commentary*, 129; see: Dugan et al., "The Concept of Investment," 249.
[155] Dugan et al., "The Concept of Investment," 249.
[156] See: Dugan et al., 253.
[157] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford: Oxford University Press, 2012), 61.

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the tribunal reviewed the case law affirming the principle of unity of investment, rejected Peru's argument that ICSID 25 was limited to Duke's contribution to DEI Peru Holding and did not include the interest in DEI Egenor, another Peruvian company.[158]

The instrument(s) that most clearly indicate a change in normative conceptualizations are bilateral/multilateral investment treaties. The 2003 US-Singapore Free Trade Agreement defines investment more broadly than the NAFTA, relying on a non-exhaustive list of forms of investments.[159] The 2004 US Model BIT follows this definition.[160] Despite pushes to narrow the definition, the 2012 US Model BIT has kept the 2004 definition.[161] That definition requires certain characteristics of an economic activity in order to qualify as investment: commitment of capital, expectation of profit and risk. SABAHI RUBINS highlights that the US practice, based on this Model BIT, is "in harmony with the Salini test used in ICSID Convention disputes",[162] and later in the same chapter goes even further to suggest that the Model treaties are actually based on the Salini model.[163]

GRABOWSKI argues that a considerable amount of recent BITs incorporates the Salini test – most of the time in a modified form.[164] However, the contribution to economic development of the host state is the criterion that is most regularly elided.[165] Furthermore, the characteristics are often linked with an 'or' and not with an 'and', making one of the criteria sufficient to qualify an investment.[166] For instance, the ASEAN Comprehensive Investment Agreement of 2009 holds in Art. 4(c):[167]

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[158] *Duke Energy Int'l Peru Invs. No. 1 Ltd v. Peru,* ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006; See: Rubins, "Notion of Investment," 357–61.
[159] Singapore-US Free Trade Agreement (2003), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3318/singapore-us-fta; See: Dugan et al., "The Concept of Investment," 252.
[160] 2004 US Model BIT; See: Dugan et al., 253.
[161] See for a more detailed analysis: Mark Kantor, "Little Has Changed in the New US Model Bilateral Investment Treaty," *ICSID Review* 27, no. 2 (2012): 345–46.
[162] Rubins, "Notion of Investment," 342.
[163] Rubins, 347.
[164] Grabowski, "The Definition of Investment under the ICSID Convention: A Defense of Salini," 157.
[165] Grabowski, 158.
[166] Grabowski, 158.
[167] ASEAN Comprehensive Investment Agreement (2009) https://investmentpolicy.unctad.org/ international-investment-agreements/treaties/treaties-with-investment-provisions/3273/asean-comprehensive-investment-agreement-2009-

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"Investment means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

i. *Movable and immovable property and other property rights such as mortgages, lines or pledges;*
ii. *Shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom;*
iii. *Intellectual property rights which are conferred pursuant to the laws and regulations of each Member State;*
iv. *Claims to money or to any contractual performance related to a business and having financial value*
v. *Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and*
vi. *Business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources."*

The term 'investment' also includes amounts yielded by investments, in particular, profits, interest, capital gains, divided, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment:"

The China-Japan-Korea trilateral agreement of 2012, Art. 1 holds:[168]

(1) the term "investments" means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investments may take include:

(a) an enterprise and a branch of an enterprise;

(b) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;

(c) bonds, debentures, loans and other forms of debt, including rights derived therefrom

(d) rights under contracts, including turnkey, construction, management, production or revenue sharing contracts;

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[168] Investment promotion and protection agreement between Japan, Republic of Korea and China, 2012, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3302/china---japan---korea-republic-of-trilateral-investment-agreement-2012-.

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(e) claims to money and claims to any performance under contract having a financial value associated with investment;

(f) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;

(g) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits; and

(h) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges;

Note: Investments also include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investments.

In 2017, the Canada-European Union (EU) Comprehensive Economic and Trade Agreement defines investment in ch. 8, Art. 1:[169]

investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
(a) an enterprise;
(b) shares, stocks and other forms of equity participation in an enterprise;
(c) bonds, debentures and other debt instruments of an enterprise;
(d) a loan to an enterprise;
(e) any other kind of interest in an enterprise;
(f) an interest arising from:
(i) a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources,
(ii) a turnkey, construction, production or revenue-sharing contract; or
(iii) other similar contracts;
(g) intellectual property rights;
(h) other moveable property, tangible or intangible, or immovable property and related rights;
(i) claims to money or claims to performance under a contract.
For greater certainty, claims to money does not include:
(a) claims to money that arise solely from commercial contracts for the sale of goods or

[169] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJ L 11, 14.1.2017, p. 23–1079,* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX: 22017A0114(01).

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services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party.
(b) the domestic financing of such contracts; or
(c) any order, judgment, or arbitral award related to sub-subparagraph (a) or (b).
Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment;

In contrast to much of the 1990ies BITs, Art. 139 *North American Free Trade Agreement* (NAFTA) provides for an exhaustive list of assets constituting investment.[170] This list changed for the 2018 Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (which replaces NAFTA).[171] Most importantly, the list morphed into a non-exhaustive one.

NAFTA (1993)	USMCA (2018)
Investment means: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;	Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment **may include:** (a) an enterprise; (b) shares, stock and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; 1

[170] North American Free Trade Agreement (1993), Art. 1139; See: Dugan et al., "The Concept of Investment," 251.
[171] Agreement between the United States of America, the United Mexican States, and Canada (2018) https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-.

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(i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from	(d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue - sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law; 2 and (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases, but investment does not mean: (i) an order or judgment entered in a judicial or administrative action; (j) claims to money that arise solely from: (i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party , or (ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i);

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(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade fina ncing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)	

3.3. Solidification?

The Salini-test remains the focal point of much discourse on the definition of investment, particularly in the context of ICSID. In 2021, on ius mundi, a platform for research on investment arbitration, the Salini test has been described as the "leading test employed by arbitral tribunals to define the term 'investment'".[172] However, narratives on the legal change that happened and the exact composition of the Salini-test continue to vary widely.

II. Analysis

1. Selection

Stability: 1. Prior to Salini there was a norm requiring investment, but no engagement with the exact content of that norm. 2. *Fedax v Venezuela* unsettled this stability, providing uncertainty on how investment is defined. 3.While there is broad consensus on the Salini-test

[172] Peter Zeng, "The Salini Test," *Ius Mundi* (blog), November 26, 2021, https://jusmundi.com/en/document/wiki/en-salini-test.

Electronic copy available at: https://ssrn.com/abstract=4430270

elements somehow being constituent of an investment, the exact scope and definition thereof remains highly diverse.

Opening: While we can identify the growth of the field as a certain opening (A precondition for that exponential growth of case-law was a change in the field allowing for investors to sue governments directly for not protecting them sufficiently.), there is no specific critical event providing for the possibility of that change in question. On a granular level, the opening occurs through the (state) party in *Fedax v Venezuela*, and in subsequent cases, challenging the existence of an investment.

No critical junctures.

Pathways: *State action path*: State action is a major force in the field of protection of foreign investment, in the form of BITs. However, the exact scope and shape of the path is hard to pin down due to the dispersed nature of that treaty making practice. We can for instance see a major shift in the 2004, but continuity in the 2012 Model BIT of the US. An analysis of actual impacts of changes in Model BITs on the then concluded BITs goes beyond the scope of this case study. *Multilateral path*: The ICSID Convention making and UNCTADs Conferences and Resolutions are major elements on which the occurring change relies. *Bureaucratic path:* UNCTADs world investment reports are an element of a bureaucratic path that is at odds with ICSIDs. *Judicial path:* An exponential increase in case law dealing with the protection of foreign investment also brought with it the eventual questioning of the exact scope of what is 'investment'. The dispersed nature of the field, i.e. the existence of ad hoc tribunals and no central court however led to the emergence of intertwining and diverging pathways for the changing definition of investment. *Private authority path:* Emmanuel Gaillard's and Christoph Schreuer's engagement with the definition of investment in academic were the major resource for the emergence of the precise definition of investment. Interestingly, the element that finds actual support in the Convention and not only in scholarly work (the requirement that investment contributes to the economic development of the host state) remains the most disputed element.

ICSID secretariat plays an important part in the granular elements of the paths of change in the field, in particular through its appointment of arbiters. To actually pin down the effect of this activity goes however beyond the timeframe available for this case study.

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Institutional availability: The dispersed character of the field is crucial for the pathway taken: ad hoc tribunals and no system of precedent allow for much divergence in jurisprudence. Furthermore, Convention and BIT are legal basis for the decision. Only the former has a directly unifying effect. BITs themselves have some sorts of common trajectories that can be traced through developments in model BITs and actually concluded BITs. The exact analysis thereof goes however beyond the scope of this case study.

Salience: The legal change did not reach much of a level of salience except for academic discussion.

Actors (especially change agents): Important actors are investors suing states for not protecting their investment sufficiently, and states retorting that there is no investment to be protected.

2. ***Construction***

Construction of change: *norm emergence*: An argument could be made, that the definition was omitted on purpose when writing ICSID, an consequently there was no norm. There is no *norm death.* *Norm adjustment*: We see a norm adjustment from 'investment' being used as a term with intuitively known content (A) to the four elements of the Salini test being a major reference point for the discussion on the definition of investment (B). *Paradigm shift*: This legal change rides on the general paradigm shift of expansion of investment arbitration, and increase of neoliberal thought.

Conditions for change: *stability*: 1. Prior Salini there was a norm requiring investment, but no engagement with the exact content of that norm. 2. *Fedax v Venezuela* unsettled this stability, providing uncertainty on how investment is defined. 3. While there is broad consensus on the Salini-test elements somehow being constituent of an investment, the exact scope and definition thereof remains highly diverse. *Previous norm availability*: Interestingly, the first arbiters had recourse more to economic definitions of investment than on the existing legal resources (in the Preamble of the Convention and in the Report)

Actors: The disputes raised by the investors being solved in ad-hoc tribunals makes the arbiters deciding those cases important actors.

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3. ***Reception***

Actors: The dispersed character of the field makes the broader interpretive community a diverse one. Some tribunals apply the test rigorously (with 4 or 3 prongs) others reject the test or apply it more as an interpretive guideline.

Outcome of change (disturbance- full acceptance): The change is partly successful. Definitions have changed, and although there is no uniform following of the test, Salini remains a fundamental point of reference. Before, the *Fedax v Venezuela* parties challenged the existence of investment. The arbiter's engagement with that challenge was the initial disturbance norm determining the scope of investment.

Pace and mode of change: The actual change takes place somewhat sudden within some years. It is however still rather incremental since that moment coincides with the exponential increase of investment arbitration cases.

In sum, while the definition of investment continues to exist in many variations, the Salini-test provides a certain focal point, in particular within the ICSID framework.

III. Particularities of the case

Entanglement and coexistence of judicial pathways

This case-study is interesting evidence for the competing conceptualizations of judicial authority and their role for change in international law. In particular with regard to the requirement that a contribution to the economic development of the host state be demonstrated one strand putting that criterion front and centre can be contrasted to a strand denying the existence of that criterion.

Cross-fertilization of academic and judicial writing

This case study also demonstrates the importance of individuals' positions in the field: the arbitrators, more than predominantly male and enrooted in the Global North, shape with their underlying assumptions the very core of the field: the definition of what the law ought to protect: 'investment? It is EMMANUEL GAILLARD's French article that makes for the normative foundation of the Salini test. His own activity as arbitrator and his subsequent

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elaboration on the jurisprudence make the path look a lot clearer than it is if one focuses for instance on Zachary Douglas's elaborations.

Towards the favoring of investors' expectations

Within the complex and diverging paths of legal change, one can identifies a shift in the definition of investment linked to a shift in ICSID arbitration from the original purpose of the Convention towards investor expectations:[173] While the Convention's original purpose was the enhancement of economic development in the host states, the way in which investment is defined now favors investors' expectations.[174] Another reason of the fluid and broad definitions of investment can be linked to the Convention-makers decision to leave the establishment of authority to the entity holding then the authority: In other words, the interest of arbiters to decline jurisdiction is minimal, since they are basically asked to auto-limit their power.

[173] Exelbert, "Consistently Inconsistent: What Is a Qualifying Investment Under Article 25 of the ICSID Convention and Why the Debate Must End," 1271.

[174] See on that point re the development of int. investment law more generally: Miles, *The Origins of International Investment Law : Empire, Environment and the Safeguarding of Capital*, 23.

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IV. Timeline

Date	Event	Norm (-change)
July 1944	IMF and World Bank founded	
1947	World Bank identifies a need to address disputes on FDI	
1961	BIT Germany-Pakistan	"capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term 'investment' shall also include the returns derived (rom and ploughed back. into such 'investment'."
1962	First formulation of the idea for ICSID (by World Bank, on demand of OECD	
1962	OECD Draft Convention on the Protection of Foreign Property	
1964	United Nations Conference on Trade and Development (UNCTAD) established	
1964	World Bank disseminates ICSID for signatures	
10 September 1964	Report of the Executive Directors on the Convention (Resolution No. 214, adopted by the	"No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which

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	Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964)	Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (art. 25(4))."
1966	ICSID enters into force	Art. 25 (1): (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may with- draw its consent unilaterally.
1967	Draft Convention on the Protection of Foreign Property, second version	
1972	UNCTAD III, Resolution 56 (III)) on Foreign private investment in its relationship to development	
1976	OECD Declaration on International Investment and Multinational Enterprises	
1979	IMF guidelines on conditionality	
1981	The World Bank, Accelerated Development in Sub-Saharan Africa	

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1982	G. Delaume, 'Le Centre international pour le règlement des différends relatifs aux investissements (CIRDI)' (1982) *Journal de droit international* 775- at 801	"[à] cette notion classique relevant d'une conception économique et juridique étroite se substitute aujourd'hui un autre concept, essentiellement économique dans sa nature et juridiquement malléable dans sa formulation, qui repose non plus sur l'apport en propriété mais, au contraire, sur la contribution escomptée, sinon toujours effective, de l'investissement au développement économique du pays intéressé."
1990	Carreau, Juillard et Flory, Droit int. économique, 3rd edn	Economic definition of investment
1990	*AAPL v Sri Lanka*	Investors rights expanded
1990	D. Carreau, P. Juillard, and T. Flory, *Droit international économique* , 3e éd., refondue et augmentée ed. (Librairie générale de droit et de jurisprudence, 1990)	"Ces critères s'articulent autour de trois idées. En premier lieu, il ne saurait y avoir investissement sans apport – quelle que soit, par ailleurs, la forme que prend cet apport. En deuxième lieu, il ne saurait y avoir d'investissement dans le court terme: l'opération d'investissement présente un caractère de "durabilité" qui ne peut se satisfaire que d'un apport à moyen ou à long terme. En troisième lieu, il ne saurait y avoir investissement sans risque, en ce sens que la rémunération différée que l'investisseur perçoit doit être fonction des profits ou des pertes de l'entreprise. Ces trois critères ne sont pas d'application alternative, mais d'application cumulative." (p. 560, par. 935.)
1991	First UNCTAD World Investment Report	
1992	ICSID Model Clause 3	"It is hereby stipulated that the transaction to which this agreement relates is an investment."
1993	Albania Law on Foreign Investment	"'Foreign investment' means every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, consisting of moveable and immoveable, tangible or intangible property and any other property rights;

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		a company, shares in stock of a company and any form of participation in a company; loans, claim to money or claim to performance having economic value intellectual property, including literary and artistic works, sound recordings, inventions, industrial designs, semiconductor mask works, know how, trademarks, service marks and trade names; and any right conferred by law or contract, and any license or permit pursuant to law”
1993	1993 Italy-Cuba BIT	“any kind of asset invested by a natural or juridical person of a contracting Party in the territory of the other Contracting Party, in accordance with the latter's laws and regulations.”
1993	NAFTA	Investment means: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

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		(f) an interest in an enterprise th at entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade fina ncing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)
1994	*Ecuador-UK BIT*	"'investment' means every kind of asset and in particular, though not exclusively, includes: Movable and immovable property and any other property rights such as mortgages, liens and pledges; Shares, stock and debentures of companies or interests in the property of such companies;

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		Claims to money or to any performance under contract having a financial value; Intellectual property rights and goodwill; Business concessions conferred by law or under contract, including concessions to search for, cultivate, or exploit natural resources.
1996	Commentary to the ICSID Convention by CHRISTOPH SCHREUER, in ICSID Review	"It would not be realistic to attempt yet another definition of "in- vestment" on the basis of ICSID's experience. But it seems possible to identify certain features that are typical to most of the operations in question. The first such feature is that the projects have a certain *duration.* Even though some break down at an early stage, the expectation of a longer term relationship is clearly there. The second feature is a certain *regularity of profit and return.* A one-time lump sum agreement, while not impossible, would be untypical. Even where no profits are ever made, the expectation of return is present. The third feature is the assumption of *risk* usually by both sides. Risk is in part a function of duration and expectation of profit. The fourth typical feature is that the commitment is *substantial.* This aspect was very much on the drafters' minds although it did not find entry into the Convention (see para. 83 *supra).* A contract with an in- dividual consultant would be untypical. The fifth feature is the operation's significance for the host State's *development.* This is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Directors' Report (see para. 88 *supra)* suggest that development is part of the Convention's object and purpose. These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention." (citations omitted)
1996	Georgia Investment Law	"(1) Investment is any kind of property or intellectual value or right to be contributed and used in the entrepreneurial activity carried out on the territory of Georgia for earning of possible income. (2) Such value or right may be: funds, shares, stocks and other securities; movable and immovable property – land, buildings, equipment and wealth;

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		land tenure or right to use other natural resources (concessions, as well), patent, license, "know-how", experience and other intellectual value; other legally recognized property and intellectual value or right."
1997	*Tanzania Investment Act*	"'investment' means the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise"
1998	Carreau et Juillard, Droit international économique, 4 edn	Omission of the economic definition of investment
1999	*Fedax v Venezuela*	First dispute on the existence of investment Par. 25: "This is the first ICSID case in which the jurisdiction of the Centre has been objected to on the ground that the underlying transaction does not meet the requirements of an investment under the Convention. " Par. 29: "The Tribunal considers that the broad scope of Article 25 (1) of the Convention and the ensuing ICSID practice and decisions are sufficient, without more, to require a finding that the Centre's jurisdiction and its own competence are well–founded. In addition, as explained above, loans qualify as an investment within ICSID's jurisdiction,[38] as does, in given circumstances, the purchase of bonds.[39] Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this. This conclusion, however, has to be examined next in the context of the specific consent of the parties and other provisions which are controlling in the matter."
1999	*CSOB v Slovak Republic*	Relying on Fedax, "these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention"

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1999	GAILLARD EMMANUEL, Fedax v. Venezuaela, 278 JDI 292 (1999)	"Trois éléments sont donc réunis : l'apport, la durée et fait que l'investisseur supporte, au moins en partie, les aléas de l'entreprise (sur l'adoption de critères analogues par la convention de Seoul du 11 octobre 1985 créant l'Agence Multilatérale de Garantie des Investissements (AMGJ)."
1999	UNCTAD Series on issues in international investment agreements – scope and definition of investment and investor	
23 July 2001	*Salini Costruttori S.P.A. and Italstrade S.P.A. v Morocco*	Par. 52: "The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be *"in direct relation to an investment"* is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre *(cf* in particular, the commentary by *E. Gaillard, in JDI* 1999, *p.* 278 *et seq.,* who cites the award rendered in 1975 in the *Alcoa Minerals vs. Jamaica* case as well as several other authors). The criteria to be used for the definition of an investment pursuant to the Convention would be easier to define if there were awards denying the Centre's jurisdiction on the basis of the transaction giving rise to the dispute. With the exception of a decision of the Secretary General of ICSID refusing to register a request for arbitration dealing with a dispute arising out of a simple sale *(I.F.I. Shihata and A.R. Parra, The Experience of the International Centre for Settlement ofInvestment Disputes: ICSID Review, Foreign Investment Law Journal, vol.* 14, *n°* 2, 1999, *p. 308.),* the awards at hand only very rarely turned on the notion of investment. Notably, the first decision only came in 1997 *(Fedax* case, cited above). The criteria for characterization are, therefore, derived from cases in which the transaction giving rise to the dispute was considered to be an investment without there ever being a real discussion of the issue in almost all the cases. The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction *(cf commentary by E. Gaillard, cited above, p.* 292). In reading the

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		Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here. "
2005	*Republic of Italy v Republic of Cuba*	"sauf dispositions contraires spécifiques d'un Traité Bilatéral de protection des Investissements, trois éléments sont requis pour que l'on se trouve en présence d'un investissement : un apport, la durée et une prise de risque de la part de l'investisseur (ce dernier doit, au mains en partie, participer aux aléas de l'opération économiques)"
2006	*Mitchell v Democratic Republic of Congo*	"The Preamble of the Washington Convention sets forth a number of basic principles as to its purpose and aims, which imbue the individual provisions of the Convention, including Article 25, which makes it needless to mention that the Convention was concluded under the auspices of the International Bank for Reconstruction and Development itself"
2008	*Victor Pey Casado and President Allende Foundation v Republic of Chile*	" L'exigence d'une contribution au développement de l'Etat d'accueil, difficile à établir, lui paraît en effet relever davantage du fond du litige que de la compétence du Centre. Un investissement peut s'avérer utile ou non pour l'Etat d'accueil sans perdre cette qualité. Il est exact que le préambule de la Convention CIRDI évoque la contribution au développement économique de l'Etat d'accueil. Cette référence est cependant présentée comme une conséquence, non comme une condition de l'investissement : en protégeant les investissements, la Convention favorise le développement de l'Etat d'accueil. Cela ne signifie pas que le développement de l'Etat d'accueil soit un élément constitutif de la notion d'investissement. C'est la raison pour laquelle, comme l'ont relevé certains tribunaux arbitraux, cette quatrième condition est en réalité englobée dans les trois premières."
2009	ASEAN Comprehensive Investment Agreement of 2009	"Investment means every kind of asset, owned or controlled, by an investor, including but not limited to the following:

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		Movable and immovable property and other property rights such as mortgages, lines or pledges; Shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights or interest derived therefrom; Intellectual property rights which are conferred pursuant to the laws and regulations of each Member State; Claims to money or to any contractual performance related to a business and having financial value Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; and Business concessions required to conduct economic activities and having financial value conferred by law or under a contract, including any concessions to search, cultivate, extract or exploit natural resources." The term 'investment' also includes amounts yielded by investments, in particular, profits, interest, capital gains, divided, royalties and fees. Any alteration of the form in which assets are invested or reinvested shall not affect their classification as investment:"
2009	*Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009	"While this characteristic is arguably subjective, it is not devoid of all utility and in fact preserves a vital link between an investment and the intended purpose of the Convention. This link, between investments and economic development, is emphasized not only in the preamble to the Convention but also in the Report of the Executive Directors of the World Bank accompanying the Convention."
2009	*Romak S.A. v Uzbekistan*, Case No. AA280, Award, (Perm. Ct. Arb. 2009)	Salini test spill-over
2012	*UNCTAD World Investment Report*	Shift from macro to sectoral analysis

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2012	*Quiborax* S.A., *Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27.09.12	"The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment. This evolution is illustrated by the following four decisions."
2012	China-Japan-Korea trilateral agreement	"(1) the term "investments" means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investments may take include: (a) an enterprise and a branch of an enterprise; (b) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom; (c) bonds, debentures, loans and other forms of debt, including rights derived therefrom (d) rights under contracts, including turnkey, construction, management, production or revenue sharing contracts; (e) claims to money and claims to any performance under contract having a financial value associated with investment; (f) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information; (g) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations and permits; and (h) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges; Note: Investments also include the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change

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		in the form in which assets are invested does not affect their character as investments.”
2017	CETA	“investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures and other debt instruments of an enterprise; (d) a loan to an enterprise; (e) any other kind of interest in an enterprise; (f) an interest arising from: (i) a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources, (ii) a turnkey, construction, production or revenue-sharing contract; or (iii) other similar contracts; (g) intellectual property rights; (h) other moveable property, tangible or intangible, or immovable property and related rights; (i) claims to money or claims to performance under a contract. For greater certainty, claims to money does not include: (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party.

