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Editorial

Dear Readers,

At the time of this issue's publication, the COVID-19 pandemic declared by the World Health Organization (WHO) in March 2020,¹ still continues to impact the lives of individuals as well as their societies and economies.² It has become apparent that many healthcare systems, as well as social programmes, were not in a condition to adequately respond to the challenges posed by the COVID-19 pandemic.³ However, the lack of resilience and capacity in the public sector is not an unforeseen and sudden problem, as pointed out by the UN Committee on Economic, Social and Cultural Rights in its statement on the pandemic and its impact on the enjoyment of economic, social and cultural rights. The committee stresses that decades of underinvestment, accelerated by the global financial crisis of 2007-2009, predated the current crisis.⁴

The global financial crisis exposed the flaws of international financial regulation, a truly one-of-a-kind area of international law, as it does not operate with the use

¹ See WHO, 'Coronavirus disease 2019 (COVID-19) Situation Report –51' (2020), available at <https://apps.who.int/iris/bitstream/handle/10665/331475/nCoVsitrep11Mar2020-eng.pdf?sequence=1&isAllowed=y> (last visited 22 April 2021).

² J. W. Goodell, 'COVID-19 and finance: Agendas for future research', in 35 *Finance Research Letters* (2020), Article 101512, 1; Indian Department of Economic Affairs, 'Monthly Economic Review' (April 2021), available at <https://dea.gov.in/sites/default/files/MER%20April%202021.pdf> (last visited 8 May 2021), 10.

³ As WHO director-general remarked at the closing of the annual session of the World Health Assembly, see UN News, 'COVID-19: Consequences of 'chronic under-investment in public health' laid bare: Tedros', 13 November 2020, available at <https://news.un.org/en/story/2020/11/1077652> (last visited 22 April 2021).

⁴ United Nations Committee on Economic, Social and Cultural Rights, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, UN Doc E/C.12/2020/1, 17 April 2020, 2, para. 4.

of traditional instruments such as treaties but rather via nonbinding agreements.⁵ Due to its so-called *soft law* framework, some have gone as far as denying that international financial law is in fact law after all.⁶ The rationale behind this system, which builds on the assumption that its non-binding nature provides regulators with the necessary flexibility, has been called into question in the debate on how to improve the regulation of international finance.⁷

Another prevailing issue that has been brought to the surface due to the COVID-19 pandemic is the vulnerability of social rights,⁸ including employment and labor rights, the right to social security, social and medical assistance, the right to be protected against poverty and social exclusion, and the right to education and housing.⁹ In the circumstances, decision-makers fighting Covid-19 should be giving special consideration to vulnerable groups such as migrant workers, children and families, women, elderly people and persons with disabilities.¹⁰ For example, many women are particularly burdened by the crisis due to their professional situation. Making up almost 70% of the health care workforce, they are often at greater risk of infection.¹¹ This adds up to previously existing inequalities¹² and increased responsibilities in the private sphere, not to mention the increase in domestic violence.¹³

International financial regulation as well as the effective protection of economic and social rights, and gender equality remain pressing and topical issues, not only in their interplay, but also each in their own regard. This is starkly illustrated by the current pandemic and well reflected in important contributions to our current issue.

⁵ C. Brummer, 'How International Financial Law Works (and How it Doesn't)', 99 *Geo. L.J.* 257 (2011), 261.

⁶ *Ibid.*

⁷ Verdier, *supra* note 5, 1406.

⁸ European Committee of Social Rights, 'Statement on COVID-19 and social rights' (2021), available at <https://rm.coe.int/statement-of-the-ecsr-on-covid-19-and-social-rights/1680a230ca> (last visited 23 April 2021), 14.

⁹ *Ibid.*, 2-8, 13.

¹⁰ *Ibid.*, 7, 9-12.

¹¹ OECD, 'Women at the core of the fight against COVID-19 crisis', available at https://read.oecd-ilibrary.org/view/?ref=127_127000-awfnqj80me&title=Women-at-the-core-of-the-fight-against-COVID-19-crisis (last visited 7 May 2021), 1.

¹² *Ibid.*, 11.

¹³ European Committee of Social Rights, *supra* note 9, 10.

This assemblage is further complemented by an engagement with the roots of the prohibition of what has famously been referred to as the *crime of crimes*:¹⁴ the crime of genocide. In a related topic, perhaps with a future-oriented perspective, this issue also explores the protection of the environment through the means of International Criminal Law. While there have been no new international crimes since 1945, a recent initiative, aiming for an amendment of the Rome Statute, has commissioned an expert panel to draft a legal definition of *ecocide*.¹⁵ While the outcome of this initiative is yet to be seen, the debate about the idea of a new international crime against the environment is ongoing.

This issue opens with *Julia Ciliberto's* article 'The Challenges of Redressing Violations of Economic and Social Rights in the Aftermath of the Eurozone Sovereign Debt Crisis'. The author turns to the question of whether the EU and national systems provide adequate remedies for violations of economic and social rights. In order to answer that question, she compares the legal remedies available for victims before national judicial organs, the Court of Justice of the European Union, international human rights bodies, as well as the European Court of Human Rights by focusing on their suitability to enhance the effective implementation of socio-economic rights.

In the second article, titled 'The Soft Touch of International Financial Regulation: Status, Flaws and Future', *Niall O'Shaughnessy* explores the rules regulating international financial institutions with regard to the question as to why they failed to prevent the 2008 global financial crisis. He analyses the internal flaws of the provisions of the Basel Accord, as well as the problems arising due to their *soft law* nature and gives an outlook on the future of financial regulation.

Julia Klaus retraces the normative development of the prohibition of genocide as a *jus cogens* provision which entails *erga omnes* obligations and highlights the role of natural law approaches. In her article 'The Evolution of the Prohibition of Genocide: From Natural Law Enthusiasm to Lackadaisical Judicial

¹⁴ W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (2009). However, the ICTY Appeals Chamber has stated that there is no hierarchy of crimes under its statute, see *Prosecutor v. Kayishema and Ruzindana*, Judgment (Reasons), ICTR-95-1-A, 1 June 2001, para. 367.

¹⁵ For an interview with one of the panel's co-chairs, Philippe Sands, see P. Sands, J. Batura, P. Eschenhagen & Raphael Oidtmann, 'Defining Ecocide: An interview with Philippe Sands', *Völkerrechtsblog* (24 April 2021), available at <https://voelkerrechtsblog.org/de/defining-ecocide/> (last visited 25 April 2021).

Perfunctoriness – And Back Again?’ she looks back at the origins of the provision as a customary prohibition of genocide before its codification in the Genocide Convention in 1948 and follows the development up to the present, ending her analysis with comments on the *Myanmar Genocide case* at the International Court of Justice.

The prohibition of genocide may in principle, as the authors of the fourth article of this issue argue, also be applied to the destruction of the environment, in the case that a perpetrator envisages the resulting destruction of a protected group. However, emphasizing the difficulty of fulfilling the *mens rea* requirement, *Ammar Bustami* and *Marie-Christine Hecken* use the prohibition of genocide as one of their examples when arguing that the current legal framework of International Criminal Law is insufficient to guarantee an adequate protection of the environment. In their article ‘Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute’, *Bustami* and *Hecken* call for a reform of environmental protection through International Criminal Law and advocate an ecocentric approach.

In the last contribution, *Natalie Alkiviadou* and *Andrea Manoli* address the approaches to gender equality in the jurisdiction of the European Court of Human Rights (ECtHR). In their article titled ‘The European Court of Human Rights Through the Looking Glass of Gender: An Evaluation’, they examine relevant ECtHR-case law concerning domestic violence, childbearing, and the wearing of religious dress by women. While the authors observe a significant positive tendency regarding the court’s role in promoting gender equality, they still see room for further improvement.

The Editors

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The Challenges of Redressing Violations of Economic and Social Rights in the Aftermath of the Eurozone Sovereign Debt Crisis

Giulia Ciliberto*

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Abstract

The Eurozone sovereign debt crisis represented an occasion to assess whether the international, European Union, and national systems provide adequate remedies for violation of socio-economic rights caused by austerity measures. Victims of these violations tried to obtain a remedy by lodging complaints before national judicial organs, the Court of Justice of the European Union, international human rights bodies (such the UN Committee on Economic, Social and Cultural Rights, the ILO Committee on Freedom of Association and the European Committee on Social Rights), and the European Court of Human Rights. This article addresses whether one (or more) of these venues indicted adequate remedies of violations of socio-economic rights and whether these mechanisms could have adopted a different (and more human rights-oriented) adjudicative approach with the view of enhancing the effectiveness of socio-economic rights enshrined in international treaties.

The paper assumes that the adequacy of the relief depends on two elements. The first is the collective nature of socio-economic rights, which requires structural or systemic remedies rather than individual ones. The second is the need to preserve States' economic soundness in order to allow Countries to satisfy their international obligations, namely securing a minimum essential level of socio-economic rights and their progressive realization. Against these assumptions, remedies should benefit the victimized class as a whole, alongside avoiding major distributional or unintended consequences to the detriment of public finances. The investigation focuses on the case law and pronouncements concerning Greece, Portugal, and Spain. The paper reaches the conclusion that constitutional review of austerity measures is the most adequate and effective venue to address such sensitive matters. This is especially true where constitutional courts rely on international conventions protecting socio-economic rights as per se parameters of constitutionality or through consistent interpretation – *viz.* by construing the national bill of rights in line with treaty-based socio-economic rights.

A. Introduction

In recent decades, the idea that economic and social rights (socio-economic rights or ES rights) are judicially enforceable has gained support thanks to the establishment of specific binding instruments and their relative supervisory mechanisms in the international legal order, alongside the growing body of national case law relying upon ES rights.¹ However, the justiciability of socio-economic rights remains a tricky matter on a practical level. Cases on austerity legislation adopted in the context of the Eurozone sovereign debt crisis are an example of this shortcoming.

As is known, the 2008 burst of the United States' housing market bubble turned into a sovereign debt crisis that affected, among other countries, European Union (the Union or EU) Member States. Five Eurozone States – namely Cyprus, Greece, Ireland, Portugal, and Spain – requested loans to face their balance of payment problems. As a condition to receive such aids, beneficiaries had to implement austerity measures at the national level.² These domestic policies included the liberalization of labor markets, drastic decreases of public expenditure towards welfare services (e.g., social security systems, healthcare facilities), and the cutting of salaries and pensions of public personnel. Simultaneously, they entailed tax hikes.³

Such reforms, which were aimed at restoring the economic soundness of the borrowing State, encroached on various socio-economic rights,⁴ such as the right to work, the right to a fair wage, the right to a remuneration which

¹ See e.g., A. Nolan, B. Porter & M. Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal', CHRGI Working Paper No. 15 2007/08; M. Langford, 'Judicial Review in National Courts. Recognition and Responsiveness', in E. Riedel, G. Giacca & C. Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 417 [Langford, Judicial Review].

² K. Tuori & K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (2014), 236-241; A. Monteverdi, 'From Washington Consensus to Brussels Consensus', in E. Sciso (ed.), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (2017), 73.

³ On the rescue packages toward Eurozone States see e.g., Tuori & Tuori, *supra* note 2, 80-116, 236-241; C. Kilpatrick & B. De Witte (eds), 'Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges', EUI Working Paper Law 2014/05.

⁴ See e.g., G. Adinolfi, 'Aggiustamento economico e tutela dei diritti umani: un conflitto inesistente per le istituzioni finanziarie internazionali?', 8 *Diritti umani e diritto internazionale* (2014) 2, 319; HRC Res. 40/8, UN Doc A/HRC/RES/40/8, 5 April 2019, which adopted the *Guiding principles on human rights impact assessments of economic reforms*, see HRC, *Guiding principles on human rights impact assessments of economic reforms: Report of the Independent Expert on the effects of foreign debt and other related international*

provides a decent living for workers and their families, the guarantees stemming from collective bargaining, the right to social security, the right to be protected against poverty and social exclusion, the right to adequate housing, and the right to health.⁵ Victims of these violations tried to obtain a remedy by lodging complaints before national judicial organs, the Court of Justice of the European Union (ECJ), international human rights bodies, and the European Court of Human Rights (ECtHR).⁶

After a brief outline of the mechanisms adopted to manage the turmoil and of the impact of conditionality on the enjoyment of the relevant ES rights (Section A), this enquiry defines the notion of *adequate remedy*, a concept that hinges upon the main features of socio-economic rights and the nature and scope of States' international obligations *vis-à-vis* such rights (Section B). This paper proceeds with an overview of the possible venues to claim a redress, moving from the international to the domestic level (Section C). The piece starts by considering the case law of international committees and the ECtHR, then it turns to the approaches adopted by the ECJ in light of the involvement of several EU institutions in various phases of the assistance programs (Section D). Lastly, this investigation explores the role played by the national courts of borrowing Eurozone States (Section E) and argues that declarations of unconstitutionality with limited temporal scope represent adequate redress measures and that domestic constitutional Courts should rely more on treaty-based ES rights when striking out national laws imposing austerity measures (Section F). The closing section concludes with final considerations (Section G).

The research question underpinning this investigation is whether one (or more) of the above-mentioned judicial venues indicated adequate remedies of violations of socio-economic rights. In case of a negative response, whether

financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, UN Doc A/HRC/40/57, 19 December 2018.

⁵ For an overview of the documents supporting such violations, see e.g., J. P. Bohoslavsky & F. C. Ebert, 'Debt Crises, Economic Adjustment and Labour Standards', in I. Bantekas & C. Lumina (eds), *Sovereign Debt and Human Rights* (2018), 284. Another critical issue is the balance of powers between States and the other actor(s) involved in the assistance program, since the conditionality attached to the rescue packages could result in a restriction of the borrowing Country's fiscal and economic sovereignty, see Tuori & Tuori, *supra* note 2, 188-192; M. Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"', 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) 1, 61, 91-100.

⁶ The term 'remedy' identifies "[...] the substance of relief as well as the procedures through which relief may be obtained". The present paper refers to the first notion. See D. Shelton, *Remedies in International Human Rights Law*, 3rd ed. (2015), 17 [Shelton, Remedies].

international and European complaint mechanisms could (or should) have adopted different adjudicative approaches, and specifically a stronger human rights-oriented attitude with the view of enhancing the effectiveness of socio-economic rights enshrined in human rights treaties.

A last preliminary remark on the scope of the present paper is needed. The article is limited to the austerity-driven litigation concerning Greece, Portugal, Spain and – to a lesser extent – Cyprus. Although Ireland received aid as well, the Irish bailout was not challenged before the relevant bodies or Courts and, hence, there is a lack of relevant practice.⁷ Regarding Cyprus, austerity measures were not contested at the international level, but the bail-in of its major banks was addressed by the ECJ, as reported in Section C below. At the national level, the Cypriot Supreme Court issued two judgments on reductions of salaries and pensions, but this article does not deal with these rulings since they do not constitute enough practice to identify a trend.⁸

⁷ For the reasons underpinning the lack of constitutional case-law on austerity policies adopted in Ireland, see C. Kilpatrick, ‘Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry’, in T. Beukers, B. De Witte & C. Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (2017), 279, 283 [Kilpatrick, Constitutions]; G. Barucchello & Á. Þór Arnason, ‘Europe’s Constitutional Law in Times of Crisis: A Human Rights Perspective’, 10 *Nordicum-Mediterraneum* (2016) 3, 1, 15.

⁸ Supreme Court of Cyprus, *Giorgos Charalambous et al. v. The Republic of Cyprus*, Joined Cases Nos. 1480-4/2011, 1591/2011, 1625/2011, Judgment of 11 June 2014, ECLI:CY:AD:2014:C388; Supreme Court of Cyprus, *Maria Koutselini-Ioannidou et al. v. The Republic of Cyprus*, Joined Cases Nos. 740/11 *et al.*, Judgment of 7 October 2014, ECLI:CY:AD:2014:C388. The first judgment declared the cuts of salaries and pensions (Law No. 112(I) of 2011) in compliance with the principle of equality as enshrined in the Cypriot constitution. The second judgment declared the cuts of salaries of civil servants (Law 88(I) of 2011) in violation of the Cypriot constitution and the *Additional Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Art. 1 (Protection of property), ETS No. 9 [Add. Prot. 1 ECHR]. On these judgments, see e.g. C. Demetriou, ‘The impact of the crisis on fundamental rights across Member States of the EU: Country Report on Cyprus’, Study for the LIBE Committee (2015), PE 510.017, 66-67; C. Kombos & S. Laulhé Shaelou, ‘The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation’, in A. Albi & S. Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (2019), 1373, 1396-1397.

B. The Impact of Austerity Measures on Socio-Economic Rights and the Notion of “Adequate Remedy”

To solve the Eurozone sovereign debt crisis, European States have concluded macroeconomic adjustment programs. The first financial assistance granted to Greece in 2010 (the so-called *Greek Loan Facility*) was a joint package of economic aid: i) provided through bilateral loans between Greece and the other euro-area member States which were reiterated in a Memorandum of Understanding (MoU) signed by the European Commission on behalf of the creditor Countries; ii) funded through a stand-by agreement between Greece and the International Monetary Fund (IMF).⁹ Subsequently, a EU Council regulation established the European Financial Stability Mechanism to assist European States in the economic crisis. This instrument falling within the EU regime is no longer in force.¹⁰ Lastly, rescue packages were provided by intergovernmental funds,¹¹ namely the European Financial Stability Facility, a private company whose shareholders are the euro-area States,¹² and the European Stability Mechanism (ESM), an international organization established by Eurozone Countries through a treaty.¹³

⁹ For an overview of the several and rather unique legal basis of this rescue package, see J.-V. Louis, ‘Guest Editorial: The no-bailout clause and rescue packages’, 47 *Common Market Law Review* (2010) 4, 971, 972; Tuori & Tuori, *supra* note 2, 90.

¹⁰ Council Regulation 407/2010, OJ 2010 L 118/1, which recalls Article 122(2) TFEU as the legal basis for the establishment of the EFSM, 1, para. 1 [EFSM Council Regulation]. For an overview of the doctrinal debate concerning the legitimacy of the EFSM constitution and its compatibility with the *no bail-out clause* under Article 125 TFEU, see among other, Louis, *supra* note 9, 981-986; Tuori & Tuori, *supra* note 2, 136-146.

¹¹ The wording *rescue package* commonly refers to the set of different lending instruments that financial institutions could grant to States facing economic distress. This phrasing is used also with regard to the aid agreed towards Eurozone States, see e.g. Louis, *supra* note 9, 971.

¹² *EFSF Framework Agreement (as amended with effect from the Effective Date of the Amendments)*, available at https://www.esm.europa.eu/sites/default/files/20111019_efs_f_framework_agreement_en.pdf (last visited 9 March 2021); See B. Ryvkin, ‘Saving the Euro: Tensions with European Treaty Law in the European Union’s Efforts to Protect the Common Currency’, 45 *Cornell International Law Journal* (2012) 1, 227, 230-235, 240-245.

¹³ *Treaty establishing the European Stability Mechanism*, 2 February 2012, T/ESM 2012-LT/en [ESM Treaty]. On the issue of whether the establishment of the ESM was compatible with EU law, see *Thomas Pringle v. Government of Ireland and Others*, Case No. C-370/12, Judgment of 27 November 2012, [2012] ECLI:EU:C:2012:756 [Pringle Case]. For the

Although these instruments diverge from each other on a number of aspects, they share common features.¹⁴ For the purpose of the present paper, two of those shared characteristics are particularly relevant. Firstly, each mechanism (except the European Financial Stability Mechanism) presents a *hybrid nature*: despite being framed under international law, they are tied to the EU legal regime.¹⁵ In particular, the reference is to the role played by the European Commission and the European Central Bank (ECB) in the assessment of the requirements to accord loans, in the negotiation and signature of the MoU, and in monitoring compliance of the national policies with the conditionality attached to the MoU.¹⁶

The second common feature is the two-fold legal basis underpinning conditionality measures, a characteristic that stems from the hybrid nature of such tools. The first legal basis of the loans is a MoU signed by the lender and the borrowing State. This is an international legal instrument that details the conditions attached to the assistance facility.¹⁷ The second legal basis lies within the EU framework. Since the first rescue package to Greece in 2010, the most important elements of the borrower-lender agreements have been reiterated in EU Council decisions addressed to the recipient State. These unilateral, legally binding acts represent the vehicle through which the fiscal consolidation programs set forth in the MoUs fall under the scope of EU secondary law.¹⁸

doctrinal debate, see, among others, V. Borger, 'The ESM and the European Court's Predicament in Pringle', 14 *German Law Journal* (2013) 1, 113.

¹⁴ Tuori & Tuori, *supra* note 2, 97-101.

¹⁵ A. Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity', in M. Adams, F. Fabbrini & P. Larouche (eds), *The Constitutionalization of European Budgetary Constraint* (2014), 41; Ioannidis, *supra* note 5, 64-65; A. Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?', 54 *Common Market Law Review* (2017) 4, 991, 995-1003 [Poulou, Financial Assistance].

¹⁶ Louis, *supra* note 9, 972-974; Tuori & Tuori, *supra* note 2, 90-97; Ioannidis, *supra* note 5, 70-89; A. Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?', 15 *German Law Journal* (2014) 6, 1145, 1156-1159 [Poulou, Austerity].

¹⁷ Louis, *supra* note 9, 972; Tuori & Tuori, *supra* note 2, 90; Ioannidis, *supra* note 5, 72.

¹⁸ Ioannidis, *supra* note 5, 89, 93-94; P. Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework', 13 *European Constitutional Law Review* (2017) 2, 369, 378-381. See also *Konstantinos Mallis and Others v. European Commission and European Central Bank (ECB)*, Joined Cases Nos. C-105/15 P to C-109/15 P, Opinion of AG Wathelet delivered on 21 April 2016, [2016] ECLI:EU:C:2016:294, para. 85 [Konstantinos Mallis and Others v. European Commission and European Central Bank (ECB): Opinion of AG Wathelet].

As broadly documented, the macroeconomic adjustment programmes that were meant to solve the Eurozone sovereign debt crisis aggravated the negative impact on the enjoyment of socio-economic rights.¹⁹ Remarkably, such policies created tensions with two main States' obligations in this field. The first is the *positive* obligation to achieve the progressive realization of socio-economic rights by taking appropriate measures to the maximum of their available resources.²⁰ Such means encompass also judicial remedies.²¹ The second is a *negative*

¹⁹ On the violation of socio-economic rights as a result of domestic implementation of austerity measures, see among others: Poulou, 'Austerity', *supra* note 16, 1154-1169; M. E. Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *European Law Journal* (2015) 4, 521; L. Ginsborg, 'The impact of the economic crisis on human rights in Europe and the accountability of international institutions', 1 *Global Campus Human Rights Journal* (2017) 1, 97, 101-103; Bohoslavsky & Ebert, *supra* note 5, 284.

²⁰ Art. 2 (1) ICESCR, as interpreted by the CESCR, *Report on the Fifth Session, Annex III: General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Doc E/1991/23, 26 November-14 December 1990, 83 [CESCR, General Comment No. 3]; *Convention on the Rights of the Child*, 20 November 1989, Art. 4, 1577 UNTS 3, 46; *Convention on the Rights of Persons with Disabilities*, 13 December 2006, Art. 4 (2), 2515 UNTS 3, 74; *American Convention on Human Rights*, 22 November 1969, Art. 26, 1144 UNTS 123, 152 [ACHR]; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador"), 17 November 1988, OAS Treaty Series No. 69; *African Charter on the Rights and Welfare of the Child*, 11 July 1990, Art. 11(2), Art. 13(3), OAU Doc CAB/LEG/24.9/49 (1990). See also International Labour Organization (ILO), *Recommendation concerning National Floors of Social Protection*, 14 June 2012, R202; *European Social Charter*, 18 October 1961, Art. 3(3) and Art. 12(3), ETS No. 35; European Committee of Social Rights, *International Association Autism-Europe v. France*, Complaint No. 13/2002, Decision of 4 November 2003, 17, para. 53; European Committee of Social Rights, *Fédération internationale des Ligues des Droits de l'Homme (FIDH) v. Belgium*, Complaint No. 75/2012, Decision of 18 March 2013, 31, para. 145.

A wealth of literature addressed the obligation to progressively realize ES rights in light of the pronouncements of international human rights bodies and the judgments of national courts. See among others e.g., P. Alston & G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987) 2, 156; S. Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realization: A Question of Quality as Well as Quantity?', 12 *Human Rights Law Review* (2012) 3, 393; R. Uprimny *et al.*, 'Bridging the Gap. The Evolving Doctrine on ESCR and 'Maximum Available Resources'', in K. G. Young (ed.), *The Future of Economic and Social Rights* (2019), 624.

²¹ CESCR, *General Comment No. 3*, *supra* note 20, 85, para. 7; CESCR, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, UN Doc E/C.12/2007/1, 21 September 2007, 1, para. 3 [CESCR, An Evaluation]; CESCR, *General Comment No. 23 (2016) on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural*

obligation, namely the prohibition of *unjustified* retrogressive measures: a State must not lower the existing level of protection of ES rights, unless it proves the existence of strong reason(s) underpinning such decision (e.g. the consolidation of public finances in time of economic hardship) and that it has chosen the least harmful options to address the situation.²² Moreover, even if States may

Rights), UN Doc E/C.12/GC/23, 27 April 2016, 14, para. 50 [CESCR, General Comment No. 23]. For the literature, see above all, Shelton, *Remedies*, *supra* note 6, 100.

²² CESCR, *General Comment No. 14 (2000): The right to the highest attainable standard of health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2000/4, 11 August 2000, 9, 11, paras 32, 37; CESCR, *General Comment No. 18: The Right to Work (Art. 6 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/18, 6 February 2006, 7, para. 21; CESCR, *General Comment No. 19: The right to social security (Art. 9 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/19, 4 February 2008, 13, 15 paras 42, 54; CESCR, *General Comment No. 23*, *supra* note 21, 15, para. 52; CESCR, *An Evaluation*, *supra* note 21, 3, para. 9; Chairperson of the CESCR, *Letter Dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights*, ESCR/48th/SP/MAB/SW, 16 May 2012 [CESCR, Letter to States Parties dated 16 May 2012]; Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, UN Doc E/2013/82, 7 May 2013, 6-7, 13, paras 15-21, 52; CESCR, *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights*, UN Doc E/C.12/2016/1, 22 July 2016, 2, para. 4; Human Rights Council, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, UN Doc A/HRC/34/57, 27 December 2016, 9, para. 22. See also ILO, *365th Report of the Committee on Freedom of Association: Case No. 2820 (Greece): Reports in which the Committee requests to be kept informed of developments*, GB.316/INS/9/1, 1-16 November 2012, 223, 269, para. 990 [ILO, 365th Report on Greece]; ILO, *371st Report of the Committee on Freedom of Association: Case No. 2947 (Spain): Report in which the Committee requests to be kept informed of developments*, GB.320/INS/12, 13-27 March 2014, 84, 122, para. 464 [ILO, 371st Report on Spain]; ILO, *376th Report of the Committee on Freedom of Association: Case No 3072 (Portugal): Report in which the Committee requests to be kept informed of developments*, GB.325/INS/12, 29 October-12 November 2015, 223, 231, 233, paras 917, 923 [ILO, 376th Report on Portugal].

A wealth of literature addressed the prohibition of retrogressive measures in light of the pronouncements of international human rights bodies and the judgments of national courts. See among others e.g., M. S. Carmona, 'Alternatives to austerity: a human rights framework for economic recovery', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), 23, 26-27; A. Nolan, N. J. Lusiani & C. Curtis, 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis*, 121; Uprimny *et al.*, *supra* note 20, 630-634.

realize ES rights progressively, they must take immediate actions to ensure the satisfaction of, at the very least, essential levels of socio-economic rights.²³ This minimum core obligation stands irrespective of the resources available to States, which implies that (justified) retrogressive measures cannot undermine the access to basic levels of ES rights.²⁴

A sample of the harmful consequences of austerity policies *vis-à-vis* socio-economic rights is the cutting of the minimum wage enacted in Greece which, on the basis of the commitments taken with the lenders, had reduced the minimum salaries of employees under 25 years of age to below the poverty level – a measure conflicting with the right of young workers to fair remuneration.²⁵ In Spain, in order to enhance the viability of the national health care system, a decree law curtailed the rights of immigrants in an irregular situation to have access to public health services,²⁶ a policy that frustrated the principle of universal health care and represented a retrogression compared to the previous regime.²⁷

Victims of such violations faced serious difficulties in the identification of venues for obtaining adequate redress, not least due to the intricate web of duty-bearers and instruments establishing obligations upon them.²⁸ Among others, the subjects upon which the human rights regime establishes obligations are

²³ See e.g., I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018), 146-150 [Leijten, Core Socio-Economic Rights].

²⁴ See e.g., CESCR, *Letter to States Parties dated 16 May 2012*, *supra* note 22.

²⁵ ILO, *Report on the High-Level Mission to Greece*, 19-23 September 2011, 59, 60, paras 309, 311, 312; *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, ECSR Complaint No. 66/2011, Decision of 23 May 2012, 16-17, paras 60-65 [ADEDY v. Greece].

²⁶ Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones, BOE núm. 98, de 24 abril de 2012 (Royal Decree-Law 16/2012 on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its services, 20 April 2012) [Real Decreto-ley 16/2012].

²⁷ CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain*, UN Doc E/C.12/ESP/CO/5, 6 June 2012, 5, para. 19 [CESCR, Concluding observation on Spain].

²⁸ For a general overview of the subjects bound to respect human rights obligations, as well as of the sources of those obligations, see A. Fischer-Lescano, *Human Rights in Times of Austerity Policy. The EU Institutions and the Conclusion of Memoranda of Understanding* (2014).

borrowing States²⁹ and EU institutions (the Commission, the ECB, and the Council). As for the sources of obligations, Eurozone States are bound to respect ES rights set forth in the International Covenant on Economic, Social and Cultural Rights (ICESCR), a number of International Labour Organization (ILO) Conventions,³⁰ and the European Social Charter. Moreover, these Countries must comply with the (few) socio-economic rights protected under the European Convention on Human Rights (ECHR),³¹ as well as with the Charter of Fundamental Rights of the European Union (CFREU) – if certain conditions are met.³² Moreover, States’ organs must also act in accordance with the socio-economic rights enshrined in their constitutions if those contain a bill of rights. Turning to the EU institutions and bodies, the Commission, the ECB, the Council, and the European Financial Stability Mechanism must act in accordance with the provisions of the CFREU.

In light of this variety of duty-bearers, plaintiffs initiated proceedings against borrowing States and the EU. Cases were referred to international judicial and quasi-judicial organs as well as the ECtHR, the ECJ, and national courts and tribunals. In order to assess whether these mechanisms could (and whether they did) ensure appropriate remedies to the victims, it is necessary to identify which are the main characteristics of an *adequate* redress in the context of sovereign debt crises.

²⁹ On the issue of whether lending States (or those participating in the procedure for granting assistance by third parties) may be held accountable, see O. De Schutter & P. Dermine, ‘The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union’, *Journal européen des droits de l’homme* (2017) 2, 108, 139 [De Schutter & Dermine, The Two Constitutions of Europe].

³⁰ The ILO’s Governing Body identified eight of these Conventions as “fundamental”, and structural labor reforms introduced by Portugal, Spain and Greece have contrasted with five of them – namely, ILO, *Freedom of Association and Protection of the Right to Organise Convention*, 9 July 1948, C87; ILO, *Right to Organise and Collective Bargaining Convention*, 1 July 1949, C98; ILO, *Convention Concerning Minimum Wage Fixing with Special Reference to Developing Countries*, 22 June 1970, C131; ILO, *Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service*, 27 June 1978, C151; ILO, *Convention Concerning the Promotion of Collective Bargaining*, 19 June 1981, C154.

³¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 (amended by the provisions of Protocol Nos. 11, 14 and 16) [ECHR].

³² *Charter of Fundamental Rights of the European Union*, 26 October 2012, OJ 2012/C 326/02 [CFREU]. On the CFREU see e.g., N. Lazzerini, *La Carta dei diritti fondamentali dell’Unione europea. I limiti di applicazione* (2018).

The adequacy of a remedy depends on the nature of the violation and on the manner of the infringement, which varies according to the (class of) right(s) at stake.³³ Two elements are crucial in understanding which could be the most adequate form of relief in case of violation of socio-economic rights: i) the main features of such rights, and ii) the nature and scope of States' obligations on ES rights under international law.

Concerning the former aspect, socio-economic rights have three specific characteristics. Firstly, this category encompasses labor and employment rights, alongside rights traditionally associated with the concept of welfare State – such as the right to housing, to education, to health, and to social security.³⁴ Secondly, ES rights are individual entitlements with a *collective* (or *social*) dimension.³⁵ The effective and practical enjoyment of these rights mostly relies on the *allocation* of resources and on labor market legislation. States' policies in these two fields are usually addressed to specific sections of the population (e.g., reduction of public servants' wage), or to its entirety (e.g., cutting of the resources allocated to the national health system). Therefore, rights-holders suffer from the lowering of the levels of protection both individually and collectively – i.e., as members of the group targeted by the national policy. Thirdly, the implementation of several socio-economic rights heavily depends on the *availability* of economic resources – hence, their realization could differ from State to State, as well as over time, according to budgetary constraints.

This last feature is strictly connected to the nature and scope of States' obligations on ES rights under international law,³⁶ namely the above-mentioned positive obligation to achieve the progressive realization of socio-economic rights

³³ Shelton, *Remedies*, *supra* note 6, 377-378, 383; L. Hennebel & H. Tigroudja, *Traité de droit international des droits de l'homme* (2018), 508-509.

³⁴ OHCHR, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights*, December 2008, 1-3; C. Kilpatrick & B. De Witte, 'A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone', *European Policy Analysis* (2014) 7 [Kilpatrick & De Witte, A Comparative Framing].

³⁵ F. Atria, 'Social Rights, Social Contract, Socialism', 24 *Social & Legal Studies* (2015) 4, 598; E. Christodoulidis & M. Goldoni, 'The Political Economy of European Social Rights', in S. Civatese Matteucci & S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (2017), 239, 243; K. Pavlidou, 'Social Rights in the Greek Austerity Crisis: Reframing Constitutional Pluralism', 10 *Italian Journal of Public Law* (2018) 2, 287, 290, 291, 315.

³⁶ For an overview see e.g., M. Ssenyonjo, 'Reflections on State obligations with respect to economic, social and cultural rights in international human rights law', 15 *The International Journal of Human Rights* (2011) 6, 969; M. S. Carmona, *supra* note 22, 23.

and the negative obligation to refrain from adopting unjustified retrogressive measures. In view of this, breaches of socio-economic rights often require structural remedies: a redress for violations of socio-economic rights could be deemed “adequate” if it benefits *all* the victims, thus meeting the *collective* dimension of ES rights. The only way to reach this result is for the remedy to address the general cause(s) of the infringement, rather than providing individual reparations.³⁷ At the same time, the remedy should preserve the State’s economic soundness: an opposite outcome will potentially worsen its balance of payment problems and, ultimately, will hinder the State’s capacity to progressively realize socio-economic rights – or even its ability to ensure their minimum core.³⁸

In the context of sovereign debt crises such as the one faced by Eurozone States, an adequate redress could be the removal of domestic austerity measures, instead of awarding monetary compensation to the parties of crisis-related litigations. This outcome could be achieved through legislative or judicial means. Regarding the former, decisions and judgments of supervisory bodies at the international and EU level could trigger the amending process of the contested policy.³⁹ Such changes result in advantages towards *all* the victims and do not imply payment of losses by the State – *viz.* they meet the *collective* dimension of socio-economic rights and preserve States’ economic soundness. Concerning the latter, declarations of unconstitutionality without retroactive effects entail the removal of austerity measures to the benefit of *each and every* right-holder, hence fulfilling the *social* dimension of ES safeguards, while the restriction of the temporal scope of the rulings prevents a (further) decrease of States’ (already scarce) economic resources.⁴⁰ When deciding on the legitimacy of austerity measures, national constitutional courts should rely also on treaty-based socio-economic rights in order to ensure that the forum State acts in conformity with

³⁷ D. Shelton, ‘Remedies and Reparation’, in M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013), 367, 380; D. Bilchitz, ‘Socio-economic rights, economic crisis, and legal doctrine’, 12 *International Journal of Constitutional Law* (2014) 3, 710, 717.

³⁸ See e.g., *ADEDY v. Greece*, *supra* note 25, 13, para. 47.

³⁹ For an overview of the theory of dialogic remedies, see K. Roach ‘The Challenges of Crafting Remedies for Violations of Socio-economic Rights’, in M. Langford (ed.), *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (2009), 46, 51-55.

⁴⁰ On the power of Constitutional Courts in determining the temporal scope of declarations of unconstitutionality, see e.g. A. R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study* (2011), 103-114; F. Gallarati, ‘La Robin Tax e l’“incostituzionalità d’ora in poi”’: spunti di riflessione a margine della sentenza n. 10/2015’, *Federalismi* (2015) 19, 1.

its international obligations. The duty of securing compliance with international law stands regardless of the way in which the specific State systems adapts to international law, i.e., irrespective of whether the State embraces a (mainly) monistic or dualistic approach,⁴¹ or the specific manners of incorporation of international conventions⁴² – as Section F below further clarifies.

In light of the above, the following sections address whether international committees, the ECJ, and national courts provided meaningful contributions in redressing violations of socio-economic rights occurring in the context of the Eurozone sovereign debt crisis.

C. Redress at the International Level

The budgetary constraints introduced to reduce public expenditure were challenged before the UN Committee on Economic, Social and Cultural Rights

⁴¹ See e.g., J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 48: “Dualism emphasizes the distinct and independent character of the international and national legal systems. [...] Neither legal order has the power to create or alter rules of the other. When an international law rule applies, this is because a rule of the national legal system so provides. In the case of a conflict between international law and national law, the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail. Monism postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent. On that basis, international law can be applied directly within the national legal order”. See also M. N. Shaw, *International Law*, 8th ed. (2018), 97-100.

⁴² Luigi Condorelli, *Il giudice italiano e i trattati internazionali: gli accordi self-executing non self-executing nell'ottica della giurisprudenza* (1974), 29-32; B. Conforti & A. Labella, *An Introduction to International Law* (2012), 7 [Conforti & Labella, An Introduction]; R. Baratta, ‘L'effetto diretto delle disposizioni internazionali self-executing’, in G. Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni. 24° Convegno SIDI (Roma, 5-6 Giugno 2019)* (2020), 75, 76-79; Y. Iwasawa, ‘Domestic Application of International Law’, 378 *Collected Courses of The Hague Academy of International Law* (2015), 9, 23-25. Iwasawa distinguishes three systems of incorporation: i) automatic incorporation; ii) by law of approval; iii) individual incorporation.

(CESCR),⁴³ the ILO Committee on Freedom of Association (ILO CFA),⁴⁴ the European Committee on Social Rights (ECSR),⁴⁵ and the European Court of Human Rights (ECtHR). However, these judicial and quasi-judicial bodies proved to be rather ineffective when called upon to provide redress measures, albeit for different reasons.

At the universal level, the CESCR adopted two views finding Spain in violation of the right to adequate housing pursuant to Article 11(1) ICESCR.

⁴³ The CESCR was established under ECOSOC Res. 17, 28 May 1985. Among other tasks, the CESCR has the competence to examine individual communications under the *Optional Protocol to the ICESCR*, GA Res. 63/117, UN Doc A/RES/63/117, 5 March 2009 [Op-Prot. to the ICESCR]. The outcome of the individual complain procedure is a (formally) non-binding view. On the Op-Prot. ICESCR see e.g. Hennebel & Tigroudja, *supra* note 33, 287-288; E. Riedel, G. Giacca & C. Golay, 'The Development of Economic, Social and Cultural Rights in International Law', in E. Riedel, G. Giacca & C. Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 3, 28-35; D. Russo, 'Il Protocollo Facoltativo al Patto Internazionale sui Diritti Economici, Sociali e Culturali: verso un allineamento dei sistemi procedurali di tutela dei diritti umani', 1 *Osservatorio sulle Fonti* (2015) 1; M. Langford *et al.* (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016).

⁴⁴ The ILO Committee on Freedom of Association was established in 1951 by the Governing Body of the ILO. Its mandate is to examine alleged infringements of the principles of freedom of association and the right to collective bargaining regardless of whether or not the State concerned has ratified the relevant ILO Conventions. The outcome of the procedure is a (formally) non-binding report. On the ILO Committee on Freedom of Association see e.g., ILO, *Freedom of Association-Compilation of decisions of the Committee on Freedom of Association*, 6th ed. (2018), 5-15.

⁴⁵ The European Committee on Social Rights is empowered to examine collective complaints. See *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, 9 November 1995, ETS No. 158. The outcome of the collective complaint is a (formally) non-binding decision. On the system of collective complaint and on the amendments to the system, see e.g., R. R. Churchill & U. Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', 15 *European Journal of International Law* (2004) 3, 417; H. Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 9 *Human Rights Law Review* (2009) 1, 61; Shelton, *Remedies*, *supra* note 6, 219-220; K. Lörcher, 'Legal and Judicial International Avenue: The (Revised) European Social Charter', in N. Bruun, K. Lörcher & I. Schömann I. (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (2014), 265, 290-294; Hennebel & Tigroudja, *supra* note 33, 319-321; G. Palmisano, 'La Charte Sociale Révisée, vingt ans après, défis et perspective', in C. Panzera *et al.* (eds), *La Carta Sociale Europea tra universalità dei diritti ed effettività delle tutele* (2016).

In the *I.D.G.* case, the Committee concluded for the infringement due to the mortgage enforcement process at the national level, in which the plaintiff was not properly notified of the application, thus affecting her right to a defence and failing to provide her effective and appropriate judicial remedies.⁴⁶ In the *Mohamed Ben Diazia* case, the breach resulted from the eviction of a family with minor children from their home without a guarantee of alternative accommodation, as shown by the denial to each application for social housing lodged by the plaintiff for well over a decade.⁴⁷

Still at the universal level, trade unions filed complaints before the ILO Committee on Freedom of Association. They opposed the structural labor market reforms adopted in Greece, Portugal, and Spain. Such organizations argued that the implementation of austerity measures had violated trade union and collective bargaining rights protected under several ILO Conventions. Among other complaints, the plaintiffs claimed that national legislation imposing cuts to wages (and of other allowances and benefits), which were adopted without a prior consultation of relevant trade unions, had annulled the clauses of collective agreements in force at that time. The ILO Committee released three interim reports in which it advised national governments to refrain from unilaterally modifying the content of freely concluded collective agreements, which are binding upon the parties. The ILO Committee also invited the governments to foster and strengthen social dialogue in relation to the policies taken to deal with the crisis.⁴⁸

⁴⁶ CESCR, *Communication No. 2/2014: I.D.G. v. Spain*, UN Doc E/C.12/55/D/2/2014, 13 October 2015 [*I.D.G. v. Spain*]. On this case, see J. C. Benito Sánchez, 'The UN Committee on Economic, Social and Cultural Rights' Decision in *I.D.G. v. Spain*: the right to housing and mortgage foreclosures', 2016 *European Journal of Human Rights* (2016) 3, 320.

⁴⁷ CESCR, *Communication No. 5/2015: Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, UN Doc E/C.12/61/D/5/2015, 21 July 2017 [*Mohamed Ben Djazia, Naouel Bellili and others v. Spain*].

⁴⁸ ILO, *365th Report on Greece*, *supra* note 22. The complainants alleged numerous violations of trade union and collective bargaining rights protected under ILO Convention Nos. 87, 98, 151 and 154. M. Yannakourou, 'Challenging Austerity Measures Affecting Work Rights at Domestic and International Level. The Case of Greece', in Kilpatrick & De Witte, *supra* note 3 [Yannakourou, Challenging Austerity Measures]; ILO, *376th Report on Portugal*, *supra* note 22. The complainant alleges the violation of the principles of free and voluntary collective bargaining and freedom of association, enshrined in ILO Conventions Nos. 87, 98 and 151. ILO, *371st Report on Spain*, *supra* note 22. The case concerned restrictive legislation on collective bargaining and trade union leave – namely, ILO Convention Nos. 87, 98, 131 and 151.

Turning to the regional level, the European Committee on Social Rights found Greece responsible for the violation of a number of workers' rights,⁴⁹ whose establishment and maintenance is deemed as a "[...] core objective [...]" of the Charter.⁵⁰ The Committee also found Greece in breach of the obligation to raise progressively the system of social security to a higher level – with specific reference to the cumulative effects produced by the reforms of the pension scheme.⁵¹ When examining the merits of the complaints, the European Committee also assessed whether these policies may be justified under the restriction clause of the Charter, which prescribes that the rights thereby enshrined may be subject to limitations provided by law and necessary in a democratic society for the protection of – among other aims – the public interest.⁵² According to the Committee, the management of the Greek balance of payment problem "[...] constitutes a pressing social need [...]" and the legislative measures enacted in this context "[...] could in principle be regarded as pursuing a legitimate public interest [...]"⁵³ However, the respondent State did not examine or consider "[...] possible alternative and less restrictive [...]" means to achieve this legitimate purpose, hence the Greek reforms failed to pass the proportionality test.⁵⁴

As for the outcome of the complaints, at the universal level both the CESCR and the ILO Committee issued general non-binding recommendations meant to provide reparation in the form of guarantees of non-repetition, i.e., with the view of preventing similar violations in the future. These remedies

⁴⁹ Namely: the prohibition of discrimination in employment on ground of age; the right of just conditions of work, to reasonable notice of termination of employment, of young workers to fair remuneration, of employed persons of under 18 years of age to a minimum of four weeks' annual holiday with pay, to access apprenticeship and other training arrangements; the obligation to and the right of workers to participate in the determination and improvement of working conditions – respectively, *European Social Charter*, *supra* note 20, Art. 1(2), 2, 4(1) and (4), 7(5) and (7), 10(2) and *Additional Protocol to the European Social Charter*, 5 May 1988, Art. 3, ETS No. 128. See e.g., *AEDDY v. Greece*, *supra* note 25, 8-12, 15-19, paras 25-32, 36-41, 56-70; *Greek General Confederation of Labour (GSEE) v. Greece*, ECSR Complaint No. 111/2014, Decision of 23 March 2017, 39-40, 43-44, 52-53, 56-57, 60-61, paras 130-138, 151-160, 198-205, 216-224, 242-245 [GSEE v. Greece].

⁵⁰ *AEDDY v. Greece*, *supra* note 25, 5, para. 14.

⁵¹ *European Social Charter*, *supra* note 20, Article 12(3). See e.g., *AEDDY v. Greece*, *supra* note 25, 13-14, paras 45-49.

⁵² *European Social Charter*, *supra* note 20, Article 31.

⁵³ See e.g., *GSEE v. Greece*, *supra* note 49, 30, para. 91.

⁵⁴ See e.g., *ibid.*, 30, para. 90-91.

included positive actions of the respondent State,⁵⁵ such as ensuring that the national legislation and its enforcement are in compliance with the obligations in question⁵⁶ and the promotion of social dialogue.⁵⁷ At the regional level, following the findings of the European Committee on Social Rights, the Committee of Ministers of the Council of Europe called on Greece to revoke the contested measures.⁵⁸

The last venue called to decide upon the alleged contrast between national-adjustment programs and human rights is the ECtHR, which assessed whether the austerity measures implemented by Greece and Portugal were in conformity with the right to property,⁵⁹ taken alone or in conjunction with the prohibition of discrimination.⁶⁰ The Court declared either the applications inadmissible⁶¹ or the measures under review to be in compliance with the ECHR.⁶² The judges grounded these decisions on the principle of subsidiarity⁶³ and on the doctrine

⁵⁵ B. Çali, 'Enforcement', in M. Langford *et al.* (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016), 363 [Çali, Enforcement].

⁵⁶ *I.D.G. v. Spain*, *supra* note 46, 16, para. 17; *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, *supra* note 47, 15, para. 21.

⁵⁷ ILO, *365th Report on Greece*, *supra* note 22, 273-274, para. 1003; ILO, *376th Report on Portugal*, *supra* note 22, 234-235, para. 927; ILO, *371st Report on Spain*, *supra* note 22, para. 465.

⁵⁸ See e.g., Council of Europe: Committee of Ministers, *General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) against Greece, Complaint No. 65/2011*, Resolution CM/ResChS (2013)2, 5 February 2013, para. 3.

⁵⁹ Add. Prot. 1 ECHR, *supra* note 8, Article 1.

⁶⁰ ECHR, *supra* note 31, Article 14.

⁶¹ See e.g., *Koufaki and ADEDY v. Greece*, ECtHR Application Nos. 57665/12 and 57657/12, Decision of 7 May 2013 [Koufaki and ADEDY v. Greece]; *De Conceição Mateus and Santos Januario v. Portugal*, ECtHR Application Nos. 62235/12 and 57725/12, Decision of 8 October 2013 [De Conceição Mateus and Santos Januario v. Portugal].

⁶² *Mamatas and Others v. Greece*, ECtHR Application Nos. 63066/14, 64297/14 and 66106/14, Judgment of 21 July 2016, concerning the exchange of Greek bonds for other debt instruments of lesser value [Mamatas and Others v. Greece]. See A. Viterbo, 'La ristrutturazione del debito sovrano greco allo scrutinio della Corte europea dei diritti umani: nessuna tutela per i piccoli investitori', 11 *Diritti umani e diritto internazionale* (2017) 1, 294.

⁶³ On the principle of subsidiarity, see e.g., R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', 14 *Human Rights Law Review* (2014) 3, 487; A. Mowbray, 'Subsidiarity and the European Convention on Human Rights', 15 *Human Rights Law Review* (2015) 2, 313.

of the margin of appreciation.⁶⁴ According to the former, national authorities are primarily responsible for safeguarding the rights set forth in the Convention, whilst the ECtHR's judicial review is subordinate to the failure in complying with such obligation.⁶⁵ The margin of appreciation doctrine is strictly linked to such principle, since the doctrine is meant to reconcile the effective protection of Convention rights and the national sovereignty of States parties to the ECHR.⁶⁶ To this end, States parties of the Convention have some room for maneuver in fulfilling the commitments stemming from the ECHR.⁶⁷ This discretion is not absolute, since it “[...] goes hand in hand [...]” with the ECtHR's supervision.⁶⁸ In the context of limitations of the rights enshrined in the Convention, the ECtHR's task consists in appraising, among other grounds, the proportionality of the measure – *viz.* whether the State has struck a fair balance between the general interest underpinning the restriction and the protection of the relevant individual right.⁶⁹

In the austerity-related cases, the judges recognized that wide discretion is granted to States when it comes to general measures of economic and social policy, specifically when the issues involve an assessment of the priorities as to

⁶⁴ On the doctrine of the margin of appreciation, see e.g., Y. Shany, ‘All roads lead to Strasbourg?’, 9 *Journal of international dispute settlement* (2018) 2, 180; E. Benvenisti, ‘The margin of appreciation, subsidiarity and global challenges to democracy’, 9 *Journal of international dispute settlement* (2018) 2, 240; The margin of appreciation doctrine is taking shape also in investor-State dispute settlement mechanisms: see G. Zarra, ‘Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v. Uruguay*’, 14 *Revista de Direito Internacional* (2017) 2, 94.

⁶⁵ See e.g., *S.A.S. v. France*, ECtHR Application No. 43835/11, Judgment of 1 July 2014, 51, para. 129 [*S.A.S. v. France*].

⁶⁶ P. Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism’, 19 *Human Rights Law Journal* (1998) 1, 1; Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” *v. Belgium (merits)*, ECtHR Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968, 30-31, para. 10; See also M. Delmas-Marty, *Le flou du droit: Du code pénal aux droits de l’homme* (2004), 15, according to which the margin of appreciation doctrine “[...] tente de conjuguer l’universalisme des droits de l’homme avec le relativisme des traditions nationales.” (emphasis added).

⁶⁷ See e.g., D. Harris *et al.* (eds), *Harris, O’Boyle and Warbrick. The Law of the European Convention of Human Rights*, 2nd ed. (2018), 14-15 and the case-law thereby provided.

⁶⁸ See e.g., *S.A.S. v. France*, *supra* note 65, para. 131.

⁶⁹ *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 23.

the allocation of limited budgetary resources.⁷⁰ The recognition of such a broad margin of appreciation had two consequences: first, national authorities are better placed to decide general social policies that have broad economic and financial implications for the domestic budget;⁷¹ second, the ECtHR denied its competence on deciding “[...] whether better alternative measures could have been envisaged in order to reduce the State budget deficit [...]”, provided that the legislator did not exceed its margin of appreciation.⁷²

The sketch of this case law shows both the advantages and the disadvantages characterizing the justiciability of socio-economic rights at the international level. As for the pros, the establishment of treaty-based bodies empowered with reviewing the respect of the instruments expressly encompassing ES rights represents a step towards obtaining adequate reparation in the event of a violation of such rights. The CESCR, the ILO Committee on Freedom of Association, and the European Committee on Social Rights recommended measures that might be potentially relevant to the *entire* (segment of the) population suffering from the contested reforms, hence they match the *collective* dimension of ES rights.⁷³ Plus, the treaty-bodies did not suggest the awarding of monetary compensation, which meets the need to preserve States’ solvency. However, the outcomes of these Committees formally lack a binding nature and their enforceability fully relies on the defending Country’s discretion and political will.⁷⁴ In this regard, the literature and the practice of monitoring bodies are slowly developing the idea that States parties to a convention should, at the very least, consider the pronouncements of the corresponding treaty bodies in good faith.⁷⁵ This notwithstanding, the current regime still struggles

⁷⁰ *Koufaki and ADEDY v. Greece*, *supra* note 61, paras 31, 39; *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 22-26; *Mamatas and Others v. Greece*, *supra* note 62, para. 88.

⁷¹ *Koufaki and ADEDY v. Greece*, *supra* note 61, 6, para. 31; *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 22.

⁷² *Koufaki and ADEDY v. Greece*, *supra* note 61, 9, para. 48; *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 28.

⁷³ M. Langford *et al.*, ‘Introduction’, in M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013), 13.

⁷⁴ Çali, ‘Enforcement’, *supra* note 55, 359, 368; R. van Alebeek & A. Nollkaemper, ‘The Legal Status of Decisions by Human Rights Treaty Bodies in National Law’, in H. Keller & G. Ulfstein (eds), *UN Human Rights Treaty Bodies Law and Legitimacy* (2012), 356, 382-387.

⁷⁵ See e.g., International Law Association: Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights*

in ensuring the *effet utile* of these provisions, i.e. their practical and effective implementation. This shortcoming characterizes also the repeats suggested in the context of the Eurozone crisis: the two views issued by the CESCER against Spain, the ILO Committee's report concerning the situation in Portugal, and all the recommendations of the Committee of Ministers of the Council of Europe towards Greece are still under the respective follow-up procedures,⁷⁶ which means that these Countries have not complied with the measures thereby attached.

Applicants could not obtain an adequate redress before the ECtHR, either – although for different reasons, since this Court's judgments are binding upon the Contracting Parties. Contrary to the findings of the Committees, the ECtHR considered all the contested measures as in compliance with the right to property under the Convention. The Court relied on the States' wide margin of appreciation in allocating limited budgetary resources, alongside its (alleged) lack of competence in deciding whether Greek and Portuguese reforms constituted illegitimate retrogressive measures.

Treaty Bodies - Report of the Seventy-first Conference, 16-21 August 2004, 5, para. 15; UN Human Rights Committee, *General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/33, 25 June 2009, 3, paras 13-15; European Commission for Democracy Through Law (Venice Commission), *Report on the implementation of international human rights treaties in domestic law and the role of courts*, CDL-AD(2014)036, 8 December 2014, 21, 31, paras 50, 78; S. Forlati, 'On "Court Generated State Practice": The Interpretation of Treaties as Dialogue between International Courts and States', 20 *Austrian Review of International and European Law* (2015) 1, 99; N. Sitaropoulos, 'States are Bound to Consider the UN Human Rights Committee's Views in Good Faith' (2015), available at <https://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/> (last visited 9 March 2021); C. Tomuschat, 'Human Rights Committee' (2019), para. 14, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e813?prd=EPIL> (last visited 09 March 2021); D. Russo, 'I trattati sui diritti umani nell'ordinamento italiano alla luce delle sentenze n. 120 e 194 del 2018 della Corte costituzionale', 13 *Diritti umani e diritto internazionale* (2019) 1, 155.