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		(b) the domestic financing of such contracts; or (c) any order, judgment, or arbitral award related to sub-subparagraph (a) or (b). Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment;"
2018	USMCA	"Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include: (a) an enterprise; (b) shares, stock and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; 1 (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue - sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law; 2 and (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases, but investment does not mean: (i) an order or judgment entered in a judicial or administrative action; (j) claims to money that arise solely from: (i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party , or

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		(ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i);”

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Case Study 24

The Doctrine of Police Powers in Indirect Expropriation

(April – August 2021)

Pedro Martínez Esponda

Synopsis

This case study frames the enduring relationship between indirect expropriation (IE) in international investment law (IIL) and the exception made to it by the doctrine of police powers (DPP). It focuses specifically on the fluctuations in understandings of IE and DPP that took place around 1970 and their reversal around 2000. IE proper came to existence roughly after 1917 as a residual mechanism meant to capture any form of state interference with the right to property of foreigners – i.e. use or enjoyment of benefits – falling short of direct appropriation by the state. While IE remained underused, understudied, and practically uncodified until the 1960s, it was generally recognized from the outset that some natural functions of government – *police powers*, following common law terminology – were beyond its reach and thus would not trigger the obligation of the host state to pay compensation. This contrasted with direct expropriation, where, despite controversies, the view that compensation ought to be paid regardless of the purpose of the measures eventually became dominant. Throughout the 1960s,1970s, 1980s, however, investment agreements (both BITs and FTAs) and jurisprudential practices altered this normative model. Without any open discussion, they equated IE to direct expropriation as requiring, whatever the purpose and circumstances of a governmental measure, compensation to the foreign investor, thereby erasing the limits to IE that until then had been thought to exist under the DPP. The change went largely uncontested, partly because the arbitral practice was scarce and affected only a handful of marginalized states, and partly because the political tides of the time made of neoliberal readings of international rules something natural and acceptable. But the decoupling of IE from the DPP would not stand the test of time. Around 2000, as cases of IE started threatening developed states, and as social awareness and activism around IIL started

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to emerge precisely in these countries, the DPP was brought back into the picture. New BITs and FTAs signed by developed states started to mention explicitly the DPP, and both arbitral jurisprudence and academic work recognized that states ought to have a certain margin of policymaking for which they are not compelled to pay compensation. Today, even if the large majority of BITs and FTAs – entered in the 1980s and 1990s – retain the unnuanced equivalence of direct and indirect expropriation in terms of compensation, there is broad agreement that IE is bounded by the DPP. The precise contours of these limits remain nonetheless highly contested.

I. Chronology

First Phase: From international minimum standard to the modern law of expropriation: the consolidation of direct and indirect expropriation in international law (1917-1970s)

The law on expropriation did not exist as such before 1917. The taking of foreign-owned property was governed by the same body of rules that governed the treatment of foreigners in general: diplomatic protection and what was called the *international minimum standard* (IMS).[1] At the base, this standard operated as a safeguard against denial of justice – focusing on the procedural aspect of the treatment of foreigners.[2] It being rather uncommon for states to engage in the formal appropriation of the property rights of foreigners (direct expropriation), IMS operated across the board regulating any type of governmental interference with the rights of foreigners.[3] In terms of the protection of property rights, it worked as a general requirement for any form of governmental disturbance of foreign

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[1] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013), 48.
[2] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), 36.
[3] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2013), 47, https://doi.org/10.1017/CBO9781139600279.

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property – going from appropriation to milder interferences – to be conducted under due process and guaranteeing compensation.[4]

This *status quo* was disturbed in 1917 by two unrelated events: the entry into force of the new Mexican Constitution and the Russian Revolution. Both in Mexico and in the newly founded USSR, the revolutionary governments set out to implement largescale agrarian – and in the case of Russia, also industrial – reforms that often required the forfeiture of the property of foreign investors: what they referred to as *nationalizations*.[5] The international concern over this form of direct interference with foreign property rights acquired an unprecedented relevance which led it to be conceived as a body of law on its own, complementary but distinct to the rules on IMS: the law on expropriation. Under it, expropriation at the expense of foreign property was not *per se* conceived as unlawful, but it required to be undertaken for a public purpose, without discrimination, and, crucially, mediating compensation.[6] Yet, judges and scholars alike seem to have been aware that direct expropriation did not cover the whole spectrum of interferences with foreign property rights that before the Mexican and Russian revolutions had fallen under the umbrella of IMS. Property could be affected, they thought, not only through the formal transfer of property titles, but also, for instance, through the hinderance of its value by a governmental act or omission. These types of interferences were qualitatively different from direct expropriation, everyone agreed, but fell nonetheless within the category of expropriation. Judges and scholars therefore started including in their writings on the law of expropriation references to interferences that were "tantamount" to expropriation – sometimes but not always referred to as *indirect expropriation.*[7]

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[4] Roland Kläger, *"Fair and Equitable Treatment" in International Investment Law* (Cambridge University Press, 2011), 50–53.
[5] Sebastián López Escarcena, *Indirect Expropriation in International Law*, Leuven Global Governance Series (Cheltenham: Edward Elgar Publishing, Edward Elgar Publishing Limited, Edward Elgar, 2014), 23, 24, https://doi.org/10.4337/9781782544111.
[6] López Escarcena, 25.
[7] Alexander P. Fachiri, "Expropriation and International Law," *British Year Book of International Law* 6 (1925): 160–63; B. A. Wortley, "Problèmes Soulevés En Droit International Privé Par La Législation Sur l'expropriation (Volume 67)," *Collected Courses of the Hague Academy of International Law*, 1939, 419, 420, https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789028610422_04;

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It was recognized from the outset, however, that not all indirect interferences with property could be considered to amount to expropriation requiring compensation under international law. Some measure of adverse effects on the rights of foreign investors was unavoidable from the normal exercise of government in host states, and could not be thought to be prohibited by international law. These "normal" functions of government were referred to as *police powers* – a term borrowed from the doctrines of expropriation in common law systems.[8] Yet, while most authors of the interwar period recognized the DPP, an uncertainty regarding the content of this notion and the border between IE and legitimate government activity is evident in the literature of the time.[9]

The jurisprudence of the interwar period is indicative of this state of the law. That acts not formally transferring the property of foreigners but severely damaging it amounted to expropriation was recognized in two seminal cases before the Permanent Court of Arbitration (PCA) and the Permanent Court of International Justice (PCIJ). In the *Norwegian Shipowners* case of 1922, a PCA tribunal decided that there had existed *de facto* expropriation in the unilateral cancellation of contracts between the US government and certain Norwegian shipbuilders. The measure had on the main not implied the actual seizure of ships or materials from the latter, but it was deemed sufficient by the tribunal that their contractual rights had been rendered worthless to hold the US liable for *de facto* expropriation.[10] Then, in *Certain*

John H. Herz, "Expropriation of Foreign Property," *American Journal of International Law* 35, no. 2 (1941): 251, 252, https://doi.org/10.2307/2192262.

[8] *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (n.d.).* In this case, Justice Oliver Wendell Holmes recognized the DPP in the domestic context, famously holding that: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses [of the Constitution] are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be (…) compensation to sustain the act (…) The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

[9] Fachiri, "Expropriation and International Law," 170, 171; Hersch Lauterpacht, "Règles Générales Du Droit de La Paix," Collected Courses of the Hague Academy of International Law (Brill Nijhoff, 1937), 346, https://doi.org/10.1163/1875-8096_pplrdc_A9789028609921_02; G. Kaeckenbeeck, "The Protection of Vested Rights in International Law," *British Year Book of International Law* 17 (1936): 16, 17; Herz, "Expropriation of Foreign Property," 252, 253.

[10] *Norwegian Shipowners Claims (Nor. v. U.S.), 1 Reports of International Arbitral Awards 307 (1922) (n.d.).*

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German Interests in Polish Upper Silesia (Chorzów Factory) of 1926, the PCIJ ruled that the Polish government had expropriated, not only a formerly German-owned factory, but also the rights of the company to the operation of the factory, including patents and licenses, by having deprived them of their value.[11] These two cases settled to some extent the transition of IMS to IE in international law, making it clear that an autonomous claim could be made under the law on expropriation for acts not appropriating property rights but only damaging them.

In a third case, *Oscar Chinn* of 1934, is also informative of the development of IE and the DPP, although it needs to be read with caution because neither the parties nor the PCIJ used these terms, which is maybe indicative of the uneven evolution of IMS towards the law on expropriation. The claim, filed by the UK against Belgium, contended that the latter had breached its international obligation to ensure free colonial trade under the Convention of Saint-Germain of 1919, by subsidizing a Belgian shipping company operating in the Congo River, thereby driving a British competitor, Mr. Oscar Chinn, out of business. The Court ultimately dismissed the claim, reasoning that the international obligations of Belgium towards foreign investors did not extend to guaranteeing the success of their enterprises, and that, in investing his money in the Belgian Congo, Mr. Chinn, just like any other investor, had accepted a measure of business risk.[12] While the Court did not deal in depth with the nature of the measures taken by the Belgian government, it did however establish for the first time the principle that regulatory measures affecting the value of foreign investments can be lawful under international law depending on their purpose – without giving rise to an obligation to compensate.[13] This has largely been read as the first significant judicial endorsement of the DPP.

One can therefore say that, at the time of WWII, both direct and indirect expropriation had clearly become autonomous of IMS. John Herz' *Expropriation of Foreign Property,* written

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[11] *Certain German Interests in Polish Upper Silesia (Germany v. Poland), 1927 Series A, No.7 (Judgment of May 25,1926) (n.d.).*
[12] *Oscar Chinn (U.K. v. Belg.), 1934 Series A/B, No. 63 (Judgment of Dec. 12, 1934) (n.d.).*
[13] Oscar Chinn (U.K. v. Belg.), 1934 Series A/B, No. 63 (Judgment of Dec. 12, 1934) paragraph 86.

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in 1941 provides a good outlook for this. Explicitly attempting to provide a "coherent theory of expropriation as a separate institution" – which he saw as lacking at the time – he contended that international law had until the outbreak of the war had developed two types of expropriation; one that implied the "express taking away of an individualized piece of property", and one whereby a "a measure indirectly interferes with property, e.g., by diminishing its value through certain acts, or by burdening the whole of the property of an individual with pecuniary obligations".[14] The general rule under international law, according to Herz, was that "any interference, by action of the state, with foreign property constitutes expropriation" therefore triggering the duty of compensation. Yet he saw international law as providing for an exception for "reasons of police", including at a minimum the protection of public health and security.[15] Nonetheless, he detected a "great controversy" on the extent of this exception.[16]

After WWII, the spread of socialism in Eastern Europe and the gradual process of decolonization led direct expropriation to occupy most of the energies of diplomats, lawyers, and scholars. Large processes of nationalization took place in different parts of the world,[17] and with them, a heated debate around the issue of compensation for direct expropriation emerged.[18] Developed countries were of the view that what is known as the *Hull Formula* had unambiguously solidified in international law throughout the nineteenth century and until WWII. This consisted in the obligation to ensure *prompt, adequate, and effective* compensation, regardless of the purpose of the expropriation, on the basis of the alleged principle that reparation ought to *wipe out* the effects of a legal injury, as stated by the PCIJ in *Chorzów*. Developing countries, in contrast, argued that foreign investors deserved the same treatment as national investors, and thus that the standard of compensation should be

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[14] Herz, "Expropriation of Foreign Property," 251.
[15] Herz, 252.
[16] Herz, 252.
[17] López Escarcena, *Indirect Expropriation in International Law*, 25, 26.
[18] August Reinisch and Christoph Schreuer, eds., "Expropriation," in *International Protection of Investments: The Substantive Standards* (Cambridge: Cambridge University Press, 2020), 6, 7, https://doi.org/10.1017/9781139004978.003.

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sovereignly determined by the law of the host state and applied without discrimination.[19] This debate occupied most of the diplomatic and legal space on the issue of expropriation for at least three decades, until the late 1970s, reaching nearly every international forum available at the time.[20] In consequence, IE and DPP stayed in the shadow of direct expropriation: understudied, underpracticed, and with the somewhat obscure legal status that it had before WWII.

Withal, IE and DPP never faded away during the decades of the boom of direct expropriation. Several authoritative studies included and discussed them, albeit tangentially. A crucial one was the work of Francisco García Amador as first ILC special rapporteur on state responsibility. In his fourth report of 1959, he discussed the issue of expropriation and distinguished between expropriation *stricto sensu* and "takings" or indirect expropriation, explicitly referring to the DPP, contending that states are allowed under international law to impose burdens on foreign property for different purposes as long as they are not discriminatory or arbitrary.[21] A second very important codification effort was produced by Sohn and Baxter, known as the *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* of 1961. Its article 10.3 established that "A taking of property includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference".[22] It then added, in clear reference to the DPP, that "An uncompensated taking of an alien's property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the

[19] David Collins, *An Introduction to International Investment Law* (Cambridge University Press, 2016), 191.
[20] López Escarcena, *Indirect Expropriation in International Law*, 31, 32.
[21] ILC, "Fourth Report on State Responsibility by F. V. Garcia Amador, Special Rapporteur," 1959, paras. 40–45.
[22] Louis B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens," *The American Journal of International Law* 55, no. 3 (1961): 553, https://doi.org/10.2307/2195879.

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valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful".[23]

A similar awareness is reflected in an article of 1962 written by George Christie that would later prove highly influential as one of the very few thorough works on IE during the height of direct expropriation.[24] The article evidences that the interest in IE at the time was in fact very linked to the idea of direct expropriation. The reasonings and examples given by Christie show a core concern with the issue of veiled forms of state appropriation. In this sense, the article started off posing the question of what legal action by a government, short of actual transfer of property, could be considered to amount to expropriation. It then explained the relevance of the matter by pointing to the recent decision of the Cuban revolutionary authorities to appoint its agents as temporary operators of American oil and sugar companies in the country, without actually affecting the owners' property titles.[25] Reviewing further recent practice, the article identified three main types of cases: those involving real property, those involving property other than land, and forced sales.[26] These make relatively clear that Christie had in mind situations analogous to direct expropriation, where the value of an investment was not simply being affected for the private owner but rather passed on to the state. His bottom-line conclusion was that the crucial consideration in order to determine the existence of a taking in these situations was the duration of the interference.[27] But Christie did refer in his article to the DPP. Expressly citing the then very recent Harvard Draft of 1961, he admitted that "the conclusion that a particular interference is an expropriation might also be avoided if the state (…) had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property".[28] Among these purposes he mentioned the operation of tax laws, currency control,

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[23] Sohn and Baxter, 554.
[24] George C Christie, 'What Constitutes a Taking of Property Under International Law?' (1962) 38 Brit. Y.B. Int'l L 307. See, for instance, how Paulsson and Douglas, 40 years later, used Christies article as a fundamental reference. Jan Paulsson and Zachary Douglas, 'Indirect Expropriation in Investment Treaty Arbitration' in Norbert Horn (ed), *Arbitrating foreign investment disputes* (Kluwer Law International 2004) 146.
[25] Christie, "What Constitutes a Taking of Property Under International Law?," 307.
[26] Christie, 312–29.
[27] Christie, 331.
[28] Christie, 331.

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and public health and morality, though warning that "'purpose' (…) is a much abused word in international law", and that "there is still a long way to go before one can come with any reasonably concrete solutions on the subject".[29]

Thus, while IE occupied a minor role during the whole period spanning from 1917 to roughly the 1970s, it remained present mainly as a residual mechanism for capturing forms of appropriation that could not be strictly defined as transfer of property from an investor to the state.[30] Direct and indirect expropriation had a fundamentally similar function in regulating appropriatory action by the state.[31] In this context, the DPP seems to have been always present, even if, as during the interwar period, it was acknowledged that its boundaries were unclear.[32]

Second Phase: IE in the years of neoliberalism: the emergence of international investment law and the sidelining of DPP (1980s-1990s)

A change towards neoliberalism started to take place in the law of expropriation throughout the 1960s, although it did not manifest fully until the 1980s. It happened gradually and in different fronts – some signs of it were visible even as early as the end of the 1950s. As such, it is impossible to anchor it to a specific moment or event. To begin with, the era of direct expropriation started to slowly come to an end in the 1970s. Direct expropriation became less

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[29] Christie, 332.

[30] This view is confirmed by the American Law Institute's Restatement of the Law Second of 1965, which in the commentary to its definition of "Taking" expressly acknowledged that "International Law has not established clear criteria for determining what constitutes a taking of an alien's property, short of complete transfer of title. The rule stated in this section is intended to cover only those situations in which conduct attributable to a state is substantially equivalent to the taking of the alien's interest in the property". The narrowness of this definition of taking shows the moderation of the drafters of the Restatement, which sought to keep IE as close to direct expropriation as possible. Important to note is also that the restatement did provide, in section 197, a general clause for DPP applying not only for expropriation but for other forms of interference as well. See: American Law Institute, *Restatement of the Law Second, Foreign Relations Law of the United States* (St. Paul Minn: American Law Institute, 1965), sec. 192.

[31] Andrew Newcombe, "The Boundaries of Regulatory Expropriation in International Law," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 21, 2005), 6, https://papers.ssrn.com/abstract=703244.

[32] This is also confirmed by the different positions expressed in a meeting of the Grotius Society on 1947 to discuss the state of the law of expropriation at the time. See, in particular Wortley and Loewenfeld's positions acknowledging IE and DPP, in: B. A. Wortley et al., "Expropriation in International Law," *Transactions of the Grotius Society* 33 (1947): 34, 35, 44.

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and less common, and the controversy over the standard of compensation ended in favor of the Hull Formula – the position that lawful expropriation requires in every case prompt, adequate, and effective compensation, and that the purpose of the expropriation is irrelevant for the determination of compensation.[33] In parallel to this, modern international investment law (IIL) saw the day. The multilateral challenges to liberalism by developing states in the context of decolonization and the New International Economic Order led developed states to pursue bilateral investment agreements (BITs) and Free Trade Agreements (FTAs) directly with developing countries, seeking to impose their views and guarantee the protection of their investors as a matter of *lex specialis*, whatever the outcome of the global *bras de fer*.[34] Moreover, many developing states found themselves in need of attracting foreign direct investment, for which they thought – and were told by international financial institutions – that entering BITs was a good idea.[35]

These two factors – the triumph of the Hull Formula in direct expropriation and the turn to bilateral investment agreements – silently transformed the prevailing understandings of IE and the practice of investment claims. More often than not,[36] BITs and FTAs of the late 1960s and until the 1990s contained expropriation clauses that joined direct and indirect expropriation with simplistic formulations such as the following, selected randomly from the Indonesia – Netherlands BIT of 1968: "neither Contracting Party shall take any measures depriving, *directly or indirectly*, nationals of the other Contracting Party of their investments goods, rights or interests unless (…): a) the measures are taken in the public interest and under due process of law; b) the measures are not discriminatory (…); c) the measures are accompanied by provision for the payment of just compensation".[37] Crucially – and contrary to the common interpretation of IE until then – this had the effect of subjecting direct

[33] Catharine Titi, "Police Powers Doctrine and International Investment Law," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, October 10, 2017), 6, https://papers.ssrn.com/abstract=3050417.
[34] Reinisch and Schreuer, "Expropriation," 6.
[35] López Escarcena, *Indirect Expropriation in International Law*, 34.
[36] Although this seems not to have been the case with the very first BITs. Germany, the main initial promotor of BITs, did not follow this practice until the 1980s.
[37] See article 7 of the Indonesia - Netherlands BIT of 1968. Similar formulations can be found in most BITs of the time.

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expropriation and IE to the same standard of compensation under the Hull Formula, implying that the purpose of any expropriatory measure, whether direct or indirect, was irrelevant for the determination of a duty to compensate. In other words, these provisions eliminated tacitly the DPP from the law of expropriation, making it immaterial whether the state was implementing its legitimate police powers in its doings. As such, all measures indirectly affecting the property of foreigners became, through the analogy with direct expropriation, subject to compensation. This was a clear, though silent, rupture with the way IE had until then been loosely understood to operate.

How did this shift happen? Two draft conventions are crucial in explaining it. The first one, published in 1959, was known as the *Abs–Shawcross Draft Convention on Investments Abroad.* This document contained the seed of what was to become the investment protection regime in the following decades. During the 1950s, seeing the spread of direct expropriation in developing countries, the business community started thinking of ways to legally protect their investments, especially after it became clear that the project of the Havana Charter and International Trade Organization had shipwrecked.[38] One of the outcomes of these efforts was the *Abs–Shawcross Draft Convention,* a project led by Hermann Abs and Lord Shawcross, then Chairman of Deutsche Bank and Director of the Shell Petroleum Company, respectively. This text recommended states to adopt multilaterally a framework of investment protection based on three pillars: Fair and Equitable Treatment (FET), the strict respect of contracts and undertakings between states and investors, and the principle that *any* expropriation ought to be compensated for in terms of the Hull Formula.[39] On this last point, article III read: "No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property except under due process of law and provided that such measures are not discriminatory or contrary to undertakings given by that

[38] Stephan W. Schill, *The Multilateralization of International Investment Law*, Cambridge International Trade and Economic Law (Cambridge University Press, 2009), 35, https://doi.org/10.1017/CBO9780511605451.
[39] "Draft Convention on Investments Abroad (Abs–Shawcross Convention), UNCTAD, International Investment Instruments: A Compendium – Volume V, p. 395," 2000, https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf. See articles I, II, and III.

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Party and are accompanied by the payment of just and effective compensation".[40] This formulation excluded, unlike the fourth report of García Amador to the ILC of the same year and the Harvard Draft of 1961, any consideration of DPP. The bar for derogations to its standards was set much higher, apparently following the recommendation of Elihu Lauterpacht to copy-paste from article 15 of the ECHR.[41] In article V, the Draft said: "No Party may take measures derogating from the present Convention unless it is involved in war, hostilities, or other public emergency, which threatens its life; and such measures shall be limited in extent and duration to those strictly required by the exigencies of the situation". While knowing the exact reactions that these specific provisions triggered among states is close to impossible, it is clear that the draft had little chances of success at that point.[42] At the critical time of the struggle by developing states to change the rules of the international economic order, it was unfeasible to attempt to build consensus on a proposal drafted by the heads of Deutsche Bank and Shell and based on such a pro-investor criteria. As explained by Georg Schwarzenberger at the time, "even moderate governments of capital-importing countries [found] it impossible to pay the political price involved in becoming parties to conventions on the Abs–Shawcross lines".[43] Therefore, the Abs–Shawcross Draft was never actually put to the consideration of states.

Yet, the ideas of this document deeply influenced a much more authoritative and transcendental draft: the 1967 *OECD Draft Convention on the Protection of Foreign Property*. This time the attempt to achieve a multilateral treaty on investment was undertaken not by private parties, but by the bureaucrats of the OECD. The Draft followed nearly to the letter the Abs–Shawcross Draft on its three first articles, establishing on expropriation that "No Party shall take any measures depriving, directly or indirectly, of his property a national

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[40] "Draft Convention on Investments Abroad (Abs–Shawcross Convention), UNCTAD, International Investment Instruments: A Compendium – Volume V, p. 395." Article III.

[41] Yuliya Chernykh, "The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention," in *International Investment Law and History*, ed. Stephan W. Schill, Christian J Tams, and Rainer Hofmann, Frankfurt Investment and Economic Law Series (Edward Elgar Publishing, 2018), 271, https://doi.org/10.4337/9781786439963.00017.

[42] Schill, *The Multilateralization of International Investment Law*, 36.

[43] Georg Schwarzenberger, *Foreign Investments and International Law*, The Library of World Affairs No. 68 (London: Stevens and Sons, 1969), 134.

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of another Party unless the following conditions are complied with: (i) The measures are taken in the public interest and under due process of law; (ii) The measures are not discriminatory; and (iii) The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto".[44] This formulation, again, erased the distinction between direct and indirect expropriation in terms of compensation, and overlooked wholly the DPP.[45] As with the Abs–Shawcross Draft in 1959, the tide of international politics in 1967 did not favor the project, and thus the draft failed to gain the support of OECD member states and was never even opened to signature.[46]

The effect of the OECD draft, however, was enormous. Its failure cemented the idea in developed countries that a much more feasible way to protect their investors was to engage in bilateral treaty-making with developing countries – BITs and FTAs. Unsurprisingly, the basis on which these started to be drafted in the late 1960s and in the 1970s was precisely the OECD Draft. As a matter of fact, the Draft was recommended by the OECD to its members as a model for bilateral agreements, and thus countries like France, the UK and the US used it as a model for several decades.[47] As the example from the Indonesia-Netherlands BIT shows, the clauses joining summarily direct and indirect expropriation, subjecting them to compensation on an equal basis, became very common.

Underlying this shift was a deeper change in the philosophy behind the protection of foreign investment. As explained by Barklem and Prieto-Ríos, BITs and FTAs, in establishing FET so broadly and in disconnecting IE and DPP, responded to the "investors' lack of confidence

[44] "OECD Draft Convention on the Protection of Foreign Property (Adopted by the OECD Council on 12 October 1967)," n.d., https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2812/download.
[45] The draft established an even higher threshold for derogations in its article 6.
[46] Schill, *The Multilateralization of International Investment Law*, 36–38.
[47] Schill, 39.

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in judges, courts, and in general the legal system of developing countries".[48] In contrast to the Friendship, Commerce and Navigation Treaties (FCNs) that had until then existed – which normally just stated, among other things, that direct expropriation required compensation – BITs sought to establish liberal normative frameworks in capital-importing states, not only outlawing the outright abuse of foreign investors, but more importantly guaranteeing favorable conditions for foreign investment.[49] This implied extending the law of expropriation beyond the concern about appropriation of foreign property by the state, towards "inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs".[50] A broad understanding of IE, decoupled from DPP, was one of the several mechanisms with which to attempt this.

The first immediate manifestation of this change was the jurisprudence, not of arbitral tribunals under BITs – which were marginal until the 1990s – but interestingly of the Iran-USA Claims Tribunal. Iran shifted in 1979 from a having in power a neoliberal, pro-American monarchy, to a theocratic, semi-democratic, and nationalist revolutionary regime. The change affected US interests in many different forms, among which stood out the nationalization of several American companies. This, however, was not the only form of intervention that damaged the interests of American investors. In many instances, the government intervened American companies by taking control of them without formally seizing their ownership.[51] This led the US to exert all its diplomatic weigh on the new Iranian government in order to get it to agree to the formation of a Claims Commission that would allow these complaints to be heard and settled. The two countries thus signed the Algiers

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[48] Courtenay Barklem and Enrique Alberto Prieto-Ríos, "The Concept of 'Indirect Expropriation', Its Appearance in the International System and Its Effects in the Regulatory Activity of Governments," *Civilizar Ciencias Sociales y Humanas* 11, no. 21 (2011): 83.
[49] Robert D. Sloane and W. Michael Reisman, "Indirect Expropriation and Its Valuation in the Bit Generation," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 9, 2006), 117, https://papers.ssrn.com/abstract=943430.
[50] Sloane and Reisman, 118, 119.
[51] Hassan Sedigh, "What Level of Host State Interference Amounts to a Taking under Contemporary International Law?," *Journal of World Investment & Trade* 2, no. 4 (2001): 631, 632, https://doi.org/10.1163/221190001X00013.

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Accords in January 1981, which provided for the creation of the Iran-US Claims Tribunal to hear complaints arising out of "debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights (…)".[52] No other jurisdictional or substantive basis was provided by the Accords. Expropriation and IE therefore had to be read in light of customary international law, and not the former FCN between Iran and the US – nor any BIT.

That notwithstanding, throughout the 1980s the Tribunal established a doctrine of IE that resonated with the new formulations of IE in the BITs of the time. Three case decided between 1983 and 1986 form the core of this approach: *Starrett Housing Corp. v. Iran*; *Tippetts and others v. TAMS-AFFA Consulting Engineers of Iran*; and *Phelps-Dodge v. Iran.* The three concerned American companies which had undergone the appointment of managers and supervisors by the Iranian authorities, and in the three of them the government argued, with some small variations, that it had done so only temporarily after the American managers had evacuated Iran during the period of civil unrest, in order to prevent the closure of factories and to ensure the payment of salaries and debts.[53] In rejecting Iran's arguments, the Tribunal famously said in *Tippetts* that: "A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected", and it added: "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact".[54] Then, in *Phelps-Dodge*, citing *Tippetts*, the Tribunal said: "The Tribunal fully understands the reasons why the Respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic

[52] "Declaration of the Government of the Democratic and Popular the Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration)," January 19, 1981, https://iusct.com/wp-content/uploads/2021/02/2-Claims-Settlement-Declaration.pdf. See article II.
[53] George H. Aldrich, "What Constitutes a Compensable Taking of Property--The Decisions of the Iran-United States Claims Tribunal," *American Journal of International Law* 88, no. 4 (1994): 588–91.
[54] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et al. (Award), No. Case No. 7 (Iran-US Claims Tribunal June 22, 1984).*

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and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss".[55]

These decisions, and particularly the passage of *Tippetts* cited above, had a huge effect in the later jurisprudential developments of the law on IE in the 1990s. They were read by academics, lawyers, and judges alike as giving no role whatsoever to the DPP in the determination of compensation for IE – indeed as the Hull Formula determined for direct expropriation. But this transposal of the jurisprudence of the Iran-US Claims Tribunal to the context of BITs has not gone without criticism. Andrew Newcombe, for example, argues that the use of these precedents in contexts different from that of the Iranian Revolution contributed to artificially developing an "orthodox approach" to IE, focusing too narrowly on the effect of deprivation of a measure at the expense of the element of appropriation, which is the central object of the law of expropriation in international law.[56] Sornarajah, in a similar vein, criticizes the import of the Iran-US Claims Tribunal's jurisprudence to the BIT context, among other things because the basis on which these were decided – the Algiers Accords – had legally nothing in common with investment agreements.[57]

The jurisprudence of the Iran-US Claims Tribunal was not the only non-BIT based jurisprudence that helped decoupling the DPP from IE. Four cases of contract-based arbitration are often cited in the literature as backing this approach to IE,[58] although their jurisdictional basis and their factual closeness to direct expropriation make it questionable whether they could reasonably be considered proper precedents. The first of them was *Revere Copper and Brass, Inc. v. OPIC* of 1978, a private arbitration under a contract between a

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[55] *Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran, IUSCT Case No. 99 (Award), No. Case No. 99 (Iran-US Claims Tribunal March 19, 1986).*

[56] Newcombe, "The Boundaries of Regulatory Expropriation in International Law," 8.

[57] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: University Press, 2015), 203.

[58] Sloane and Reisman, "Indirect Expropriation and Its Valuation in the Bit Generation," 125, 126; Rudolf Dolzer, "Indirect Expropriation of Alien Property," *ICSID Review - Foreign Investment Law Journal* 1, no. 1 (1986): 51, 52, https://doi.org/10.1093/icsidreview/1.1.41; Rudolf Dolzer and Felix Bloch, "Indirect Expropriation: Conceptual Realignments?," *International Law Forum (Hague, Netherlands)* 5, no. 3 (2003): 162, https://doi.org/10.1163/138890303322398350.

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transnational mining company and Jamaica. In it, the panel ruled that that the imposition of tax and royalty obligations, as well as the establishment of minimum levels of production by the government on Revere, amounted to expropriation under the contract and international law.[59] A second case was *Benvenuti et Bonfant v People's Republic of the Congo* of 1980, where an ICSID panel ruled over a dispute arising from a joint venture between an Italian company and the Republic of Congo. Under the contract, a bottling company was to be created, for which the government committed to establish a special tax regime, provide some preferences, and guarantee its financing. The government, nevertheless, failed to do so, ultimately even occupying with military personnel the headquarters of the joint venture and instituting criminal proceedings against one of the Italian directors, leading the tribunal to the conclusion that there had been a *de facto* expropriation of the joint venture.[60] The third case is *Liberian Eastern Timber Corporation v. Liberia* of 1986, where an ICSID tribunal ruled under a concession contract that there had existed expropriation in the disregard of certain obligations by the government, rendering the investment worthless.[61] And lastly, in *Biloune and Marine Drive Complex Ltd. v. Ghana*, an *ad hoc* contractual arbitration solved in 1989 under UNCITRAL rules, it was determined that certain prejudicial measures by the Ghanaian government – including a stop work order, the demolition of premises, and the arrest and deportation of the investor – had provoked the "irreparable cessation" of business activities and thus constituted a "constructive expropriation", regardless of the motivations of the government.[62]

These four cases, plus the Iran-US Claims Tribunal's jurisprudence, helped cement the impression among academics and arbitrators that the purpose of a measure was immaterial to the determination of IE, or at least to cast serious doubts on the matter.[63] The ground was set for this doctrine to set its foot in BIT and FTA jurisprudence, which only fully took off

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[59] *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation, No. Case No. 1610013776 (American Arbitration Association 1978).*

[60] Benvenuti et Bonfant v People's Republic of the Congo (Award), No. Case No. ARB/77/2 (ICSID 1980).

[61] *Liberian Eastern Timber Corporation v. Republic of Liberia (Award), No. Case No. ARB/83/2 (ICSID 1986).*

[62] *Biloune and Marine Drive Complex Ltd. v. Ghana (Award on Jurisdiction and Liability) (Ad hoc arbitration under UNCITRAL rules) (1989).*

[63] Titi, "Police Powers Doctrine and International Investment Law," 5–9.

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in the 1990s. Three cases are usually referred in this regard, although, again, there are reasons to doubt whether at least the first two of them have solid precedential value. The first case came from the NAFTA framework, but did not make it to the merits phase: *Ethyl Corporation v. Canada* of 1998. In it, the Canadian government faced an IE complaint – together with other provisions – stemming out of a ban on the manufacture of a chemical additive to petrol, arguing health and environmental reasons.[64] The tribunal admitted the complaint and dismissed Canada's objections on jurisdiction, after which the government decided to opt for a settlement. The literature often assumes that this shows that the claim of IE might have been grounded, something which is certainly questionable.[65]

The second case, more often cited as an authority than *Ethyl*, was *Santa Elena v. Costa Rica*, decided in 2000. In it, the tribunal famously held, citing *Tippetts*, that "there is ample authority for the proposition that a property has been expropriated when the effect of the measure taken by the states has been to deprive the owner of title, possession, or access to the benefit and economic use of its property", adding that "expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains".[66] What casts a doubt over the value of this precedent is that the facts of the case concerned an instance of direct expropriation which the Costa Rican government admitted to have engaged in, the only dispute being the time at which the relevant interference had actually taken place. This was because the claimant contended that the expropriatory measures had begun before the expropriation decree – an argument tacitly akin to IE – something that the tribunal agreed with.

[64] Ethyl Corporation v. The Government of Canada (Award on Jurisdiction) (UNCITRAL Tribunal under NAFTA 1998); Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, 2015, 204.
[65] Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, 2015, 196.
[66] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica (Award), No. Case No. ARB/96/1 (ICSID 2000).

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The third and crucial case was *Metalclad v. Mexico*, a claim brought under NAFTA and also solved in 2000. This case is doubtlessly the most cited authority for the doctrine of IE without DPP. Relying in *Biloune*, the Tribunal ruled that Mexico had indirectly expropriated Metalclad's investment in the development of a hazardous-waste landfill by interfering with its reasonable expectations. The basis of these interferences, according to the Tribunal, where the accumulation of harmful regulatory acts and omissions by a municipal authority, coupled with the favorable representations of the federal government.[67] Discarding the argument that the measures pursued legitimate environmental aims, the tribunal held that: "[it] need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation".[68] This determination, rather summary in the award, is so far the starkest judicial endorsement of IE decoupled from DPP, and as such it became the unavoidable reference among investment lawyers.[69]

Metalclad had the important effect of consolidating what can be called a "doctrine" out of the different tendencies interpreting IE as autonomous from DPP. From 2000 on, this reading of IE was for the first time singled out as only one possible take on the issue of IE, often called the *sole effects doctrine* – a term apparently created by Rudolph Dolzer around that time.[70] Andrew Newcombe, less popularly, characterized it as the "orthodox approach" to IE, an approach which he perceived to be dominant in 2005.[71] This step is noteworthy in the

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[67] *Metalclad Corportaion v. Mexico, No. CASE No. ARB(AF)/97/1 (ICSID 2000).*
[68] Metalclad Corportaion v. Mexico paragraph 111.
[69] Joshua Paine, "On Investment Law and Questions of Change," *The Journal of World Investment & Trade* 19, no. 2 (2018): 196, 197, https://doi.org/10.1163/22119000-12340080.
[70] Rudolf Dolzer, 'Indirect Expropriations: New Developments' (2002) 11 New York University Environmental Law Journal 64, 79, 80; Campbell McLachlan, *International Investment Arbitration: Substantive Principles* (University Press 2007) 301; Paul Barker, 'Legitimate Regulatory Interests: Case Law and Developments in IIA Practice' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2016) 245, 246
<https://www.cambridge.org/core/books/reassertion-of-control-over-the-investment-treaty-regime/legitimate-regulatory-interests-case-law-and-developments-in-iia-practice/3CF56B9D94D2CFBC39D0E081DC579691> accessed 17 March 2021.
[71] Newcombe, "The Boundaries of Regulatory Expropriation in International Law," 8.

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history of IE because it marks the moment where there emerged an awareness among scholars that there were two possible conflicting ways of approaching the matter. Before the neoliberal turn in the 1960s and the 1970s, while there was uncertainty about the boundaries of the DPP, no one really doubted that it set a limit on IE. Thus there was no conceptual need for differentiating "doctrines" of IE. Similarly, during the neoliberal period, it was tacitly taken for granted that IE operated like direct expropriation: without limits set by the DPP. Authors and authorities did not speak of several approaches to IE; the conflict with the previous paradigm was not presented or perceived as a conflict. This shows how the neoliberal revision of the law on expropriation between the Abs–Shawcross Draft Convention in 1959 and *Metalclad* in 2000 happened silently. There was never an explicit rejection of the DPP – it was rather gradually forgotten. At the same time, it is important to acknowledge that until *Metalclad*, the jurisprudence on the sole effects doctrine never actually went extremely far in interpreting IE as autonomous from the DPP. As seen, cases usually had strong elements of direct expropriation and were based on contracts whose legal standards were not strictly those of international law. In that sense, it is perhaps unsurprising that *Metalclad* was the first award were international lawyers realized that something had happened in the law of IE while they were not looking. The sole effects doctrine had emerged and presented itself as having behind it two decades of arbitral jurisprudence.

A last caveat for the sake of perspective is relevant at this point. The Restatement Third of the Foreign Relations Law of the US, released in 1987, acknowledged fully IE and the DPP. Much more clearly than the Restatement Second of 1965,[72] it spelt out the existence of IE as an independent standard from direct expropriation and, despite being released only some years after the key cases of the Iran-US Claims Tribunal, it determined that "a state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory".[73] This was an

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[72] See footnote 30.
[73] American Law Institute, *Restatement of the Law Third, Foreign Relations Law of the United States* (American Law Institute, 1987), sec. 712.

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unambiguous endorsement of the DPP, certainly surprising for its time. What is even more surprising – and in fact raises doubts on how the provision made it to the Restatement – is that DPP was established as a standard applying equally to direct and indirect expropriation, something going against the then cemented Hull Formula, which traditionally determined that the purpose of a direct expropriation had no impact on the duty and amount of compensation. As such, the inclusion of the DPP in the 1987 Restatement is puzzling, and it signals that the changes described in this section were not always continuous nor clear-cut. It is very likely that the drafters of the Restatement Third did not perceive there to be a need to choose between doctrines of IE and DPP. Key to note, though, is that these provisions of the Restatement Third played a central role in the post-2000 jurisprudence, as will be seen in the following.

Third Phase: Re-moderation of IE and mainstreaming of DPP (2000-on)

Around the turn of the century, a second inflection took place in the trajectory of the law on IE, this time under a moderationist spirit: the DPP came back into international investment law. Many authors identify the year 2000 as the point of change. Allain Pellet identifies it as an "attempt by investment tribunals to reconcile the sovereign right of the state, as the guardian of the general public interest, to regulate economic activities on its territory with its treaty or contractual obligations".[74] Catherine Titi talks about it as "a tendency […] that increasingly decouples an indirect expropriation from the exercise of the state's police powers" which is "obvious both in the deference shown by investment tribunals to the state's police powers and in recent investment treaty practice".[75] The simple fact is that, more or less around 2000, all kinds of authorities in the field began acknowledging that measures hindering property short of appropriation do not give rise to an obligation to compensate if

[74] Alain Pellet, "Police Powers or the State's Right to Regulate," in *Building International Investment Law – The First 50 Years of ICSID*, ed. Meg Kinnear (Kluwer Law International, 2016), 447, 452.
[75] Titi, "Police Powers Doctrine and International Investment Law," 11.