⁷⁶ CESCER, *Report on the sixty-third and sixty-fourth sessions (12–29 March 2018, 24 September–12 October 2018): Supplement No. 2*, UN Doc E/2019/22-E/C.12/2018/3, 2019, 15, para. 80; European Committee of Social Rights, 'Follow-Up to Decisions on the Merits of Collective Complaints - Findings 2018' (2018), available at <https://rm.coe.int/findings-2018-on-collective-complaints/168091f0c7> (last visited 9 March 2021); The ILO CFA declared closed the cases against Greece and Spain: see ILO, *365th Report on Greece*, *supra* note 22; ILO, *Effect given to the recommendations of the committee and the Governing Body - Report No 378: Case No 2947 (Spain)*, June 2016.

Those crisis-related applications had social-security implications, so one could argue that the stance of the Court is consistent with the content of the Convention, which foremost safeguard civil and political rights – and not socio-economic rights, as the instruments supervised by the Committees.⁷⁷ Yet, the textual scope of the ECHR does not alone justify this standpoint: indeed, the previous case law of the ECtHR shows that the Court could have reached a different conclusion had the judges pushed forward the emerging – although exceptional – trend to interpret the Convention provisions in a broader manner so as to encompass also ES rights that are not expressly protected therein.⁷⁸ This approach is based on the social and economic implications of a number of civil and political rights enshrined in the ECHR,⁷⁹ as well as on the Court’s well-established case law principle according to which “[...] the Convention cannot be interpreted in a vacuum [...]” and the ECtHR must take into account all the other relevant rules relating to the protection of human rights⁸⁰ – which also include the ones concerning ES rights. Had the Court found a violation of the Convention, it could have required the State to implement general remedial measures addressing the underlying problem and ensuring non-repetition of the infringement (e.g. amending the existing legislation on budget allocation), rather than awarding monetary compensation in favor of the applicants.⁸¹ In other

⁷⁷ De Schutter & Dermine, ‘The Two Constitutions of Europe’, *supra* note 29, 133-136.

⁷⁸ D. Binder & T. Schobesberger, ‘The European Court of Human Rights and Social Rights – Emerging Trends in Jurisprudence’, 3 *Hungarian Yearbook of International Law* (2015) 1, 51, 54; I. Leijten, ‘The German Right to an *Existenzminimum*, Human Dignity, and the Possibility of a Minimum Core Socioeconomic Rights Protection’, 16 *German Law Journal* (2015) 1, 23, 24-25, 35-36; Leijten, *Core Socio-Economic Rights*, *supra* note 23, 25-39.

⁷⁹ See e.g., *Airey v. Ireland*, ECtHR Application No. 6289/73, Judgment of 9 October 1979, 11-13, para. 26.

⁸⁰ See e.g., *Demir and Baykara v. Turkey*, ECtHR Application No. 34503/97, Judgment of 12 November 2008, 19-24, 36-38, paras 65-86, 147-154; *Correia De Matos v. Portugal*, ECtHR Application No. 56402/12, Judgment of 4 April 2018, 33, para. 134; The Court refers to the harmonizing interpretation (or systemic integration) of treaties under Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331; For the potential of this provision in enhancing coherence in international law and in understating it as a legal order – hence, opposing its fragmentation – see International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission to the Fifty-Eighth Session*, UN Doc A/CN.4/L.682, 13 April 2006, 214, 235-243, paras 467-479.

⁸¹ On the different means to abide by the judgments of the ECtHR, see e.g., W. A. Schabas, *The European Convention on Human Rights: A Commentary* (2016), 868-871.

words, the Court could have indicated a remedy that matches both the collective nature of ES rights and the need to preserve States' solvency.⁸² Regrettably, the Court opted not to apply such a scheme and preferred to act in self-restraint.

This survey shows the lack of an adequate remedy at the international level, due to either specific characteristics of some of the mechanisms (i.e., the non-binding nature of the Committees' outcomes) or the deferential approach adopted by others (*viz.* the ECtHR). Such flaws in ensuring the effective protection of human rights make it worth exploring whether other remedies are available. The specific features of the management of the Eurozone sovereign debt crisis allow us to consider – at least – two other routes: the ECJ and national judiciaries.

D. Redress at the EU Level

The involvement of EU organs and the use of EU law instruments in the assistance programs provided to euro-area States call into question the applicability of the CFREU, which establishes – among other entitlements – ES rights.⁸³ Under Article 51 CFREU, the rules of the Charter “[...] are addressed to the institutions, bodies, offices and agencies of the Union [...] and to the Member States [...] only when they are implementing Union law”.

As for the EU organs, the mechanisms meant to manage the Eurozone turmoil have involved three EU institutions, namely the European Commission, the ECB, and the Council, and one EU body, the European Financial Stability

⁸² This is also confirmed by the broad consequences of the interim measures granted to families arguing the violation of their right to housing under Art. 3 and Art. 8 of the ECHR. In at least three cases, families with children requested the ECtHR to apply interim measures under Rule 39 of the Rules of the Court to obtain the suspension of forced evictions ordered by the Spanish Government without providing alternative accommodation. The Court upheld every request, each of which was eventually lifted for different reasons. Notably, following the interim measures adopted by the ECtHR, Spanish Courts have suspended evictions of families with children. See *A. M. B. v. Spain*, ECtHR Application No. 77842/12, Decision of 28 January 2014 (interim measure granted on the 12 December 2012); *Mohamed Raj and Others v. Spain*, ECtHR Application No. 3537/13, Decision 16 December 2014 (interim measure granted on 31 January 2013); *Ceesay Ceesay and Others v. Spain*, ECtHR Application No. 62688/13, Decision of 15 October 2013 (interim measure granted on 15 October 2013). On this issue, see D. Utrilla, ‘Spain’, in S. Civatese Matteucci & S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (2017), 98, 113.

⁸³ For an overview of the ES provisions of the Charter *in peril*, see Poulou, ‘Austerity’, *supra* note 16, 1161-1169.

Mechanism. The applicability of the Charter to the European Financial Stability Mechanism and to the Council has never been contested: the former is an EU institution and the latter is an EU body established under a specific regulation; moreover, both operate within the Union system.⁸⁴ On the contrary, the issue of whether the CFREU binds the European Commission and the ECB has been a matter of debate: specifically, their qualification as institutions notwithstanding they perform tasks assigned under international law instruments outside the EU regime. The ECJ clarified this issue by expressly ruling that “[...] the Charter is addressed to the EU institutions, including [...] when they act outside the EU legal framework”.⁸⁵ Even if, in that specific case, the Court focused essentially on the obligations binding the European Commission,⁸⁶ the breadth of this statement covers also the conducts of the ECB in the context of the ESM.⁸⁷

Following the applicability of the CFREU, potential victims may resort to the ECJ to challenge the compatibility of austerity measures with the Charter by two means: the action for compensation for non-contractual liability of the EU and the action for annulment.

The end of the first proceeding is awarding *monetary compensation* to the plaintiffs of a successful action, rather than removing the contested measure from the Union’s legal order.⁸⁸ The *individual* nature of such relief hampers its adequacy in redressing violations of socio-economic rights, deemed as entitlements with a *collective* nature.⁸⁹

⁸⁴ L. Fromont, ‘L’application problématique de la Charte des droits fondamentaux aux mesures d’austérité: vers une immunité juridictionnelle?’, *Journal européen des droits de l’homme* (2016) 4, 469, 482-483.

⁸⁵ *Ledra Advertising Ltd. and Others v. European Commission and European Central Bank (ECB)*, Joined Cases Nos. C-8/15 P to C-10/15 P, Judgment of 20 September 2016, [2016] ECLI:EU:C:2016:701, para. 67 [Ledra Advertising Case].

⁸⁶ *Ibid.*, paras 67, 75.

⁸⁷ *Ledra Advertising Ltd. and Others v. European Commission and European Central Bank (ECB)*, Joined Cases Nos. C-8/15 P, C-9/15 P and C-10/15 P, Opinion of AG Wahl delivered on 21 April 2016, [2016] ECLI:EU:C:2016:290, para. 85; S. Vezzani, ‘Sulla responsabilità extracontrattuale dell’Unione europea per violazione della Carta dei diritti fondamentali: riflessioni a margine alla senza della Corte di giustizia nel caso Ledra Advertising’, 99 *Rivista di diritto internazionale* (2016) 1, 156; O. De Schutter, *The Implementation of the Charter of Fundamental Rights in the EU institutional framework: Study for the AFCO Committee* (2016), 38.

⁸⁸ *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, Art. 268, Art. 340 (2) and (3), OJ C202/1 [TFEU]. See also A. Kaczorowska-Ireland, *European Union Law*, 4th ed. (2016), 511-533.

⁸⁹ Atria, *supra* note 35, 598; Christodoulidis & Goldoni, *supra* note 35, 243; Pavlidou, *supra* note 35, 290, 291, 315. The ECJ also expressed its *great concern* related to the scarcity

Even assuming that making good for damages constitutes an adequate remedy for infringements of ES rights, the action for compensation proved to be ineffective in the context of the Eurozone sovereign debt crisis. Applicants introduced several proceedings challenging: i) the conducts of the European Commission and of the ECB under the ESM Treaty,⁹⁰ and ii) one of the Council decisions reproducing conditionality measures.⁹¹ The ECJ dismissed each claim on the grounds that the contested conduct and decision did not contribute to a serious breach of the provisions of the CFREU, since the interferences in the enjoyment of the rights at stake respected the limitation clause set forth in Article 52(1) CFREU. According to this provision, restrictions must be provided by law, must genuinely meet objectives of general interest of the Union, and must be proportionate to this aim.⁹²

of the Union budget. See *Evangelou v. European Commission and European Central Bank (ECB)*, Case No. T-292/13, Order of 21 September 2017, [2017] ECLI:EU:T:2017:678, para 23 [Evangelou Case, 21 September 2017]; F. Pennesi, 'The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?', 3 *European Papers* (2018) 2, 511, 529.

⁹⁰ These actions claimed the violation of the right to property (Art. 17 CFREU). See *Evangelou Case*, 21 September 2017, *supra* note 89; *Ledra Advertising Case*, *supra* note 85.

⁹¹ See *Leïmonia Sotiropoulou and Others v. Council of the European Union*, Case No. T-531/14, Judgment of 3 May 2017, [2017] ECLI:EU:T:2017:297 [Leïmonia Sotiropoulou Case]. The applicant claimed the violations of several ES rights under the CFREU, namely the right to human dignity (Art. 1), of access to social security benefits (Art. 25), and to social services (Art. 34). The applicant also claimed the violation of the principle of conferral of powers and the principle of subsidiarity (Art. 4 and 5 TEU). This complaint was dismissed as well, paras 67-74.

⁹² *Ledra Advertising Case*, *supra* note 85, paras 69-76; *Leïmonia Sotiropoulou Case*, *supra* note 91, paras 89-90. In this judgement the ECJ also took into account the wide margin of appreciation enjoyed by the Council and stated that it did not overstep the limits of its discretion when it adopted the contested acts (paras 77-87). In the *Evangelou* case, the ECJ declared that the applicants did not establish "[...] with the necessary certainty that the damage they claim to have suffered was actually caused by the inaction alleged against the Commission", *Evangelou v. European Commission and European Central Bank (ECB)*, Case No. T-292/13, Order of 10 November 2014, [2014] ECLI:EU:T:2014:977, para. 54 [Evangelou Case, 10 November 2014]. For a critical view on the ECJ's line of reasoning, see among others, A. Spagnolo, 'The loan of organs between international organizations as a *normative bridge*: insights from recent EU practice', 26 *Italian Yearbook of International Law* (2017) 1, 171; Pennesi, *supra* note 89; F. Costamagna, 'The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights', Carlo Alberto Notebooks 2016/487, 22-23; A. Miglio, 'Le condizionalità di fronte alla Corte di giustizia', 11 *Diritto internazionale e diritti umani* (2017) 3, 763, 770.

Moving to the action for annulment, such a proceeding is meant to remove the contested acts from the Union's legal order.⁹³ In the context of the Eurozone crisis, this would result in the removal of the Council decision encompassing conditionality, which would constitute a *collective* redress since it would benefit *all* the individuals affected by austerity measures.⁹⁴ Persons affected by such policies launched two actions for annulment claiming that the Council decision adopted during the first rescue package to Greece was in violation of the CFREU. The ECJ dismissed both actions on a procedural ground: according to the Court, applicants lacked standing.⁹⁵ In particular, the plaintiffs struggled to prove that the decision had directly affected their rights and that the addressee – namely, Greece – had enjoyed no discretion in its implementation. The judges declared that the structural program encompassed in the Council decision was framed in general terms. Such vagueness left a “wide discretion” to the Greek authorities in determining the specific content of the required implementing measures, provided that the ultimate aim of reducing the Country's excessive deficit was pursued. Hence, it would have been the Greek law which would have directly affected the legal situation of the applicants and not the Council decisions at stake.⁹⁶ This last argument backed the Court's suggestion to challenge the validity of national legislation enacting austerity measures before domestic courts and, thus, triggering the referral of a question for a preliminary ruling.⁹⁷

This case law shows that, in the context of the Eurozone crisis, the action for annulment could provide an adequate redress but its effectiveness appears theoretical rather than practical because of the adjudicative approach

⁹³ TFEU, *supra* note 88, Art. 263. See Kaczorowska-Ireland, *supra* note 88, 467-497.

⁹⁴ Persons affected by such measures launched actions for annulment against ESM-State MoUs, but the ECJ declared them inadmissible: according to the Court, ESM-State MoUs fall outside its *ratione materiae* scope, since they are acts of the ESM, i.e. external to the EU legal regime. See *Pringle Case*, *supra* note 13, para. 161; *Evangelou Case*, 10 November 2014, *supra* note 92, para. 56-60; *Ledra Advertising Case*, *supra* note 85, para. 53-54.

⁹⁵ *ADEDY and Others v. Council of the European Union*, Case No. T-541/10, Order of 27 November 2012, [2012] ECLI:EU:T:2012:626, paras 56, 67 [Case No. T-541/10]; *ADEDY and Others v. Council of the European Union*, Case No. T-215/11, Order of 27 November 2012, [2012] ECLI:EU:T:2012:627, paras 59, 73-78 [Case No. T-215/11]. Albeit none of the orders explicitly referred to the CFREU, these rulings are worthy of attention due to their underpinning reasoning.

⁹⁶ Case No. T-541/10, *supra* note 95, paras 70-76, 84; Case No. T-215/11, *supra* note 95, paras 81, 84, 97.

⁹⁷ Case No. T-541/10, *supra* note 95, para. 90; Case No. T-215/11, *supra* note 95, para. 102.

of the ECJ.⁹⁸ Due to this drawback, it is worth examining whether the other proceeding suggested by the ECJ itself – i.e., a referral for a preliminary ruling – could (and did) grant an appropriate relief.

Besides representing an additional safeguard for persons with no *locus standi* to propose an action for annulment, the request for a preliminary ruling is a tool to indirectly control whether national law implementing conditionality violates EU law: by demanding a clarification of the meaning of EU provisions, domestic judicial organs implicitly raise the issue of whether national policies comply with the Union system.⁹⁹ Domestic courts and tribunals may request the ECJ to clarify whether specific provisions of the CFREU preclude Member States to adopt certain austerity measures on condition that the forum State was “implementing” EU law within the meaning of Article 51(1) CFREU when it enacted those policies.¹⁰⁰

As suggested by the ECJ, pending crisis litigations, Portuguese tribunals referred several questions related to the interpretation of the workers’ rights set forth in the CFREU. The ECJ dismissed all of them by stating that the order for reference did not contain concrete evidence that Portugal was “implementing” EU law within the meaning of Article 51(1) of the Charter while enacting the contested national reforms,¹⁰¹ although those acts were executing the loan requirements enclosed in Council decisions.¹⁰²

This stance is highly questionable for a number of reasons, among which is the inconsistency of the ECJ. Firstly, the Court did not follow the path it had set out in the above-mentioned decisions concerning actions for annulment. Secondly, the ECJ did not conform with the approach it had embraced in a

⁹⁸ Another criticality of the action for annulment is its short time limits, since it shall be introduced “[...] within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be” (TFEU, *supra* note 88, Art. 263(3)). For a different opinion on the potential of annulment action, see Poulou, ‘Austerity’, *supra* note 16, 1172-1173; Dermine, *supra* note 18, 379-380.

⁹⁹ Case No. T-541/10, *supra* note 95, para. 90 and Case No. T-215/11, *supra* note 95, para. 102.

¹⁰⁰ For a general overview of the preliminary rulings under TFEU, *supra* note 88, Art. 267, see Kaczorowska-Ireland, *supra* note 88, 388-428.

¹⁰¹ See e.g. *Sindicato Nacional dos Profissionais de Seguros e Afins v. Via Directa-Companhia de Seguros SA*, Case No. C-665/13, Order of 21 October 2014, [2014] ECLI:EU:C:2014:2327, paras 11-16.

¹⁰² Kilpatrick, ‘Constitutions’, *supra* note 7, 311.

previous similar – although not identical – case.¹⁰³ On this occasion, the judges affirmed that the objectives set out in the relevant Council decision were “[...] sufficiently detailed and precise [...]”¹⁰⁴ to infer that the purpose of the national law under scrutiny was to implement such act within the meaning of Article 51(1) of the Charter – consequently, the CFREU was applicable.

Notably, an indirect protection of the right to housing stemmed from the referrals of Spanish tribunals related to the interpretation of the Unfair Contract Terms Directive.¹⁰⁵ In one of these cases, the ECJ also declared that the Spanish mortgage enforcement proceeding contrasted with the Directive because the system did not grant equality of arms among the parties of the proceeding. This statement was also based on the principle of effective judicial protection under Article 47 of the Charter.¹⁰⁶ All these rulings impacted the Spanish mortgage regime, which was amended through declarations of the Supreme Court and legislative reforms.¹⁰⁷ These changes have a *collective* dimension, due to their wide-ranging corrective consequences which benefit not only the applicants of the domestic disputes but the entire sections of the population affected by the prior Spanish mortgage system.

The survey of this case law highlights two main aspects. Firstly, the action for compensation for non-contractual liability of the EU is inappropriate: it is a remedy of an *individual* character since its aim is awarding monetary compensation to the parties of the relevant case. Secondly, the action for annulment and the request for preliminary rulings are quite ineffective in

¹⁰³ *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others*, Case No. C-258/14, Opinion of AG Bot delivered on 21 December 2016, [2016] ECLI:EU:C:2016:995, paras 65-71; *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others*, Case No. C-258/14, Judgment of 13 June 2017, [2017] ECLI:EU:C:2017:448, para. 48; *Konstantinos Mallis and Others v. European Commission and European Central Bank (ECB): Opinion of AG Wathelet*, *supra* note 18, para. 89, according to which “[...] the Council decisions thus addressed to a Member State support the view that national measures [...] constitute an implementation of EU law [...]”.

¹⁰⁴ *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others*, Case No. C-258/14, Judgment of 13 June 2017, [2017] ECLI:EU:C:2017:448, para. 48.

¹⁰⁵ Council Directive 93/13/EEC, OJ 1993 L 95/29. See e.g. *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others*, Case No. C-49/14, Judgment of 18 February 2016, [2016] ECLI:EU:C:2016:98.

¹⁰⁶ *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria, SA*, Case No. C-169/14, Judgment of 17 July 2014, [2014] ECLI:EU:C:2014:2099, paras 21-51.

¹⁰⁷ M. G. Pascual, ‘Welfare Rights and Euro Crisis – The Spanish Case’, in Kilpatrick & De Witte, *supra* note 3.

providing an adequate remedy for victims of violations of ES rights under the CFREU, albeit their *hypothetical* feasibility in affording a redress of *collective* nature. As shown above, the most effective protection of ES rights results from proceedings related to EU secondary law which safeguard specific aspects of the Union internal market (as consumer protection provisions), rather than from referral straightforwardly based on the fundamental rights enshrined in the CFREU.¹⁰⁸

E. Redress at Domestic Level

To tackle austerity measures, domestic courts had two main venues of redress: awarding monetary compensation for non-contractual liability of the borrowing State for a breach of the CFREU or declaring the unconstitutionality of austerity measures.

Applicants could propose the action for compensation if there is a direct causal link between two elements: i) a sufficiently serious breach of a provision of the Charter conferring rights on individuals and ii) the damage suffered by the injured parties.¹⁰⁹ States executing loan conditions are implementing EU law within the meaning of Article 51(1) CFREU, since these policies are outlined (also) in Council decisions addressed to those Countries.¹¹⁰ Hence, the State beneficiary of the aid shall respect the Charter while enacting macroeconomic reforms. A Country that breaches this obligation must compensate the victims.

Domestic tribunals of Eurozone Countries receiving rescue packages have never adjudged on this issue.¹¹¹ This does not represent a missed opportunity to judicially enforce ES rights. Had courts awarded pecuniary damages to the parties of the litigations, other persons in the position of the plaintiffs could (and probably would) have sought a similar remedy. This circumstance would be at odds with the *collective* nature of the ES rights, first and foremost for the *individual* character of monetary compensation. Besides, the remedy would be paradoxical for the responsible State because it would be bound to pay a (very large) sum towards successful applicants while facing a severe debt crisis.

¹⁰⁸ C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *European Constitutional Law Review* (2014) 3, 393, 419-420.

¹⁰⁹ For a general overview of the features of this action, see Kaczorowska-Ireland, *supra* note 88, 362-387.

¹¹⁰ Kilpatrick, 'Constitutions', *supra* note 7, 311.

¹¹¹ See e.g. Poulou, 'Financial Assistance', *supra* note 15, 1018-1019, noticing that both Greek and Portuguese highest courts and tribunals rarely consider the EU origin of domestic austerity measures.

Turning to constitutional adjudication, the compatibility of austerity measures with national constitutions has been challenged in Spain, Portugal, and Greece.¹¹²

While at the international level complaints focused on the impairing of the right to housing, the Spanish courts have mostly addressed health-related issues. The majority of such cases were discussed in the frame of conflicts of competences or questions of constitutionality.¹¹³ Specifically, the Spanish government is empowered to outline general economic policies, while Autonomous Communities legislate on social matters. The overlapping of these two fields resulted in most of the Spanish judgments dealing with one of these authorities either narrowing or broadening the scope of the right to health.¹¹⁴

In particular, the Spanish Constitutional Court declared unconstitutional the legislation of the Basque¹¹⁵ and Valencian¹¹⁶ communities which re-included irregular migrants to the public healthcare system following their exclusion under a governmental decree.¹¹⁷ According to the Court, both the communities exceeded their competences by extending the standard of health protection to

¹¹² C. Fasone, 'Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective', EUI Working Paper MWP 2014/25, 8-10; Kilpatrick, 'Constitutions', *supra* note 7, 309-310. For the reasons underpinning the lack of constitutional case-law on austerity policies adopted in Ireland and Cyprus, see *ibid.*, 284; Barucchello & Þór Arnason, *supra* note 7, 15.

¹¹³ The Spanish system is based on a centralized model of constitutional review (Art. 159 Spanish Constitution). The *recurso de amparo* (Art. 53(2) Spanish Constitution) is not available to challenge the violation of the social rights enshrined in the constitution – with some exception.

¹¹⁴ The Supreme Constitutional Court was also called upon to decide a question of constitutionality referred by an ordinary tribunal pending the main proceeding. The Court declared it inadmissible on procedural grounds: see M. G. Pascual, 'Constitutional Courts before Euro-crisis law in Portugal and Spain: A Comparative Prospect', 4 *e-Pública* (2017) 1, 110 [Pascual, Constitutional Courts].

¹¹⁵ Decreto del Gobierno Vasco 114/2012, de 26 de junio, sobre régimen de las prestaciones sanitarias del Sistema Nacional de Salud en el ámbito de la Comunidad Autónoma de Euskadi, BOPV núm. 127, 2973 (Basque Government Decree 114/2012 on the regime of health benefits of the National Health System in the scope of the Autonomous Community of the Basque Country, 26 June 2012).

¹¹⁶ Decreto-ley 3/2015, de 24 de julio, del Consell de la Generalitat Valenciana, por el que se regula el acceso universal a la atención sanitaria en la Comunidad Valenciana, DOGV núm. 7581, de 29 de julio de 2015, pg. 23079-23083 (Decree-Law 3/2015 of the Consell de la Generalitat Valenciana regulating universal access to health care in the Valencian Community, 24 July 2015).

¹¹⁷ Real Decreto-ley 16/2012, *supra* note 26.

situations not covered by the State's basic law.¹¹⁸ Yet, due to the pressure of civil society, a few months later the Spanish Government restored universal access to the national healthcare system.¹¹⁹

Quite interestingly, and contrary to the foregoing judgments, this decree explicitly refers to the prohibition of discrimination set forth in international human rights law. The statute recognizes that the exclusion of irregular migrants constituted a retrogressive measure affecting the previous legal protection scheme and a more general violation of international commitments binding upon Spain – to which this recent reform aims to give effect.¹²⁰

In the same vein as the Spanish judiciary, the Portuguese Constitutional Court reviewed macro-adjustment programs following abstract proceedings.¹²¹ The Court's rulings dealt with public salary cuts,¹²² reforms of the public pension

¹¹⁸ STC 134/2017 de 16 de noviembre de 2017, BOE núm. 308, de 20 de diciembre de 2017, 125915-125954, ECLI:ES:TC:2017:134, paras 4-5; 145/2017, de 14 de diciembre de 2017, BOE núm. 15, de 17 de enero de 2018, 6881-6890, ECLI:ES:TC:2017:145, para. 2. See also STC 85/2014, de 29 de mayo de 2014, BOE núm. 153, de 24 de junio de 2014, 97-103, para. 3(d); 71/2014, de 6 de mayo de 2014, BOE núm. 135, de 4 de junio de 2014, 6-32, para. 6. In these two judgments, the Spanish Constitutional Court declared unconstitutional the regional legislation of Catalonia and Madrid, both imposing an extra-charge of one euro on medical prescription, since the citizens of the two autonomous communities would have access to basic services under more burdensome conditions compared to the citizens of the other Spanish regions.

¹¹⁹ Real Decreto-ley 7/2018, de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud, BOE núm. 183, de 30 de julio de 2018, 76258-76264 (Royal Decree-Law 7/2018 on universal access to the National Health System, 27 July 2018).

¹²⁰ *Ibid.*, Preamble.

¹²¹ Constitution of the Portuguese Republic, Art. 281. The Portuguese system of constitutional review has a dual nature: each court could decide not to apply a law that they deem to be unconstitutional (Constitution of the Portuguese Republic, Art. 280), but only the Constitutional Court is empowered to remove the provision from the legal order and to model the temporal effects of its own decision (Constitution of the Portuguese Republic, Art. 282). For an overview of the constitutional case-law on austerity measures, see M. Canotilho, T. Violante & R. Lanceiro, 'Austerity measures under judicial scrutiny: the Portuguese constitutional case-law', 11 *European Constitutional Law Review* (2015) 1, 155; F. Pereira Coutinho & N. Piçarra, 'Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution', in A. Albi & S. Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (2019), 591, 617-621.

¹²² See e.g. Tribunal Constitucional de Portugal, Processo n.º 14/2014, Acórdão do Tribunal Constitucional n.º 413/2014, Diário da República n.º 121/2014, Série I de 2014-06-26, 3420.

system,¹²³ and workers' rights.¹²⁴ The Court's attitude has been characterized by a progressive – although not always consistent – evolution towards a rigorous approach critically labelled as judicial activism.¹²⁵ In the words of Dworkin, “judicial activism” allows courts “[...] to accept the directions of the so-called vague constitutional provisions [...]”¹²⁶, including the principles of legality and equality, and to judge municipal laws according to them. These vague standards are appeals to moral concepts that guide domestic tribunals in the interpretation of the underlining provisions. The chief objection against judicial activism argues that advocates of this theory depart from strict legal authority only to achieve a desired (and moral-oriented) result.¹²⁷

The first of this set of rulings declared the 2012 Budget Law unconstitutional since the disputed policy on workers' and pensioners' rights was not temporary and it did not allocate the public burden accordingly with the proportionality principle.¹²⁸ However, since the retroactive effects of this judgment could have endangered the State's solvency, the judges decided not to apply them retrospectively – i.e., with regard to 2012.¹²⁹ This ruling could be considered as a (unheeded) warning toward the Portuguese government: in almost all its subsequent judgments, the Constitutional Court adopted similar grounds of review and attributed retroactive effects to its declarations of unconstitutionality.¹³⁰

¹²³ See e.g. Tribunal Constitucional de Portugal, Processo n.º 1260/13, Acórdão do Tribunal Constitucional n.º 862/2013, Diário da República n.º 4/2014, Série I de 2014-01-07, 20.