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they can be considered to fall within a certain core of state functions, or *police powers*.[76] This view has, today, become virtually uncontroversial.[77]

There are two main manifestations of this change: investment arbitration jurisprudence and practices of investment treaty-making. Concerning the case-law, from 2000 on, BIT and FTA tribunals started to acknowledge and apply the DPP, to the point that it became an unavoidable reference in cases and discussions concerning IE.[78] Only very exceptionally tribunals used the sole effects doctrine since then.[79] The case that can be considered to have started the trend is *S.D. Myers, v. Canada.* Its value, however, resides more in having broken the precedent of *Metalclad* only two months after it, rather than in having actually endorsed the DPP. The tribunal in this case decided that the temporal closing of the border between Canada and the US for the transport of toxic waste, hindering the business of S.D. Myers, did not amount to IE.[80] The decision, nevertheless, was not based on the legitimacy of environmental purpose of the measure – DPP potentially – but on the fact that there had not been any appropriation of the investment by the authorities, which was deemed to be the essence of expropriation.[81] What is more, no substantive reference to *Metalclad* was made whatsoever in the award, which suggests that the tribunal saw no need to tackle argumentatively the reading of IE employed in it.

The case that followed, however, *Marvin Feldman v. Mexico*, of 2002, did substantially overturn *Metalclad* on the meaning of IE and the role of the DPP. Endorsing the reasoning of the tribunal in *S.D. Myers* regarding the nature of expropriation, it added, fatefully, that: "(…) governments must be free to act in the broader public interest through protection of the

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[76] Titi, 1.
[77] Titi, 5; Pellet, "Police Powers or the State's Right to Regulate," 457; Johanne M. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford : Oxford University Press, 2019), 154; Katia Yannaca-Small, "Arbitration Under International Investment Agreements: A Guide to the Key Issues," 2nd ed. (Oxford : Oxford University Press, 2018), 585; Paulsson and Douglas, "Indirect Expropriation in Investment Treaty Arbitration," 147.
[78] UNCTAD, "Expropriation: A Sequel," UNCTAD Series on Issues in International Investment Agreements II, 2012, 91–94, https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.
[79] See, for example, Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentina (Award), No. ICSID Case No ARB/97/3 (ICSID 2007).
[80] Cox, *Expropriation in Investment Treaty Arbitration*, 171.
[81] *S.D. Myers, Inc. v. Government of Canada (Partial Award) (UNCITRAL November 13, 2000).*

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environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this".[82] Interestingly, the sole basis on which the tribunal reached this conclusion was the 1987 Restatement Third of the Foreign Relations Law of the US, mentioned in the last section. An immediate sequel to this interpretation can be found in an award of a year after, *Tecmed v. Mexico,* where the tribunal said, without citing any authority, that "the principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable".[83] This precedent, however, is ambiguous because just some paragraphs below the tribunal cited *Santa Elena v. Costa Rica* and held that, in reading the relevant BIT provision, it found no principle "stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever".[84] Perhaps because of this contradiction, *Tecmed* is not very often referred to in discussions on the topic.

Be that as it may, *Feldman v. Mexico* laid the ground for the next crucial case, considered in the literature as the main jurisprudential turn away from *Metalclad* and towards the DPP: *Methanex Corporation v USA*, of 2005.[85] Again a claim under NAFTA, in Methanex – like in *Ethyl* seven years earlier – in question was a ban by the state of California on the sale and use of a gasoline additive deemed harmful for human health and for the environment. The tribunal held, in one of the most cited paragraphs on the matter of IE and the DPP, that: "(…) as a matter of general international law, a non-discriminatory regulation for a public purpose,

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[82] *Marvin Feldman v Mexico (Award), No. Case No ARB(AF)/99/1 (ICSID 2002).*
[83] Técnicas Medioambientales Tecmed S.A. vs. Mexico (Award), No. CASE No. ARB (AF)/00/2 (ICSID 2003).
[84] Técnicas Medioambientales Tecmed S.A. vs. Mexico (Award) paragraph 121.
[85] Paine, "On Investment Law and Questions of Change," 196.

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which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government".[86] Surprisingly, though, the part of this quotation that could be interpreted as supporting the DPP, was entirely an *obiter dictum* in the context of the award. The tribunal focused solely on the last element for its decision: the lack of "specific commitments" given by the government to the investor, citing even the remote case of *Revere v. Jamaica* of 1978 in making that argument. Significantly, however, it did not cite any authority for the assertion of the first part, the non-expropriatiory nature of *a non-discriminatory regulation for a public purpose*, nor did this idea have any bearing in the reasoning that followed its finding against IE. Withal, it is evident from the wording that this formulation was taken from the Restatement Third and from *Feldman v. Mexico.* Why the tribunal decided not to cite either of them, nor develop this line of argument, is unclear.

The case that is generally seen as finally consolidating the re-emergence of the DPP is *Saluka Investments BV v. Czech Republic*, of 2006. It concerned a claim about the intervention and eventual forced administration of a private bank – of which Dutch nationals held shares – by the Czech National Bank.[87] In rejecting that there had existed IE, the tribunal found that "it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare".[88] Sustaining this assertion, the tribunal referred to the Harvard Draft Convention of 1961, a rather unknown and improperly cited "accompanying note" to the 1967 OECD Draft Convention, the Restatement Third, and *Methanex.* Why it did not refer to *Feldman v. Mexico* is, again, not clear, although here, in contrast to *Methanex*, the tribunal did not shy away from spelling out the DPP.

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[86] *Methanex Corporation v USA, UNCITRAL (NAFTA), (Final Award),* part IV chapter D para 7.
[87] Cox, *Expropriation in Investment Treaty Arbitration*, 160.
[88] *Saluka Investments BV v. Czech Republic (Partial Award) (PCA 2006).*

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Many cases followed this stream of jurisprudence after *Saluka*. Among them, the literature usually refers to *Chemtura Corporation v. Canada*; *Copper Mesa v. Ecuador*; *Burlington Resources Inc. v. Ecuador*; *WNC Factoring Limited v. Czech Republic*; *Continental v. Argentina*; *Azurix Corp v. Argentina*; *El Paso v. Argentina*, among others.[89] Worth mentioning is only one of the relatively recent decisions, which is largely seen as reflecting the state of the matter today: *Philip Morris v. Uruguay* of 2016. Capturing the historical trajectory of IE, and citing *Tecmed, Methanex, Saluka* and *Chemura,* the tribunal decided that:

> "The principle that the State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory did not find immediate recognition in investment treaty decisions. But a consistent trend in favour of differentiating the exercise of police powers from indirect expropriation emerged after 2000. During this latter period, a range of investment decisions have contributed to develop the scope, content and conditions of the State's police powers doctrine, anchoring it in international law. According to a principle recognized by these decisions, whether a measure may be characterized as expropriatory depends on the nature and purpose of the State's action".[90]

As concerns the shift in practices of investment treaty-making, the turning point came in 2004. In that year, both the US and Canada issued new model BITs that specified and limited the type of governmental acts that can constitute IE.[91] The US model used basically the old formulation from the 1967 OECD Draft in its provision on expropriation (article 6), but a specific annex confined its interpretation. It said, among other things, that "except in rare

[89] Paine, "On Investment Law and Questions of Change," 197.

[90] *Phillip Morris v. Uruguay (Award) (2016).*

[91] Eric De Brabandere, "States' Reassertion of Control over International Investment Law: (Re)Defining 'Fair and Equitable Treatment' and 'Indirect Expropriation,'" in *Reassertion of Control over the Investment Treaty Regime*, ed. Andreas Kulick (Cambridge: Cambridge University Press, 2016), 302, https://doi.org/10.1017/9781316779286.013.

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circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation".[92] The Canadian BIT used nearly the same wording.[93]

A very important number of BITs and FTAs have adopted similar practices since then, especially those entered by developed countries. The most prominent examples include the ASEAN-Australia-New Zealand Free Trade Area of 2010; the Comprehensive Economic and Trade Agreement (CETA) of 2016 between Canada and the EU; the Trans-Pacific Partnership Agreement (TPP), negotiated for many years and finally entered into force in 2018; and the remake of NAFTA, the United States-Mexico-Canada Agreement (USMCA) of 2020. The Trump-boycotted Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU contained similar provisions too. China seems to have adopted a similar practice, as evidenced by its BITs since 2011.[94] But the practice of including some form of DPP in investment treaties has not been exclusive of developed countries. An early and notable example is the Investment Agreement for the Common Investment Area of the Common Market for Eastern and Southern Africa (COMESA), of 2007, which provides in article 20 that "consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation (…)." Colombia is another example of a developing country adopting the DPP in its BITs since 2008.[95] Other countries, like India and Brazil, have opted for excluding wholly IE from their investment treaties.[96] Despite this, it must be said that the overwhelming majority of BITs

[92] "US 2004 Model BIT," n.d., Annex B, p 38, https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf.
[93] "Canada 2004 Model BIT," n.d., Annex B p. 21, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download.
[94] See China's BITs with Uzbekistan, Tanzania, and Turkey. Chinese BITs before 2011 did not provide for a DPP clause.
[95] See the BIT between Colomia and France, of 2014.
[96] See the India-Brazil BIT of 2015 and the Mexico-Brazil BIT of the same year.

Electronic copy available at: https://ssrn.com/abstract=4430270

currently in force date from the 1990s and the beginning of the 2000s, and retain the former, unnuanced form of expropriation clause providing no space for the DPP.

It stems from all of this that a rupture both in jurisprudence and treaty-making took place roughly between *Metalclad* in 2000 and *Saluka* in 2006. Two sets of reasons seem to explain the shift. The first and slightly more obvious one is that developed states grew aware of the potential risks of IE clauses based on the 1967 OECD Draft Convention, and did what they could to curve the increasing expansive interpretations of it by investment tribunals. This is particularly visible in the context of NAFTA, where the US and Canada model BITs providing for the DPP came exactly after the saga of IE cases that took place between 1998 and 2002: *Ethyl, Metalclad, SD Myers,* and *Feldman.* While only in *Metalclad* the tribunals opted to discard starkly the DPP – and against Mexico, not the US or Canada – these four cases must have signaled that a source of potential trouble with their regulatory capacities existed in article 1110 of NAFTA and the host of BITs entered by them until then. This would explain the fact that in 2004 both Canada and the US adopted a new model BIT that was responsive to the issue, and potentially also why other jurisdictions took the same attitude.[97] Several authors also suggest that it was these model BITs and the apprehension by the Canadian and US governments that awoke a sensibility among arbitrators towards the DPP, which would explain why only a year after their publication the tribunal in *Methanex* ruled in favor of allowing environmental regulations, opening the gates for the jurisprudence that followed.[98] Thus it might well be that there was a reciprocal influence in this evolution: the jurisprudence influenced treaty negotiators and policymakers, and treaty negotiators influenced the jurisprudence back. In any case, what is clear is that the change in jurisprudence and treaty-making in the years following the NAFTA case-law constituted a "sudden reversal of the way the law was heading".[99] A similar and perhaps unrelated process

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[97] Brabandere, "States' Reassertion of Control over International Investment Law," 294; Collins, *An Introduction to International Investment Law*, 165.
[98] Ursula Kriebaum, "FET and Expropriation in the (Invisible) EU Model BIT Special Issue: The Anatomy of the Invisible EU Model BIT," *Journal of World Investment & Trade* 15, no. 3–4 (2014): 466; Paine, "On Investment Law and Questions of Change," 198.
[99] Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, 2015, 204.

Electronic copy available at: https://ssrn.com/abstract=4430270

of realization of the problematic nature of an unnuanced IE clause seems to have happened in other countries. India is the best example of that, where after decades of being skeptical of the investment arbitration system,[100] it decided to terminate most of its BITs and renegotiate new ones excluding IE completely.[101]

The second set of reasons for the rupture is related to the failed attempt by the OECD and its members to create a multilateral investment agreement (MAI) between 1994 and 1998, and the social backlash it generated. This part of the story is mostly omitted from the legal literature, but it appears to have had significant influence as well. In the beginning of the 1990s, the OECD reembarked on its old project to push for a multilateral agreement on investment, which it had abandoned after the failure of the 1967 Draft Convention. This time the OECD convened its members to start negotiations in 1994, which happened in remarkable secrecy from 1995 on.[102] The meetings were closed, and all the documents remain confidential. Only by a later decision to disclose minimal summaries of the meetings, omitting any reference to names of diplomats and countries, can the development of the negotiations be more or less known today.[103] Thus it is possible to see that the first version of the MAI took its expropriation provision from the 1967 OECD Draft with no substantial changes, that is, placing direct and indirect expropriation on the same footing in terms of the requirement of compensation according to the Hull Formula, and giving no place to the

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[100] Abhisar Vidyarthi, "Revisiting India's Position to Not Join the ICSID Convention," Kluwer Arbitration Blog, August 2, 2020, http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/.

[101] Simon Weber, "What Happened To Investment Arbitration In India?," Kluwer Arbitration Blog, March 27, 2021, http://arbitrationblog.kluwerarbitration.com/2021/03/27/what-happened-to-investment-arbitration-in-india/.

[102] Catherine Schittecatte, "The Politics of the MAI: On the Social Opposition of the MAI and Its Role in the Demise of the Negotiations," *The Journal of World Investment & Trade* 1, no. 2 (2000): 333, https://doi.org/10.1163/221190000X00122.

[103] The introductory note to the MAI website explains the following: "In making these documents available, the OECD, at the request of Member governments, has retained the original dates and reference numbers of the documents but removed the names of individuals and countries. Under the OECD's normal release procedures, these documents could not have entered the public domain for several more years. Enquiries concerning the positions of individual countries should be addressed directly to the countries concerned". See: http://www.oecd.org/daf/mai/intro.htm

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DPP.[104] In the discussion about the potential limits of expropriation, a remarkably low threshold was mentioned. The relevant document says that "The Group understands that the violation of criminal laws could result in the loss of an investment (or part thereof) which would not be deemed expropriation, provided those laws and their application are non-discriminatory and otherwise consistent with the standards of this agreement".[105] Other than that, there seems to have been a discussion on the burden of responsibility for the lost of money in currency adjustments, but no conclusion was reached on this point.[106]

Decisively, however, a confidential copy of the draft agreement was filtered to the public in early 1997.[107] This triggered an unprecedented campaign by civil society organizations from all over the world which took place largely online – something unheard-of at the time.[108] Noteworthy is that one of the crucial points raised by NGOs, and specially by Canadian NGOs, was that the MAI's provision on IE was very likely to tie the hands of governments in their efforts for implementing environmental policies. In making this claim they pointed to the *Ethyl* case, which exactly at that point was being heard in a NAFTA panel against Canada, and which provided the perfect example of a state being sued by transnational companies before obscure arbitral tribunals for well-meant environmental regulation.[109] The reference to this case, coupled with the social unawareness of investment arbitration generally, produced apparently a big impression in the public opinion of Canada and other countries.

One can clearly see in the documentation available that, from the moment when the draft was filtered onwards, the topic of the DPP in IE suddenly emerged in the negotiations. The summary of a meeting of 1997 says, for example: "The Group took note of comments expressed by some delegations about the scope of the expropriation provision of the MAI in

[104] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), "Consolidated Reports by Drafting Group N° 1 and Drafting Group N°2 (DAFFE/MAI(96)16)," May 29, 1996, Article 2.
[105] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), 21.
[106] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), 21.
[107] Schittecatte, "The Politics of the MAI," 337, 338.
[108] Schittecatte, 388.
[109] Schittecatte, 343.

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relation to legitimate government regulations in environment, labor, health and other fields that for the took place".[110] Because this concern is absent from the records of the negotiations in 1994, 1995, and 1996, this reference strongly suggests that some delegations reacted to the pressure by civil society. By March 1998, the issue had clearly become problematic. In a note of the Chairman dated 9 March, it is said that "the proposal for an interpretative note for the expropriation and general treatment articles responds to the agreement at the High Level Meeting that it needs to be made clear that the MAI will not inhibit the exercise of the normal regulatory powers of government and that the exercise of such powers will not amount to expropriation".[111] And then, towards the end of April 1998, the whole process stranded. In the ministerial note that closed for good the negotiations – pretending that they would be resumed soon – it is stated that: "Ministers confirm that the MAI must be consistent with the sovereign responsibility of governments to conduct domestic policies. The MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation".[112]

Knowing the exact weight of the issue of IE and DPP is impossible. Surely, disagreements existed on many more issues. Yet, it is clear that IE was one of the issues that was forced on the table through the oversight of civil society, and which brought the negotiating states to disagree on something that they had agreed on at the outset of the process. Catherine Schittecatte makes emphasis on the key role that France played in all of this. According to her, activism in France brought the matter to the mainstream media, where great suspicion grew at the secrecy and confidentiality of the MAI negotiations. This, she recalls, provoked a request of inquiry by the Senate on the matter, which made for a big scandal and

[110] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), "Drafting Group No.3 on Definition, Treatment and Protection of Investors and Investments (DAFFE/MAI/DG3/M(97)9)," December 4, 1997.
[111] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), "CHAIRMAN'S NOTE ON ENVIRONMENT AND RELATED MATTERS AND ON LABOUR (DAFFE/MAI(98)10)," March 9, 1998.
[112] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), "Ministerial Statement on the MAI, 28 April 1998," n.d.

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embarrassment of the Executive, leading France to withdraw entirely from the process in early 1998.[113] While this level of public attention on the matter was not reached in other countries, it is feasible that similar concerns emerged among many governments.[114]

Beyond the MAI negotiations as such, this multilateral failure raised alarms among policymakers all over the world of the potential social cost this type of clauses. While it is unlikely that investment arbitrators felt at that point the pressure from civil society, it is clear that the story of the MAI fed a "growing public disquiet over the functioning of the global economic system, including investor-State arbitration" which "translated into heightened public scrutiny of IIA negotiations".[115] In this context, it is expectable that countries with more active civil societies would want to reconsider their doings in BIT and FTA negotiations.

Today, the existence of the DPP is uncontroversial.[116] The pathway followed by the jurisprudence and the practices of treaty-making described above show that the debate about whether it plays a role or not in assessing IE is over. What remains open, however, just as at the time when the first texts on expropriation were written – nearly a century ago[117] – is the precise content of the DPP. On this matter, the debate is likely to still go on for some time.

II. Trajectory of the case (SCR framework)

This case captures the whole of the trajectory of IE since its emergence during the interwar period. However, its main focus lies on the two main inflections in this trajectory, which can be characterized both as instances of norm adjustment: the neoliberal rupture with the initial

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[113] Schittecatte, "The Politics of the MAI," 349.
[114] See, as a general reference on the role of public opinion in IIA: Moshe Hirsch, "Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law," *Leiden Journal of International Law* 34, no. 1 (2020), https://doi.org/10.1017/S0922156520000643.
[115] Barker, "Legitimate Regulatory Interests," 232.
[116] Yannaca-Small, "Arbitration Under International Investment Agreements: A Guide to the Key Issues," 585; Christoph Schreuer, "The Development of International Law by ICSID Tribunals," *ICSID Review - Foreign Investment Law Journal* 31, no. 3 (October 1, 2016): 728–39, https://doi.org/10.1093/icsidreview/siw017.
[117] See footnote 9.

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understanding of IE decoupling it from the DPP, around 1970, and the strong comeback and consolidation of the DPP after 2000. From a chronological perspective, each of these inflections could be seen as independent norm changes in themselves. Yet, neither can be properly explained without fully accounting for the other, and as such they are better characterized as one single, fluctuating, norm change. In addition, the external circumstances of, for instance, institutional availability, were largely the same throughout both inflections, which makes it more plausible to see the trajectory as a single case of norm change. In this sense, it appears that the first inflection of 1970 is the main analytical change attempt in focus, and the second one represents its strong refutation at the reception stage.

1. Selection stage

Actors and agency

Putting on the side the early history of this case, the origin of the first inflection of IE around 1970 is found in the activism and lobbying of mainly European developed-country investors at the end of the 1950s and during the 1960. The Abs–Shawcross Draft Convention of 1959, mentioned above, is the strongest and most consequential evidence of this push. This document was the outcome of two private initiatives led by groups of interest particularly affected by the increasing trend of nationalizations in socialist and newly independent countries: the banking sector and the oil industry. The first initiative was headed by Herman Abs, perhaps the most prominent German banker of the 1950s, who took it on himself to do something to protect foreign investors from these measures. He founded the *Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen*, a group of German businessmen that advocated for an international convention to protect foreign investments, and that very likely had a big influence in the launching of the first ever BIT program: that of Federal Germany, kicked off with the signature of the first BIT in history with Pakistan in 1959.[118] The second initiative, less activist but similarly consequential, was that of Lord Schawcross, a former leading British prosecutor at the Nuremberg Trials, attorney general of the UK for many

[118] Chernykh, "The Gust of Wind," 250.

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years, member of Parliament and, fatefully, director of the Shell Corporation during some years.[119] These two men joined efforts in drafting the Draft Convention of 1959, which had as main purpose the creation of a permanent system of international adjudication for the claims of investors to be heard, but which in passing came up with a definition of expropriation that joined its direct and indirect forms for the purpose of compensation and did away with the DPP.

While these efforts had no immediate success, another set of actors played a crucial role in being receptive to them: international bureaucrats. First and foremost was the OECD. As an international organization committed by its mandate to free trade, the OECD was the perfect venue to channel attempts to create a new international legal regime for foreign investment, which happened during the 1960s. This yielded the highly influential OECD Draft Convention that appropriated the ideas and concepts proposed in the Abs-Shawcross Draft, and that fostered states to use it as a basis for the wave of BITs to follow. While it is likely that, at the time, the revision of the concept of IE and the exclusion of the DPP were not fully deliberately planned outcomes but rather the product of a simplistic neoliberal take on expropriation more generally, what was certainly deliberate was the creation of the system of investment arbitration that enabled the spread of pro-investor readings of the law on expropriation.[120] The World Bank was the key actor in this move, having created ICSID in 1966 as a means to "depoliticize" dispute settlement in a time of acute ideologic confrontation in economic matters.