¹²⁴ See e.g. Tribunal Constitucional de Portugal, Processo n.º 531/12, Acórdão do Tribunal Constitucional n.º 602/2013, Diário da República n.º 206/2013, Série I de 2013-10-24, 6241; Processos n.os 935/13 e 962/13, Acórdão do Tribunal Constitucional n.º 794/2013, Diário da República n.º 245/2013, Série II de 2013-12-18, 36019.

¹²⁵ See e.g. R. Cisotta & D. Gallo, ‘Il tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei’, 7 *Diritti umani e diritto internazionale* (2013) 2, 465; Fasone, *supra* note 112, 24-30; Pascual, ‘Constitutional Courts’, *supra* note 114, 123-125.

¹²⁶ R. Dworkin, *Taking Rights Seriously* (1977), 137.

¹²⁷ *Ibid.*, 131-149.

¹²⁸ Tribunal Constitucional de Portugal, Processo n.º 40/12, Acórdão do Tribunal Constitucional n.º 353/2012, Diário da República n.º 40/2012, Série I de 2012-07-20, 3846, 3854-3857, paras 5-6.

¹²⁹ *Ibid.*, para. 6.

¹³⁰ Fasone, *supra* note 112, 27. See e.g. Tribunal Constitucional de Portugal, Processos n.os 2/2013, 5/2013, 8/2013 e 11/2013, Acórdão do Tribunal Constitucional n.º 187/2013, Diário da República n.º 78/2013, Série I de 2013-04-22, 2328, 2377, para. 61, which also referred to the ECtHR case-law on the right to property under Art. 1, Add. Prot. 1 ECHR, *supra* note 8; Processo n.º 531/12, Acórdão do Tribunal Constitucional n.º

More in detail, the Portuguese Constitutional Court based its conclusions on the violation of the principles of proportional equality ensuring the fair and equitable repartition of public burdens through the fiscal system. The Court also drew upon the protection of legitimate expectations – this last one considered strictly connected to the principle of legal certainty. Among these judgments, only one was based on the breach of a labor right enshrined in the Constitution.¹³¹

The several declarations of unconstitutionality led to the renegotiation of loan conditions.¹³² Further, due to the evolution of the Court's approach, the Portuguese government has tried to mitigate the risks to the State's balance of payments caused by the retrospective effects of similar rulings: the lawmaker executed austerity measures through general legislative acts, whose constitutionality could be reviewed *before* their entry into force, thus “[...] allowing [the] early reaction on the part of the government [...]”.¹³³

Moving to Greece, its diffuse system of constitutional review resulted in a rather multifaceted case law on austerity measures. Both lower and higher courts decided upon incidental and concrete requests of constitutional legitimacy.¹³⁴ Lower courts contributed significantly to the protection of labor and workers' rights by providing interim measures prohibiting the application of the contested

602/2013, *supra* note 124. Only two rulings upheld the constitutionality of the contested legislation: Processos n.os 935/13 e 962/13, Acórdão do Tribunal Constitucional núm. 794/2013, *supra* note 124; Acórdão do Tribunal Constitucional núm. 572/2014, Diário da República n.º 160/2014, Série II de 2014-08-21, Série II de 2014-08-21, 21763.

¹³¹ See Tribunal Constitucional de Portugal, Processo n.º 531/12, *supra* note 124, paras 29-34, which declared that some of the disputed provisions violated the right to job security (Constitution of the Portuguese Republic, Article 53).

¹³² A. Baraggia, ‘Conditionality Measures in the Euro Area Crisis: A Challenge to the Democratic Principle?’, 4 *Cambridge Journal of International and Comparative Law* (2015) 2, 268, 285-286.

¹³³ International Monetary Fund, ‘Portugal: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding’ (2013), 7, para. 9, available at <https://www.imf.org/external/np/loi/2013/prt/061213.pdf> (last visited 9 March 2021).

¹³⁴ Greece adopted a diffuse system of constitutionality review: ordinary courts may declare a provision unconstitutional and refuse to apply it to the pending case. The decision is binding *inter partes* (Article 93(4) of the Constitution of Greece). The three highest courts (the Supreme Civil and Criminal Court, the Council of State and the Court of Audit) may review the constitutional judgments of the relevant lower courts, thus harmonizing the system. See A. Kaidatzis, ‘Greece’s Third Way in Prof. Tushnet’s Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It’, 13 *Jus Politicum* (2014), 1.

rules, which were subsequently declared unconstitutional.¹³⁵ The judges based their conclusions – among other grounds – on the violation of rights enshrined in the Greek Constitution and in the European Social Charter,¹³⁶ as well as on the general principles of human dignity¹³⁷ and proportionality.¹³⁸

The case law of high judicial organs is rather intricate. As for the claims related to the right to property (e.g. cuts of public salaries and pensions, abolition of pecuniary benefits for public servants), the Greek Council of State – i.e., the highest administrative court – reached opposite outcomes depending on the specific occupation of the applicants. The Court found that the reductions of these entitlements complied with the Greek Constitution,¹³⁹ except where the right-holders belonged to specific sub-categories of public servants – such as judges, doctors working for the National Health System, and people serving in the armed forces.¹⁴⁰ According to the Council of State, the legislature failed to strike a fair balance between the importance of the job performed by personnel employed in these sectors and the budgetary interest of the State. This questionable differentiation was indirectly challenged by the Greek Court of Audit, which issued a number of non-binding opinions declaring the

¹³⁵ See M. Yannakourou, ‘Austerity Measures Reducing Wage and Labour Costs before the Greek Courts: A Case Law Analysis’ (2014), 11 *Irish Employment Law Journal* (2014) 2, 36, 41 [Yannakourou, Austerity Measures]; Pavlidou, *supra* note 35, 293-299.

¹³⁶ See the case-law referred to in Pavlidou, *supra* note 35, 296. According to the Author, references have been made also to the ECHR. See also Yannakourou, ‘Austerity Measures’, *supra* note 135, 42, who reports Xanthi Court of First Instance, Decision 90/2013, (2013) 72 *EErgD* 347, to which further reductions of salary violated Art. 4(1) of the *European Social Charter*, *supra* note 20 (right to a fair remuneration).

¹³⁷ See the case-law referred to in: Pavlidou, *supra* note 35, 297; Yannakourou, ‘Austerity Measures’, *supra* note 135.

¹³⁸ Referred to in M. Iodice, ‘Solange in Athens’, 32 *Boston University International Law Journal* (2014) 2, 101, 122-126.

¹³⁹ See e.g. Hellenic Council of State 668/2012, 1285/2012, para. 12. See also the case-law reported in: Iodice, *ibid.*, 117-121; Pavlidou, *supra* note 35, 300; S. Kaltsouni, A. Kosma & N. Frangakis, ‘The Impact of the Crisis on Fundamental Rights across Member States of the EU: Country Report on Greece’, Study for the LIBE Committee (2015), PE 510.014, 77, 101, 135-136, 142-143; D. Diliagka, *The Legality of Public Pension Reforms in Times of Financial Crisis: The Case of Greece* (2018), 264-265.

¹⁴⁰ See e.g. Hellenic Council of State 7412/2015, paras 3 and 17 and 431/2018, paras 13 and 17. See also the judgments reported in: Diliagka, *supra* note 139, 202-203, 214-215, 222; A. Marketou, ‘Greece: Constitutional Deconstruction and the Loss of National Sovereignty’, in T. Beukers, B. De Witte & C. Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (2017), 179, 194-196.

unconstitutionality of the cuts of pensions regardless of the specific occupation of former public servants.¹⁴¹

Notably, all these judgments of the Council of State and the opinions of the Court of Audit were mostly based on general principles (e.g. proportionality, equitable distribution of public charges, and protection of legitimate expectations) and on the right to a dignified life, which stems from the principle of minimum subsistence.¹⁴² However, few rulings of the Council of State examined also whether the contested measures contrasted with the right to property under the ECHR, which the Council of State deemed as a directly applicable provision.¹⁴³ Lastly, similar to the Portuguese Constitutional Court, the Greek Council of State limited the temporal effects of a number of its declarations of unconstitutionality so as to avoid impairing the State's solvency.¹⁴⁴

This inconsistent approach towards claims related to the right to property differs from the uniform attitude of the Council of State regarding ES entitlements. This Court never declared the unconstitutionality of austerity measures for breaching ES entitlements, set forth either in the Greek Constitution or in international treaties. As for the latter, the Council of State affirmed that ILO Conventions¹⁴⁵ and the European Social Charter only contain "directions" for Contracting Parties.¹⁴⁶ Hence, their non-directly applicable nature precludes

¹⁴¹ See the advisory opinions mentioned in: Iodice, *supra* note 138, 126-128; E. Psychogiopoulou, 'Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges', in Kilpatrick & De Witte, *supra* note 3.

¹⁴² See, in particular, Hellenic Council of State 2287/2015, paras 7, 21 and 24. Diliagka, *supra* note 139, 144-148, 260-270, also reported Hellenic Council of State 2288-2290/2015 as similar to Judgment 2287/2015. In Judgment 2307/2014, the Council of State based its declaration of unconstitutionality on the violation of the right to determine general working conditions by means of arbitration (paras 32-33). On this case law, see also A. Baraggia, *Ordinamenti giudici a confronto nell'era della crisi: La condizionalità economica in Europa e negli Stati nazionali* (2017), 108-110; Kaltsouni, Kosma & Frangakis, *supra* note 139, 73-74, 98-102.

¹⁴³ Hellenic Council of State 668/2012, *supra* note 139, paras 34-36 (declaring the measures in compliance with the ECHR); 7412/2015, para. 16 (declaring the measures in violation of the ECHR).

¹⁴⁴ See e.g. Hellenic Council of State, Judgment 2287/2015, *supra* note 142, para. 26.

¹⁴⁵ Namely, ILO Convention Nos. 87, 97 and 154.

¹⁴⁶ Hellenic Council of State, Judgment 2307/2014, para. 40. In para. 41 the judgment also found the contested policy in compliance with *Add. Prot. 1 ECHR, Art. 1*, *supra* note 8. See also Judgment 1285/2012, in which the Council of State dismissed the pleas claiming the violation of the European Social Charter and the ICESCR because too vague (paras 18-19).

any declaration of unconstitutionality of the relevant national law for breaching the provisions thereby enshrined.

Notably, this statement contradicts the stance of lower judges and the previous approach embraced by the Council of State itself: according to all these rulings, municipal law could be declared invalid for infringing the provisions of the European Social Charter.¹⁴⁷

F. The Way Forward: International Treaties as Parameters to Review the Constitutionality of Austerity Measures

The survey of the Spanish, Portuguese, and Greek case law points out similarities and differences among the standards of review and the adjudicative interpretative approaches adopted by national judiciaries. The most evident common feature is the use of general constitutional principles as constraints to the policymakers' discretion in matters concerning allocation of public resources. On the other side of the coin, the highest tribunals referred just a few times to international ES rights. The Greek case law is partly different, since lower courts relied more on treaty-based socio-economic rights. Still, both the Greek Council of State and the Court of Audit based their respective rulings mostly on general constitutional principles of international law.

¹⁴⁷ See Hellenic Council of State 1571/2010, paras 5 and 7; Xanthi Court of First Instance, *supra* note 136. On this issue, see Yannakourou, 'Challenging Austerity Measures', *supra* note 48, 19, 28; C. Deliyanni-Dimitrakou, 'Les Transformations Du Droit Du Travail Et La Crise: Les Réponses Du Droit Grec', 5 *Revista Jurídica de los Derechos Sociales* (2015) 2, 52, 78-80; N. A. Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' (2019), available at https://www.academia.edu/39175763/Paving_the_way_for_effective_socio-economic_rights_The_domestic_enforcement_of_the_European_Social_Charter_system_in_light_of_recent_judicial_practice (last visited 9 March 2021); C. Tsimpoukis, 'Some Brief Notes on Decision N° 3220/2017 Of Piraeus' Single-Member Court of First Instance' (2018), 8 *Revista Jurídica de los Derechos Sociales* (2018) 2, 18. Besides, the justiciability and direct application of treaty-based socio-economic rights is confirmed by a statement of the delegation of Greece before the CESCR. The delegation stated that: "All courts had the power and the duty not to apply any legislative decision contrary to the Covenant. The provisions of the Covenant were justiciable and could be used as norms of reference for the application of economic, social and cultural rights.", see CESCR, 'Committee on Economic, Social and Cultural Rights considers report of Greece' (2015), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16568&LangID=E> (last visited 9 March 2021).

Yet, treaty-based provisions form part of the Greek, Spanish, and Portuguese legal systems¹⁴⁸ and prevail over ordinary statutes – such as the ones executing austerity measures.¹⁴⁹ In Spain and Portugal, domestic rights and freedoms must be construed according to international human rights law,¹⁵⁰ and in Spain these rights must be granted in conformity with the interpretation of the relevant international supervisory bodies.¹⁵¹

The attitude of Spanish, Portuguese, and Greek courts towards the domestic application of treaty-based ES rights leads to a wider reflection on their justiciability before national courts, especially in times of budgetary imbalances.

In general terms, the purpose of international human rights treaties – including those enshrining socio-economic rights – is to confer entitlements to individuals.¹⁵² Therefore, asserting that they provide mere “directions” to State parties is defective.¹⁵³ Contracting parties enjoy discretion as to the manner of implementation of international commitments in their respective

¹⁴⁸ See, respectively: Spanish Constitution, Article 96(1) and STC 116/2006, de 24 de abril de 2006, BOE núm. 125, de 26 de mayo de 2006, 12-22, ECLI:ES:TC:2006:116, para. 5; Constitution of the Republic of Portugal, Article 8(2); Constitution of Greece, Article 28(1).

¹⁴⁹ See A. Yokaris, ‘Greece’, in D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011), 249, 257; F. Ferreira de Almeida, ‘Portugal’, in D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011), 500, 510-512; A. Cassese, ‘Modern Constitutions and International Law’, 192 *Recueil des Cours* (1985), 331, 403-405.

¹⁵⁰ See, respectively: Spanish Constitution, Article 10(2) and STC 31/2018, de 10 de abril de 2018, BOE núm. 124, de 22 de mayo de 2018, 53548-53638, ECLI:ES:TC:2018:31, para. 4(a); Constitution of the Republic of Portugal, Article 16(2).

¹⁵¹ Spanish Constitution, Article 10(2); STC 116/2006, *supra* note 150, para. 5; 31/2018, *supra* note 148. See also *Recurso de casación n.º 1002/2017*, (2018) Tribunal Supremo, Sala De Lo Contencioso-Administrativo, ECLI:ES:TS:2018:274, according to which the views of the UN Committee on the Elimination of Discrimination Against Women in individual complaints are binding on Spain, although neither the Convention nor its Optional Protocol establishes their binding character.

¹⁵² M. Iovane, ‘Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), 607, 608.

¹⁵³ Langford, ‘Judicial Review’, *supra* note 1, 416; M. C. R. Craven, ‘The Domestic Application of the International Covenant on Economic, Social and Cultural Rights’ (1993), 40 *Netherlands International Law Review* (1993) 3, 367, 376; G. Zarra, ‘La Carta Sociale Europea tra unitarietà dei diritti fondamentali, *Drittwirkung* e applicazione da parte dei giudici interni’, 5 *Annali della SISDiC* (2020), 19.

legal systems.¹⁵⁴ However, once international human rights conventions acquire formal validity within municipal legal orders, States must respect, protect, and fulfil such rights.¹⁵⁵ This duty binds domestic public organs, including the judiciary.¹⁵⁶ Indeed, courts and tribunals are those primarily responsible for the effective enforcement of these rights.¹⁵⁷

Broadly speaking, international human rights, including socio-economic rights, could play at least three roles before national courts. Such norms could: i) be deemed as directly applicable rules, i.e. tribunals could apply them as such, regardless of any further domestic measure; ii) serve as interpretative standards of municipal statutes (so-called indirect application); iii) work as parameters of constitutionality of ordinary laws.¹⁵⁸

The direct and indirect applicability of international human rights before domestic courts has been a matter of doctrinal debate, as well as of inconsistent case law – across States and between courts of the same forum State.¹⁵⁹ Notably, despite the extensive scholarly attempt at clarification, the terminology surrounding these two notions still lacks a universally accepted agreement.¹⁶⁰

¹⁵⁴ A. Nollkaemper, ‘The Effects of Treaties in Domestic Law’, in C. J. Tams *et al.* (eds), *Research Handbook on the Law of Treaties* (2014), 123, 131 [Nollkaemper, The Effects of Treaties].

¹⁵⁵ *Ibid.*, 132; O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2018), 495, according to which the freedom of implementation “[...] is circumscribed by the principle of effectiveness, which gains special importance in the context of human rights [...] treaty law”. See also B. Conforti, ‘National Courts and the International Law of Human Rights’, in B. Conforti & F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997), 3, 7 [Conforti, National Courts]; Craven, *supra* note 153, 377.

¹⁵⁶ Conforti & Labella, *An Introduction*, *supra* note 42, 3; G. Betlem & A. Nollkaemper, ‘Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation’, 14 *The European Journal of International Law* (2003) 3, 569, 574; C. Sciotti-Lam, *L’applicabilité des traités internationaux relatifs aux droits de l’homme en droit interne* (2004), 353.

¹⁵⁷ B. Conforti, *International Law and the Role of Domestic Legal System* (1993), 8-10; Craven, *supra* note 153, 367-368; Betlem & Nollkaemper, *supra* note 156, 574; Iovane, *supra* note 152, 608; Poulou, ‘Austerity’, *supra* note 16, 1171.

¹⁵⁸ See above all Iwasawa, *supra* note 42, 86-90; Nollkaemper, ‘The Effects of Treaties’, *supra* note 154; A. Nollkaemper, *National Courts and the International Rule of Law* (2011), 117-165 [Nollkaemper, National Courts].

¹⁵⁹ Langford, ‘Judicial Review’, *supra* note 1, 440-442. See also the Greek case-law on austerity measures.

¹⁶⁰ M. J. Bossuyt, ‘The Direct Applicability of International Instruments on Human Rights (With Special Reference to Belgian and U.S. Law)’ 15 *Revue Belge de Droit International*

Besides, uncertainty characterizes also the method for determining whether a (part of a) treaty is directly applicable.¹⁶¹ Sufficient is to recall the discussion concerning the need to adopt a subjective criterion or objective parameters. The former is grounded on the intention of the contracting Parties, as expressed in the text of the treaty (provision) invoked.¹⁶² Doubts mark the latter, since there are no unequivocally accepted objective criteria.¹⁶³ According to some, treaty-based human rights are directly applicable if their substantive content is sufficiently complete and precise,¹⁶⁴ while for others the category of non-directly applicable rules is restricted to two types of norms: the ones conferring discretionary powers on States (rather than creating obligations), and the ones that create obligations but that cannot be (immediately) implemented due to the lack of the necessary mechanisms or procedures in the domestic legal order.¹⁶⁵

Ultimately, the notion of direct applicability is not *by definition* inadequate to ease the protection of treaty-based socio-economic rights before national courts. However, its effectiveness in achieving such a goal heavily depends on the approach adopted by the specific court called upon to decide the dispute. Therefore, rather than enhancing effectiveness, direct applicability may serve as a justification for national courts to declare the issue as non-justiciable.¹⁶⁶ The Greek case law on austerity measures shows the negative consequences stemming from the absence of binding parameters to secure that even just those courts belonging to the very same forum State adopt a coherent and uniform approach. Indeed, while Greek lower courts considered ES rights set forth in international instruments as directly applicable rules, the Council of State denied this theory and overruled its previous stance on the matter. The unpredictability surrounding judicial outcomes and the resulting lack of legal certainty lead to the conclusion that direct applicability of treaty-based human rights does not

(1980) 2, 317; Sciotti-Lam, *supra* note 156, 335; Iwasawa, *supra* note 42.

¹⁶¹ A. Aust, *Modern Treaty Law and Practice* (2000), 159.

¹⁶² Bossuyt, *supra* note 160, 319-320. For an extensive analysis of the subjective criterion, see Iwasawa, *supra* note 42, 158-171; Sciotti-Lam, *supra* note 156, 357-437.

¹⁶³ For an extensive analysis on the objective criteria, see Iwasawa, *supra* note 42, 172-184; Sciotti-Lam, *supra* note 156, 438-499.

¹⁶⁴ See e.g. Bossuyt, *supra* note 160, 318-319; A. Nollkaemper, 'The Duality of Direct Effect of International Law', 25 *The European Journal of International Law* (2014) 1, 105, 112, 115-117.

¹⁶⁵ Conforti, 'National Courts', *supra* note 155, 8.

¹⁶⁶ Iwasawa, *supra* note 42, 174-177; Craven, *supra* note 153, 388; Nollkaemper, *National Courts*, *supra* note 158, 140.

represent the most suitable technique in fostering the protection of ES rights before national courts.

The implications of the indirect applicability are also unclear.¹⁶⁷ This notion requires national courts to interpret municipal law (both constitutional provisions and ordinary statutes) in conformity with the forum States' international treaty obligations, including those concerning socio-economic rights. Through consistent interpretation, courts can secure States' compliance with international commitments, including human rights in cases where individuals have no standing before national tribunals.¹⁶⁸ However, it is still unclear whether courts should rely solely on the wording of the treaty provisions or if they should take into account the (often non-binding) interpretation of the relevant supervisory body. This problem was explored also with regard to international human rights treaties as parameters of constitutionality. Generally speaking, courts must duly *take into account* such pronouncements.¹⁶⁹ This obligation that ultimately stems from the general principle of interpreting and applying treaties in good faith and compels national courts to duly consider the interpretation of treaty-based bodies and to provide a reason in case they decide to depart from it.¹⁷⁰

¹⁶⁷ The terminology "indirect applicability" has multiple meanings, among which: i) the duty of national courts to interpret municipal statutes in line with the international commitments of the forum State; ii) a technique of incorporation of international law in the domestic legal system. The present paper used the first one as working definition. See A. Nollkaemper, 'General Aspects', in A. Nollkaemper et al. (eds), *International Law in Domestic Courts: A Casebook* (2018), 1, 19-27; Bossuyt, *supra* note 160, 318.

¹⁶⁸ Condorelli, *supra* note 42, 42; Iwasawa, *supra* note 42, 192; Sciotti-Lam, *supra* note 156, 601-605; Betlem & Nollkaemper, *supra* note 156, 574-579.

¹⁶⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, ICJ Reports 2010, 639, 663-66, para. 66. According to the International Law Commission, these pronouncements cover "[...] all relevant factual and normative assessments by such expert bodies", including general comments, views, reports, and decisions, Special Rapporteur Georg Nolte, *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, UN Doc A/CN.4/694, 7 March 2016, 8, para. 14.

¹⁷⁰ Craven, *supra* note 153, 389-390; Iwasawa, *supra* note 42, 232-242; S. Forlati, 'Corte costituzionale e controllo internazionale. Quale ruolo per la "giurisprudenza" del Comitato europeo dei diritti sociali nel giudizio di costituzionalità delle leggi?', in Università degli Studi di Ferrara Dipartimento di Giurisprudenza, *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea? - Atti del seminario in previsione dell'udienza pubblica della Corte Costituzionale del 25 settembre 2018 sulla questione di costituzionalità sul d. lgs n. 23/2015* (2018), 67, 76; D. Amoroso,

With this in mind, constitutional courts could declare the invalidity of austerity measures for infringing general constitutional principles (e.g. proportionality or human dignity) and socio-economic rights listed in national constitutions, construed in accordance with the international instruments binding upon the forum State and taking into account the pronouncement of supervisory mechanisms.¹⁷¹ A strict proportionality test and the reference to provisions setting forth socio-economic rights under both domestic and international law could avoid confining their safeguarding solely to situations where individuals are deprived of their minimum subsistence – as occurred, for example, in the case law of the Greek Council of State, which considered the right to human dignity as the ultimate constraint on legislators’ discretion.¹⁷²

Lastly, once international conventions become part of the national legal system and the forum State prescribes their supremacy over ordinary laws, constitutional courts could (and should) use treaty provisions as parameters of constitutionality of ordinary statutes.¹⁷³ Once again, the standard of review is the treaty provision as interpreted by the relevant supervisory body. This is a suitable alternative specifically where constitutions do not contain a bill of rights. In the absence of such a list, there is no constitutional provision that could be construed consistently with international law, but constitutional courts could still strike down ordinary statutes for infringing a superior rule. The opposite

‘Sull’obbligo della Corte Costituzionale italiana di “prendere in considerazione” le decisioni del Comitato europeo dei diritti sociali’, in *Ibid.*

¹⁷¹ See e.g. the case-law of the Belgian Council of State in Sciotti-Lam, *supra* note 156, 352; Corte Costituzionale Italiana 194/2018, as briefly commented in G. Frosecchi, ‘European Social Charter in the Constitutional Review of National Laws: the Decisive Application of Art. 24 by the Italian Constitutional Court’, 5 *International Labor Rights Case Law* (2019) 2, 182. On this judgment, see also: C. Di Turi, ‘Libertà di associazione sindacale del personale militare e Carta sociale europea nella recente giurisprudenza della Corte costituzionale’, in 12 *Diritti umani e diritto internazionale* (2018) 3, 615.

¹⁷² See e.g. Hellenic Council of State 668/2012, *supra* note 139, where the right to a dignified life appears to be the extreme limit to the State’s wide discretion in shaping the content of financial reforms (paras 34-36).

¹⁷³ Nollkaemper, ‘The Effects of Treaties’, *supra* note 154, 142-143; R. Pisillo-Mazzeschi, ‘Sulla natura degli obblighi internazionali di tutela dei diritti economici, sociali e culturali’, in G. Venturini & S. Bariatti (eds), *Liber Fausto Pocar, Diritti individuali e giustizia internazionale* (2009), 715, 723-725; D. Amoroso, ‘Inutiliter Data? La Convenzione delle Nazioni Unite sui Diritti delle Persone con Disabilità nella Giurisprudenza Italiana’ (2017), available at <http://www.sidiblog.org/2017/02/07/inutiliter-data-la-convenzione-delle-nazioni-unite-sui-diritti-delle-persone-con-disabilita-nella-giurisprudenza-italiana/> (last visited 9 March 2021) [Amoroso, Inutiliter Data].

outcome would deprive ES rights of their binding nature and of their higher ranking in the national legal system.¹⁷⁴

Greek lower courts followed this approach and declared the unconstitutionality of statutory laws imposing austerity measures due to their contrast with – among other grounds – treaty-based socio-economic rights. Portuguese and Spanish constitutional courts could have adopted the same approach, since their legal regime prescribes the supremacy of international law over ordinary statutes. All these courts could have relied upon the interpretation of treaty-bodies in shaping the content of such rights.¹⁷⁵ For instance, the Spanish Constitutional Court could have upheld the Basque and Valencian regulation: the judges could have argued that the national legislation excluding undocumented migrants from the public healthcare service was in violation of the ICESCR (as interpreted by the CESCR) because such limitation violated the prohibition of discrimination, constituted an unjustified retrogressive measure and impaired the core of the right to health.¹⁷⁶ Incidentally, the preamble of the 2018 reform expressly mentions Spain's international commitments. It recognizes that such curtailing had represented a step backwards compared to the previous regime, which instead had complied with treaty-based obligations. Furthermore, the decree law recalled the prohibition of discrimination enshrined in international instruments.¹⁷⁷

Ultimately, judgments declaring the unconstitutionality of austerity measures meet the *collective* nature of socio-economic rights: such rulings produce systemic consequences, since the removal of the cause(s) of the infringement benefits (the sections of) the population that suffered from the harm. Moreover, human rights-based declarations of unconstitutionality should have no (or limited) retroactive effects in order to avoid worsening the balance of payment of the forum State: rulings with retrospective consequences could hamper States' ability to secure the protection of socio-economic rights, since preserving economic soundness is a crucial condition for ensuring the satisfaction of minimum essential levels of ES rights as well as their progressive

¹⁷⁴ See e.g. R. Pisillo-Mazzeschi, *Ibid.*; D. Amoroso, 'Inutiliter Data?', *supra* note 173.

¹⁷⁵ On the *taking into account approach*, see e.g. P. Rossi, 'L'interpretazione conforme alla giurisprudenza della Corte EDU: quale vincolo per il giudice italiano?', *Osservatorio sulle Fonti* (2018) 1, 1.

¹⁷⁶ See e.g. CESCR, *Concluding observation on Spain*, *supra* note 27, 5, para. 19. See also N. J. Luisiani, 'Rationalising the Right to Health: is Spain's austere response to the economic crisis impermissible under international human rights law?', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), 202, 221-223.