A third and decisive set of actors were capital-exporting states. Policymakers and diplomats of Western, capitalist governments during this period were highly receptive of private initiatives, and endorsed as a matter of foreign policy the protection of their nationals' investments abroad. As during the height of liberalism in the nineteenth century, there seems to have been in the 1960s and 1970s an underlying conviction that it was the natural business of states to use their diplomatic structures and their political capital to secure certain

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[119] Chernykh, 251.
[120] Miles, *The Origins of International Investment Law*, 84–87.

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standards of treatment and mechanisms of compensation for their investors in "countries with few checks and balances, where the absence of rule of law, veto players, secure property rights, and coherent administrative institutions raise the specter of rent seeking and other forms of government predation or opportunistic policy making that could jeopardize foreign investment".[121] For their part, the governments of developing countries – and if one looks at the list of countries entering BITs during the 1960s and 1970s, mainly small, least-developed countries[122] – saw BITs as a useful instrument to attract capital while not openly detracting the NIEO spirit of the third-world multilateralism of the time.

Pathways

The main channel through which the change attempt was launched was clearly the state action pathway, manifested in the adoption of BIT foreign policies and the conclusion of these agreements. The efforts of private individuals and groups were all meant to trigger this precisely, after the failure of the multilateral pathway. In any case, private endeavors never really relied on their own authority to push for change. The bureaucratic path also proved certainly receptive, mainly through the OECD and the World Bank at this stage, but, again, the objective of these enterprises was more to motivate state action after the blocking of the multilateral pathway. At this early stage, the judicial pathway played no significant role.

Institutional availability

The institutional availability during the selection stage was mid-high. The clear fact that large multilateral institutions – the UNGA and UNCTAD mainly – were blocked due to the control of NIEO states only pushed the tandem of private interest groups, diplomats, and policymakers to alternative institutions that shared a liberal ideology and that responded to the interests of developed countries – the OECD and the World Bank. Another venue that

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[121] Srividya Jandhyala, Witold J Henisz and Edward D Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55 Journal of Conflict Resolution 1047, 1051; see also, WJ Henisz, 'The Institutional Environment for Multinational Investment' (2000) 16 The Journal of Law, Economics, and Organization.

[122] See: https://investmentpolicy.unctad.org/international-investment-agreements

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proved unreceptive to the change attempt was the ICJ. The first case where it could have discussed IE was *Barcelona Traction* of 1970, but it was rejected at the stage of preliminary objections without touching upon the substance of the matter. A second and more relevant case was *Elettronica Sicula* of 1989, where the court regarded with certain skepticism but did not exclude the theoretical possibility of IE, ultimately basing its ruling on criteria irrelevant for the discussion on the DPP.[123]

What was fundamental during this stage, however, was the capacity of the tandem investors/states to create a new regime where the neoliberal standards of investment protection – including IE decoupled from DPP – could flourish unhindered by the tides of global multilateralism: international investment arbitration. BITs and FTA paved the way for the exceptionally isolated and immune institutional venue of investment tribunals, were pro-investor legal interpretations thrived without significant criticism for many decades. The creation of the Iran-US Claims Tribunal is also revealing of this regime-generating capacity of investors and developed-states. The Tribunal could basically be imposed by the US to Iran because of geopolitics, sanctions, and the control of the former over large amounts of Irani frozen assets in the American banks. In this sense, this is a remarkable case of resilience to multilateral blockage; the institutions required for the norm change were created by its entrepreneurs.

Stability

A fundamental factor that allowed the change attempt to take place with considerable success during the 1960s and 1970s was the sheer instability of the previous norm. As seen in the chronology, during the interwar period IE was understood to be limited by the DPP, but there were many doubts on where that limit stood, and the mere existence of IE was in any case perceived as abstract and obscure, in the absence any instrument codifying it and the scarcity of caselaw. Then, after WWII, direct expropriation became the main object of discussion politically and academically, further lowering the awareness and importance of IE. It is in

[123] *Elettronica Sicula (USA v. Italy) (Judgment) (ICJ 1989).*

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this context that it seemed wholly unremarkable to introduce in BITs and FTAs the formulation "no Party shall take any measures against nationals of another Party to deprive them directly or *indirectly* of their property", taken from the Abs-Schawcross draft and the OECD draft, subjecting direct and indirect expropriation to the same standard of compensation. In fact, this coupling seemed so legally anodyne that it basically went unnoticed for several decades, when around 2000 certain NAFTA cases awoke the concern of developed states and Rudolph Dolzer singled out for the first time the attempt as the "sole effects doctrine".

2. ***Construction stage***

Pathways

The main pathway through which the change in question was constructed was the judicial pathway, in parallel to the continuance of the adoption of BITs and FTAs through the state action pathway. Regarding the former, it has been seen that the Iran-US Claims Tribunal played a very important role in grounding the idea among practitioners that IE existed in customary international law and that, as it said in *Tippetts,* "The intent of the government is less important than the effects of the measures on the owner". That is, that the DPP had no relevance in the determination of compensation. The awards of arbitral tribunal established under international contracts similarly played an important role in this phase: *Revere, Benvenuti et Bonfant, Liberian Timber Corp.,* and *Biloune.* Finally, the late-1990s jurisprudence of NAFTA and other ICSID tribunals – *Santa Elena* and, above all, *Metalclad* – were crucial components.

To put things in perspective, it is important to note that the jurisprudence just enlisted was in itself not an exceeding amount of cases. IE cases were still limited, if anything because investment arbitration in itself was still a marginal practice. This is reflected in the ICSID database, where only 39 cases predate *Metalclad* – initiated in 1997 – and 804 have followed since.[124] Yet, what seems to be more significant than this number is that the literature does

[124] https://icsid.worldbank.org/cases/case-database

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not register one single case, from the dawn of investment arbitration in the early 1970s to at least *S.D. Myers v. Canada* in 2000, where a tribunal upheld the DPP in a case of IE. This absence is perhaps more telling than the cases themselves.

The second pathway, state action, is reflected in the exponential increase of BITs and FTAs in the 1980s and BITs. According to UNCTAD, in 1969, 72 investment agreements existed; in 1979, 165; in 1989, 385; and in 1999, 1857.[125] It is out of the reach of this study to review the content of each of these, but a simple search in the database of UNCTAD confirms that an overwhelming majority contained provisions on IE, and it can be safely assumed through a random review of some of these, that nearly all contained the simplistic formulation of the Abs-Shawcross and OECD Drafts, joining direct and indirect expropriation in the requirement of compensation, and excluding the DPP.[126]

Opening and Factors

While in this case there are no critical junctures, it is clear that the peak of interpretations of IE decoupled from DPP, perhaps best exemplified by the adoption of article 1110 of NAFTA in 1994, happened at a time where neoliberalism had become the dominant economic global trend.[127] It was widely believed among economists, politicians, diplomats, and policymakers during the 1980s and 1990s that the main drivers of economic growth were the private enterprise and the free market.[128] This was undoubtedly a crucial factor in cementing understandings of IIL that reduced the scope of policymaking for states and in making them appear as natural before broad audiences. The evolution of FET during these years is a confirmation of this.

Salience

[125] UNCTAD, "Bilateral InvestmentTreaties 1959-1999," 2000, 1.
[126] https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping
[127] George Ritzer, "A Brief History of Neoliberalism by David Harvey (Book Review)," *American Journal of Sociology* 113, no. 1 (2007): 11, https://doi.org/10.1086/520901.
[128] John Toye, 'UNCTAD at 50: A Short History' (2014) UNCTAD/OSG/2014/1 81

Electronic copy available at: https://ssrn.com/abstract=4430270

Salience is in this case remarkably variant. At the time of the first inflection of this case and up until the second inflection, the salience of IE and the DPP was low, maybe even very low. That explains why the change was never really noticed in legal and diplomatic circles. The main focus, with undoubtedly a high-level salience, was on direct expropriation, which was for several decades discussed at the highest levels of policymaking and multilateral diplomacy. IE mattered little because cases were, as seen above, rare, and because they concerned states – with the partial exception of Iran – significantly marginalized and somewhat perceived as wild territories in the international community: Jamaica, the Republic of Congo, Liberia, and Ghana.

This radically changed with two factors during the second inflection of the case, around 2000, referred in the third part of the chronology. First, IE claims impeding national policymaking became a real threat for developed countries mainly in the NAFTA context with *Ethyl v. Canada* in 1998 and *S.D. Myers v. Canada* in 2000, plus the shadow of the cases against Mexico – *Metalclad, Feldman,* and *Tecmed* – which must have opened the eyes of the government of the US and other countries. Second, the failure of the MAI process in 1998 certainly brought the attention of the public and, crucially, of civil society, to the implications of IE and the absence of DPP in investment law. This signaled to governments the potential social backlash that these clauses could bring. Thus, it is clear that, after 2000, the matter acquired a heightened salience.

Pace and mode of change

The pace of change in this case was gradual, with the introduction of IE without DPP silently through the Abs-Shawcross and OECD draft convention in 1959 and 1967 respectively, thereafter being gradually incorporated into investment treaties and eventually being taken up by the jurisprudence. The second inflection tearing apart the neoliberal paradigm of IE, however, came about rather suddenly around 2000, without there being one single event to which this can be attributed.

3. ***Reception stage***

Outcome

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The second inflection in this case – around 2000 – marks the tipping point from which the attempt to decouple IE from the DPP began to fail. The first important indicator was the adoption of the US and Canada Model BITs in 2004, establishing unambiguously the DPP, and leading other countries to take a similar attitude. The second important indicator was the jurisprudence, which after *Metalclad* in 2000 shifted in favor of the DPP, to the point that today it would be very difficult for a tribunal to uphold the pre-2000 paradigm without nuances. In sum, the reception stage is marked by the gradual rejection of the change attempt, and the mainstreaming of the DPP, as explained in the third part of the chronology above.

Actors

In this stage of the case's trajectory, a new set of actors appeared: NGOs and civil society more broadly. It was seen above the role they played as antipreneurs at the time of the negotiations of the MAI in 1997 and 1998, advocating for transparency in the procedures and expressing outrage at provisions that tended to limit the scope of policymaking for states, particularly in the environmental sphere. Noteworthy is that this happened only at the time of global multilateral negotiations, and that the negotiation and entry into force of 1857 investment agreements before 1999 did not become, at any point, the object of similar public scrutiny. This is telling of the obscurity in which the framework of IIA was built from the 1960s to the 1990s, and the effects of public oversight over international lawmaking.

States have been also key actors in the inflection that led the DPP to regain prominence, and thus can also be considered antipreneurs in this phase. As said by De Brabandere, "it is precisely to avoid the potential for regulatory non-discriminatory measures taken for a public purpose to constitute indirect expropriations that States have redefined the formulation of the prohibition of indirect expropriation".[129] This trend is largely documented and has reflected in different areas of IIA, most prominently in the interpretation of FET.

[129] Brabandere, "States' Reassertion of Control over International Investment Law," 294.

Electronic copy available at: https://ssrn.com/abstract=4430270

III. Particular features of the case

Interplay between formal and informal lawmaking

Discussions on sources are remarkably absent in this case. Throughout the whole trajectory there is seems to have been a general assumption that the debate was taking place place at the level of customary international law (CIL), although CIL methodology was basically never used by authors nor arbitrators. The appearance of conventional rules – BITs and FTAs – made little difference in this respect because of the thinness of their wording and, again, the assumption that they had to be read against CIL. This is also reflected in the huge importance attributed to precedent in every stage of the trajectory. The effect of this is to fade away, more than in other cases, the line between formal and informal lawmaking.

Decisiveness of low stability of previous norm

This case strongly confirms the hypothesis that the stability of the previous norm can be decisive in norm changes. The fact that IE and the DPP were such marginal and obscure topics before the neoliberal revision of IE in 1970, meant that this change attempt had, at least in appearance, nothing to fight against with. Thus, it is understandable that no controversy whatsoever emerged until 2000, when other actors and interests became involved. It is likely that, had there been some type of conventional norm or even considerable judicial precedent clearly distinguishing between direct and indirect expropriation, or neatly defining the DPP, the Abs-Shawcross Draft of 1959 and the OECD Draft of 1967 would have had a harder time cementing their definition of IE.

Silent change / marginal intent and contextual inertia

In addition to the low stability of the previous norm, one would have to add to the list of factors that smoothened the decoupling of IE and the DPP around 1970 the fact that, at first sight, it was only a very minor, even tangential component of a much bigger normative endeavor: the launching of international investment law. The emphasis of the Abs-Shawcross and OECD Drafts was on creating, first, a whole set of standards of protection seeking not merely to secure compensation for expropriation, but to establish liberal normative frameworks in capital-importing states; and second, to build a denationalized system of adjudication detached wholly from what they portrayed as politicized domestic legal

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environments – an euphemism for non-investor oriented legal environments. In this context, the reformulation of IE as a joint component of direct expropriation in terms of compensation, seems certainly minor. It is even feasible to think that there was no deep reflection on this precise point by Abs, Shawcross, or the OECD drafters, but that they opted for a simplistic formulation of expropriation just for the sake of clarity. This is nothing but a hypothesis, for confirming or refuting is impossible. The point, however, is that all of this makes it somewhat easier to understand that the change in IE was undertaken in the 1960s and 1970s amid a nearly complete political and academic silence, which lasted until the attention of different stakeholders was finally drawn to it in 2000.

Coalition of entrepreneurs having at the base transnational enterprises

Private enterprises were, much more clearly than in other cases, the core entrepreneurs of change, as reflected by the Abs-Shawcross Draft and its impact in IIL. In an of itself, this is not surprising, given that the whole body of IIL is designed to protect primarily the interests of foreign investors, and therefore it is not by chance that these actors stand at the origin of the whole enterprise. Yet, the bluntness with which private enterprises dared to even draft and propose the text of a convention protecting their interests is remarkable, especially if one compares it to the less visible ways in which corporate interest operates in other areas of international law. That said, it is also very telling that the Abs-Shawcross Draft had to undergo several "handovers" – first to the OECD and then to the diplomatic bodies of developed countries – before its standards could begin to operate as international legal rules. That signals with great clarity how entrepreneurs in international law often have to coalesce with other, more legitimate, agents in order to get their way.

Path shifting

As in other cases, it is quite transparent here that the blockage of a pathway in a given change attempt will more likely lead entrepreneurs to seek other avenues than to desist. This happened in this case, where the efforts behind the Abs-Shawcross Draft and the OECD Draft to activate the multilateral pathway shifted towards the state action pathway when it became clear that the former would yield no result.

The "easy" comeback of the DPP

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In few cases has it been so easy to revert the trajectory of a norm change as in this one. This is evident from the fact that just a couple of months after the IE decoupled from DPP reached its peak with the *Metalclad* award in August 2000, it was overturned by a succession of cases beginning with *S.D. Myers* and consolidating in 2004 with the publication of new model BITs by the US and Canada. This reflects, at the surface, two things: that IE without DPP was much less settled than it appears at first sight, and that the value of precedent in investment arbitration is hugely relative. But it also reflects, at a systemic level, how the interests of developed countries are simply more determinant than those of developing countries. In this case, the moment Canada and the US saw in IE a possible source of constraint and embarrassment for their domestic policymaking, they set out to change it, and largely managed to. In contrast, a developing country like Mexico, deeply affected by the disregard of the DPP in IE claims – take *Metalclad, Feldman*, or *Tecmed* – was significantly less proactive in objecting IE, and the system less receptive to its concerns.[130]

The effect of public oversight

This case makes it evident that changes in international law behave very differently when conducted under public oversight than when removed from it. The demise of the MAI process in 1998 is the perfect example. As seen in the third section of the chronology above, this formal law-creating effort ran entirely aground, at least in part as a result of filtration publication of its content to the public and the ensuing activism of committed NGOs. The contrast is bleak in this case when one takes the experience of the MAI and compares it with the nearly absolute absence of public scrutiny over the 1857 BITs and FTAs that were negotiated and adopted before 1999 with clauses very similar to those of the failed MAI. One can only presume that some degree of public oversight over these agreements would have impeded the rise of IIL as we know it today. Hence, public oversight matters, and awareness-raising plus activism by civil society organization makes a big difference in international lawmaking.

[130] One can see this in, for instance, the fact that Mexico still used the old formulation of IE in its BITs up to as late as 2018.

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Lack of authority and residual relevance of the judicial pathway

The role of arbitral jurisprudence was crucial during the different phases of this case. This has to do more with the lack of alternative, more stable authorities to hold on to, than with the authority of arbitral tribunals in themselves. Had there been resolutions of the UNGA at any point, a ruling of the ICJ in *Barcelona Traction* or *Elettronica Sicula*, or a clear interpretive guidance by NAFTA states, for example, the relevance of cases like *Tippetts, Metalclad* or *Methanex* would have been more nunaced. Yet, this did not happen, and as such the trajectory of this case was largely dependent on the tides of the jurisprudence of arbitral tribunals. Other means, such as the Restatement Third of 1987, also acquired great relevance for the same residual reason.

Precedent cherry picking

As any investment lawyer knows, one can find a precedent for any position one ones to defend in the corpus of IIL jurisprudence. This case reflects this with great clarity. The different streams of precedence in the trajectory of IE are based on very different, sometimes random refences. This is not unique of IE but pervasive in IIL, and certainly enables a higher degree of fluctuation in interpretive lawmaking.

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Case Study 25

The Development of Fair and Equitable Treatment

(September – December 2021)

Pedro Martínez Esponda

Synopsis

This case covers the emergence and development of fair and equitable treatment (FET). It spans from the birth of the idea of FET around 1945, to its full development as a central standard of treatment in international investment law (IIL) nowadays. This trajectory had several points of inflexion and ran at different speeds in each stage. First, from 1945 to 1967, different attempts by groups of businesspersons were made at establishing FET through a multilateral convention. Although these failed in becoming binding treaties, the drafts proposed by investors, bureaucrats and diplomats contained the conceptual and procedural seed of a system that would be later implemented through bilateral investment treaties (BITs). BITs started being negotiated and adopted in the 1960s, and by the 1990s, the number of BITs had expanded exponentially. However, during this time, the content of FET remained completely uncharted. It was not until around 2000 that the explosion of investment jurisprudence led FET to the formation of several interpretive threads. In the few years that followed, FET was used in an unrestricted and creative way by investment tribunals, without much controversy arising. Yet, around 2007, the elements of content that the jurisprudence had delivered started being questioned by arbitrators, states, academics, and the civil society. These led to a revision under the logic of public interest, which delivered a more nuanced understanding of FET. Today, FET remains the most popular rule in investment litigation, despite the unresolved questions regarding its content.

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I. Chronology

1. First attempts at establishing FET multilaterally and bilaterally (1945-1967)

The idea of introducing Fair and Equitable Treatment (FET) as a general standard of treatment to foreign investment emerged within Western policymakers and private investors roughly between 1945 and 1967.[1] The global economic context was one where, on the one hand, there was a perceived need within Western economic elites to find alternative forms of capital-export aside foreign aid and governmental loans to developing countries, and foreign private investment seemed the obvious option.[2] On the other hand, there existed an utter mistrust within these same elites with regard to the governments of the newly-created states where they expected to bring their investments. Expropriations, protectionism, and a broad diplomatic movement among developing countries in favour of permanent sovereignty over natural resources – the nascent New International Economic Order (NIEO) – led investors to lobby with their governments for guarantees under international law to counter these apparent threats.[3] In doing these, however, bankers, business-people, and Western officials reached the conclusion that the rules of international law concerning the protection of foreign investors that had existed until WWII – namely the international minimum standard (IMS), diplomatic protection, and certain incipient rules on expropriation – were not clear and enforceable enough to provide the level of protection they now expected.[4] Thus they attempted – unsuccessfully – to establish new multilateral new rules on trade and investment: full compensation for direct and indirect expropriation, national treatment (NT), most-favoured nation (MFN) treatment and, quite innovatively, FET.

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[1] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 85.
[2] Georg Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad' (1961) 14 Current Legal Problems 213, 213, 214.
[3] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 211–213.
[4] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties Standards of Treatment* (Alphen aan den Rijn, Kluwer 2009) 19–22; Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International lawyer 655, 659.

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The first attempted multilateral instrument to include FET – or something very close to it: "just and equitable treatment" – was the stillborn Havana Charter of the International Trade Organization (ITO) of 1948. In two articles describing the goals of the ITO – 11(2)(a)(i) and 72(1)(c)(i) – the Charter established that the ITO should seek to assure, together with its member states "just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another". Thus, in the context of the Havana Charter, the concept of "just and equitable treatment" worked as a general clause meant to fill with purpose the different policies sought by the ITO and its members, and not to establish a standard of treatment as such, let alone a precise one.[5] Unsurprisingly, the precise content of "just and equitable treatment" was never the object of discussion. This is confirmed by the *travaux préparatoires.*[6]

A second failed multilateral attempt to establish a legal rule resembling FET was the Economic Agreement of Bogotá. This attempted treaty was strongly advocated for by the US in the context of the Ninth Conference of American States in 1948, largely responding to the demands of American businesses of specific legal safeguards for their investments in Latin American countries. Crucial to them were the issues of adequate compensation for expropriation, protection against discrimination in the form of taxation and exchange controls, and protection against discriminatory execution of laws.[7] In contrast to the Havana Charter, therefore, the Bogotá Agreement was expressly intended to govern matters of investment policy. "Equitable treatment" – not yet FET as such – was for the first time foreseen as a true standard of treatment, although its content was deliberately left general and unspecified.[8] Article 22 established that:

> "Foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the

[5] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 90.
[6] ibid.
[7] John E Lockwood, 'The Economic Agreement of Bogota' (1948) 42 The American journal of international law 611, 612, 617.
[8] ibid 612.

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legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied".

In the end, however, the perceived imbalance between concessions to investors and benefits to capital-importing countries led Latin American governments and legislatives to refuse ratifying the agreement.[9] It never came into force.

The US' reaction to this failure was to include provisions on investment protection in its Treaties of Friendship, Commerce, and Navigation (FCNs). At the express request of influential business groups – notably the US Chamber of Commerce – these treaties, which traditionally dealt with matters of shared use of resources, territorial integrity, access to ports, fisheries, and general cooperation, began to condition US assistance to the guaranteeing of "fair treatment" to US investors by host states.[10] During the 1950s, the US signed a number of FCNs including clauses, first, of "equitable treatment", and then of "fair and equitable treatment" with countries benefitting from US aid: France, Federal Germany, the Netherlands, Ireland, Pakistan, Nicaragua, Ethiopia, and several others.[11] Withal, FET was at this point understood as a broad heading for the principles of non-discrimination and reasonableness, rather than as a concrete standard of treatment upon which international claims could be brought.[12] Proof of this is that the dispute settlement mechanism set by FCNs – commonly recourse to the ICJ – yielded practically no case where investment concepts were argued until the *Elettronica Sicula* case in 1989.

The next attempt at establishing FET in a multilateral instrument was entirely led by private interest: the 1959 *Abs–Shawcross Draft Convention on Investments Abroad.*[13] Drafted and prepared exclusively by European businesspeople – it was led by Hermann Abs and Lord

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[9] EI Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (Manchester University Press 1965) 137–141.
[10] Kenneth J Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press 2017) 187.
[11] Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (2000) 70 British yearbook of international law 99, 111, 112.
[12] Vandevelde (n 10) 193.
[13] Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 35.

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Shawcross, then Chairman of Deutsche Bank and Director of the Shell Petroleum Company, respectively – it responded to the two main concerns of foreign investors. On the one hand, it established new substantive rules on the treatment of foreign investors through FET, the standard of "constant protection and security", and rules on expropriation including "just and effective" compensation for it. On the other hand, it instituted a system of arbitral dispute settlement that allowed investors to skip the step of diplomatic protection and directly bring complaints against host states before arbitral panels. FET appeared in article I with a very general wording – "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties" – working both as a general provision and as a specific standard of treatment.[14] As explained by Schwarzenberger, the use of the wording "fair and equitable treatment" expressly sought to combine two standards of treatment: IMS and equitable treatment.[15] According to him, this was meant as a concession by investors intended to temper the stringency of IMS, by "providing equality on a footing of commendable elasticity" vis-à-vis host-states through the standard of equitable treatment.[16] With all, Schwarzenberger acknowledged that the FET standard in the Abs-Shawcross Draft "suffer[ed] from the drawbacks of its virtues : a corresponding measure of vagueness and subjectivity".[17] Thus, it seems clear that the introduction of the FET standard in this text was not casual but also not intended to have a concise, delimited meaning. It attempted to introduce a new standard of treatment, related but wider than IMS, and deliberately open-ended.[18] This view is shared by other authors of the time, such as Preiswerk, who said in relation to FET that it "may sound vague, but the strength of the principle lies precisely in its indeterminate character".[19]

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[14] 'Draft Convention on Investments Abroad (Abs–Shawcross Convention), UNCTAD, International Investment Instruments: A Compendium – Volume V, p. 395' (2000) <https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf>. See article I.
[15] Schwarzenberger (n 2) 220.
[16] ibid 221.
[17] ibid.
[18] FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 British Yearbook of International Law 241, para 3.
[19] R Preiswerk, 'New Developments in Bilateral Investment Protection' (1967) 3 Revue Belge de Droit International 186.

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The Abs-Shawcross Draft failed however to be put to the consideration of states. From the outset, the Draft was perceived as too one-sided in favour of investors, and in detriment of host-states.[20] As explained by Schwarzenberger, "even moderate governments of capital-importing countries [found] it impossible to pay the political price involved in becoming parties to conventions on the Abs–Shawcross lines".[21] It is therefore unsurprising that the Abs–Shawcross Draft did not materialize into any form of diplomatic negotiation, let alone binding instrument. Nevertheless, it did play a major role in influencing the later development of IIL, as will be seen.

The last major attempt to put FET into operation multilaterally in this initial phase was the 1967 *OECD Draft Convention on the Protection of Foreign Property*. Devised by OECD bureaucrats under the mandate of its – mainly Western and developed – member states, the Draft Convention followed nearly to the letter the Abs–Shawcross Draft in its first article on FET. It established that "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures".[22] The commentary issued by the OECD on its own draft explained in a somewhat puzzling manner that the FET standard corresponded to that set in customary international law – making a clear reference to IMS, from which the Abs–Shawcross Draft had intended to depart.[23] It added, similarly, a modest nod to the Calvo Doctrine defended by developing states at the time, saying that the protection of the FET standard "shall be that generally accorded by the Party concerned to its own nationals", but making it clear that "being set by international law, the standard may be more exacting where rules of national

[20] Arthur Larson, 'Recipients' Rights Under an International Investment Code' (1960) 9 Journal of Public Law 172, 172.
[21] Georg Schwarzenberger, *Foreign Investments and International Law* (Stevens and Sons 1969) 134.
[22] 'OECD Draft Convention on the Protection of Foreign Property (Adopted by the OECD Council on 12 October 1967)' <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2812/download>.
[23] OECD, 'Draft Convention on the Protection of Foreign Property (Text with Notes and Comments)' (1967) 9 <https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf>.

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law or national administrative practices fall short of the requirements of international law".[24] In sum, while the text of the OECD Draft was very similar to that of the Abs-Shawcross Draft, the commentary of article 1 went significantly further in mixing IMS and national treatment within the content of FET. Be that as it may, the state of international politics in 1967 was still one of stark ideological confrontation between developed and developing countries, making it impossible for the draft to gain the support of non-OECD states.[25] It thus never made it into any form of binding instrument.

This ideological confrontation between developed and developing countries largely explains the failure of the different attempts at establishing a multilateral treaty containing FET between 1945 and 1967.[26] Yet, it is clear that FET was perceived as a very minor item in the discussion, accessory to bigger controversies. The main concern on both sides was the issue of direct expropriation, where developing countries pushed for the idea of a right of states to expropriation subject only to the requirement of compensation in terms of the Calvo Doctrine – that is, in accordance with the regulations of the country and not an overarching standard established by international law.[27] Developed countries, on the contrary, defended expropriation in terms of the Hull formula, requiring an homogeneous international standard of "prompt, adequate and effective" compensation. One can therefore not attribute the failure of the different multilateral instruments establishing FET in this period to a rejection of this standard. Rather, it was the failure of a whole system of investment protection – of which FET was an element – which kept it from becoming a binding multilateral rule. As a matter of fact, FET was very seldom the object of discussion, both in diplomatic conferences and in academic work. It might well be that the abstraction and generality of its formulations in

[24] ibid.
[25] Schill (n 13) 36–38.
[26] ibid.
[27] Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 U.C. Davis journal of international law & policy 157, 168.

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these draft texts led states to think that FET was an innocuous provision, with little in it to fear.[28]

2. The spread of FET as an empty norm in BITs (1967-2000)

Despite their inability to transcend into actual treaties, the failed multilateral attempts at producing a convention on investment between 1945 and 1967 were very successful in one crucial regard. The model of investment protection they proposed, based on substantive norms – FET being the first of them – and dispute settlement through investor-state arbitration, was taken up by several capital-exporting countries as a template for concluding bilateral investment treaties with capital-importing countries.[29] In fact, after the failure of the OECD Draft, the OECD expressly recommended its members to negotiate bilateral treaties based on it – an avenue they readily took in view of the impossibility to achieve a multilateral instrument.[30] This model thus became the basis on which the overwhelming majority of Bilateral Investment Treaties (BITs) were to be drafted and negotiated after 1967.

Already before 1967, however, several capital-exporting countries had realized that the hurdles of multilateralism could be avoided by engaging in bilateral investment diplomacy, where block politics played no role.[31] The first to do so was the US with its FCN policy during the 1950s and early 1960s, as already explained. The second one was Germany, which for the first time entered a Bilateral Investment Treaty (BIT) with Pakistan in 1959.[32] Switzerland and other European states followed this trend. However, these early bilateral approaches to investment protection lacked several crucial elements of the model proposed by the OECD. In the case of the European BITs, FET was not included among their standards of treatment,[33] while both FCNs and early BITs did not include the investor-state system of

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[28] Patrick Juillard, 'L'évolution Des Sources Du Droit Des Investissements (Volume 250)' [1994] Collected Courses of the Hague Academy of International Law 132–134.
[29] Paparinskis (n 5) 90.
[30] Schill (n 13) 39.
[31] Vasciannie (n 11) 125, 126.
[32] Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press 2011) 9, 10.
[33] ibid 10.

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arbitration.[34] It was only after the OECD recommendation in 1967 that BITs began to include these features.

The number of BITs including these features increased significantly in the next two decades, and exponentially after 1990. According to UNCTAD, if by 1969 there existed 72 BITs in total, by 1979 the number was 165, by 1989 385, and by 1999 1857.[35] Of these, UNCTAD estimated that by 1990 only 8% did not include FET,[36] and after that year the number shrank even further, to the point of becoming a "rare exception", as Kläger puts it.[37] Dumberry estimates that by 2014, out of 1964 BITs globally, only 50 did not contain a FET provision at all.[38] Even countries that had resisted the system of investment protection of the Abs-Shawcross and OECD drafts during the 1960s – mostly Latin American countries defending the Calvo Doctrine – eventually consented and started entering BITs with FET clauses in them.[39] The US, which had continued with its FCN policy throughout the 1960s and 1970s, also joined the trend in 1981 by launching its first BIT program, using FET as a general standard and embracing investor-state arbitration.[40] Beyond bilateral treaties, FET also found reception during the 1980s and 1990s in a number of Free Trade Agreements (FTAs) and other regional instruments such as the Lomé IV Convention, the Colonia Protocol of MERCOSUR, the ASEAN Treaty for the Promotion and Protection of Investments, the Common Market for Eastern and Southern Africa (COMESA), and the European Energy Charter.[41] Non-binding documents such as the UN Draft Code of Conduct on Transnational Corporations of 1986 and the World Bank Guidelines on the Treatment of Foreign Direct Investment of 1992 also included FET among their provisions.

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[34] Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The foundations of international investment law: bringing theory into practice* (Oxford University Press 2014) 25, 26.
[35] UNCTAD, 'Bilateral InvestmentTreaties 1959-1999' (2000) UNCTAD/ITE/IIA/2 1.
[36] UNCTAD, 'Fair and Equitable Treatment' (1999) UNCTAD/ITE/IIT/11 (Vol. III) 22.
[37] Kläger (n 32) 10.
[38] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016) 145.
[39] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (2004) 5 <http://dx.doi.org/10.1787/675702255435>.
[40] Salacuse (n 4) 657, 658.
[41] OECD (n 39) 7, 8.

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During this period of expansion, FET was perceived both as a "basic standard" and as an "auxiliary element for the interpretation of specific provisions of the treaty or in order to fill gaps […]", as a report of the now disappeared United Nations Centre on Transnational Corporations put it in 1988.[42] Its abstract and general formulation was intended to work more as an interpretive principle than as a conventional rule.[43] As put by Muchlinski in 1995, FET "offers a general point of departure in formulating an argument that the foreign investor has not been well treated".[44] Julliard was of a similar view, insisting that "[le] traitement juste et équitable est un principe; […] ce principe est un principe général du droit international; et […] ce principe général du droit international existe indépendamment du support conventionnel qui l'exprime", adding that the purpose of FET is to fill the gaps left by other standards.[45] Dolzer, likewise, sees the inclusion of FET in BITs during this period as an attempt to "include a general standard, in addition to the specific rules, which would cover such issues and matters relevant for the desirable extent of protection which did not fall under the specific rules".[46] Thus it seems apparent that FET was not seen during its expansion as a fully autonomous principle, but rather as a general clause meant to articulate and round-up the protection afforded by other provisions in BITs.

Unsurprisingly, it was commonplace among scholars during this stage to acknowledge the utter uncertainty of the content of FET, and to dismiss it as a rule with few or no practical implications.[47] Preiswerk wrote as early as 1967 that "There is much confusion as to the exact meaning of the term and some hesitation concerning its practical significance".[48] 32 years

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[42] UN Centre on Transnational Corporations, 'Bilateral Investment Treaties.' (UN, 1988) para 114 <https://digitallibrary.un.org/record/38784> accessed 29 July 2021.
[43] OECD (n 39) 25, 26.
[44] Peter T Muchlinski, *Multinational Enterprises and the Law* (Oxford, Cambridge MA: Blackwell Publishers 1995) 625.
[45] Juillard (n 28) para 224.
[46] Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 The International lawyer 87, 89.
[47] Jean-Pierre Laviec, *Protection et promotion des investissements : Étude de droit international économique* (Graduate Institute Publications 1985) 98.
[48] Preiswerk (n 19) 185.

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later, as late as 1999, little had changed. UNCTAD's report on FET admitted in one of the opening paragraphs that:

> "Notwithstanding its currency in investment instruments, however, the fair and equitable standard still prompts a number of difficult questions in investment law. The precise meaning of the concept is sometimes open to enquiry, not least because the notions of "fairness" and "equity" do not automatically connote a clear set of legal prescriptions in some situations".[49]

In its substantive part, the report very tellingly limited its analysis of the content of FET to a discussion on whether there existed a "plain meaning" derived from the textual meaning of the words "fair" and "equitable", or whether FET should be understood as equal to IMS under international customary law.[50] The conclusions of the report in this regard were accordingly limited. A last telling example of this uncertainty is provided by Giorgio Sacerdoti, who gave in 1997 a Hague Academy lecture on Investment Law. In the published version of his course, he addressed FET in two out of 200 pages and limited his discussion to explaining that FET "implies the right to carry out [...] business activity free from unreasonable and discriminatory measures, a requirement which will have to be judged on a case-by-case basis".[51] Quite clearly, FET was understood in the mainstream as a general principle, and there was little room or need for questioning what its precise meaning was.

3. Free-for-all: unconstrained arbitral jurisprudence (2000-2007)

The passivity with which international lawyers saw FET changed abruptly around 2000. Until then, there had been no case whatsoever where judges or arbitrators had had to interpret and apply FET. Some cases had stayed in the margins of FET, dealing superficially with related notions such as "constant protection and security", but staying short of actually having to deal with FET. Examples of this are *Rankin v. Iran* before the US-Iran Claims Tribunal

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[49] UNCTAD, 'Fair and Equitable Treatment' (n 36) 4, 5.
[50] ibid 10–14.
[51] Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection (Volume 269)', *Collected Courses of the Hague Academy* (Leiden, Koninklijke Brill NV 1997) 346.

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(IUSCT) in 1987, *Elettronica Sicula (US v. Italy)* before the ICJ in 1989, *AAPL v. Sri Lanka* before an ICSID arbitral tribunal in 1990, and *AMT v. Zaire* also before an ICSID tribunal in 1997. No direct question of FET was addressed in them, and therefore no discussion in this regard emerged at any point. From a contemporary perspective, this is certainly surprising, considering that FET was in theory available in the FCNs and BITs lying at the base of the claims.

Why no FET cases emerged before 2000 is not easy to explain. First of all, one would have to note that the number of cases related to investment was generally very low. Until the 1990s, there were considerably fewer BITs and FTAs allowing for investor-state arbitration than in the 2000s, so the jurisdictional space for litigation was much thinner. More importantly, perhaps, was the fact that in most of the investment disputes that had happened until then, the main issue had been direct expropriation.[52] One can only guess, judging by the little attention paid to FET in academic works before 2000, that this standard was simply not conceived as a workable tool in litigation, and thus neither claimants nor arbitrators considered it seriously. The jurisprudence of the IUSCT is particularly telling in this regard. Nothing in principle impeded FET to be claimed in this venue. In several important cases – *Phelps Dodge v. Iran* and *Amoco v. Iran*, among others – IUSCT panels determined that the provisions of the Treaty of Amity of 1955 between Iran and the US were applicable before them, and this included a FET clause. Yet FET did not emerge in any case – other than very remotely in *Rankin v. Iran*, as mentioned above. This is specially surprising given the questions that arose in this venue around indirect expropriation, a legal concept somewhat similar to FET.[53] But FET never arose in the caselaw of the IUSCT.

It was not until direct expropriation disputes became less common in the 1990s that investors turned to FET as a means to complain about regulatory measures that did not appropriate the investment in question, but that hindered it in some way. This trend manifested strongly after 2000, when cases concerning FET started to emerge in the context of BITs and of the North

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[52] M Sornarajah, *The International Law on Foreign Investment* (3rd ed., University Press 2010) 349.
[53] George H Aldrich, 'What Constitutes a Compensable Taking of Property--The Decisions of the Iran-United States Claims Tribunal' (1994) 88 American Journal of International Law 585.

Electronic copy available at: https://ssrn.com/abstract=4430270

America Free Trade Agreement (NAFTA). From this point and until around 2007, many influential FET cases took place, and a considerable body of arbitral jurisprudence started to appear. FET won even more relevance around 2005, when tribunals started narrowing the application of indirect expropriation through the doctrine of police powers, making it a very complicated argument to make before investment tribunals.[54] This left FET as the main and obvious standard for investors to resort to in most cases.[55]

But far from being articulated, the FET caselaw between 2000 and approximately 2007 developed irregularly.[56] Specific and often unrelated understandings of FET arose from the facts of each case, without arbitrators necessarily justifying their methodologies. Interpretations were sometimes transposed to other cases and sometimes not, leading to the emergence some incipient interpretive threads which could be taken up or discarded in subsequent cases at the will of the arbitrators. As a result, FET developed freely, without any check other than loose subsequent arbitral jurisprudence and, very exceptionally at this stage, interpretive controls by states.

Before addressing these interpretive threads, however, it is pertinent to mention a debate that marked considerably the discussion – both jurisprudential and doctrinal – about FET during this phase. It concerns its relation with IMS. Already in the previous phases of this chronology, the question of whether the content of FET was in truth nothing else than the old customary standard of IMS had been present. F.A. Mann had very emphatically and authoritatively made the point that FET went far beyond IMS as early as 1981.[57] Other authors had also dealt with the issue, reaching significantly less categorical conclusions.[58] Yet, the absence of caselaw and the scarcity of other authorities left the matter unresolved. It

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[54] Alain Pellet, 'Police Powers or the State's Right to Regulate' in Meg Kinnear (ed), *Building International Investment Law – The First 50 Years of ICSID* (Kluwer Law International 2016) 447, 452; Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (Oxford : Oxford University Press 2019) 154.
[55] Dolzer (n 46) 87.
[56] Sebastian Lopez López Escarcena, 'Aplicacion de La Clausula de La Nacion Mas Favorecida y Del Trato Justo y Equitativo En La Jurisprudencia Internacional En Materia de Inversion Extranjera - El Caso MTD, La Derecho Internacional Publico' (2005) 32 Revista Chilena de Derecho 79.
[57] Mann (n 18) para 3.
[58] Schwarzenberger (n 2); Preiswerk (n 19); Laviec (n 47).

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is therefore not surprising that, when cases about FET did actually start to take place, tribunals were faced having to clarify the relation between FET and IMS with little or no previous authorities to rely on.

Both the practice of treatymaking and the jurisprudence have been widely diverse in this regard.[59] In the context of NAFTA, for instance, the issue has been hotly debated. Expansive interpretations of FET – particularly in *Metalclad, S.D. Myers* and *Pope & Talbot* – led the Free Trade Commission to issue an interpretive note in 2001 in which it determined that "The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".[60] This was seen as an effort by the state parties to limit the scope of FET to the very high threshold of manifest *injustice, outrage, bad faith, or wilful neglect of duty* established in the *Neer* case of 1926.[61] And while most NAFTA tribunals seem to have duly followed this line,[62] some notable exceptions exist. The *Pope & Talbot* award on damages, for example, went as far as saying that the "the principles of customary international law were not frozen in amber at the time of the *Neer* decision", openly challenging the interpretive note.[63] Outside the context of NAFTA, the debate has been less jarring. Yet, it has also led to divided opinions. A modest number of tribunals have held that the content of FET corresponds to IMS,[64] but the majority seems to have favoured the view that FET and IMS are different standards.[65] Nowadays, at least outside the context

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[59] Paparinskis (n 5) 93–95.

[60] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) <http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp>.

[61] Kläger (n 32) 71.

[62] See, for example: *Mondev International Ltd v United States of America (Award)* [2002] ICSID ARB(AF)/99/2 [119–121]; *United Parcel Service of America Inc v Government of Canada (Award on Jurisdiction)* [2002] ICSID-UNCITRAL Case No. UNCT/02/1 [97]; *ADF Group Inc v United States of America (Award)* [2003] ICSID Case no ARB(AF)/00/1 183; *Loewen Group, Inc and Raymond L Loewen v US (Award)* [2003] ICSID ARB(AF)/98/3 [125–128]; *Methanex Corporation v USA, UNCITRAL (NAFTA), (Final Award)* [9, 11]; *Waste Management, Inc v Mexico (Award)* (2004) Case N° ARB(AF)/00/3 (ICSID) [89]; *GAMI Investments v Mexico (Final Award) (UNCITRAL)* [92].

[63] *Pope & Talbot Inc v Canada UNCITRAL (NAFTA) (Award on Damages)* [57, 58].

[64] *Genin, Eastern Credit Limited, Inc and AS Baltoil v Estonia (Award) (ICSID)* [2001] [367]; *Lauder v Czech Republic (Award)* (UNCITRAL) [292].