¹⁷⁷ Real Decreto-ley 7/2018, *supra* note 119.

realization.¹⁷⁸ This conclusion is valid irrespective of whether the declaration of unconstitutionality derives from indirect application of human rights treaties (i.e. the interpretation of the national constitution according to obligations stemming from these conventions) or their role as *per se* parameters of review of constitutionality.

G. Concluding Observations

The Eurozone sovereign debt crisis represented an occasion to assess whether the international, EU, and national systems provide adequate remedies for violation of ES rights caused by austerity measures. The adequacy of the relief depends on two elements. The first is the *collective* nature of socio-economic rights, which requires structural or systemic remedies – rather than individual ones. The second is the need to preserve States' economic soundness in order to allow Countries to satisfy their international obligations, namely securing a minimum essential level of socio-economic rights and their progressive realization.

Committees established under the international treaty law recommended general measures, but they turned out to be deficient due to the non-binding nature of their outcomes. The ECtHR did not suffer from this shortcoming, yet the Court adopted a restrained approach in interpreting the scope of the rights covered by the Convention and declared either the applications inadmissible or the contested measures in compliance with the ECHR. The action for compensation before the ECJ provides *individual* relief, which is inadequate to remedy violations of ES rights. Besides, plaintiffs who launched similar actions failed due to findings of non-violation of the CFREU. Moreover, actions for annulment and referrals for preliminary rulings were ineffective because of procedural barriers – although the structural consequences stemming from such proceedings could represent an adequate remedy, at least theoretically.

On the contrary, constitutional review of austerity measures in Spain, Portugal, and Greece proved to be rather adequate and effective. The wide-ranging consequences of such rulings appear in line with the *collective* nature of socio-economic rights, since they benefit (entire portions of) the population which suffered the harm. Moreover, the binding nature of such declarations

¹⁷⁸ Roach, *supra* note 39, 56-58, suggests “[...] two-track remedial strategies [...]” that combine individual remedies (e.g. payment of compensation to the parties of the litigation) with systemic remedies to the benefit of the groups affected by the contested policy.

ensures their effectiveness. Lastly, the possibility of limiting the temporal scope of these decisions could help preserve States' solvency and, consequently, their ability to satisfy their international commitments – *viz.* the obligation to ensure the enjoyment of the minimum essential level of ES rights and the duty to progressively achieve their realization. The case law related to the Eurozone sovereign debt crisis proved that sensitive matters which may have major distributional or other unintended consequences on sensitive matters strictly linked to States' sovereignty, such as the allocation of public finances, may be adequately addressed solely before domestic courts.

These positive aspects notwithstanding, the interpretative and adjudicative approaches developed during the Eurozone sovereign debt crisis are improvable. Constitutional Courts could (and should) rely on international instruments, alongside constitutional general principles, to boost the protection of ES rights, especially in times of economic downturns and austerity policies which may seriously threaten the enjoyment of such rights. Constitutional courts may either construe the bill of rights under national constitutions in line with socio-economic rights enshrined in international instruments, or may strike down ordinary statutes by using treaty-based ES rights as *per se* parameters of constitutionality. In any event, Constitutional courts must duly take into account the interpretation provided by the relevant monitoring bodies.

This scheme is also in line with the principle of subsidiarity, according to which the effective enforcement of international commitments relies primarily on States' organs, including the domestic judiciary. Ultimately, declarations of unconstitutionality grounded on treaty-based socio-economic rights secure their *effet utile* as well as States' compliance with their international human rights obligations.

The Soft Touch of International Financial Regulation: Status, Flaws and Future

Niall O'Shaughnessy*

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Abstract

The 2008 global financial crisis focused attention on the relationship between the behaviour of international financial institutions and the rules they follow. Many banks in the US and Europe failed, in part, due to their inability to absorb the fallout of the US mortgage market collapse. If international financial institutions could not protect themselves from the cycles of the market, how come regulators were unable to do so either? The most relevant instrument of international financial regulation for understanding the 2008 crisis is the Basel Accords, the rules that specify how much capital a bank should always hold in reserve. However, these rules are 'soft law' and so, non-binding.

It is a myth of course that soft law is the only way to regulate international finance, as many scholars argue. Despite numerous rounds of reform, the Basel Accords have always been inadequate. The purpose of this paper is to account for the flaws of the Basel Accords and the role that soft law plays in creating those flaws. This paper also analyses the competing theories behind the rise of soft law within financial regulation and the 'political economy' explanation is endorsed. The final section of the paper discusses the future of financial regulation and soft law, as well as highlighting innovations from outside the hard/soft law dichotomy and outside the Global North. This paper concludes by stating that the theory behind soft law does not play out in practice within finance and that it remains in place because it suits the interests of large institutions and powerful states. At the same time, a return to Bretton Woods or a new *World Financial Organization* is problematic and, as such, we must look beyond the hard/soft law debate and embrace the work of the Global South and East.

A. Introduction

Just as the world's leading economies were abandoning the fixed exchange rate system, and financial globalization was taking shape, then United States (US) Treasury Secretary Henry Fowler said in 1972 “[...] the free world has backed inadvertently into a developing international capital market rather than affected a rational and conscious entry”.¹ Rather than correct this path, international efforts to regulate finance have been defined by the characteristics of the system, accepting those characteristics rather than changing them.² The rationale goes as follows: traditional instruments of international law, such as treaties and global authorities with corrective powers, are unsuited to the size, volatility and complexity of international finance. As such, regulation must be malleable and informal enough to respond to the unique and ever-changing demands of finance, hence the prevalence of so-called soft law.³ The 2008 global financial crisis (GFC) called this logic into question as individuals, banks and States throughout the world felt the impact of the collapse of the sub-prime mortgage market in the US.

The primary instruments of international financial regulation (IFR) are the Basel Accords. The Basel Accords are non-binding agreements that are intended to guide domestic regulators and international financial institutions about appropriate levels of reserve capital. Having sufficient levels of reserve capital protects banks against acute liquidity shortages. The development of the Accords has been defined by crises and criticism but because the organisation responsible, the Basel Committee, cannot create binding rules, the Accords are mostly shielded from domestic politics. In a sense, international finance regulates itself – banks have historically complied with IFR on their own terms, industry representatives were involved in drafting the Accords and there is a *revolving door* of personnel between public and private institutions. Questioning this arrangement is difficult as the perceived complexity of finance lends itself to technocratic regulation. I agree with those who argue that this is intentional,

¹ United States House of Representatives, Committee on Foreign Affairs, ‘The International Implications of the New Economic Policy: Hearings, Ninety-second Congress’, First Session(1971), 16.

² P-H. Verdier, ‘The Political Economy of International Financial Regulation’, 88 *Indiana Law Journal* (2013) 4, 1405, 1416.

³ See, for example, C. Brummer, ‘Why Soft Law Dominates International Finance – And Not Trade’, 13 *Journal of International Economic Law* (2010) 3, 623; C. Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century*, 2nd ed. (2015), ch. 3 [Brummer, *Soft Law and the Global Financial System*].

that such a system suits powerful States, institutions and companies. As such, I hope to highlight the fallacy of soft law in finance by identifying the many theoretical and legal gaps.

Accordingly, the primary purpose of this paper is to account for the flaws of the Basel Accords and the role that soft law plays in creating those flaws. The first section will trace the development of the Accords, accounting for the substantive flaws before moving onto omissions and, lastly, to the flawed theory behind them. Because the theoretical arguments for soft law's place within finance have been the primary source for IFR's problems, the second section will examine the different accounts that try to explain soft law's dominance. Much in the same way the first section divides the problems of the Accords into internal and external categories, the third and final section will appraise the different proposals for the future of IFR within and outside the soft law framework. I believe the suggestions of both sets of authors lack rigour, this final section therefore also includes reforms that look beyond the hard/soft law debate, as well as recent innovations from the Global South and East.

B. The Basel Accords

The 2008 financial crisis highlighted the vulnerable position banks put themselves in, due in large part to insufficient capital reserves. These weaknesses were immediately exposed by an unexpected event like the collapse of the sub-prime markets in the US.⁴ The problems that accrued from the accompanying *credit crunch* were not contained within the US. In particular, banks operating in the EU experienced liquidity emergencies as a result of loan shortages. These events justify the rationale behind regulating capital requirements on an international basis, the purpose of the Basel Accords. The following section traces the development of the Accords, before presenting the flaws from an internal perspective (issues with the substance and omissions of the Basel Accords) and an external perspective (issues that stem from its soft law nature).

I. Development and Internal Flaws

The last global crisis was not an isolated event; the first crisis that spurred the international community into action was the collapse of the Herstatt Bank

⁴ Of course, many commentators predicted the impending crisis. For a general discussion on what preceded the '08 crisis, see A. Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (2018).

in 1974, which led to the first Basel Accord being introduced in 1988.⁵ This also marked the beginning of a trend in IFR with crises being a catalyst for changes from Basel I to II to III, as is set out below. The collapse of a medium-sized German bank revealed serious shortcomings in the capitalisation of banks in the US, Europe and Japan. As such, US regulators mounted pressure on the international community to match their domestic capital requirements but also to ensure their own banks remained globally competitive.⁶ Specifically, banks operating on an international level would be required to hold a minimum capital requirement of 8%. The 1988 Accord has since been adopted by over 100 countries.⁷ The first Accord came under heavy criticism as it featured an explicit bias against developing countries – credit to non-OECD banks was assigned an 80% higher risk weight if it took over one year to mature.⁸ This measure was a contributing factor to the Asian financial crisis of the late 1990s as it encouraged short-term lending practices.⁹ As such, Basel I failed on its own terms as a stabilising influence in global finance.

The Accord was revised in 2004 to address these issues and brought in two additional pillars to go along with capital requirements: supervisory review and market discipline.¹⁰ However, Basel II granted the banks themselves discretion in deciding how much capital should be reserved, according to their own internal policies.¹¹ As some authors point out, Basel II was “[...] based primarily only on what the big banks are able, or perhaps more accurately, willing, to do to their capital structures [...]”.¹² The ability of banks to sidestep capital requirements, and become excessively leveraged, is crucial to understanding the 2007 crisis;¹³

⁵ R. Bollen, ‘The international financial system and future global regulation’, 23 *Journal of International Banking Law and Regulation* (2008) 9, 458, 462.

⁶ *Ibid.*, 462.

⁷ S. Griffith-Jones & S. Spratt, ‘Will the proposed new Basel Capital Accord have a net negative effect on developing countries?’, *Institute of Development Studies* (2001), 1.

⁸ *Ibid.*, 1.

⁹ S. Griffith-Jones & J. Cailloux, ‘Encouraging the Long Term; Institutional Investors and Emerging Markets’, *Institute of Development Studies* (1998), 33.

¹⁰ L. J. Rodríguez, ‘International Banking Regulation - Where’s the Market Discipline in Basel II?’, 455 *Policy Analysis* (2002), 1.

¹¹ Basel Committee on Banking Supervision, ‘The New Basel Accord’ (2001), available at <https://www.bis.org/publ/bcbsca02.pdf> (last visited 20 April 2021), 32-35.

¹² J. Linarelli, M. E. Salomon & M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018), 193 [Linarelli, Salomon & Sornarajah, *The Misery of International Law*].

¹³ A. Admati & M. Hellwig, *The Bankers’ New Clothes: What’s Wrong with Banking and What to Do about It* (2014), 4 [Admati & Hellwig, *The Bankers’ New Clothes*]. The

for instance, at the beginning of the crisis, major financial institutions like Swiss bank UBS held equity to the equivalent of 2 to 3 percent of its total assets.¹⁴

Once again, a global crisis in 2008 refocused attention on the role of regulators in international finance. The Basel Committee even indirectly recognised its own shortcomings in the Basel III framework publication: “[T]he global banking system entered the crisis with an insufficient level of high quality capital. The crisis also revealed the inconsistency in the definition of capital across jurisdictions”.¹⁵ Accordingly, Basel III reemphasised the need for increased capital ratios – 8% of risk-weighted assets at all times – with a more nuanced and extensive definition of regulatory capital.¹⁶ Basel III also attempted to address the systematically crucial, *too big to fail* banks through proposed capital surcharges, as well as *conservation* and *countercyclical* buffers.¹⁷ In short, Basel III encouraged banks to stockpile capital in times of economic growth and stability.

Unfortunately, the central flaw of Basel II – the means and discretion banks used in assigning risks to assets – was not undone in Basel III.¹⁸ As outlined above, the ratio of capital held as a percentage of risk-weighted assets increased. However, as banks were still able to calculate risk-weighted assets as they wish, the ratio was completely malleable. Secondly, the capital buffers proposed were worthy of little enthusiasm as the realities of their implementation were down to what national authorities decided was suitable.¹⁹ Further, Basel III was still structured to allow banks to hold capital reserves of 3% of total assets.²⁰ In other words, the changes proposed in response to the 2007 crisis would likely have had no bearing on the contagion had they been in place beforehand.

Basel III was originally intended to come into force at the start of 2013 but was delayed due to simultaneous changes in the regulatory architecture of both the US and Europe.²¹ Basel III’s full implementation was also hindered

authors rely on quotes explaining the crisis from CEOs of banks like Bank of America, JPMorgan and Morgan Stanley.

¹⁴ *Ibid.*, 96.

¹⁵ Basel Committee on Banking Supervision, *Basel III: A global regulatory framework for more resilient banks and banking systems* (2010), 12.

¹⁶ *Ibid.*, 12.

¹⁷ *Ibid.*, 7 and 54-57.

¹⁸ Verdier, ‘The Political Economy of International Financial Regulation’, *supra* note 2, 1464.

¹⁹ *Ibid.*, 1465.

²⁰ Admati & Hellwig, ‘The Bankers’ New Clothes’, *supra* note 13, 96.

²¹ P. Yeoh, ‘Global banking reforms: mission accomplished?’, 33 *Journal of International Banking Law and Regulation* (2018) 9, 305, 310.

by a new set of reforms published by the Committee in December 2017. The intention of the December 2017 reforms was surprisingly far-reaching and could more appropriately be classified as Basel IV.²² Semantics aside, the most striking addition to the final version of Basel III is the reversal of internally-calculated risk weighted assets.²³ In its place, the Committee drafted a standardised approach, with risk weights assigned based on an asset's alphabetical rating if the exposed organisation involved is a bank (there is a unique *look-up table* for exposures to corporate, real-estate, equity and debt etc.).²⁴ So for instance, where a financial institution is a creditor to another bank with an AAA to AA rating, it is now obliged to assign that asset a risk weight of 20%.²⁵ The Basel Committee acknowledged the degree to which the internal model regime undermined its ability to regulate. Committee Chairman, Stefan Ingves, felt the Basel Committee had lost the trust of bank stakeholders and the general public,²⁶ rather than outwardly admit failure on behalf of the regulator.

II. Oversights and Omissions

The following points – regulatory arbitrage, undetectable transactions and the pitfalls of focusing on capital requirements and bank size – are still framed as substantive flaws but there is a common thread throughout. The actors that are best placed to identify these shortcomings and assess how great a threat they pose to financial stability are the banks themselves. Whilst some may argue that this is a prime reason for embracing the self-regulation that comes with a soft law regime, the fact that such flaws exist demonstrate that financial institutions cannot regulate themselves.

With the benefit of hindsight, allowing banks discretion to decide their own capital requirements using internal policy seems like an inevitable path to exploitation. However, Beltratti and Paladino don't see this as regulatory oversight and go as far as calling the Basel II reforms *sound* and that they “[...]”

²² ABA Banking Journal, ‘Basel Committee Releases ‘Basel IV’ Capital Framework’ (2017), available at <https://bankingjournal.aba.com/2017/12/basel-committee-releases-basel-iv-capital-framework/> (last visited 20 April 2021).

²³ Basel Committee on Banking Supervision, *High-level summary of Basel III reforms* (2017), 2.

²⁴ *Ibid.*, 3.

²⁵ *Ibid.*, 3.

²⁶ S. Ingves, ‘Basel III: Are we done now?’, Keynote Speech at the Institute for Law and Finance conference, Frankfurt (2018), available at <https://www.bis.org/speeches/sp180129.pdf> (last visited 20 April 2021), 2.

promised to better tune the financial structure of each bank to its (and its own home country—) individual characteristics [...]”.²⁷ Instead, they enquire whether it was the banks themselves that engaged in regulatory arbitrage – locating and exploiting gaps in the law – and undermined the international system as a whole.²⁸ Beltratti and Paladino found that for banks *not* under the Basel II umbrella, they had to pay more for equity capital (what an investor expects to receive for investing their money) as the proportion between the risk-weighted assets the bank held, and its total assets, increased.²⁹ This is a logical relationship: if a bank engages in risky loan practices that may result in a series of defaults, the investor deserves a higher return; similarly, this dissuades investors who are not in a position to embark on such high-risk investments. However, Beltratti and Paladino found that for banks operating in Basel II jurisdictions, they were able to employ their own internal measurements for risk-weighted assets and display this as a lower share of their total assets, thereby lowering the cost of equity capital.³⁰ This may deceive a potential investor, but as the last crisis has shown, when banks voluntarily weaken their own contingency plans, the impacts are not contained to the financial system itself. Further, the fact that banks did voluntarily weaken themselves directly undermines the effectiveness of self-regulation.

Despite the progress of the Basel Accords, some commentators still stress that the system is not yet sufficiently countercyclical. In an IMF Working Paper, Singh and Alam argue that international finance as a whole is failing to appreciate the role played by transactions that do not traditionally appear on bank balance sheets.³¹ Specifically, it is pledged collateral transactions that undermine how accurately systematic risk can be judged. Pledged collateral transactions are different from other banking activity in that they are funded using assets that have been pledged to them from a non-bank institution, like a hedge fund. As this asset is not yet in the possession of the bank – it has only been agreed that it shall come into its possession should loan repayments cease – it is not counted as an asset or a liability for the purposes of a bank’s balance

²⁷ A. Beltratti & G. Paladino, ‘Basel II and regulatory arbitrage. Evidence from financial crises’, 36 *Journal of Empirical Finance* (2016), 180, 180 [Beltratti & Paladino, Basel II and regulatory arbitrage].

²⁸ *Ibid.*, 181.

²⁹ *Ibid.*, 181.

³⁰ *Ibid.*, 195.

³¹ M. Singh & Z. Alam, ‘Leverage—A Broader View’, IMF Working Paper WP/18/62 (2018), available at <https://www.imf.org/en/Publications/WP/Issues/2018/03/19/Leverage-A-Broader-View-45720> (last visited 20 April 2021), 4.

sheet. The central thesis of Singh and Alan's paper is not to suggest that the global financial infrastructure is necessarily made fragile by these transactions, but that we cannot fully grasp the stability of international finance without accounting for all forms of leverage being used by financial institutions. What the authors find curious is that, for US banks, credit to the wider economy has not changed much since 2008 despite lower levels of leveraging (money borrowed to fund investments) and only minor increases in bank capital.³² This is explained through gathering available data on Globally Systematically Important Banks in the US and EU on the volume of pledged collateral and off-balance sheet funding. Volumes have not declined in pledged collateral since the shock of the Lehman Brothers collapse and, in fact, off-balance sheet funding has increased on the whole.³³ Taking the specific example of Barclays, it reported over £1 trillion in total assets in 2016 and exhibited £466 billion in pledged collateral. However, only £34 billion of that pledged collateral made it onto the balance sheet.³⁴ According to Singh and Alam, most pledged collateral transactions take place across borders,³⁵ which demonstrates the financial system is still highly vulnerable to the contagion witnessed when the sub-prime mortgage collapsed in 2007.

The vulnerability of a bank or financial institution need not necessarily be a fatal wound in international financial systems. Identifying what organisations are Systematically Important Financial Institutions (SIFIs) or Global Systematically Important Banks (G-SIBs) requires more than ranking banks in order of size, or amount of assets held.³⁶ For example, look at how exposed a relatively minor institution like Northern Rock was to the sub-prime mortgage crisis, eventually leading to its nationalization.³⁷ Accordingly, Varotto and Zhao argue that fighting systemic risk through minimum levels of reserve capital is a narrow-minded approach.³⁸ Once again, if self-regulation were working in reality, Northern Rock would have recognised the risks of immense interconnectivity and corrected itself.

Others have argued that, even if we accept that size is the most relevant factor for determining systemic risk, limiting size in banking would have a

³² *Ibid.*, 12.

³³ *Ibid.*, 16.

³⁴ *Ibid.*, Table 2, 18.

³⁵ *Ibid.*, 13.

³⁶ S. Varotto & L. Zhao, 'Systemic risk and bank size', 82 *Journal of International Money and Finance* (2018), 45, 46.

³⁷ *Ibid.*, 49.

³⁸ *Ibid.*, 46.

detrimental effect on consumers through reducing economies of scale within banking.³⁹ For example, prices in bank services may increase due to competitive disadvantages that arise if bank size is regulated in one jurisdiction only. Regulators remaining open to restricting bank size can be reconciled with Varotto and Zhao's warnings about a preoccupation with size: if a sizeable bank is also highly interconnected, then limiting growth is a viable option. Barth and Whilborg further argue there is a danger in relying on capital requirements to act as a disincentive for further size and complexity in banking, which can be thought of as a tax that tries to discourage such behaviours.⁴⁰ Their point is that burdensome capital requirements may succeed to a point but that once a bank reaches a 'trigger point' of size/complexity, there is no further disincentive to stop there. Barth and Whilborg also argue that large capital requirements would actually mobilise banks to evade regulation.⁴¹ This is a difficult claim to stand behind because, yes the Basel Accords had trouble with regulatory arbitrage and encouraging compliance in general, but these issues are traceable to the soft law nature of the regulation, they are not a result of setting capital requirements. Under Barth and Whilborg's logic, any soft law regulation encourages the very behaviour it attempts to change.

III. A Flawed Theoretical Foundation

International financial bodies like the Basel Committee can be classified as *Transnational Regulatory Networks* (TRN), relying on principles or guides to be adopted at the national level; in Segura-Serrano's words, a decentralised enforcement mechanism.⁴² TRNs are synonymous with soft law and advocates for TRNs rely on similar rationales of providing flexibility for actors that are fearful of binding agreements, as well as offering a forum that is insulated from domestic politics.⁴³ TRNs are not inherently flawed as a standalone concept but there are reasons to suggest that they cannot fulfil their promise within

³⁹ J. Barth & C. Whilborg, 'Too Big to Fail and Too Big to Save: Dilemmas for Banking Reform', 235 *National Institute Economic Review* (2016), R27, R33.

⁴⁰ *Ibid.*, R36.

⁴¹ *Ibid.*, R36.

⁴² A. Segura-Serrano, 'International Economic Law at a Crossroads: Global Governance and Normative Coherence', 27 *Leiden Journal of International Law* (2014) 3, 677, 689 [Segura-Serrano, International Economic Law at a Crossroads].

⁴³ P-H. Verdier, 'Transnational Regulatory Networks and Their Limits', 34 *Yale Journal of International Law* (2009) 1, 113, 162.

finance. For one, as Verdier points out,⁴⁴ the Basel II negotiations show that regulators within TRNs cannot truly balance domestic pressures and global interests – that process was consistently held up by intervention from Germany, the US and industry lobby groups and the eventual compromises rendered the Accord wholly inadequate.⁴⁵ On top of that, one alleged advantage of TRNs is that the regulators involved cannot and should not concern themselves with the distributive consequences of agreed measures. In securing wide agreement for Basel I, the Basel Committee was forced to sacrifice a guarantee of financial stability to allow for a flexible approach to defining capital. This then allowed banks to heavily invest in risky assets that eventually became the source of the last financial crisis.⁴⁶ TRNs offer powerful States a veil of technocracy where democracy and distribution are ignored, whilst still providing a regulatory forum to exert influence.⁴⁷ By way of example, the Basel I process was overseen by the US and the United Kingdom who managed to secure broader levels of capitalisation globally without harming the competitiveness of their domestic banks.⁴⁸

The Financial Stability Board's (FSB) annual report on the implementation of the so-called *G20 Reforms*, which include Basel III frameworks, provides an insight into compliance levels amongst its 28 member States.⁴⁹ Certain aspects of Basel III, such as changes to risk-based capital requirements and Liquidity Coverage Ratio, began being phased in during 2013 and 2015 respectively.⁵⁰ Relatively speaking, levels of compliance are high with all but 6 of the 28 jurisdictions adopting the risk-based capital changes and effectively all of the 28 implementing rule changes around liquidity.⁵¹ Notably however, the 6 non-compliant States are the FSB's EU members and the United Kingdom. The EU's implementation of the initial Basel III reforms, the Capital Requirements Directive (CRD) IV,⁵² was watered down to such an extent as to be classified as

⁴⁴ *Ibid.*, 162.

⁴⁵ *Ibid.*, 141.

⁴⁶ *Ibid.*, 163.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 117.

⁴⁹ Financial Stability Board, 'Implementation and Effects of the G20 Financial Regulatory Reforms: 2020 Annual Report'(2020), available at <https://www.fsb.org/wp-content/uploads/P131120-1.pdf> (last visited 20 April 2021).

⁵⁰ *Ibid.*, 3.

⁵¹ *Ibid.*, 3.

⁵² Council Directive 2013/36/EU, OJ L 176/338, 27 June 2013.

materially non-compliant.⁵³ Put more succinctly, the EU's divergence means that 31% of the market has not implemented the Basel III framework for risk-based capital.⁵⁴ Further, only 10 States were found to comply with Basel III exposure framework and 11 complied with final rules for the Net Stable Funding Ratio.⁵⁵ The Basel III finalisation process also highlighted the systematic shortcomings in the drafting process; the countries at the table fought not for what they believed was most appropriate internationally, but what their banks had asked them to bargain for. France and Germany, home to many of the institutions responsible for ensuring the crash in the US derivatives market in 2007 became a European problem, lobbied for decreases in the amount of capital reserves required.⁵⁶ As with previous iterations of Basel Committee standards, compliance is an enormous obstacle. In 2018, the Committee noted over 1,200 deviations from capital reforms encouraged under Basel III.⁵⁷

On its face, a soft law approach is not without its advantages. For one, a hard-law alternative would require intense negotiation that must be consistent with rules around treaty formation.⁵⁸ Similarly, soft law navigates the *globalization paradox*,⁵⁹ in other words the tension between responding to challenges that exist across borders and the delicate subject of sacrificing national sovereignty. Unfortunately, the weight given to these advantages is generous. If the negotiations around the finalisation of guidelines already demand large amounts of resources, surely they would be better channelled towards treaty negotiations. Also, the benefits gained from navigating the *globalization paradox* have historically been too minimal compared to the lack of protection provided by guidelines such as the Basel Accords.⁶⁰ Further, the processes used by TRNs to draft new guidelines do not make room for the views of developing countries despite the expectation of compliance, giving rise to accusations of political

⁵³ L. Quaglia, 'The politics of state compliance with international "soft law" in finance', 32 *Governance* (2019), 45, 57.

⁵⁴ Financial Stability Board, *supra* note 49, 7.

⁵⁵ *Ibid.*, 6.

⁵⁶ Verdier, The Political Economy of International Financial Regulation, *supra* note 2, 1465, cites D. Borak, 'Bair Details Inside Story of Regulatory Clash Over Basel III', *American Banker* (2012), available at <https://www.americanbanker.com/news/bair-details-inside-story-of-regulatory-clash-over-basel-iii> (last visited 20 April 2021).

⁵⁷ Ingves, *supra* note 26.

⁵⁸ K. Alexander, 'Global Financial Standard Setting, the G10 Committees, and International Economic Law', 34 *Brooklyn Journal of International Law* (2009) 3, 861, 879.

⁵⁹ Segura-Serrano, 'International Economic Law at a Crossroads', *supra* note 42, 689.

⁶⁰ Linarelli, Salomon & Sornarajah, *supra* note 12, 208.

illegitimacy.⁶¹ The characteristics of TRNs do not lend themselves to solving regulatory issues; the regulators involved have been tasked with representing domestic interests, not to inspire international cooperation.⁶² There is also the ease with which States can ignore, or walk away from, commitments made to TRNs.⁶³ Finally, soft law develops not out of a long-term vision of what prudential regulation could and should look like, its development is *path-dependent* and *ad-hoc*, merely representing a series of isolated compromises.⁶⁴ According to Verdier, this is not a coincidence, as such an informal institution, lacking in cohesion, suits those looking to exert influence.⁶⁵

The proliferation of TRNs in the 1990s – with the strengthening of the Basel Committee, International Organization of Securities Commissions and the International Association of Insurance Supervisors – is indicative of the *fragmentation* of international law. Fragmentation in this context means the continual creation of regulatory bodies with “[...] overlapping jurisdictions and ambiguous boundaries”.⁶⁶ Benvenisti and Downs have described this phenomenon as a tool “[...] to undermine the normative integrity of international law”.⁶⁷ Powerful States maintain their position in the arena of international law using the decentralised nature of international regulation. According to Benvenisti and Downs, this is accomplished in two ways: hide the fact that developing countries are involved in a *repeating game*, i.e. make smaller States believe this particular negotiation is their only chance to protect their interests, and take away opportunities for developing countries to resolve their differences.⁶⁸ The prior may be accomplished through halting the establishment of a permanent law-creating and enforcing body (like a potential World Financial Organization [WFO]). The latter can be achieved through ensuring there are multiple, similar forums available for exploitation (such as the three TRNs mentioned above).