[65] See, for example: *MTD Equity Sdn Bhv and MTD Chile SA v Chile (Award)* [2004] ICSID Case no ARB/01/07 [236]; *Iurii Bogdanov and others v Moldova (Award)* (SCC Case) [4.2.4]; *Noble Ventures v Romania (Award)*

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of NAFTA, there seems to be little doubt that FET and IMS are not identical: while FET covers some of the aspects of IMS – for example denial of justice[66] – it is thought to be autonomous from it.[67]

As to the interpretive threads that emerged during these years, perhaps the earliest one was the idea of transparency. As an element of FET, transparency was and is still thought to require the legal framework and procedures of the host state applicable to the investment to be clear and readily identifiable for the investor.[68] The first award to put this element forward was *Metalclad*, in august 2000, where the tribunal borrowed the word "transparency" from one of the objectives in the first chapter of NAFTA to reach the conclusion that it forms part of FET. It said, in one of the most controversial decisions on FET, that "there should be no room for doubt or uncertainty on [the legal requirements surrounding the investment]", adding that "once the authorities of the central government of any Party […] become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined".[69] This high standard triggered the dispute that led to the issuance of the NAFTA Free Trade Commission's interpretive note equating FET with IMS, mentioned above.[70] However, this did not keep the notion of transparency from being considered as part of FET in later NAFTA and non-NAFTA cases, consolidating a jurisprudential thread that is to this day considered by many to unquestionably form part of

[2005] ICSID ARB/01/11 [181]; *Eastern Sugar BV v Czech Republic (Partial Award)* [2007] [335]; *Desert Line Projects LLC v Yemen (Award)* [2008] ICSID ARB/05/17 [192]; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua v Argentina (Decision on Liability)* [2010] ICSID ARB/03/17 176–178.

[66] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 6.

[67] Francisco Gonzalez de Cossio, *Arbitraje de inversión* (1. ed, Porrúa 2009) 143, 144; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (University Press 2008) 56–85; Paparinskis (n 5) 96.

[68] Kläger (n 32) 118.

[69] *Metalclad Corportaion v Mexico* [2000] ICSID CASE No. ARB(AF)/97/1 [76].

[70] Kläger (n 32) 70.

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FET.[71] The most notable early cases in this regard were *Maffezini v. Spain* of 2000,[72] *Tecmed v. Mexico* of 2003,[73] and *Occidental v. Ecuador* of 2004. [74]

A second important thread of FET emerged in the early 2000s is that of fair procedure. Anchored in the classic notion of IMS – of which denial of justice is a central component[75] – the first investment award to have considered fair procedure as a potential component of FET was *Azinian v. Mexico,* of 1999. Withal, the conclusions in this case can hardly be attributed much weight in the interpretation of FET, as the both the claimant and the tribunal argued only in terms of expropriation, considering FET only as residual of it and mostly not referring to it.[76] Much more relevant in this regard was *Genin v. Estonia*, where the tribunal studied the procedures of a central Bank under the lens of FET. While it acknowledged that "the exact content of [FET] is not clear", it resorted to IMS in order to argue that a procedural violation would have to amount to "wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" in order to breach the FET standard.[77] This high standard, reminiscent of the *Neer* case, was very controversial, and cannot be said to have marked the ensuing jurisprudence on FET in any significant way. What did mark a powerful precedent, however, was the express linking of FET and fair procedure, which many arbitral tribunals followed in the coming years, expressly referring to *Genin v. Estonia.* These include *Mondev v. US,*[78] *Marvin Feldman v. Mexico,*[79] *Loewen v.*

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[71] Katia Yannaca-Small, 'Arbitration Under International Investment Agreements: A Guide to the Key Issues' (2nd edn, Oxford : Oxford University Press 2018) 515.
[72] *Maffezini v Spain (Award)* [2000] ICSID ARB/97/7 [83].
[73] *Técnicas Medioambientales Tecmed SA vs Mexico (Award)* [2003] ICSID CASE No. ARB (AF)/00/2 [84].
[74] *Occidental Exploration and Production Company v The Republic of Ecuador (First Final Award)* (2004) Case No. UN3467 (London Court of International Arbitration) [183].
[75] Paulsson (n 66) 36.
[76] *Robert Azinian, Kenneth Davitian, & Ellen Baca v Mexico* [1999] ICSID ARB (AF)/97/2 [92, 97, 98].
[77] *Genin, Eastern Credit Limited, Inc. and AS Baltoil v Estonia (Award) (ICSID)* (n 64) para 367.
[78] *Mondev International Ltd. v. United States of America (Award)* (n 62) paras 126, 127.
[79] *Marvin Roy Feldman Karpa v Mexico (Award)* [2002] ICSID ARB(AF)/99/1 [138, 139].

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US,[80] *Waste Management v. Mexico*,[81] *ADC v. Hungary,*[82] *Vivendi v. Argentina*,[83] and *Victor Pey Casado v. Chile*,[84] which largely referenced each other in interpreting FET.

Non-discrimination was also one of the first elements of content with which the arbitral jurisprudence started to shape FET in this phase. In *Myers v. Canada* of 2000, perhaps the first case making this argument, a violation of national treatment under NAFTA was deemed to simultaneously constitute a breach of FET.[85] A year later, the *Lauder* tribunal assumed – without much reflection and only citing a report by UNCTAD – that "[FET] will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances".[86] This interpretation is noteworthy because it left behind any reference to national treatment, in contrast to *Myers*. In *Nykomb Synergetics v. Latvia*,[87] *CMS v. Argentina,*[88] *Saluka v. Czech Republic*,[89] and *Parkerings-Compagniet v. Lithuania*[90] arbitrators reached the same conclusion. Interestingly, these cases made very few references to other cases or authorities, something which suggests that non-discrimination is perceived as a more evident element of FET, requiring little explanation. The literature only identifies one case, *Methanex*, openly rejecting that non-discrimination forms part of FET.[91] The argument behind this reading was that article 1105 in NAFTA does not mention non-discrimination while other provisions in the agreement expressly do, so there would be no reason to interpret article 1105 as a restatement of other standards.[92]

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[80] *Loewen Group, Inc. and Raymond L. Loewen v. US (Award)* (n 62) paras 129, 153.
[81] *Waste Management, Inc. v. Mexico (Award)* (n 62) paras 95–98.
[82] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary* [2006] ICSID ARB/03/16 [435].
[83] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* [2007] ICSID ARB/97/3 [7.4.10-7.4.12].
[84] *Victor Pey Casado and President Allende Foundation v Chile* [2008] ICSID ARB/98/2 653.
[85] *SD Myers, Inc v Government of Canada (Partial Award)* (UNCITRAL) [266].
[86] *Lauder v Czech Republic (Award)* (n 64) para 292.
[87] *Nykomb Synergetics Technology Holding AB v The Republic of Latvia (Award)* (SCC) [4.3.2.].
[88] *CMS Gas Transmission Company v Argentina* (2005) CASE NO. ARB/01/8 (ICSID) [290].
[89] *Saluka Investments BV v Czech Republic (Partial Award)* (PCA) [307, 460].
[90] *Parkerings-Compagniet AS v Republic of Lithuania* [2007] ICSID ARB/05/8 [280, 287].
[91] Kläger (n 32) 117.
[92] *Methanex Corporation v USA, UNCITRAL (NAFTA), (Final Award)* (n 62) para part IV, chapter C, paras. 14 et seq.

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Finally, the last clearly identifiable interpretive thread that emerged in these years was the idea of *legitimate expectations*. As will be seen, this is the most controversial one, if anything because the idea of "legitimate expectations", in contrast to the previous three interpretive threads, has no textual correspondence with any provision commonly found in BITs. The basic idea behind it is that investors, when making the investment, have certain expectations of how the regulatory environment will behave, and that these expectations determine the regulatory treatment that the state is obliged to provide throughout the duration of the investment. As explained by Kläger, these expectations are generally understood to be formed, first, by express representations or commitments made by the state, and second, by a general presumption of "stability and consistency in the legal framework".[93]

Tecmed v. Mexico, of 2003, was the case that introduced the concept. Arguing that the following resulted from "an autonomous interpretation […] according to [the] ordinary meaning [of FET]",[94] the tribunal held that:

> "[FET] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations".[95]

This paragraph heavily marked the understandings of FET in the years to come. The influential *Occidental v. Ecuador* award cited it, referring to the idea of *stability of the legal and business framework*.[96] In *CMS v. Argentina,* the tribunal also cited *Tecmed*, saying that

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[93] Kläger (n 32) 117.
[94] *Técnicas Medioambientales Tecmed S.A. vs. Mexico (Award)* (n 73) para 155.
[95] ibid 154.
[96] *Occidental Exploration and Production Company v. The Republic of Ecuador (First Final Award)* (n 74) paras 183–187.

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"the Tribunal believes this is an objective requirement unrelated to whether the Respondent had any deliberate intention or bad faith in adopting the measures in question", and again referring to the idea of stability and predictability.[97] The tribunals in *MTD v. Chile (Award),*[98] *Iurii Bogdanov v. Moldova,*[99] *Thunderbird v. Mexico*,[100] *LG&E v. Argentina*,[101] and *PSEG v. Turkey*,[102] and several others followed the same argumentative line, making reference to *Tecmed* with no apparent hesitation on whether legitimate expectations was part of the content of FET.[103] Although the limits of *legitimate expectations* would become a disputed matter in the following years – as will be seen – this stream of jurisprudence cemented the belief that this element lies at the core of FET, making it seemingly impossible to argue the opposite from 2007 on.

In conclusion, towards the end of this phase, around 2007, some defined but rather unchecked interpretive threads on FET had formed in the jurisprudence. The contrast with the state of debates around FET in and before 2000 is remarkable. While back then the doctrinal discussion was limited to whether FET should be read as equal to IMS or if the words "fair" and "equitable" should be taken at face value,[104] by 2007 there was a widely varied and growing corpus of ideas thought to constitute the FET standard.[105] The discussion shifted from wondering about the nature of FET to determining its specific content as applicable in concrete cases.

4. Drawing boundaries to FET: the emergence of public interest (2007-present)

After the creative period of 2000-2007, the expansion of jurisprudential and academic interpretations of FET came to a gradual standstill. From 2007 on, two phenomena seem

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[97] *CMS Gas Transmission Company v. Argentina* (n 88) para 280.
[98] *MTD Equity Sdn. Bhv. and MTD Chile S.A. v Chile (Award)* (n 65) paras 113–115.
[99] *Iurii Bogdanov and others v Moldova (Award)* (n 65) para 4.2.4.
[100] *International Thunderbird Gaming Corporation v Mexico* (UNCITRAL) [147–150].
[101] *LG&E v Argentina (Decision on Liability)* (2006) Case No. ARB/02/1 (ICSID) [124, 127–130].
[102] *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Ltd Sirketi v Turkey (Award)* [2007] ICSID ARB/02/5 [240–241].
[103] Kläger (n 32) 117.
[104] Vasciannie (n 11) 103; UNCTAD, 'Fair and Equitable Treatment' (n 36).
[105] Tudor (n 67) 151–182.

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clear. First, novel elements of FET ceased to emerge, limiting the discussion to legitimate expectations mainly, and to a lesser extent transparency, fair procedure, and non-discrimination – or alternative formulations of the same ideas.[106] Second, these four, and particularly legitimate expectations, began a process of revision and recalibration which questioned the broad, unbound understandings of the 2000-2007 period. The seminal *Tecmed* precedent, to put the clearest example, started being heavily questioned, qualified and, on occasion, plainly rejected after 2007. The same can be said of *Metalclad* and other landmark cases of the early years.

Regarding the element of legitimate expectations, a first sign of change came with *Saluka v. Czech Republic,* in 2006. Paying tribute to *Tecmed,* the tribunal acknowledged that "the standard of [FET] is therefore closely tied to the notion of legitimate expectations, which is the dominant element of that standard".[107] But two paragraphs below it stated that " if [the] terms [of the *Tecmed* award] were to be taken too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic", adding that expectations, "in order […] to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances".[108] One year later, the *MTD v. Chile* annulment committee openly said that "the *TECMED* Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable", although this assertion had little impact on the whole of its reasoning.[109] More significant was the award in *Parkerings v. Lithuania.* Again, the tribunal cited *Tecmed* to confirm that *legitimate expectations* forms part of the FET standard, but it elevated the threshold by saying that "the investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances".[110] The *Continental v. Argentina* tribunal followed

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[106] Yannaca-Small (n 71) 510–530.
[107] *Saluka Investments BV v. Czech Republic (Partial Award)* (n 89) para 302.
[108] ibid 304.
[109] *MTD Equity Sdn Bhv and MTD Chile SA v Chile (Decision on Annulment)* [2007] ICSID Case no ARB/01/07 [67].
[110] *Parkerings-Compagniet AS v. Republic of Lithuania* (n 90) para 333.

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a similar road in questioning the extent to which stability can be applied as a component of FET. It said: "it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose".[111] Similar statements followed in *EDF v Romania,*[112] *Total v. Argentina,*[113] *AES v. Hungary*,[114] *Impreglio v. Argentina,*[115] *Toto Costruzioni v Lebanon,*[116] *Perenco v. Ecuador,*[117]and *Charanne and v. Spain.*[118] The contemporary state of the matter seems well depicted in *Philip Morris v. Uruguay,* of 2016, where the tribunal said:

> "422. It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.
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> 423. On this basis, changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change".[119]

In sum, while there is little doubt nowadays on whether legitimate expectations and legal stability form part of the FET standard, this element is qualified by the right of the state to

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[111] *Continental Casualty Company v Argentina* [2008] ICSID ARB/03/9 [258].
[112] *EDF (Services) Limited v Romania (Award)* [2009] ICSID ARB/05/13 [217].
[113] *Total SA v The Argentine Republic (Decision on Liability)* [2010] ICSID ARB/04/01 [115].
[114] *AES v Hungary (Award)* [2010] ICSID ARB/07/22 [9.3.29].
[115] *Impregilo S.pA v Argentine Republic* [2011] ICSID ARB/07/17 285, 290–91.
[116] *Toto Costruzioni Generali SPA v Lebanon (Award)* [2012] ICSID ARB/07/12 [241–245].
[117] *Perenco Ecuador Limited v The Republic of Ecuador and Petroecuador (Decision on Remaining Issues of Jurisdiction and Liability)* [2014] ICSID ARB/08/6 [560].
[118] *Charanne and Construction Investments v Spain (Award)* [2016] SCC V 062/2012 [510, 513].
[119] *Phillip Morris v Uruguay (Award)* (2016) Case No. ARB/10/7 [422, 423].

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regulate for the purpose of public interest.[120] A FET clause in a treaty is not equivalent to a stabilization clause in a contract; that is to say, FET cannot be interpreted as a commitment of the host state to keep the regulatory environment unchanged.[121] Moreover, the duty of transparency of the state is complemented by a duty of due diligence for investors to actively collect and assess information about the rules and regulations operating in the host country at the moment of investing.[122] In other words, there is a presumption of awareness by the investor of the general regulatory environment.[123]

Now, the trajectory of legitimate expectations within FET is reflective of a broader pattern in investment jurisprudence since 2007: the growing space for the states' right to regulate and implement policies in pursuance of public interest.[124] Tribunals have come to acknowledge that regulatory change forms part of the sovereign powers of the state and that FET cannot be interpreted as curtailing them, even at the expense of the investor's interests, within the margins of legitimacy and reasonableness.[125] The decisions in *Duke v. Ecuador,*[126] *Lemire v. Ukraine,*[127] and *El Paso v. Argentina*[128] are early examples of this tendency in this phase. The tribunal in *Electrabel v. Hungary* of 2012, also made clear the place of regulatory change in investment arbitration, interpreting the element of fairness in the following way:

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[120] Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford University Press 2019) 8.

[121] Moshe Hirsch, 'Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law' (2011) 12 Journal of World Investment & Trade vii, 805, 806.

[122] Yulia Levashova, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law' (2020) 67 Netherlands International Law Review 233, 233.

[123] UNCTAD, 'Fair and Equitable Treatment' (2012) 72.

[124] Ursula Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT' (2014) 15, 2014 The journal of world investment & trade 454, 471; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, University Press 2012) 141 <http://oxia.ouplaw.com/view/10.1093/law/9780199651795.001.0001/law-9780199651795> accessed 13 July 2021.

[125] Joshua Paine, 'On Investment Law and Questions of Change' (2018) 19 The Journal of World Investment & Trade 173, 188, 189.

[126] *Duke Energy Electroquil Partners & Electroquil SA v Ecuador (Award)* (2008) Case No. ARB/04/19 (ICSID) [340].

[127] *Joseph Charles Lemire v Ukraine (Decision on Jurisdiction and Liability)* [2010] ICSID ARB/06/18 500.

[128] *El Paso Energy International Company v Argentina (Award)* [2011] ICSID ARB/03/15 [372].

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> "[…] it is well-established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment".[129]

This has also been made explicit in more recent cases. In *Copper Mesa Mining Corporation v Ecuador* of 2016, the tribunal studied possible violations to FET under the light of its "deference" to the state's "sovereign right, as regulator, to determine what lies within its national interest".[130] In *Blusun SA, Lecorcier and Stein v. Italy*, similarly, the tribunal said that FET "preserves the regulatory authority of the host state to make and change its laws and regulations to adapt to changing needs, including fiscal needs […]".[131] In *Urbaser v. Spain,* the tribunal held that "the investor is and must be aware of the State's commitment to deal with situations and problems that may emerge over the time and were impossible to anticipate […].[132] In *Eiser Infrastructure Ltd v. Spain*, of 2017, the tribunal stated that "investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs".[133] Lastly, in *Novenergia II – Energy & Environment (SCA), SICAR v. Spain*, of 2018, the tribunal again held that "a state has a right to regulate and investors must expect that legislation may and will change".[134]

What explains interpretive readjustment? A first source of change has been the explicit reassertion of regulatory space by developed states. Most BITs signed before 2000 were entered by developed states with the conviction that they were protecting their investors in

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[129] *Electrabel SA v Hungary (Decision on Jurisdiction, Applicable Law and Liability)* [2012] ICSID ARB/07/19 [7.77].
[130] *Copper Mesa Mining Corporation v Ecuador (Award)* [2016] PCA-UNCITRAL Case No 2012-2 [6.64].
[131] *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italy (Award)* [2016] ICSID ARB/14/3 [319 (4)].
[132] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina (Award)* [2016] ICSID ARB/07/26 [628].
[133] *Eiser Infrastructure Ltd and Energia Solar Luxembourg Sàrl v Spain (Award)* [2017] ICSID No ARB/13/36 [362].
[134] *Novenergia II – Energy & Environment (SCA), SICAR v Spain (Final Arbitral Award)* [2018] SCC No 2015/063 [654].

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developing countries, never thinking that they would eventually become respondents in in high-profile cases.[135] Thus they were quick to accept clauses in BITs and FTAs with vague formulations that would give arbitrators a wide margin of interpretation – indeed like FET. But throughout the 2000, developed countries became the subject of investment claims questioning national policies of all types – environmental, labour and health related.[136] This led them to attempt to limit the scope of interpretation of arbitrator by clarifying and reshaping FET clauses in BITs and FTAs. The earliest example of this is the Note of Interpretation of the Free Trade Commission of NAFTA in 2001, which has already been discussed.[137] There the state parties thought that by anchoring FET to IMS, arbitrators would be sufficiently constrained, something which was not necessarily always the case.

More recent attempts show less naiveté. States have negotiated investment treaties with FET clauses that specify elements of its content and that expressly narrow possible interpretations.[138] For example, the US Model BIT of 2012, aside from making clear that FET is equal to IMS, contains a clause that says that FET "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world",[139] suggesting that FET can only be invoked in the context of judicial or executive proceedings, but not against laws.[140] This exact wording was adopted in the renegotiated NAFTA, now called United States-Mexico-Canada Agreement (USMCA), in force since July 2020. Another example is the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, signed in 2016, which makes a list of elements of FET meant to inhibit the

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[135] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 The American Journal of International Law 45, 78.
[136] M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford Univeristy Press 2008) 40–41.
[137] Kläger (n 32) 71.
[138] Eric De Brabandere, 'States' Reassertion of Control over International Investment Law: (Re)Defining "Fair and Equitable Treatment" and "Indirect Expropriation"' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2016) 299 <https://www.cambridge.org/core/books/reassertion-of-control-over-the-investment-treaty-regime/states-reassertion-of-control-over-international-investment-law-redefining-fair-and-equitable-treatment-and-indirect-expropriation/1185C14AAD1A6C8ADEE4EB7BAA3355E7> accessed 17 March 2021.
[139] Article 5(2)(a) of the US Model BIT (2012)
[140] David Collins, *An Introduction to International Investment Law* (University Press 2017) 126.

Electronic copy available at: https://ssrn.com/abstract=4430270

creativity of arbitrators. It includes denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination, and abusive treatment including coercion, duress and harassment.[141] Legitimate expectations is mentioned later in that article as a subsidiary element and limited to "specific representations" of the host state – excluding the controversial expectations generated by the general regulatory framework at the time of the investment, the main problem of *Tecmed*. The draft Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU, boycotted by the Trump administration in 2018, contained a formulation similar to CETA, but adding in its article 2.2 that "the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits".[142] This provision was in fact explained by the European Commission in the following terms, which are remarkably transparent of the feeling of developed countries around the *Tecmed* interpretation of FET:

> "We have defined key concepts like "fair and equitable treatment" and "indirect expropriation", in order to prevent abuse […]."Fair and equitable treatment" is defined through a clear, closed text which defines precisely the content of the standard without leaving unwelcome discretion to arbitrators. Moreover, detailed language has been agreed upon to clarify what constitutes indirect expropriation, particularly excluding claims against legitimate public policy measures".[143]

Other countries have followed similar courses of action. China, for instance, which formerly included unqualified FET clauses in its investment treaties,[144] has for several years now included references to IMS, limited FET to denial of justice, and sometimes even required

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[141] Article 8.10(1) and (2), final CETA Text (29 February 2016)
[142] Article 2(2), Transatlantic Trade and Investment Partnership (TTIP) EU Draft (12 November 2015)
[143] European Commission, 'Concept Paper: Investment in TTIP and beyond – the Path for Reform' 2 <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>.
[144] Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford Univeristy Press 2009) para 3.86; Axel Berger, 'Investment Rules in Chinese Preferential Trade and Investment Agreements' (2013) Discussion Paper 7/2013 Deutsches Institut für Entwicklungspolitik.

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the exhaustion of local remedies.[145] More surprisingly, the China–Australia Free Trade Agreement (ChAFTA), entered into force in December 2015, does not even include a FET clause and asserts in its preamble the 'rights of [the] governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare'. Colombia, for its part, has started to specify in its BITs that FET does not include a stabilization clause nor limits the right of the parties to regulate.[146] Another example is the ASEAN Comprehensive Investment Agreement, of 2012, which specifies, "for greater certainty", that FET requires "each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process", making it a purely procedural standard.

Attributing the shift in the jurisprudence to these changes in BIT-negotiation policies must be done with an important caveat. On the one hand, it is clear that modified FET clauses in new BITs and FTAs do not have any direct, formal effect on other BITs retaining the older, broader formulations. On the other hand, the jurisprudence emerging from these new formulations is not yet available or at least not visible in the academic works produced in recent years. That leaves the observer with very few possibilities of proving a causal link between the change in jurisprudence and the new conventional wordings of FET. What is clear, however, is that there has been a change of mindset within the epistemic community of IIL. While at the time of *Tecmed* there was little or no authoritative material to counter the argument that FET was a broad standard encompassing legitimate expectations, the changes in treatymaking mentioned above signalled to the whole community that there was something wrong with that reading. There was an element missing in the balancing of the interests involved, and the efforts by states to change the way FET was worded certainly signalled that missing element.

This adds, of course, to the many voices that denounced the overly liberal readings of the 2000-2007 period. As Anthea Roberts points out, the early cases "dramatically demonstrated

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[145] M Sornarajah, 'Chinese Investment Treaties in the Belt and Road Initiative Area' (2020) 8 The Chinese Journal of Comparative Law 55, 71.
[146] Ortino (n 120) 45.

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the public law implications of investment treaty arbitration".[147] The critical situation of Argentina facing excessive complaints after a complete shutdown of its economy, the embarrassment of the three NAFTA members and more recently Germany defending before arbitral tribunals important environmental measures, and the backlash against financial institutions after the 2008 crisis all pointed to a necessary reassessment of the place of public interest in investment arbitration.[148]

Academic works served as a first line for this reflexion. Already in 2007, Gus Van Harten dedicated a book, *Investment Treaty Arbitration and Public Law*, to explaining the troubled interaction of private arbitration with public law. As he put it in the introduction, "the system's unique use of private arbitration in the regulatory sphere conflicts with cherished principles of judicial accountability and independence in democratic societies; in effect, it taints the integrity of the legal system by contracting out the judicial function in public law".[149] Similar works by Schill,[150] Montt,[151] and notably Sornarajah[152] appeared in 2009 and 2010. At the same time, scholars from other areas in international also began to question the system of investment arbitration. Álvarez,[153] Kurtz[154] and Simma[155] are examples of this. These works doubtlessly contributed to changing the narratives around IIL generally, and FET in particular. The same can be said of the work of civil society organizations in raising

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[147] Roberts (n 135) 78.

[148] Paul Barker, 'Legitimate Regulatory Interests: Case Law and Developments in IIA Practice' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2016) 230, 231 <https://www.cambridge.org/core/books/reassertion-of-control-over-the-investment-treaty-regime/legitimate-regulatory-interests-case-law-and-developments-in-iia-practice/3CF56B9D94D2CFBC39D0E081DC579691> accessed 17 March 2021.

[149] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Univeristy Press 2008) 4.

[150] Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010).

[151] Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (Hart 2009).

[152] Sornarajah, *The International Law on Foreign Investment* (n 52).

[153] José E Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law 2011).

[154] Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' (2009) 20 EJIL 749.

[155] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International & Comparative Law Quarterly 573.

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public awareness about the workings of the system, and its problematic impact on governmental policymaking.[156]

In conclusion, since 2007 the interpretive elements inherited from the previous phase have been questioned and reassessed. This process has been dominated by the repositioning of public interest within the whole of IIL, to the point that the *Tecmed* reading of FET cannot really be made nowadays without reservations. As Katia Yannaca-Small puts it, the "FET standard has been extensively litigated and significantly clarified but still has ambiguities and continues to evolve".[157] Both academic and jurisprudential discussions about FET nowadays take place on the basis of the elements of transparency, fair procedure, non-discrimination and legitimate expectations/stability, but none of these is seen as concludingly defined. As such, FET is still a relatively ambiguous standard, but certainly less ambiguous than in 2000. The door for coming up with a new element of content seems closed, but there is still a considerable margin of manoeuvre within the existing ones. Moreover, past discussions around FET, such as its relationship with IMS, seem to be now largely overcome.[158]

II. Trajectory of the case (SCR framework)

This case is clearly one of norm emergence. Its trajectory throughout the four phases of the chronology just described is analytically neat. The selection stage would comprise the two first phases, from 1945 to 1967 and then from 1967 to 2000. In it, different attempts were made, first, at establishing FET through a multilateral convention, and when these failed, through BITs – all in the context of a broader project of investment protection where FET was a relatively minor element. The exponential expansion of FET through BITs and FTAs during the 1980s and 1990s shows the success of this attempt, although, crucially, at the time the content of FET remained completely unexplored and uncertain.

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[156] Roberts (n 135) 84.
[157] Yannaca-Small (n 71) 501.
[158] Kläger (n 32) 439.

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The construction stage corresponds with the third phase in the chronology, from 2000 to roughly 2007, and in part also with the fourth phase. Between 2000 and 2007, the explosion of investment jurisprudence led to the formation of certain threads of content in FET in a seemingly unrestricted and unchecked way. Academics during this time largely played along, functioning as codifiers of the jurisprudence and explaining analytically the interpretive lines of the jurisprudence – not, in any case, questioning them. After 2007, the elements of content that the jurisprudence had delivered started being questioned by arbitrators, states, academics, and the civil society. These led to a revision under the logic of public interest, which delivered a more nuanced understanding of FET, particularly as regards the element of legitimate expectations and stability of legal framework.

Lastly, in the still ongoing reception stage, which would correspond to the last few years, a less liberal understanding of FET has slowly been settling in the jurisprudence and in the work of academics.

1. ***Selection stage***

Actors and agency

The crucial actors pushing for the creation of an investment-protection regime during the selection stage were private Western investors. This is clear both in the case of the US and in Europe. In the US, it was the US Chamber of Commerce and other groups of businesspeople during the 1950s who very actively lobbied with the government to achieve Havana Charter, the Bogotá Agreement, and then the inclusion of FET in FCNs. In Europe, it was first German groups of interest who lobbied for the adoption of some form of multilateral regime of investment protection, and then businesspeople of other countries. This led to the adoption of BIT policies by European countries at the failure of multilateral efforts. Of course, during this stage states lent themselves to these efforts, so agency would also have to be acknowledged on their side. International bureaucrats, with the exception those of the West-controlled OECD, were mostly absent in this stage. The same would have to be said about other actors – judges, scholars, etc.

Pathways

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The pathways of choice in the selection stage were, first, the multilateral pathway, and after its failure, the state action pathway. As said above, this last one proved readily available for protecting the interest of Western investors, at least until around 2000. Western states were receptive to the lobbying of private groups partly because they saw it in the interest of their national economies to export capital – largely in substitution to the dying colonial order – and partly because they saw nothing to lose in doing that. It was explained before how capital-exporting states never really imagined being sued under the new investment arbitration regime until this actually happened in the 2000s.

Why was no other pathway taken? Using international organizations to promote this project was not possible since developing countries had acquired a numeric majority at the global stage. As a matter of fact, they used this majority to counter the neoliberal project through initiatives like the NIEO at the UN General Assembly and UNCTAD in its early years, so it was unthinkable to resort to these universal institutions. This limited the possibilities of multilateral action to OECD and in trade matters to GATT, which were closed clubs of developed countries. Their direct impact was accordingly limited, although it is clear that the advocacy of BITs based on the Abs-Shawcross draft by OECD proved very influential in the following decades.

Why the judicial pathway was not used during the selection stage to advance FET is more puzzling. Admittedly, there were very few instruments providing for FET that allowed some form of adjudicatory procedure. Most of them were FCN, which provided recourse to the ICJ. Of course, these procedures required investors to persuade their home countries to bring a formal lawsuit against their host country, which was a big hurdle. Yet, the possibility existed, and it basically did not happen until *Barcelona Traction* of 1970 and *Elettronica Sicula* in 1989 – the first of which did not make it past the jurisdiction stage, while the second did not really concern FET. Equally bewildering is that the issue of FET never emerged in the IUSCT, contrary to indirect expropriation. The same can be said of the very early ICSID jurisprudence of the 1980s and 1990s, where FET was not even mentioned. The only likely explanation for this is that FET was not thought of as a standard of treatment under which claims could be brought, but rather as a general principle informing the investment treaties

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in which it was found. As discussed above, this is confirmed by the treatment the investment literature gave to FET.

Although of limited relevance in the discussion of FET, it must also be said that in the last part of the selection stage, another multilateral attempt at having an investment treaty failed. Between 1994 and 1998 the OECD and its members attempted the multilateral agreement on investment (MAI) which included a FET provision, and which failed due to differences in the definitions of other clauses and strong public disapproval of the secrecy of the negotiations.[159]

Institutional availability

Institutional availability during this stage was low. International institutions other that the OECD and GATT were blocked by the numerical majority of developed states. Judicial fora were few and generally implied high political costs for home states. This gradually changed throughout the 1980s and the 1990s, when the possibility of directly resorting to arbitration opened for investors in BITs and, in the case of American investors in Iran, through the IUSCT. Yet, these opportunities were not taken to pursue the project of FET.

Stability

For all its ambiguity, FET was originally conceived as a new norm, related but distinct to IMS. In this sense, one could say that the previous normative stability was low. However, this seemed to matter very little for two reasons. First, FET was formulated as a general principle of fairness and equity. These terms were so general and mainstream that the new norm never seemed revolutionary or ground-breaking in any way. Second, no dispute concerning its meaning emerged during the first 50 years of its existence. As a result, there was no need to have a plausible content based on a previous stable norm in order to clarify

[159] Catherine Schittecatte, 'The Politics of the MAI: On the Social Opposition of the MAI and Its Role in the Demise of the Negotiations' (2000) 1 The Journal of World Investment & Trade 329, 333.

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its application until around 2000, when the discussion about FET and IMS did emerge in the jurisprudence and in academia – yielding very little outcomes due to the instability of IMS.

2. ***Construction stage***

Pathways

During the construction stage the clear pathway followed by investors was the judicial pathway. As explained in the chronology, from 2000 on the discussion on FET took place almost entirely in the BIT and FTA jurisprudence. Thus, arbitrators played a crucial role in coming up with interpretive threads of content. However, in contrast to more orderly judicial systems – for instance in the WTO – the decentralized nature of the investment system allowed for a particularly unstructured construction phase. Different elements were brought up by different tribunals, capriciously choosing methodologies and precedents, with the result that, by 2007, the content of FET was very disputed and uncertain. The state action pathway, for its part, was used to put some order to the rather chaotic body of jurisprudence, by way of changes in the formulations of FET in BITs and FTAs. Lastly, the private authority pathway in the way of academic works played an important role in systematizing the jurisprudence and distilling the patterns in the caselaw. Absent in this stage was the multilateral

Opening and Factors

A clear factor which accompanied the explosion of liberal interpretations of FET during the construction phase was the predominantly neoliberal and technocratic mindsets of arbitrators. From the beginning of the 1980s and well into the 2000s, it was widely believed among economists, politicians, diplomats, and policymakers that the main driver of economic growth was the free market.[160] As such, it is unsurprising that the first awards interpreting

[160] John Toye, 'UNCTAD at 50: A Short History' (2014) UNCTAD/OSG/2014/1 81

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FET – *e.g. Metalclad, Tecmed, Occidental* – favored a view of investment protection that accorded little or no space to regulation and policymaking in favor of the public interest. It corresponded with a global economic trend that went well beyond investment arbitration.[161] In the same vein, it seems logical that after the global financial crisis of 2008, global mindsets changed, and this reflected on the FET jurisprudence.

Salience

The salience of the FET standard was clearly low or very low before 2000. Its only salience during that period was that of an element of the whole architecture of the IIL system. After 2000, however, its salience grew considerably, probably to the point of becoming medium. The big cases where developed countries realized their vulnerability before arbitral tribunals and the reaction of these states rose significantly the stakes involved in the FET norm. The growing public awareness of the whole system also became a considerable element of salience during the construction stage.

Pace and mode of change

The pace of change in this case was remarkably slow until 2000. Before this point, there was no significant change concerning the clarification of the content of FET, other that the formal expansion of FET in BITs. After 2000 and until 2007, the pace accelerated in an extraordinary way, largely due to the unconstrained flow of arbitral jurisprudence.

3. ***Reception stage***

Outcome

This case is one of successful change. Seen from the perspective of the interest groups that originally advocated for FET as the principle heading a system of investment protection, the spread of FET in BITs throughout the 1980s and 1990s would embody this success. But also

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[161] George Ritzer, 'A Brief History of Neoliberalism by David Harvey (Book Review)' (2007) 113 American Journal of Sociology 286, 11.

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seen from the perspective of the investors that, around 2000, sought to use FET as a substantive standard to bring arbitral claims against host states, the development of FET was successful. Throughout the chronology explained above, FET went from a failed multilateral project to a ubiquitous norm in hundreds of BITs, and from an ambiguous and largely inapplicable general principle to a standard of treatment with a loosely defined content, prone to judicial application. Even if the original liberal project of investors was revised to make space for public interest, FET became what it was intended to become.

III. Particular features of the case

Agency by businesspeople

This case is noteworthy for being one where the baseline agency lied within private actors seeking to protect private economic interests. Few other successful cases of change in international law are so dependent on private initiative. Of course, it would be too reductionist to say that business was the only interest concerned. Developed states probably sought to build political and economic influence in developing countries by expanding the investments of their nationals, and certainly developing countries perceived there to be a benefit in attracting foreign direct investment. Yet, it is quite remarkable how detached from public interest the original agency in this case was, and how much it achieved.

Creation of an empty standard by states

A very peculiar characteristic of this case is the fact that FET was created as an empty norm and remained so for many decades. Why would states create a rule which they largely saw as inapplicable, and on which they showed no interest in defining? The contrast with other investment rules is stark on this point: the rules on direct expropriation had a very clear purpose and were thoroughly debated, indirect expropriation was very ambiguous but was always meant to have very specific purpose, and national treatment and most favoured nation were always of clear practical application. The same could be said about umbrella clauses and other rules occasionally considered in investment treaties. It is only FET that was left with little or no content for so long. One can only venture that it was always seen as a general, principle-like rule, and that it took around 40 years for investors to realize that it could be

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used as a standard of treatment. In this sense, it is puzzling why FET did not come up in the ICJ investment caselaw, the IUSCT jurisprudence, or the early BIT litigation.

IMS: always operating in the shadow

It is paradoxical that, even if FET was created as a different rule from IMS, IMS was until the last stages of development always present in the FET debate. The uncertainty about FET made inevitable that scholars and arbitrators resort to IMS as a possible source of meaning.

Prominent role of academic works

In the absence of institutional authority other than the jurisprudence of arbitral tribunals, the work of academics played a crucial role in classifying the possible elements of meaning in FET, and in analysing their implications. Prove of this is that arbitral jurisprudence regularly cites academic works in making conclusions. This is also clearly related to the fact that most of the time arbitrators are also academics publishing on the subject, and that often they were chosen as arbitrators precisely because of their views on particular issues.

Closure of interpretive possibilities after 2007

Another interesting feature of this case is how the terms of the discussion around FET changed in each stage. While before 2000 the debate was about its nature, until around 2007 it concerned its possible elements of content. From 2007 on, however, the debate seems to have narrowed to the revision of the already present interpretive elements of FET, and the possibility of coming up with new ones seems to have been foreclosed. In a debate that had little firm ground to hang on to, it seems that when a somewhat firm basis was achieved, it became too rigid for significant modifications. It is therefore not surprising that tribunal discussing FET nowadays do it terms of what was said between 2000 and 2007.

Monopoly of authority by the judicial path

More than other IIL cases, the evolution of FET is particularly centred on the jurisprudence of arbitral tribunals. There was little or no authority to rely outside the caselaw and residually academic works. This is reflected by the fact that the two non-judicial international institutions that dealt with the topic, namely the OECD and UNCTAD, discussed it almost

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exclusively on the basis of arbitral jurisprudence. Little or nothing could be said in this topic without judicial authority.

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ANNEX

ORIGINAL LIST OF POTENTIAL CASE STUDIES

(As of February 2019)

General International Law

1. The concept of internationally wrongful act
2. Erga omnes and jus cogens norms of international law
3. Humanitarian intervention and the doctrine of Responsibility to Protect
4. International crimes of state
5. Challenges to the states' monopoly over international legal personality
6. Preventive self-defence
7. Self-defence against non-State actors
8. Attempts to depoliticize recognition
9. Remedial secession
10. Changing understanding around sovereign statehood: from negative to positive
11. The jus cogens exception to state immunity for civil claims
12. The "international crimes" exception to state-official immunity in criminal procedures
13. Textualism in treaty interpretation
14. The concept of threat to the peace under article 39 of the UN Charter
15. The effects doctrine: alternative (no.1) to traditional criteria for jurisdiction
16. Passive personality principle: alternative (no.2) to traditional criteria for jurisdiction
17. Protective principle: alternative (no.3) to traditional criteria for jurisdiction
18. Universality principle: alternative (no.4) to traditional criteria for jurisdiction

International Human Rights Law

19. HR of corporations
20. HR obligations of armed groups
21. Humanitarian intervention against genocide
22. Poverty/development/social and economic rights
23. Group Right: The right to self-determination
24. Group Right: Indigenous rights
25. The right to a clean environment

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26. The right to life
27. Non-discrimination of sexual minorities
28. Margin of appreciation/subsidiarity
29. Interim measures
30. Relation IHL-HR
31. Evolutive interpretation – living instrument principle
32. The emergence of positive obligations
33. Proliferation of rights
34. Extraterritorial application of human rights treaties
35. Expanding the definitions of norms: rape as a method of torture and genocide
36. Digital rights
37. Right to the truth as an autonomous right
38. From the right to work to the right to decent work in the age of automation
39. The novelties of the UN Human Rights Council: triple mechanisms of accountability
40. Innovative remedy systems: Pilot judgments, and extensive and collective reparations

International Humanitarian Law

41. The regulation of private military companies
42. Unlawful combatant
43. Internationalized non-international armed conflict
44. Customary Law
45. Direct participation in hostilities
46. The relationship between HR and IHL
47. Changing the narrative on IHL
48. Rules for Cyber Warfare
49. Effective control
50. Ottawa Treaty (Anti-Personnel Mine Ban Convention)
51. International Code of Conduct against Ballistic Missile Proliferation (HCOC)
52. ICRC Emblem
53. Autonomous weapons

International Criminal Law

54. Completion Strategy at the ICTY/ICTR
55. Transnational Crimes
56. War crimes
57. Modes of Responsibility
58. Incitement
59. Human Rights in ICL
60. Children

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61. Universal jurisdiction
62. Sources of International Criminal Law
63. International Humanitarian fact-finding commission (IHFCC) (similar institutions in HR-field less successful)
64. Crimes against humanity - abandoning the nexus between CAH and armed conflict
65. Transitional Justice

International Trade Law

66. Development as an exception to MFN: the Enabling Clause (1979)
67. Discrimination understood as market distortion
68. General exceptions under GATT article XX and the incorporation of non-trade considerations into decision-making
69. The meaning of "exhaustible natural resources" under article XX(g) of GATT
70. The Shifting Threshold for Safeguard Measures
71. From Post-Discrimination back to Non-Discrimination
72. Subsidies: A Changing Approach to "Public Bodies"
73. Data Localization as a trade barrier under GATS
74. Procedural Approach to Standard of Review in WTO
75. Functional approach to "like products" under MFN rules

International Investment Law

76. The use of income approaches for the calculation of compensation for expropriation
77. Public interest and Fair and Equitable Treatment
78. Doctrine of police powers in indirect expropriation
79. The expansion of international minimum standard towards FET
80. Definition of Investor and Investment
81. The International Protection of Contractual Terms
82. The Expansion of Most-Favoured Nation Clauses to Jurisdictional Aspects
83. Preservation of economic stability as grounds for a necessity claim
84. Limitation of grounds for annulments under ICSID Convention
85. Exhaustion of domestic remedies
86. Limited legal personality of the investor
87. Universalization of the Calvo Doctrine

International Environmental Law

88. Common heritage of humankind
89. Equitable Shared Resources
90. Natural resources- from economic protection to environmental protection
91. Neighbourliness, pollution, transboundary harm

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92. The emergence of the precautionary principle (no harm principle)
93. Secondary law-making: Defining what endangered species are through annexes to CITES
94. War and environment
95. Environmental Democracy
96. Access and Benefit Sharing (ABS)
97. Environmental Impact Assessment (EIA)
98. Environmental Standard Setting
99. Dealing with scientific uncertainty
100. International Environmental Partnerships
101. Compliance Control and Compliance Assistance
102. The right to a clean environment
103. The use of nuclear power sources in outer space
104. State liability for damage to the environment

Law of the Sea

105. Allowing coastal states to regulate ships passing through their EEZ due to environmental concerns
106. Exercise of authority over security matters in the contiguous zone
107. Refusing non-refoulement obligation and entry of vessels carrying refugees and asylum seekers to territorial waters
108. Innocent passage of warships through territorial waters
109. Innocent passage of ships transporting hazardous cargoes through territorial waters
110. Revising the enforcement jurisdiction model under the LOSC for pirates
111. The popularity of the equidistance principle
112. Revising the parallel system of access: Increasing options for companies seeking license for deep seabed mining – providing a reserve area or future equity interest
113. Marine protected areas (MPA) – Ecosystem-based approach to ocean governance.
114. Obligation to prevent Illegal, unreported and unregulated (IUU) fishing

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