⁶¹ K. Alexander, R. Dhumale & J. Eatwell, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (2005), 153.

⁶² Verdier, ‘Transnational Regulatory Networks and Their Limits’, *supra* note 43, 121.

⁶³ UN, ‘Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System’ (2009), available at https://www.un.org/en/ga/econcrisissummit/docs/FinalReport_CoE.pdf, 107 (last visited 20 April 2021).

⁶⁴ Segura-Serrano, ‘International Economic Law at a Crossroads’, *supra* note 42, 684.

⁶⁵ Verdier, ‘The Political Economy of International Financial Regulation’, *supra* note 2, 1408.

⁶⁶ E. Benvenisti and G. W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, 60 *Stanford Law Review* (2007) 2, 595, 596.

⁶⁷ *Ibid.*, 597.

⁶⁸ *Ibid.*, 608.

The analysis of Quaglia around State compliance and the Basel Accords sheds some light on the process an international agreement goes through to become implemented domestically, and where the transplant often falls down.⁶⁹ Quaglia's starting point is the compliance records of the US and EU with Basel II and Basel III; the US complied with Basel III but not Basel II and the EU vice-versa, compliance with II but not III.⁷⁰ In both instances of non-compliance, when it came to implement the Accords domestically, this was the only stage at which domestic interest groups could hope to exert influence (international institutions are primarily active at the inter-governmental drafting stage). In the US, whilst the implementation of Basel II was being discussed, domestic banks won over politicians by highlighting the comparative disadvantage that Basel II would bring in comparison with international institutions, whose capital requirements would actually be reduced.⁷¹ European banks pressured domestic and regional parliamentarians by arguing that Basel III neglected characteristics of finance that were unique to Europe, namely European banks' links with the *real economy*.⁷² Quaglia points out that democratically elected politicians only play a significant role at the implementation stage. The initial drafters are domestic regulators, whose technical aptitude places them there ahead of parliamentarians, and lobbyists from international banks. Even at the implementation stage, the influence of finance remains, albeit in a different form. As Quaglia concludes, that difference deserves attention as it highlights a democratic deficit at the global level of financial regulation, where politicians and domestic interest groups are largely excluded.⁷³

C. Explaining the Dominance of Soft Law

There are three dominant theories that attempt to explain the current position of soft law within international finance: the historical path dependence approach, the contractarian approach and the political economy approach. Historical path dependence has its roots in the international relations theory of historical institutionalism, which argues that the foundational structures of institutions set the boundaries for future development.⁷⁴ In the context of IFR,

⁶⁹ Quaglia, *supra* note 53.

⁷⁰ *Ibid.*, 47.

⁷¹ *Ibid.*, 52.

⁷² *Ibid.*, 56.

⁷³ *Ibid.*, 58.

⁷⁴ O. Fioretos, 'Historical Institutionalism in International Relations', 65 *International Organization* (2011) 2, 376, 371.

much of the current system can be traced back to the Bretton Woods conference in 1944 that established the rules around fixed exchange rates but not a specific governing authority.⁷⁵ When those measures were abandoned in the 1970s, and finance took advantage of unrestricted capital flows, domestic regulators had to contend with a new era of globalization in the absence of a central international authority. Hence, we have the informal coordinating actions that have led to measures like the Basel Accords.⁷⁶ Lastra argues that this process is found elsewhere in international law and makes the point that there are ties between the historical development of *lex mercatoria* (commercial law) and *lex financier* (financial law).⁷⁷ In the case of the former, much current commercial law owes its foundations to the *lex mercatoria* of the middle ages – a series of uncodified customs around trade and maritime practices. Lastra provides three reasons why international financial law has progressed so precariously. First of all, the legal mandate to pursue a hard law regime has been absent. Secondly, regulatory changes have always been a reaction to something, not as part of a long-term plan. Finally, the relationship of mutual dependence that national governments have with their financial institutions has made them reluctant to relinquish any regulatory power to a global authority.

Another group of theorists have put forward a more sympathetic narrative framework to explain soft law's popularity: the contractarian approach. Abbott and Snidal argue that if international agreements are viewed as contracts, the decisions and attitudes of State actors are more easily understood.⁷⁸ In other words, the *contracting costs* associated with soft law are significantly more attractive than those associated with hard law.⁷⁹ The most politically contentious aspect of international cooperation is sovereignty; certain characteristics of soft law alleviate these concerns, such as escape clauses, substantive imprecision or discretion in delegating authority.⁸⁰ Similarly, the absence of being bound gives States the chance to evaluate the impacts of an agreement and may eventually lessen perceived costs if the agreement then becomes binding. The authors

⁷⁵ M. Waibel, 'Financial Crises and International Law', *University of Cambridge Faculty of Law Legal Studies Research Paper Series* (2019) 18, para. 34.

⁷⁶ Verdier, 'The Political Economy of International Financial Regulation', *supra* note 2, 1427.

⁷⁷ R. Lastra, 'Do We Need a World Financial Organisation?', 17 *Journal of International Economic Law* (2014) 4, 787, 795-797.

⁷⁸ K. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421.

⁷⁹ *Ibid.*, 434.

⁸⁰ *Ibid.*, 435.

offer a predictor for determining the likelihood of future agreements being soft law or hard law; on one end of the scale, if sovereignty costs and the level of uncertainty are both low, a hard law agreement is most likely. If only one variable is high, options around delegation and the precision of the agreements are explored. In the event that both variables are high, soft law becomes an inevitability.⁸¹ Unfortunately, the puzzle is not that simple – the contractarian approach requires a version of States' interests that excludes the influence of non-political actors such as domestic finance and lobby groups. The contractarian theory also falls down on its own terms as it assumes that where the likelihood of opportunism is high, the less attractive the soft law option is.⁸² However, the prevalence of regulatory arbitrage throughout the history of the Basel Accords defies this logic.⁸³ If the contractarians were correct, such a record of exploitation would have encouraged a shift towards a hard law regime.

The third approach to explaining the prevalence of soft law is the political economy approach, advocated by the likes of Verdier.⁸⁴ Verdier has three central issues with contractarian theory; first of all, soft law regimes have had a varied record of success – yes the regulation of bank capital reserves is multifaceted and thorough, however, moves to secure cooperation in areas like insurance have failed.⁸⁵ The contractarian approach cannot explain this failure despite its potential. The contractarians also point to “[...] the sheer multiplication of [...] bodies, reports and standards” as evidence of a system working well but this is not a measure of how well States implement or abide by measures.⁸⁶ Finally, it misinterprets the role that markets play in enforcing soft law.⁸⁷ Take the 1997 Asian financial crisis for example, with governments caught between foreign pressure to adopt international standards, and domestic pressure to resist, a *mock compliance* approach was adopted.⁸⁸ In other words, Asian governments complied with IFR on paper but not in practice, thereby undermining the validity of the market correction argument. Accounting for the prevalence of

⁸¹ *Ibid.*, 444.

⁸² Verdier, ‘The Political Economy of International Financial Regulation’, *supra* note 2, 1423.

⁸³ Beltratti & Paladino, ‘Basel II and regulatory arbitrage’, *supra* note 27, 195.

⁸⁴ Verdier, ‘The Political Economy of International Financial Regulation’, *supra* note 2, 1405.

⁸⁵ *Ibid.*, 1424-1425.

⁸⁶ *Ibid.*, 1425.

⁸⁷ *Ibid.*, 1424-1425.

⁸⁸ A. Walter, *Governing Finance: East Asia's Adoption of International Standards* (2011), 42-43.

soft law within financial regulation first requires accounting for the parties involved and why their interests might align with characteristics of soft law. Because of the perceived complexities of finance, regulating at the domestic level is often delegated to technocrats. When such agencies enter the realm of international cooperation, they prioritise domestic mandates and are reluctant to make strict commitments and agree to further oversight. Further, domestic regulators are more likely to accept an agreement that does not require domestic legislative changes, preferring to implement under their own mandate.⁸⁹ Such an arrangement also suits the financial industry, which maintains an open line of communication with domestic regulators, either through routine supervision or the ease with which employees move in between the public and private sector.⁹⁰ Despite the technocratic nature of soft law regimes, they are not immune from the dynamics of international relations, particularly the interests of the so-called *great powers* like the US or the EU.⁹¹ The absence of a World Trade Organization (WTO)-like independent institution suits more powerful States, who can take advantage of a disorganised regime to pursue policy objectives and choose a particular forum to suit their needs. Linarelli, Salomon and Sornarajah further evidence Verdier's version of events by highlighting how notions like rent-seeking and regulatory capture essentially reverse the expected power dynamic between regulator and the targets of regulation.⁹² Baker points to the link between the Institute of International Finance – a collective representation of the world's biggest banks – and Basel II as proof of regulatory capture. The Institute actually drafted the first version of the agreement and, through repeat consultations, effectively wrote Basel II.⁹³

D. The Future of Financial Regulation

Recent reception from domestic and regional regulators to Basel IV provides an insight into how new capital requirements will work going forward. In the EU, Directive 2019/878 (commonly referred to as CRD V)⁹⁴ – the EU's

⁸⁹ Verdier, 'The Political Economy of International Financial Regulation', *supra* note 2, 1431.

⁹⁰ *Ibid.*, 1433.

⁹¹ *Ibid.*, 1434.

⁹² Linarelli, Salomon & Sornarajah, *The Misery of International Law*, *supra* note 12, 208.

⁹³ A. Baker, 'Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance', 86 *International Affairs* (2010) 3, 647, 650.

⁹⁴ Council Directive 2019/878, OJ 2019 L 150/253.

implementation of Basel IV – permits banks to achieve capital requirements with debt, not just equity. The first EU bank to avail of these measures was Italy's UniCredit, who disclosed that its equity demands have been reduced by 0.8 percentage points, in contrast to the 1.1 percent increase stipulated for European banks under Basel IV.⁹⁵ Similarly, Valdis Dombrovskis from the European Commission has recently warned Britain against starting a regulatory *race to the bottom* if London's financial firms are to access the Single Market post-Brexit.⁹⁶ Such a remark is, first of all, quite ironic given the EU's generous interpretation of Basel IV. Secondly, the fact that the economic stability of the European continent going forward is dependent on threats, or the good will of politicians, highlights a blinding flaw in global financial regulation: compliance is voluntary. This puts the *soft law* approach under a microscope and requires an examination of its suitability in relation to securing compliance. For the purposes of this discussion, arguments about the future development of IFR are divided into the revolutionary and reformist views. Exploring the revolutionary view contains an account of the tension between globalization and international regulation. This section concludes with an account of recent theoretical and regulatory innovations into IFR, which will hopefully set the tone for future research.

I. The Revolutionary View: A New Global Authority

Rodrik has written extensively about the relationship between domestic politics and the trend towards globalization.⁹⁷ As he sees it, there is an insurmountable tension when it comes to advancing the following three objectives: increased globalization, strengthening the nation State and encouraging further democratic engagement.⁹⁸ Achieving all three is impossible, Rodrik argues, we can pursue only two. Rodrik asks us to picture a world economy that is wholly globalised – trade restrictions and barriers to capital flow are a thing of the past – the only role for a nation State in such circumstances is to ensure this

⁹⁵ P. Jenkins, 'Worrying signs that a great global deregulation has begun', *Financial Times* (2019), available at <https://www.ft.com/content/fc15abec-182e-11ea-8d73-6303645ac406> (last visited 20 April 2021).

⁹⁶ J. Bruntsden, S. Fleming & P. Stafford, 'EU chief issues Brexit warning over City of London access', *Financial Times* (2019) available at <https://www.ft.com/content/59569142-12c9-11ea-a7e6-62bf4f9e548a> (last visited 20 April 2021).

⁹⁷ D. Rodrik, *The Globalization Paradox; Democracy and the Future of the World Economy* (2012).

⁹⁸ *Ibid.*, 200.

borderless market is maintained.⁹⁹ Similarly, any interference with this *status quo* from domestic politics, for example by way of labour protection policies, could not be tolerated unless the globalization project is abandoned.¹⁰⁰ If sacrificing democracy is too unpalatable, and reversing globalization too unrealistic, then a move towards what Rodrik calls the “[...] ‘global governance’ option [...]” solves the dilemma.¹⁰¹ However, Rodrik goes on to rightly point out that present-day examples of shifts away from national sovereignty have been marred with resistance and controversy. Even within the EU, whose membership has a huge amount in common, both culturally and historically, full integration has been painstakingly slow and contentious. Rodrik further strengthens his point by highlighting the gap in average incomes within the EU and then internationally; in 2008, Ireland was the EU’s richest country, 3.3 times more so than Bulgaria, but this ratio is closer 190 for the World’s richest and poorest countries.¹⁰² Translating the EU federalisation project to a global context thus appears impossible. Rodrik’s recommendation in light of this, a shift away from globalization to an international order vaguely resembling the Bretton Woods system, would require a huge amount international cooperation – look at the dire circumstances of the post-World War II economy that laid the ground for the 1944 Bretton Woods Conference. Because of this, it is difficult to see how Rodrik’s solution solves his own trilemma; yes, it does somewhat resemble a compromise between sovereignty and globalization but it is not obvious where the political will for a 21st Century Bretton Woods will come from, despite its potential. The proponents of the original Bretton Woods, the US and UK, do not enjoy the power they once did, nor do they share the enthusiasm for cooperation that they once did. Further, the GFC shattered the power dynamics of international finance and, as is set out below, it is the Global South and East that are the source of regulatory innovation in the 21st Century.

Lastra accepts that the *trilemma* between globalization, democracy and sovereignty is insurmountable but argues that sovereignty is the correct sacrifice, not globalization.¹⁰³ Lastra goes on to make the point that, whilst there may be regulatory functions in finance best left to domestic regulators,

⁹⁹ *Ibid.*, 201.

¹⁰⁰ *Ibid.*, 202.

¹⁰¹ *Ibid.*, 202.

¹⁰² *Ibid.*, 217.

¹⁰³ R. Lastra, ‘The Globalization Paradox: Review of Dani Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy’, 11 *International Journal of Constitutional Law* (2013) 3, 809, 812.

enforcement is something that must be done at the international level.¹⁰⁴ In order to secure financial stability internationally, Lastra argues, markets require regulation, supervision and crisis management.¹⁰⁵ Lastra sets out the case for a WFO, akin to the WTO which initially would be tasked with cross-border dispute resolution and effectively addressing financial institutions that become insolvent.¹⁰⁶ The dispute resolution function would instil a degree of consistency in areas of finance that the international community has already agreed deserve attention. Lastra justifies prioritising insolvency by pointing to the collapse of the Lehman Brothers in 2008, a US-based investment bank with significant ties to international financial institutions.¹⁰⁷ Neither that scenario, nor a *bail out* arrangement is desirable, hence the need for a settled mechanism for resolving cross-border insolvency.

One important consideration that Lastra overlooks is that a potential WFO is a wholly different proposition to an organisation like the WTO. As Baxter sets out,¹⁰⁸ membership of the WTO comes with a very clear reward – uninhibited access to new markets. The reward within a WFO would presumably be financial stability but, firstly, this is not a guarantee and, secondly, would come at a great cost in terms of sovereignty. Additionally, punishing States that break WFO rules through exclusion would likely create new offshore financial centres.¹⁰⁹ Another difference between trade and finance is that the regulation of trade occurs for specific identifiable transactions and measures, whereas financial regulation involves supervising the daily activities of a variety of institutions, each with different structures and range of activities.¹¹⁰ There is also the problem that we may not be able to wait for the negotiation process to conclude.¹¹¹ Given the extra political costs associated with a WFO, and plight of the Doha Round of WTO negotiations – a series of talks that went on for 14 years with no overarching agreement reached¹¹² – it is unlikely that global finance will carry

¹⁰⁴ Lastra, 'Do We Need a World Financial Organisation?', *supra* note 77, 793.

¹⁰⁵ *Ibid.*, 793.

¹⁰⁶ *Ibid.*, 798.

¹⁰⁷ See generally, L. McDonald & P. Robinson, *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers* (2010).

¹⁰⁸ L. G. Baxter, 'Exploring the WFO Option for Global Banking Regulation', in L. Boule (ed.), *Globalisation and Governance* (2011), 113, 117.

¹⁰⁹ *Ibid.*, 117.

¹¹⁰ *Ibid.*, 116.

¹¹¹ *Ibid.*, 117.

¹¹² R. Azevedo, 'The Doha round finally dies a merciful death', *Financial Times* (2015), available at <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879> (last visited 20 April 2021).

on crisis free whilst a WFO agreement is finalised. On that point, if finance were to remain stable for such a long period of time, it would undermine the need for a WFO and sap whatever political will was there initially. There is also the fear that the mandate of a WFO will overlap and compete with the WTO, and raises the concerns associated with fragmentation.¹¹³ For Baxter, the debate should really focus on addressing the true cause of the GFC: bloated and highly complex SIFIs that are solely capable of bringing down the system.¹¹⁴ Reform then should focus on domestic solutions as these institutions depend on public backing.¹¹⁵ However, Baxter ignores the source of calls for a supranational regulator; domestic politics is ill-equipped to address large financial institutions because (a) tying SIFIs to a single jurisdiction is difficult and (b) SIFIs can wield a lot of power in domestic politics. As much as it irresponsible to wait for a WFO agreement before addressing issues in international finance, asking domestic politicians to step up is just as short-sighted.

The historical circumstances that led to the establishment of the WTO further delegitimises the WFO argument.¹¹⁶ Prior to the WTO, international trade law governed State conduct through the General Agreement on Tariffs and Trade¹¹⁷ and remedies were found under customary international law.¹¹⁸ It was not the case that the formation of the WTO brought with it unprecedented levels of international cooperation. The regulatory architecture of pre-WTO international trade, defined by recognised sources of international law, is not analogous to international finance's current soft law regime. There is also a stark difference between how States interact when it comes to perceived or actual breaches of trade law versus finance.¹¹⁹ If one State decides to impose import tariffs on another State's exports, the latter may be permitted to impose retaliatory measures.¹²⁰ It is difficult to see how this translates to finance – if one State's lax

¹¹³ Benvenisti & Downs, *supra* note 66, 595.

¹¹⁴ Baxter, *supra* note 108, 119.

¹¹⁵ *Ibid.*, 120.

¹¹⁶ M. Turk, 'Reframing International Financial Regulation after the Global Financial Crisis: Regional States and Interdependence, Not Regulatory Networks and Soft Law' 36 *Michigan Journal of International Law* (2014) 59, 60 [Turk, Reframing International Financial Regulation after the Global Financial Crisis].

¹¹⁷ *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 188.

¹¹⁸ *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *Yearbook of the International Law Commission* (2001), Vol. II(2), ch.IV.E.1, Art. 49-53.

¹¹⁹ Turk, 'Reframing International Financial Regulation after the Global Financial Crisis', *supra* note 116, 112.

¹²⁰ *Marrakesh Agreement establishing the World Trade Organization*, Annex 2, 15 April 1994, Art. 22, 1869 UNTS 401.

supervision leads to economic instability for another, is the latter entitled to relax regulatory oversight for its own banks? Turk, in making this point, does argue that, for the moment, regulatory reform should focus on SIFIs rather than trying to influence States' response to crises.¹²¹ Specifically, harmonising processes for bank resolutions, i.e. the manner in which a failed, internationally active bank's assets are to be liquidated. Turk's reasons for focusing on this measure are set out poorly: States would be able to "[...] streamline the complexity of regulatory compliance [...] and reduce [...] transaction costs [...]".¹²² Nevertheless, his suggestion has real merit as it identifies a major gap in the post-GFC regulatory response. As the analysis of Varotto and Zhao has demonstrated, remedying capital adequacy problems is only one aspect of tackling *too big to fail*.¹²³ Agreeing on a common resolution procedure for future banking crises would further that cause.

II. The Reformist View: Improving Soft Law

Dismissing the WFO solution on the basis that the sovereignty costs are too high also fails to account for the political economy and path dependence narratives.¹²⁴ As Verdier puts it, IFR "[...] may exist in an uneasy state of tension between pressures for reform and political and historical constraints on its evolution".¹²⁵ Even within these constraints, the current regulatory architecture can make short-term improvements. For one, the compliance capabilities of TRNs like the Basel Committee can be bolstered by allowing regulators from one country to inspect the large financial institutions of another.¹²⁶ However, Verdier has himself said that TRNs are not the apolitical, technocratic bodies that they promise to be,¹²⁷ and so, it is hard to imagine how this particular reform could avoid exploitation. Another idea involves recalibrating the balance between highly technical regulation and accessibility.¹²⁸ As many non-regulators are involved in securing compliance, assessing whether a State or institution

¹²¹ Turk, 'Reframing International Financial Regulation after the Global Financial Crisis', *supra* note 116, 115.

¹²² *Ibid.*, 115.

¹²³ Varotto & Zhao, 'Systemic risk and bank size', *supra* note 36, 14.

¹²⁴ Verdier, 'The Political Economy of International Financial Regulation', *supra* note 2, 1471.

¹²⁵ *Ibid.*, 1471.

¹²⁶ *Ibid.*, 1471.

¹²⁷ Verdier, 'Transnational Regulatory Networks and Their Limits', *supra* note 43, 163.

¹²⁸ Verdier, 'The Political Economy of International Financial Regulation', *supra* note 2, 1472.

is acting in accordance with regulation should be as simple as possible. In the context of the latest measures put forward by the Basel Committee, the likelihood of compliance may be increased by simplifying the large number of assets that have a specific risk-weight. The latest iteration of the Basel Accords is a vast improvement on Basel II but it illustrates the tension between technical prowess and accessibility. Such measures would however involve asking regulators to give up one of their trump cards as the more technical the regulation is, the more their perceived expertise is needed. Verdier's final recommendation is the strongest by far, rather than waiting for the onset of the next crisis to provide the political will to introduce binding regulations, set out a template in advance to reduce painstaking negotiation. Unfortunately, Verdier does not answer questions such as how will present-day regulators know enough about the next crisis to have an adequate solution in place? If that were the case, would those measures not already feature in the regulation? Nevertheless, the core of Verdier's idea is sound and is a realistic workaround to one of the main obstacles to formalising IFR. Leaving pre-treaty negotiations to TRNs during periods of economic stability is an area of governance research that deserves future attention.

Another strong opponent of the WFO option is Chris Brummer whose 2015 book *Soft Law and the Global Financial System* is, in the round, a defence of TRNs for finance's unique regulatory problems.¹²⁹ His proposals for reform, unsurprisingly, apply within the boundaries of the current architecture. If the possibility of a WFO is "small to non-existent",¹³⁰ Brummer's proposals are so practical and unambitious that it is hard to see potential for any significant improvements. He calls for regulators to be more persuasive in seeking compliance for reluctant international actors and for countries to abandon the *do what I say, not what I do* hypocrisy.¹³¹ Not only are these recommendations quite obvious but Brummer fails to explain where exactly in the IFR system these issues are most prevalent. To his credit, Brummer does echo a sentiment expressed by Verdier and stresses the need to be proactive and not wait for the next crisis to incentivise further cooperation.¹³² Because soft law depends on market forces to secure compliance, a "critical mass" of adoption is needed to highlight the risk of ignoring a measure.¹³³ The earlier this process takes place, the earlier stability may be achieved – and ideally at a pre-crisis stage. Brummer

¹²⁹ Brummer, *Soft Law and the Global Financial System*, *supra* note 3.

¹³⁰ *Ibid.*, 329.

¹³¹ *Ibid.*, 336, 340.

¹³² *Ibid.*, 334.

¹³³ *Ibid.*, 334.

also makes the point that IFR still has a legitimacy problem owing to the hegemony of the Anglo-American model pre-GFC but argues that this can only be rectified slowly as regulators and financial institutions start to take regulatory risk seriously.¹³⁴ It is worrying that Brummer fails to see the circularity here – does IFR need legitimacy to secure compliance or does it require compliance in order to reclaim legitimacy?

III. Theoretical and Regulatory Innovations

Whilst the debate on IFR's problems typically revolves around its soft law nature, Brummer goes a step further and questions the usefulness of the hard law/soft law dichotomy.¹³⁵ The lines that theoretically divide hard and soft law are much less distinct upon closer inspection. For instance, the threat of reputational damage exists in both regimes, but the presumption is that a breach of a hard international law instrument is far more harmful. As far as Brummer can see, the hard law of some United Nations Resolutions concerning human rights abuses or environmental protection are often disregarded. By contrast, for regulators in a soft law regime to remain credible as reforms progress, it is essential they be seen to be trustworthy. Brummer goes on to stress that, when analysing an international legal instrument, its *true nature* is not found in its formal status *but the range and activity of supplemental measures supporting the legal mandate*.¹³⁶ Brummer's point is undermined by the absence of concrete examples but it is valuable in encouraging us to look beyond the hard/soft law debate for other solutions.

Most commentators ignore the role that banking and finance plays in upholding the social contract and whether future regulation has space for this. Linarelli, Salomon and Sornarajah's account of how finance has neglected this role is a crucial addition to the regulation debate.¹³⁷ One important social function that financial institutions undertake is money creation through the sale of credit.¹³⁸ That comes with significant discretion over how to allocate this money, a decision typically dependent on creditworthiness and/or a high chance of repayment. These distributive considerations are also contingent on economic

¹³⁴ *Ibid.*, 342.

¹³⁵ *Ibid.*, 179.

¹³⁶ *Ibid.*, 180.

¹³⁷ Linarelli, Salomon & Sornarajah, *The Misery of International Law*, *supra* note 12, 206.

¹³⁸ The role of central banks in this process is diminishing; Linarelli, Salomon & Sornarajah cite Adair Turner, *Between Debt and the Devil: Money, Credit, and Fixing Global Finance*, (2016), 58.

growth with banks less willing to lend during a downturn. On top of that, the impacts on the price of assets makes debt even more burdensome for the ordinary individual. With domestic governments relying on finance to carry out what was once viewed as a central function of the State,¹³⁹ the possibility of States paying any of the sovereignty costs associated with deeper regulatory cooperation are lowered. This all amounts to a “[...] moral failure” on the part of IFR,¹⁴⁰ but Linarelli, Salomon and Sornarajah do not offer any detailed plans for the future. Regulating how governments interact with their domestic banks when it comes to the provision of credit could never be seriously considered at the international level.

Other commentators have focused on the future of theorising the place TRNs have within IFR.¹⁴¹ There is a parallel to be drawn between how the GFC ruptured the *orthodox* consensus within economics¹⁴² and the network theory that underpinned the soft law rationale.¹⁴³ As the *efficiency* payoff of a totally free market became a tougher sell,¹⁴⁴ so too did the theory that soft law is the most efficient way to regulate international finance to the detriment of distribution and legitimacy considerations.¹⁴⁵ Alternative schools of thought have emerged as a result; advocates for a Global Administrative Law (GAL) argue that attempts to democratise soft law would be futile.¹⁴⁶ As such, principles of administrative law should be incorporated into global governance structures to fill the gaps and introduce elements of liberal democracy such as accountability, transparency and proportionality.¹⁴⁷ As de Stefano correctly points out though, this same argument is used in a domestic setting to justify the democratic deficit within

¹³⁹ B.A. Simmons, ‘The Legalization of International Monetary Affairs’, 54 *International Organization* (2000), 3, 573, 573.

¹⁴⁰ Linarelli, Salomon & Sornarajah, *The Misery of International Law*, *supra* note 12, 225.

¹⁴¹ C. de Stefano, ‘Reforming the Governance of International Financial Law in the Era of Post-Globalization’, 20 *Journal of International Economic Law* (2017) 3, 509.

¹⁴² V. A. Beker, ‘From the Economic Crisis to the Crisis of Economics’, in B. Moro & V.A. Beker (eds), *Modern Financial Crises, Financial and Monetary Policy Studies*, vol. 42 (2016), 183.

¹⁴³ De Stefano, *supra* note 141, 527.

¹⁴⁴ See generally, H-J. Chang, *23 Things They Don't Tell You about Capitalism*, (2011).

¹⁴⁵ De Stefano, *supra* note 141, 527.

¹⁴⁶ D. Etsy, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’, 115 *Yale Law Journal* (2006) 7, 1490, 1503.

¹⁴⁷ M. Barr & G. Miller, ‘Global Administrative Law: The View from Basel’, 17 *European Journal of International Law* (2006) 1, 15, 18.

an independent administrative agency.¹⁴⁸ However, such bodies are answerable to the legislature and the same cannot be said for TRNs in the area of IFR.¹⁴⁹ By contrast, the *democratic-striving* approach asserts that in any instance where authority is exercised, democratic legitimacy must be a priority.¹⁵⁰ It gets around the GAL argument that democratisation is utopian by embracing an *inchoate* form of democracy that works to “prevent processes from becoming arbitrarily closed or captured” and focuses on political equality.¹⁵¹ Again, de Stefano is unconvinced that the democratic-striving approach addresses the root causes of IFR’s legitimacy problems as identifying what communities or political actors are to be engaged is left unanswered.¹⁵² Whilst this may be the case, de Stefano is too quick to dismiss the normative potential of the democratic-striving approach as its one of the few reforms that is aimed at systemic flaws but still operates within the boundaries of soft law.

One striking aspect of the GFC was how *non-global* its origins were. Yes, the consequences of the crisis were felt around the world but it was the financial systems of the US and Europe that were the source of the problems. Within the context of this reputational crisis for international finance and its central players, governments of the Global South and East had an opportunity reform their financial systems on their own terms.¹⁵³ As Grabel points out, there have been two trends in regional cooperation in the Global South and East – reserve pooling arrangements and development finance institutions.¹⁵⁴ The most relevant for issues of international governance are reserve pooling arrangements, which in some instances had been in place before the crisis. However, after 2008, existing institutions such as the Latin American Reserve Fund and the Chang Mai Initiative expanded significantly to extend liquidity support to their

¹⁴⁸ De Stefano cites L. Schultz Bressman & R. B. Thompson, ‘The Future of Agency Independence’, 63 *Vanderbilt Law Review* (2010) 3, 599, 612.

¹⁴⁹ De Stefano, *supra* note 141, 529.

¹⁵⁰ G. de Búrca, ‘Developing Democracy Beyond the State’, 46 *Columbia Journal of Transnational Law* (2008) 2, 101, 129.

¹⁵¹ *Ibid.*, 131-133.

¹⁵² De Stefano, *supra* note 141, 530.

¹⁵³ I. Grabel, ‘Post-Crisis Experiments in Development Finance Architectures: A Hirschmanian Perspective On ‘Productive Incoherence’, 73 *Review of Social Economy* (2015) 4, 388, 389 [Grabel, Post-Crisis Experiments in Development Finance Architectures].

¹⁵⁴ I. Grabel, ‘Financial Crises and the Emergence of New Financial Architectures: Towards a Post-Neoliberal World’, in D. Barrowclough & R. Gottschalk (eds), *Solidarity and the South, New Directions in Long-Term Development Finance* (2017), 24, 26.

regions.¹⁵⁵ Similarly, two new reserve pooling arrangements were established – the Eurasian Fund for Stabilization and Development and the Contingent Reserve Arrangement.¹⁵⁶ These measures are not monumental shifts in the global architecture but they do suggest there are cracks in the hegemony.¹⁵⁷ As such, the Global South and East may be the source of future innovations in regulating financial institutions. A further point of note is the sweeping reforms taken by Ecuador in the early stages of the GFC. For instance, the government of President Correa established a liquidity fund that was funded by taxes paid by banks, as well as requiring that 45% of bank liquid assets be held domestically.¹⁵⁸ The partial effect of these measures was that when the crisis took hold, and oil prices plummeted (Ecuador's main export), its economy only initially shrank by 1.3% of GDP and had returned to pre-recession levels within 2 years.¹⁵⁹ Of course, implementing such reforms on a global scale is a non-starter, however they are further proof that the Global South and East are the primary source of ambition in the future of financial regulation.

E. Conclusion

At the time of writing, the global financial system is coming face-to-face with its latest challenge as the Covid-19 pandemic takes an unprecedented toll on the health of economies throughout the world.¹⁶⁰ In response, the Basel Committee has deferred until 2023 the implementation date of the December 2017 version of Basel III.¹⁶¹ It is too early to judge the impact this measure may

¹⁵⁵ *Ibid.*, 26.

¹⁵⁶ *Ibid.*, 27.

¹⁵⁷ Grabel, 'Post-Crisis Experiments in Development Finance Architectures', *supra* note 153, 407.

¹⁵⁸ M. Weisbrot, J. Johnston & S. Lefebvre, Centre for Economic and Policy Research, 'Ecuador's New Deal: Reforming and Regulating the Financial Sector' (2013), available at <https://cepr.net/documents/publications/ecuador-2013-02.pdf> (last visited 20 April 2021), 3.

¹⁵⁹ *Ibid.*, 16.

¹⁶⁰ R. Partington & J. Kollwe, 'Dow suffers biggest-ever points loss as FTSE 100 hits eight-year low', *The Guardian* (2020), available at <https://www.theguardian.com/business/2020/mar/16/markets-hit-by-further-losses-despite-us-interest-rate-cut-willie-walsh-ba-coronavirus> (last visited 20 April 2021).

¹⁶¹ Basel Committee on Banking Supervision, 'Governors and Heads of Supervision announce deferral of Basel III implementation to increase operational capacity of banks and supervisors to respond to Covid-19' (2020), available at <https://www.bis.org/press/p200327.htm> (last visited 20 April 2021).

have, but it does exemplify the speed with which soft law can respond. Global finance was blindsided in 2007 by the complexity of the financial products associated with the US mortgage market, and underestimated the impact of the Greek sovereign debt crisis on the Eurozone. Whilst the Basel Committee has promised to remedy its previous mistakes, financial regulators will likely still have to contend with further unfamiliar challenges. Some argue that the private corporate sector debt – specifically the giants of technology – is another weak point in the system.¹⁶² Others stress the need for regulators to start thinking about the impact the climate crisis will have on global finance with insured losses due to weather amounting to \$55 billion a year (and rising).¹⁶³ The FSB regards nine insurance firms as G-SIBs.

This paper has argued that the Basel Accords are not fit for purpose. Their development has been rife with difficulties. Basel I was undone by bias against developing countries and Basel II and III recklessly allowed banks to determine their own capital requirements. The notion that finance requires a degree of flexibility and self-regulation is undermined by internal flaws that remain ignored. Banks easily sidestep rules, keep transactions off balance sheets, and regulators may be overly focused on bank size. In addition, the theory that supposedly supports soft law in finance does not play out in practice. TRNs like the Basel Committee shield finance from politics and are fora for technocrats and lobby groups.

The current state of IFR is a direct product of the questionable intentions of domestic regulators and industry insiders, who have been successful in keeping IFR away from political pressures. Some proponents of soft law may like to argue that it is simply a better approach from a cost-benefit analysis. However, the system is tailored to the interests of those involved.

Despite the undeniable failures of the Basel Accords, the advocates of a centralised financial authority resembling the WTO are unconvincing. A return to Bretton Woods is not feasible due to recent monumental shifts in global economic and political influence. We also cannot draw a direct comparison between the nature of international trade law and the nature of financial regulation – the WTO has, in some ways, very apparent membership advantages. At the

¹⁶² R. Foroohar, 'How big tech is dragging us towards the next financial crash', *The Guardian* (2019), available at <https://www.theguardian.com/business/2019/nov/08/how-big-tech-is-dragging-us-towards-the-next-financial-crash> (last visited 20 April 2021).

¹⁶³ A. Tooze, 'Why Central Banks Need to Step Up on Global Warming', *Foreign Policy* (2019), available at <https://foreignpolicy.com/2019/07/20/why-central-banks-need-to-step-up-on-global-warming/> (last visited 20 April 2021).

same time, it is difficult to endorse the efforts of those seeking reform within the current soft law system. Soft law reforms would merely be an extension of the current architecture, the basis of which is severely lacking. As such, it is my view that the future of financial regulation lies beyond the confines of the hard/soft law debate and the hegemony of Global North-led governance. Democratic legitimacy and distributional impact must become priorities within IFR. Innovations in the Global South and East, as well as the damage done to those regions in the Accords, have shown that the involvement of those States is non-optional going forward.

The politics and problems around the procurement of Covid-19 vaccines has exposed the perils of interpreting truly international concerns as solely domestic issues. We are only just beginning to see the scale of the gaps between the winners and losers. Furthermore, as damaged economies cherish the Dollar swap lines the US Federal Reserve has put in place to preserve liquidity, a new era of cooperation becomes not just optional but almost inevitable. Even for heavy hitters like the US and the EU, taking advantage of the weaknesses of soft law in such an interconnected system is short-sighted. The mask is starting to slip on soft law within IFR and a series of impending crises may just rip it off for good.

The Evolution of the Prohibition of Genocide: From Natural Law Enthusiasm to Lackadaisical Judicial Perfunctoriness – And Back Again?

Julia Klaus*

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Abstract

International legal scholarship and practice have reached a point where it is undisputed that the prohibition of genocide has the status of *jus cogens* and entails *erga omnes* obligations. It is, however, astonishing how little academic focus has been dedicated to the normative development leading to this extraordinary rank. In a legal regime with as little hierarchical structure as public international law, examining the birth process of such a norm promises considerable insights into normative formation in general and may inform jurisprudential theories on the nature of international law. This article illustrates the evolution of the prohibition of genocide by outlining the way to the 1948 UN Genocide Convention and the later interpretations of the norm. It traces the origin of the genocide prohibition to naturalistic ideas of overarching *laws of humanity* in international law and follows its development into the early 21st century. An analysis of international jurisprudence reveals that, after the *jus cogens* status of the prohibition of genocide and its *erga omnes* dimension had been settled, international judges handled the norm in a surprisingly lackadaisical and perfunctory manner. The very recent ICJ order on provisional measures in the *Myanmar Genocide* case potentially marks a return towards a deeper focus on moral facts determining the prohibition that point to naturalistic theories persisting, notwithstanding the positivistic mainstream approaches to international law. The article contributes to a more accurate picture of and greater academic interest in these naturalistic undercurrents.

A. Introduction

“There can be no more important issue, and no more binding obligation, than the prevention of genocide.”¹

As of this writing, the prohibition of genocide has undoubtedly reached the status of a *jus cogens* norm and is an *erga omnes* obligation.² The best approach to analyze how it reached this extraordinary rank in public international law – a legal field with almost no hierarchy – is to scrutinize a two-step densification process. The first step therein is the general evolution of the genocide prohibition, while the second step is its attainment of the outstanding rank as *jus cogens* with *erga omnes* dimensions. The dynamics within public international law render fruitless any attempt to draw a clear line between these steps. Nevertheless, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter *Genocide Convention* or *Convention*)³ provides a suitable reference point with a panorama of the developments before and after its adoption in 1948.

On 9 December 1948, the United Nations (UN) General Assembly unanimously passed Resolution 260 (III) and, therein, the Genocide Convention. As the first-ever codification of the prohibition of genocide, the Convention marks the central milestone in the evolution of that international legal norm. According to its Article I, the contracting parties *confirmed* that genocide was a crime under international law. This terminology reflects the States’ opinion that

¹ K. Annan, *Address by Secretary-General Kofi Annan to the Stockholm International Forum*, UN Doc SG/SM/9126, 26 January 2004.

² *Prosecutor v. Kupreskić et al.*, Judgement, IT-95-16-T, 14 January 2000, 203-204, paras 519-520; J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (2012), 595-596; J. A. Frowein, ‘Genocide’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3 (1991-2001), 65, 67; while *jus cogens* refers to the peremptory nature of a norm, the compliance with *erga omnes* norms is owed to the whole State community; see further *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgement, ICJ Reports 1970, 3, 32, paras 33-34 [Barcelona Traction Case]; *Prosecutor v. Furundžija*, Judgement, IT-95-17/1-T, 10 December 1998, 58-59, para. 153; M. Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, 59 *Law and Contemporary Problems* (1996) 4, 63, 66; M. Knorr, ‘The International Crime of Genocide: Obligations *Jus Cogens* and *Erga Omnes*, and their Impact on Universal Jurisdiction’, 7 *Essex Human Rights Review* (2011) 2, 32, 36; J. Wouters & S. Verhoeven, ‘The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide’, 5 *International Criminal Law Review* (2005) 3, 401, 408.

³ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

genocide had been a crime and, as such, prohibited even before 1948.⁴ But when had the prohibition then come into being?

The Genocide Convention protects groups that had already been protected to some extent as so-called *national minorities* prior to World War II.⁵ It addresses not only States but also individuals – a dichotomy linking the Convention to the establishment of an international criminal justice system.⁶ Both of these developments – national minorities protection and international criminal justice – were accompanied by the evolution of international humanitarian law, with which they stood in relationships of mutual influence.⁷

The first part of this article follows the interweaving threads of these three legal disciplines. The second part is a close-up of the discourse in the UN immediately preceding the adoption of the Genocide Convention. The third part moves beyond 1948, where international jurisprudence becomes the most instructive but not exclusive source for the subsequent career of the genocide prohibition. The fourth part is another close-up, this time on the International Court of Justice (ICJ) proceedings in the *Myanmar Genocide* case that attracts new attention for the ultimate determinants of the genocide prohibition.

Analytically, this article rests on the jurisprudential notion of legal facts and their ultimate determinants. Legal facts are facts about the existence or the content of a particular legal system.⁸ It is, e.g., a legal fact about the content of international law that, today, the commission of genocide is prohibited, States are under an obligation to prevent and punish it, and perpetrators of genocide incur direct international criminal liability. Legal facts are never ultimate facts but always determined by other facts,⁹ which is a crucial recognition for any study of the processes by which legal norms evolve. What other facts are there that *ultimately* determine legal facts?

Positivist and naturalistic approaches to law respond to that question differently. Legal positivism asserts that all legal facts are ultimately determined by social facts, at times also referred to as descriptive facts, alone. Different

⁴ C. Tams, L. Berster & B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (2014), 39.

⁵ The protection extends to national, ethnic, racial and religious groups; see *Prosecutor v. Krstić*, Judgement, IT-98-33-T, 2 August 2001, 195, para. 556.

⁶ W. A. Schabas, 'Genocide in International Law and International Relations Prior to 1948', in C. Safferling & E. Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (2010), 19, 22 [Schabas, Genocide Prior to 1948].

⁷ *Ibid.*

⁸ S. J. Shapiro, *Legality* (2011), 25.

⁹ *Ibid.*, 26.

strands of positivist theories disagree on the nature of these social facts, but they can generally be characterized as non-normative, non-evaluative, and contingent. Legal positivism is not necessarily blind to morality and values but can only take them into account when intermediated by social facts. Naturalistic approaches to law hold that all legal facts are ultimately determined by social and moral facts, the latter also known as value facts, meaning that there are moral or value constraints on legality, i.e. the property of being law. Unsurprisingly, different strands of natural law theories disagree on the nature of these moral facts, but they can generally be characterized as normative or evaluative.¹⁰

This analytical jurisprudential basis clarifies that the answer to the question of how and when exactly the prohibition of genocide acquired its legality depends on whether one follows a positivistic or a naturalistic legal theory. The aim of this article is not to take sides by claiming to find anecdotal evidence for one or the other approach in the evolution of the genocide prohibition. Instead, it takes an observational point of view in retracing this evolutionary history and analyzing the theoretical assumptions that underlay the involvement of and contributions by various participants to the process. As such, the article is a pre-study for further research applying, for example, a jurisprudential anecdotal strategy,¹¹ and hopes to stir interest in international law theory.

B. The Long Way to the Genocide Convention: Three International Law Disciplines on the Weaving Loom

The content of the prohibition of genocide as it is codified in the Genocide Convention finds its genealogy in three distinct disciplines of international law. Whereas minority protection and international humanitarian law will be examined from the 16th century until 1920 and 1914 respectively, the development of international criminal law relevant for the prohibition of genocide

¹⁰ *Ibid*, 27; M. Greenberg, 'How Facts Make Law', 10 *Legal Theory* (2004) 3, 157; these different understandings are not only discernible in the developments leading to the establishment of the prohibition of genocide as an international legal rule. They also affect its interpretation: Positivists will make empirical enquiries into social facts, whereas naturalists will engage in moral and political philosophy to justify their position; see Shapiro, *supra* note 8, 29. The relevance of positivistic v. naturalistic approaches for interpretation will become particularly clear in the context of the ICJ *Myanmar Genocide Order*, see *infra* part E.

¹¹ An anecdotal strategy is a strategy of research imagination supposed to "[...] stimulate thought about law through the examination of anthropological and historical evidence about the formation and operation of legal systems [...]"; see Shapiro, *supra* note 8, 21-22.

began during the First World War and invited these disciplines' interweaving during the subsequent three decades leading up to the adoption of the Genocide Convention in 1948.

I. Minority Protection and (Mostly) Social Facts

The earliest roots of minority protection that are of interest regarding the groups protected by the genocide prohibition lead back in history by almost 500 years. The struggle for minority protection for the coming centuries was a predominantly non-normative struggle for power. This section will move between reconstructing instances of such struggle in the internal or domestic as well as the external or non-domestic spheres of States.

After the turmoil of the Protestant Reformation since 1517, rulers in Central Europe were confronted with demands for assurances to protect religious minorities. In the 1552 Treaty of Passau and in the 1555 Religious Peace of Augsburg, the Holy Roman King and later Emperor Ferdinand I guaranteed to treat his Protestant subjects equal to the Catholic majority under his reign.¹² The prince-electors of Protestant faith had conducted a successful insurrection against Ferdinand's brother and predecessor, Karl V, after which the Catholic electors pressured Ferdinand to finally settle the religious dispute.¹³ Both of these instruments were later confirmed in the 1648 Peace of Westphalia,¹⁴ which brought an end to the Thirty Years' War (1618-48) by establishing the concept of State sovereignty that still dominates today's mainstream approaches to international law. Ferdinand's concession that had helped to hold the Holy Roman Empire together in the 16th century thus shaped the external equilibrium of the States in the new Westphalian system.

This dominance of minority protection being grounded in social facts becomes even clearer when moving forward beyond the end of the Holy Roman Empire in 1806 and to the reorganization of Europe at the 1815 Congress of Vienna, which expands the focus from religious minorities to ethnic and national ones. When Poland was apportioned among Prussia, Austria, and Russia, the

¹² *Treaty of Passau*, 2 August 1552, paras 6, 8, 9, 15, 16, 23, 25, 28, as reprinted in V. H. Drecoll, *Der Passauer Vertrag (1552)* (2000), 95-134; 'Religious Peace of Augsburg' (1555), available at https://www.lwl.org/westfaelische-geschichte/portal/Internet/finde/langDatensatz.php?urlID=739&curl_tabelle=tab_quelle (last visited 10 March 2021).

¹³ W. Jones & W. Russell, *The History of Modern Europe* (1842), 639-642.

¹⁴ *Treaty of Osnabrück*, 24 October 1648, Holy Roman Empire – Sweden, Art. 5(1)-(3), 1 ConTS 119; *Treaty of Münster*, 15 May 1648, Holy Roman Empire – France, para. 47, 1 ConTS 271.

Prussian emperor Friedrich Wilhelm III emphasized that the Poles under his reign would not have to repudiate their religion, language, and nationality.¹⁵ Prussia enacted a language ordinance in 1823, acknowledging Polish as a sort of tribal language, while German had to be studied and used as a second language only. The responsible education minister explained that Prussia aimed not to *denationalize* or *Germanize* Poland.¹⁶ What might appear to be a glance of normative reasoning was in fact mere compliance with the Final Act of the Vienna Congress that, as a last reminiscence of the Russian Tsar's idea of a reunified Poland, contained a clause on the respect for Polish national interests.¹⁷ The seemingly moral-based German rescript rested on plain power politics. When Poland was to become formally independent sooner or later, it would still need the protection of a larger European power. The memory of good treatment under emperor Friedrich Wilhelm III would hopefully make Polish leaders turn to their Western neighbor then.

The second half of the 19th century was characterized by instability in the Balkans and in the Ottoman Empire, which largely originated in the 1856 Treaty of Paris concluded by the Ottoman Empire and Russia after their Crimean War.¹⁸ The Ottoman Empire's enemies put peace negotiations under the condition that the Empire adopt national laws protecting its non-Muslim population.¹⁹ Russia and its allies acted as protecting powers mostly for Christians, although religious considerations blurred with ideas of ethnic bonds. The Sublime Porte, the Ottoman government, relented by passing the Second Ottoman Reform Act – a law it never intended to implement internally. When the Christian Armenians requested that they be actually granted the rights guaranteed in the Act, they suffered a series of massacres.²⁰ The Sublime Porte did not show constraint by normative facts and simply shook off the negotiated social facts by which the other powers had sought to make minority protection a binding legal obligation.

¹⁵ H. Delbrück, *Weltgeschichte*, Vol. 5 (1923-1928), 411.

¹⁶ M. Broszat, *Zweihundert Jahre deutsche Polenpolitik*, 2nd ed. (1972), 90.

¹⁷ J. A. R. Marriott & C. G. Robertson, *Evolution of Prussia: The Making of an Empire* (1937), 257-258.

¹⁸ There are multiple bilateral and multilateral international treaties referred to as *Treaty of Paris*. The one referred to here was the *Peace Treaty of Paris*, 30 March 1856, Art. 9, 114 ConTS 409.

¹⁹ V. N. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', 14 *Yale Journal of International Law* (1989) 2, 221, 234.

²⁰ *Ibid.*, 221, 234-235, 242, 318-319.

The Armenians were not the only minority group suffering in the Ottoman Empire. One particular massacre sparked the invocation of moral determinants of legal minority protection: In 1876 the Sublime Porte quelled the Bulgarian April Rebellion in a manner so gruesome that its graphic accounts in the emerging mass medium newspaper led to calls for consequences from all over Europe.²¹ The English politician William Gladstone pressed for a suspension of any British assistance to the Ottoman government up until the individual perpetrators' punishment, as well as collective punishment in form of a complete Ottoman withdrawal from Bulgaria, Bosnia, and Hercegovina.²² Victor Hugo, the French national poet and statesman, held an emotional speech in the National Assembly, based on which he published the discourse *Pour la Serbie*: "Crimes are crimes, and a government is no more allowed to become a murderer than any individual".²³ Hugo exchanged letters with the Italian freedom fighter and national hero Giuseppe Garibaldi, whose protest against the Bulgarian massacre sparked public demonstrations against the Sublime Porte in Italy.²⁴ Other famous Europeans without political mandate or mission also raised their voices to condemn the atrocities, e.g. Oscar Wilde and Leo Tolstoy.²⁵

This European public discussion evidences a collective perception of the Bulgarian horrors as intolerably unjust and immoral. Such discourse and demands themselves are social facts but what is invoked in their content are moral facts, which leads to the analytical jurisprudential question of whether these moral facts are also ultimate determinants of legal facts or whether it is merely their invocation in a social act that renders them potential to determine legal facts. Both possible answers leave space to acknowledge that normative considerations have been a decisive factor for the initiation and fueling of legal norm-building processes far beyond the prohibition of genocide. Following the 1876 Bulgarian massacre, they had finally stepped on the scene of minority protection.

²¹ Compare the renowned letters by the Daily News correspondent: J. A. MacGahan, *The Turkish Atrocities in Bulgaria* (1876), available at <https://archive.org/details/MacGahanTurkishAtrocitiesInBulgaria/page/n9/mode/2up> (last visited 10 March 2021); see also A. Skordas, 'Mass Media, Influence on International Relations' (2014), in A. Peters & R. Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, paras 46-47.

²² W. E. Gladstone, *Bulgarian Horrors and the Question of the East* (1876), 38.

²³ V. Hugo, *Actes et Paroles IV: Depuis l'Exile* (1880-1926), 6 (translation by author).

²⁴ J. A. Frey, *A Victor Hugo Encyclopedia* (1999), 104.

²⁵ R. Jackson & I. Small (eds), *The Complete Works of Oscar Wilde*, Vol. 1 (2000), 237-238; W. Geier, *Bulgarien zwischen West und Ost vom 7. bis 20. Jahrhundert* (2001), 10.

The Russian Empire considered that it had sufficiently strong ethnic links to the Bulgarians to justify another war against the Ottoman Empire in 1877. The Russian campaign, an early form of humanitarian intervention in light of the previous year's massacre, ended with a devastating defeat of the Ottomans within a year.²⁶ In its aftermath, the European powers made new social facts by forcing the independence of the Christian nations of Montenegro, Serbia, and Romania in the 1878 Treaty of Berlin,²⁷ while Bulgaria became an autonomous region under Ottoman suzerainty.²⁸ That very Treaty of Berlin was the predecessor of the later minority protection treaties under the aegis of the League of Nations,²⁹ but also intensified internal tensions between the Sublime Porte and its non-Muslim subjects.³⁰

These minority protection treaties were a result of World War I and a turn to preventative approaches. When the States assembled at the Paris Peace Conference, US President Woodrow Wilson declared that nothing endangered world peace as much as startlingly bad treatment of minorities.³¹ The Romanian delegate Bratiano added that not a single nation questioned the need for stronger minority rights.³² To assure more robust protection, the Allied and Associated Powers obliged the new nation-States forming after World War I to accept the following provision in their respective peace treaties:

“[The State] undertakes to assure full and complete protection of life and liberty to all inhabitants of [the State] without distinction of *birth, nationality, language, race or religion*.

²⁶ Dadrian, ‘Genocide as a Problem of National and International Law’, *supra* note 19, 239-240.

²⁷ *Treaty of Berlin for the Settlement of Affairs in the East*, 13 July 1878, Art. 26, 34, 43, 153 ConTS 171.

²⁸ *Ibid.*, Art. 1-12.

²⁹ W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2009), 18 [Schabas, Genocide: Crime of Crimes].

³⁰ Dadrian, ‘Genocide as a Problem of National and International Law’, *supra* note 19, 240-242, 318-319.

³¹ Office of the Historian, United States Department of State, *Foreign Relations of the United States: The Paris Peace Conference, 1919*, Vol. 3 (1943), 406.

³² *Ibid.*, 409.

All inhabitants of [the State] shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.³³

These positive legal provisions, for the first time, precisely listed criteria of discrimination, foreshadowing what would coagulate in the Genocide Convention almost three decades later. Another result of the Paris Peace Conference was the foundation of the League of Nations in the Treaty of Versailles.³⁴ A precondition for the membership of Albania, Lithuania, Latvia, Bulgaria, and Greece was that they each provided a unilateral declaration on minority protection reflecting the above-cited clause in the peace treaties.³⁵

Overall, minority protection had long been mostly a question of protecting religious minorities that were majorities in other States and could therefore gain militarily powerful protectors willing to intervene on their behalf. The undisturbed dominance of social facts lasted well into the second half of the 19th century until widely accessible media reports of atrocities spurred public debate that entailed recourse to moral facts. After World War I, the victorious States assembled at the Paris Peace Conference and achieved at least a formal transition from protective power patterns to guardianship of the new League of Nations, but this essentially rested on the social fact of their prevailing position and ability to dictate terms of minority protection. To not much surprise, once such social facts change due to shifting positions of power or willingness to enforce it, legal facts not determined by persisting moral facts may lose their legality. This has to be borne in mind throughout the next section as it offers an explanation of the striking difference between the development of minority protection and

³³ *Treaty between the Principal Allied and Associated Powers and Poland*, 28 June 1919, Art. 2, 225 ConTS 412 (emphasis added); *Treaty between the Principal Allied and Associated Powers and Czechoslovakia*, 10 September 1919, Art. 2, 226 ConTS 170; *Treaty between the Principal Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes*, 10 September 1919, Art. 2, 226 ConTS 182; *Treaty between the Allied and Associated Powers and Greece*, 10 August 1920, Art. 2, 28 LNTS 243.

³⁴ *Treaty of Versailles*, 28 June 1919, Art. 1-26, 225 ConTS 188.

³⁵ *Minority Schools in Albania*, Advisory Opinion, PCIJ Series A/B, No. 64, 7 (1935); the League of Nations' minority protection system was as ineffective as the piecemeal approach taken in the peace treaties since 1850. While the German National Socialists protracted applying the Nuremberg Racial Laws in Upper Silesia because these laws violated a minority protection treaty between Germany and Poland, that treaty expired in 1937 and could not prevent any World War II atrocities; see Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 24.

that of international humanitarian law – law for contexts of immediate physical power struggle.

II. International Humanitarian Law and Moral Facts

International humanitarian law likewise played a key role in the development of the prohibition of genocide. Unlike for minority protection, however, moral facts took center stage from the outset and often so explicitly as the ultimate determinants of legal facts. This section first focuses on just war theory or *jus ad bellum* before moving on to *jus in bello*.

Francisco de Vitoria, a Spanish natural law scholar, claimed as early as 1539 that religion cannot be a reason for just war. He referred to Thomas Aquinas, the 13th-century Italian philosopher and natural law theorist, according to whom *barbarians* may not alone be battled to put the victorious power in a position of either baptizing or killing them.³⁶ The Dominican friar de Vitoria emphasized that these were not merely abstract questions of law but of Christian conscience.³⁷ Religion reappears, now driving humanitarian considerations of restraint in warfare.

A non-religious philosophical turn came in 1762 when Jean-Jacques Rousseau argued that war was an affair between States and not between their subjects.³⁸ The humans facing each other in combat were nothing but incidental enemies and a State may only antagonize another State, not its population as such.³⁹ Rousseau based this thesis on the right of citizens to have their lives and property left untouched by the State, contending that these private rights were the very basis on which every nation was founded.⁴⁰ He dressed the doctrine as part of his social contract philosophy, and it was the French statesman Charles-Maurice de Talleyrand-Périgord who, in a letter to Napoleon I in 1806, eventually rephrased it as a legal norm addressed to the sovereign.⁴¹ The idea that

³⁶ U. Horst, H.-G. Justenhoven & J. Stüben (eds), *Francisco De Vitoria, Vorlesungen II* (1997), 556-557.

³⁷ D. Zacharias, 'Missionaries' (2008), in Peters & Wolfrum, *supra* note 21, para. 4.

³⁸ J.-J. Rousseau, *Du Contrat Social ou Principes du droit politique* (1762), 13.

³⁹ *Ibid.*, 14.

⁴⁰ E. Benvenisti, 'The Origins of the Concept of Belligerent Occupation', 26 *Law and History Review* (2008) 3, 621, 626.

⁴¹ *Ibid.*; in 1877, the year of the Russian war against the Ottoman Empire following the Bulgarian horrors, the Swiss legal scholar Johann Caspar Bluntschli classified the so-called Rousseau Portalis Doctrine as part of the legal advancement from barbarism to humanity; see J. C. Bluntschli, 'Du Droit de Butin en General et Specialement du Droit de Prise Maritime', 9 *Revue de droit international* (1877), 508, 512-514.

States were founded on a pre-existing basis that limited the sovereign entails the idea of moral facts that, as ultimate determinants, curtail what social facts may determine.

The field of just war theory contains at least two understandings of moral facts as the law's ultimate determinants: de Vitoria advocated Christian conscience and, by that, reason. Rousseau, on the other hand, drafted his new State theory in rejection of the classic Christian natural law. Instead, his idea of the normative determinants of law was a constructivist moral philosophical one resting on pre-State basic principles.⁴² The paradigm shifted, but both scholars were mainly concerned with moral facts.

Moving to *jus in bello* brings us to further contributions to the evolution of the genocide prohibition. In 1899 and 1907, The Hague was the venue of two peace conferences which ultimately led to the conclusion of several multilateral treaties on the laws of war. All of the 1899 and 1907 Hague Conventions' preambles contain the so-called Martens Clause:

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of the *public conscience*.”⁴³

This explicit reference to the laws of humanity and the dictates of public conscience transfers the Vitorian and Rousseauian ideas of ultimately determining moral facts from just war theory to regulating the means and methods of warfare. The scope of the substantive provisions, e.g., of the Hague Regulations on Land Warfare (Hague Regulations)⁴⁴ was so limited that the Martens Clause evolved

⁴² It would go far beyond the scope this article to provide a thorough analysis of Rousseau's position to natural law as it was understood in his times, his alternative concept of a social contract theory and in how far it was a new naturalistic approach to international law. An apt analysis with further references is provided by K. R. Westphal, 'Natural Law, Social Contract and Moral Objectivity: Rousseau's Natural Law Constructivism', 4 *Jurisprudence* (2013) 1, 48.

⁴³ See e.g. *Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, Preamble, 205 ConTS 227 (emphasis added).

⁴⁴ See e.g. provisions aimed at protecting the civilian population from attacks or detrimental treatment for religious reasons in *ibid.*, Annex, 'Regulations Concerning the Laws and

into a general clause called on to assess certain massacres as prohibited by the laws of war and hence criminally punishable. The Commission to Inquire Into the Causes and Conduct of the Balkan Wars (Balkan Commission) did so in its 1914 report on the 1912-1913 Balkan Wars. The Balkan Commission assessed that the atrocities of which it had gathered evidence – and which would mostly be characterized as genocide today⁴⁵ – violated the Hague Regulations although hardly any articles therein were neatly applicable.⁴⁶

Despite only being part of the preambles of the Hague Conventions, the Martens Clause's idea of a basic standard of laws of humanity and the public conscience informing and shaping the law of armed conflict was sufficiently persuasive to substantially promote this legal regime. Although grounding *jus in bello* in moral facts and the Balkan Commission practically applying it in its report did not prevent the atrocities of World War I, the subsequent development of international criminal law as a response thereto cannot be imagined without these naturalistic ideas.

III. International Criminal Law Between Moral and Social Facts

International criminal law is the third and youngest legal regime that joined the weaving process towards the genocide prohibition becoming a legal fact. Itself drawing strongly on minority protection and international humanitarian law, its emergence as a discrete regime with its birth moment at the Nuremberg and Tokyo major war crimes trials after World War II is inextricably linked to the evolution of the prohibition of genocide. The State-addressed genocide prohibition is unthinkable without the crime of genocide. It, therefore, deserves a more detailed study than minority protection. Strikingly, this study reveals that, although there was a display of natural law enthusiasm, the actions propelling the emergence of international criminal law were not dominated by naturalistic claims to moral facts.

1. The Armenian Genocide

The study ties to the previous sections by returning to the Ottoman Empire where, in 1908, the nationalist Ittihad Party had risen to power and the situation for non-Muslims deteriorated drastically. State-sanctioned persecution

Customs of War on Land', Art. 2, 46, 56.

⁴⁵ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 16, note 12.

⁴⁶ Carnegie Endowment for International Peace, *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars* (1914), 230-231.

particularly targeted the Armenians. Arrests of Armenian intelligentsia began on 24 April 1915 under the pretext of the Armenians allegedly siding with the Russian war opponents; large scale deportations of the rural population were initiated shortly thereafter.⁴⁷ France, Great Britain, and Russia issued a joint declaration as early as 24 May 1915:

“For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April (new style) at Erzerum, Dertchun, Eguine, Akn, Bitlis, Mush, Sassun, Zeitun, and throughout Cilicia. Inhabitants of about one hundred villages near Van were all murdered. In that city Armenian quarter is besieged by Kurds. At the same time in Constantinople Ottoman Government ill-treats inoffensive Armenian population. In view of those new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.”⁴⁸

The declaration evidences how genocide entered international law as part of the still very unspecific category of crimes against humanity, the concept of humanity being joined by civilization. Against the background that no written law criminalizing such massacres existed at the time, the recourse to humanity and civilization follows the patterns of thought established by de Vitoria, Rousseau, and associated thinkers by purporting the decisiveness of moral facts to inform the law. However, in stark contrast to the tensions of the 19th century, the declaration did not cause foreign humanitarian intervention.

The Ottoman Prince Salid Halim asserted that any intervention would violate the sovereign rights of Turkey over her Armenian subjects,⁴⁹ contesting the ability of normative facts curtailing internal sovereignty. It took until 1918 for the French Prime Minister Georges Clemenceau to formulate a naturalistic

⁴⁷ Dadrian, ‘Genocide as a Problem of National and International Law’, *supra* note 19, 262; B. Barth, *Genozid: Völkermord im 20. Jahrhundert* (2006), 69.

⁴⁸ France, Great Britain & Russia, ‘Joint Declaration’ (1915), available at Armenian National Institute, https://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160 (last visited 12 March 2021).

⁴⁹ J. F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982), 27.

response to the Prince's positivistic statement by reiterating, in a letter to the Armenian people's representative, the punishment of the perpetrators "according to the supreme laws of humanity and justice".⁵⁰ At the 1919-1920 Paris Peace Conference, the State leaders and diplomats attempted to fulfill their promise and established a special commission to evaluate wartime atrocities.⁵¹ At one of its meetings, the Greek Foreign Minister Nikolaos Politis argued that the Armenian massacre technically did not fall under any criminal provision, but still constituted a grave violation of the *laws of humanity*.⁵² The commission eventually found that all enemy subjects who had committed crimes against the laws of war or the *laws of humanity* ought to face prosecution.⁵³ The United States and Great Britain went beyond that proposal by advocating, at the main conference table, collective punishment of the Ottoman Empire through segmenting it into new microstates and mandated territories.⁵⁴

On 10 August 1920, the Allied and Associated Powers and the Ottoman Empire signed the Peace Treaty of Sèvres.⁵⁵ Article 226 of the Treaty contained a provision in which Turkey accepted the Powers' authority to court-martial Ottoman nationals for war crimes. Article 230 was identically structured for massacres committed in the course of the war. The articles illustrate not only the crystallization of morally informed *laws of humanity* into two discrete criminal provisions, but also genocide emerging as a separate crime. Yet, for political reasons, the Treaty of Sèvres was never ratified and instead replaced by the Treaty of Lausanne containing a full amnesty.⁵⁶

Just as political opportunism had fueled the first agreements on minority protection in the 16th century, it reappeared as a rather obstructive element in the interwar years almost four centuries later. It is often overseen, however, that the granting of an amnesty presupposes that otherwise punishable crimes had been committed. It was insofar a conscious overriding of legal facts that may be

⁵⁰ Dadrian, 'Genocide as a Problem of National and International Law', *supra* note 19, 290, note 252 (translation by author).

⁵¹ Carnegie Endowment for International Peace, *Violations of the Laws and Customs of War – Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris (1919)* [Carnegie Endowment, *Violations of Laws and Customs of War*].

⁵² Willis, *supra* note 49, 157.

⁵³ Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 20.

⁵⁴ D. Lloyd George, *The Truth About the Peace Treaties*, Vol. 2 (1938), 62, 189, 288-290, 539-540; note how this idea revived Gladstone's suggestion after the Bulgarian horrors.

⁵⁵ *Treaty of Sèvres*, 10 August 1922, Art. 88, 140-51, 113 BFSP 652 (not ratified).

⁵⁶ *Treaty of Lausanne*, 24 July 1923, Art. 138, 28 LNTS 11.

morally informed, but not a categorical denial of normative determinants of the law.

Notwithstanding the amnesty, a military tribunal subsequently established in the Ottoman Empire conducted several trials relating to the Armenian genocide. Whereas the tribunal applied national criminal law, the prosecutor spoke of the judges' duty to punish *crimes against humanity*.⁵⁷ The trials resulted in 17 death sentences, only three of which could be executed due to the escape of the most prominent accused.⁵⁸ Further trials became impossible after a new nationalist government had been formed by the Kemalists.⁵⁹ The tribunal's imperfectness resulted in an astonishing twist of history: the Armenian Soghomon Tehlirian decided to take the escaped perpetrators' punishment into his own hands. He traveled to Germany and fatally shot Talaat Pasha, the former Ottoman Minister for the Interior and Grand Vizier, in 1921.⁶⁰ The young law student Raphael Lemkin followed Tehlirian's trial by a Berlin court intensely. Lemkin wondered why it was a crime to murder one person, but not that the victim had murdered almost one million of his subjects.⁶¹

Overall, the Armenian genocide solidified the approach that *humanity* and *civilization* were the moral facts in which a crime of genocide was grounded. They were, however, overridden both internationally and nationally – in the Ottoman Empire – by social facts. The naturalistic proponents of moral facts being the ultimate determinants did not prevail.

2. Allocating War Guilt

A similar appraisal has to be made about high-level criminal liability for World War I as such and the atrocities committed in its course. In Paris, the

⁵⁷ V. N. Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series', 28 *Holocaust and Genocide Studies* (1997) 28, 34, 39.

⁵⁸ Barth, *supra* note 47, 75.

⁵⁹ Despite its limited success in investigating high-ranking Ittihad functionaries, the tribunal set an early example of local ownership over international crimes. Such proceedings and the reference to *humanity* therein can be assessed in light of Rousseau's social contract theory: the very people whose *humanity* had been violated by their sovereign sit in judgement and, by that, restore their own state's legitimacy.

⁶⁰ Barth, *supra* note 47, 75.

⁶¹ J. Vervliet, 'Raphael Lemkin (1900-1959) and the Genocide Convention of 1948', in H. van der Wilt et al. (eds), *The Genocide Convention: The Legacy of 60 Years* (2012), xii; notably, Pasha had been convicted by the Turkish military tribunal, although his sentence could not be executed due to his escape, and Tehlirian was eventually acquitted.

abovementioned Allied commission tasked with evaluating wartime atrocities accused German Emperor Wilhelm II and Crown Prince Wilhelm of war crimes and crimes against the *law of humanity*, for which they should be prosecuted before an international tribunal.⁶² They should face charges of, *inter alia*, “[a]ttempts to denationalise the inhabitants of occupied territory”⁶³ for acts that were at least close to falling under the later definition of genocide.⁶⁴ The commission failed to name a distinct legal rule violated by these examples – a problematic omission when it comes to criminal punishment, but a hint of its strong theoretical reliance on moral facts.

Another obstacle was that the conference parties had originally assigned the commission to examine the “[...] responsibility of the authors of the war [...]” and “[...] breaches of the laws and customs of war [...]”.⁶⁵ Two US delegates disagreed with transgressing the commission’s competences by also covering the *law of humanity*, arguing that there was no universal understanding of and approach to *humanity*, the term hence being too vague for legal usage.⁶⁶ The US delegates’ alternative suggestions were “[...] act[s] of cruelty [...]”, i.e. “[a] wanton act which causes needless suffering (and this includes such causes of suffering as destruction of property, deprivation of necessities of life, enforced labour, &c.) [...]”.⁶⁷ They collectively called these misdeeds “[...] crime[s] against civilization [...]”,⁶⁸ a barely less ambiguous proposal. The disagreement between the majority and the US delegates nevertheless shows the minimum consensus on a normative basic standard that only needed to be identified and labeled correctly.

Due to persistent US opposition, the Treaty of Versailles eventually contained no reference to *humanity* or *civilization*. Instead, Emperor Wilhelm II was accused of “[...] a supreme offence against international morality and the sanctity of treaties [...]”,⁶⁹ which, again, merely replaced one ambiguous

⁶² Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 20, 23.

⁶³ *Ibid.*, 18.

⁶⁴ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 18; the facts listed by the commissioners include, *inter alia*, the prohibition of the Serbian language and books written therein, the substitution of Serbian schools with Bulgarian ones, and the deportation of the clergy to suffocate the communities’ religious traditions, see Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 39.

⁶⁵ Carnegie Endowment, *Violations of Laws and Customs of War*, *supra* note 51, 1.

⁶⁶ *Ibid.*, 64.

⁶⁷ *Ibid.*, 79.

⁶⁸ *Ibid.*

⁶⁹ *Treaty of Versailles*, *supra* note 34, Art. 227; Art. 228 of the Treaty of Versailles envisaged charging other individuals with *acts in violation of the laws and customs of war*, but the

term with another. Still, *international morals*, which from here on joined the debate, is more transparent in identifying the value-laden facts in which the prohibition of genocide is grounded. The Emperor's timely escape to the Netherlands prevented his trial because the Dutch government did not share a naturalistic understanding of *international morals* that would have obliged it, under international law, to extradite Wilhelm II.⁷⁰

3. New Courts for New Laws

If a new regime of international criminal law was to emerge, it would need courts to adjudicate and enforce its substantive rules. The efforts to establish such an international criminal judiciary after World War I resulted from disenchantment as to moral facts' capability to inspire ad hoc action after the fact. Resigning themselves to the force of social facts, international lawyers attempted to erect an international criminal court through codified law.

One product of the Paris Peace Conference was the Statute of the League of Nations that further envisaged an international court of justice, the later Permanent Court of International Justice (PCIJ), to control legal obligations like those in the abovementioned minority treaties.⁷¹ A jurists' committee established to draft the Court's statute⁷² proposed, upon the initiative of its Belgian president Baron Descamps, the creation of yet another international court with jurisdiction over individuals. That court should adjudicate on "[...] crimes against *international public order*, and against the *universal law of nations* [...]"⁷³. The proposal, the wording and function of which resemble the Martens Clause, was opposed by the American delegation and stalled.⁷⁴ The Council of the League of Nations nonetheless explicitly reserved the right to establish a department for international criminal matters at the PCIJ if needed.⁷⁵

Allied and Associated Powers never set up military tribunals for such prosecutions. The Leipzig Trials conducted by the young German Republic did not address genocidal atrocities either, see Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 19.

⁷⁰ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 19.

⁷¹ *Treaty of Versailles*, *supra* note 34, Art 14.

⁷² Advisory Committee of Jurists, League of Nations, *Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th, 1920, with Annexes* (1920), III.

⁷³ *Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General*, UN Doc A/CN.4/7/Rev.1, 1 January 1949, 3 (emphasis added) [Historical Survey].

⁷⁴ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 23.

⁷⁵ *Historical Survey*, *supra* note 73, 4.

The same jurists' committee suggested that organizations and jurists specialized in public international law continue to work on a new international criminal jurisdiction.⁷⁶ The South African representative Lord Robert Cecil objected to this idea at the First Assembly of the League of Nations, displaying his positivistic persuasion by contending that it would be a “[...] very dangerous project at this stage in the world’s history”.⁷⁷ Eventually, the committee’s proposal was rejected by the Assembly,⁷⁸ but this did not prevent qualified jurists from independently taking up their work and developing progressive proposals.

4. Individual Publications and International Conferences

Although the debate had been canceled at the League of Nations, the League could not hinder new arguments and theories developing outside of its institutional context both in individual publications and at other international conferences.

As early as 1922, the English law professor Hugh Bellot presented a statute for a permanent international criminal court at the 31st conference of the International Law Association. This first draft only covered war crimes,⁷⁹ but Bellot continued to rework it after a positive vote at the conference and inspired others. Two years later, the French law professor Henri Donnedieu de Vabres published an article on activating international criminal jurisdiction at the PCIJ. He named “[...] attacks on humanity, committed [...] due to racial hatred [...]”⁸⁰ as one of the crimes over which the Court should have jurisdiction *ratione materiae*.

Closely linked to Donnedieu de Vabres – through common activities in the then still young Association Internationale de Droit Pénal (AIDP) – was Vespasian V. Pella. Pella pleaded for creating an international criminal court at a meeting of the Union Interparlementaire the same year.⁸¹ He considered internal sovereignty, i.e. how a State treats its citizens, which he had previously

⁷⁶ *Ibid.*, 10.

⁷⁷ World Peace Foundation, *The First Assembly of the League of Nations* (1921), 114.

⁷⁸ *Ibid.*

⁷⁹ H. H. L. Bellot, ‘A Permanent International Criminal Court’, in International Law Association, *Report on the Thirty-First Conference Held at the Palace of Justice, Buenos Aires, 24th August – 30th August, 1922* (1923), 63, 73.

⁸⁰ H. Donnedieu de Vabres, ‘La Cour Permanente De Justice Internationale et sa vocation en matière criminelle’, 1 *Revue Internationale de Droit Pénal* (1924) 1, 175, 186.

⁸¹ V. V. Pella, ‘L’Union Interparlementaire – Compte - rendue de la XXII conférence tenue à Berne et à Genève en 1924’, 86 *Revue Internationale de Droit Pénal* (2015) 3/4, 841.

classified as generally inviolable, to be restricted when it came to crimes like the Armenian massacre. Due to the strong global repercussions of such incidents, international repression thereof had to be permissible and accepted by all States independent of any prior conclusion of treaties.⁸² Without naming the crime, Pella essentially demanded a universally applicable genocide prohibition of *jus cogens* character. Such a peremptory character able to resist social facts to the contrary, particularly the golden calf of sovereignty in the Westphalian system, implies that Pella adopted a naturalistic approach.

Pella's ideas inspired a new member of the AIDP, Raphael Lemkin, who had become a young prosecutor in Poland by then.⁸³ At the April 1933 AIDP conference in Palermo, lawyers had reviewed whether universal jurisdiction was adequate for certain crimes.⁸⁴ Upon Pella's initiative, *acts of barbarity and vandalism resulting in general danger* had been included on the list besides piracy and slavery.⁸⁵ Lemkin tied to that debate in a memo on behalf of Poland for a conference on the unification of criminal law in Madrid later the same year.⁸⁶ He proposed two criminal provisions of barbarism and vandalism for inclusion in an international convention.⁸⁷ While Lemkin defined vandalism as the destruction of certain groups' cultural property, he understood barbarism as violence directed against "[...] racial, confessionnal or social communities [...]"⁸⁸. Barbarism was the more direct predecessor to the definition in the Genocide

⁸² V. V. Pella, 'La Criminalité de la Guerre d'Aggression et l'Organisation d'une Repression Internationale', 3/4 *Revue Internationale de Droit Pénal* (2015), Vol. 86, 851, 861.

⁸³ Lemkin had been introduced to the AIDP by his mentor, the assistant professor and judge Emil Stanislaus Rappaport, see D. M. Segesser & M. Gessler, 'Lemkin and the International Debate on the Punishment of War Crimes', in D. J. Schaller & J. Zimmerer (eds), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence* (2009), 12; Lemkin's connection to Rappaport will become more important for the subsequent war crimes trials after the Second World War, see *infra* B.III.7.

⁸⁴ N. N., 'IIIe Congrès international de droit pénal (Palèrme 3-8 avril 1933)', 1/2 *Revue Internationale de Droit Pénal* (2015), Vol. 86, 37.

⁸⁵ *Ibid.*

⁸⁶ V. Chanethom, 'International Conference on the Unification of Penal Law, Madrid, October 1933 – Special Report Presented by M. Raphael Lemkin' (2014), 14, available at <http://watchersofthesky.com/wp-content/uploads/2014/10/lemkins-madrid-report-in-1933.pdf> (last visited 9 September 2020); R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), 55 [Lemkin, Axis Rule].

⁸⁷ R. Lemkin, *Les actes constituant un danger général (interétatique) considérés comme délits de droit des gens* (1933), 8.

⁸⁸ R. Lemkin, 'Akte der Barbarei und des Vandalismus als *delicta juris gentium*', 19 *Internationales Anwaltsblatt* (1933) 6, 117 (translation by author).

Convention and shows a significant evolution as to precision since earlier references to the vague basic standard of the laws of humanity. The Madrid conference, however, focused on *terrorism*⁸⁹ and the delegates did not even cast a vote on Lemkin's proposal.⁹⁰

Hersch Lauterpacht is another key figure for the development of the genocide prohibition who showed a stronger focus on normative grounds of international law than it appears to have been the case for the codifying attempts of Lemkin. Lauterpacht had already emerged as a critic of absolute State sovereignty in the 1920s.⁹¹ In 1933, the year of the Nazi seizure of power, he proposed a draft resolution to the League of Nations Council, condemning new German laws as violations of “[...] the principle of non-discrimination on account of race or religion [which was] part of the public law of Europe [...]”.⁹² All members of the League of Nations ought to obey such a principle of non-discrimination towards all individuals within their territory.⁹³ It was not possible to find any related Council resolution, but the draft nevertheless indicates an almost constitutionalist understanding of normative basic principles that bind the members of the international community irrespective of their will and are capable of limiting their internal sovereignty.

Whereas the examples above reflect the problematic Eurocentrism in public international law, there is evidence of parallel developments on the other side of the globe. In 1938, the Eighth International Conference of American States met in Lima and obliged all member States to criminalize “[p]ersecution for racial or religious motives [...]”.⁹⁴ In sum, both legal scholarship and a remarkable number of sovereigns had come to the point where race and religion must not just be left unharmed but also actively be protected by States through the introduction of national criminal laws. In other words, an obligation to omit was joined by an obligation to perform.

Although the 1920s and 1930s saw the activism of many scholars and practitioners that appear to have been driven by individual naturalistic

⁸⁹ Chanethom, *supra* note 86, 2.

⁹⁰ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 26 note 79; A. F. Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law’, 20 *European Journal of International Law* (2009) 4, 1163, 1177 [Vrdoljak, Human Rights and Genocide].

⁹¹ Vrdoljak, ‘Human Rights and Genocide’, *supra* note 90, 1168-1169.

⁹² *Ibid.*, 1181.

⁹³ *Ibid.*

⁹⁴ J. B. Scott (ed.), *The International Conferences of the American States: First Supplement, 1933-1940* (1940), 260.

persuasions, the majority of them bowed to the *realpolitik* experiences in and after World War I. Even so, none of their codification attempts was able to prevent World War II.

5. Preparations for Punishment

While World War II was still raging, the Allies started to plan the punishment of those responsible for the massacres perpetrated in its course and Raphael Lemkin worked on the legal facts on which such punishment could be based. While there was some recourse to moral facts, they are not invoked as the ultimate determinants of the international (criminal) legal regime.

In 1942, delegates of the US, Britain, the Soviet Union, and China met in Moscow. They issued a joint declaration announcing the criminal prosecution of the Germans, especially for “atrocities, massacres and cold-blooded mass executions” committed in Poland and the Soviet Union.⁹⁵ Although the declaration itself and the consensual Allied action envisaged are but social facts, the strong term “cold-blooded” notably reflects the moral appeal of this dedication to not repeat what had happened almost three decades earlier.

One year later, the Allies established the United Nations War Crimes Commission (UNWCC) in London to implement the Moscow Declaration.⁹⁶ The UNWCC took up the materials of the 1919 Commission,⁹⁷ but also acknowledged the developments of the interwar years.⁹⁸ Just like after World War I, violations of “[t]he principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience [...]” should be prosecuted.⁹⁹ *Denationalization* as a specific crime was revived as well.¹⁰⁰ The legal concepts seem identical to the ones developed in The Hague and Paris. Concerning the names of those legal concepts, however, a new label appeared: the American commissioner Herbert Pell now addressed crimes “[...] committed against [...] any person due to her

⁹⁵ US Senate Committee on Foreign Relations & US Department of State, *A Decade of American Foreign Policy: Basic Documents 1941-49* (1950), 11, 13.

⁹⁶ *Historical Survey*, *supra* note 73, 20.

⁹⁷ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31.

⁹⁸ A. F. Vrdoljak, ‘Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity’, 22 *European Journal of International Law* (2011) 17, 22 [Vrdoljak, *Genocide and Restitution*].

⁹⁹ *Historical Survey*, UN Doc A/CN.4/7/Rev.1, *supra* note 73, 21.

¹⁰⁰ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31.

race or religion [...]” as crimes against humanity,¹⁰¹ invoking a moral fact to ground them so that they could be applied to World War II notwithstanding the lack of any codification.

US President Roosevelt was no less explicit in a speech, proclaiming that no individual involved in the systematic murder of the Jews would go unpunished.¹⁰² The legal committee of the UNWCC subsequently tried to persuade the Commission of enlarging its mandate to also cover racially or religiously motivated crimes, advocating this proposal by pointing to the evolution of minority protection since 1918.¹⁰³ However, the general mandate of the UNWCC was limited to crimes in the context of war.¹⁰⁴ The Commission, therefore, decided to report crimes against Jews separately and leave it to the States to include them as war crimes or as a distinct category in any later agreement.¹⁰⁵ The social fact of a limited mandate prevailed.

Raphael Lemkin did not endorse this hesitant position. In 1944, he published *Axis Rule in Occupied Europe* and created a new name for the massacres of distinct groups: *genocide*, a neologism manufactured of *genos* (Greek for race, kin) and *cidere* (Latin for to kill).¹⁰⁶ Genocide was “[...] a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves”.¹⁰⁷ It was executed in two phases: first, the destruction of the attacked group’s national pattern, and second, the imposition of the oppressor’s national pattern.¹⁰⁸ For Lemkin, such conduct had previously been labeled as *denationalization*, but the term was not adequate for crimes in the course of which entire peoples were

¹⁰¹ United Nations War Crimes Commission, *Resolution moved by Mr. Pell on 16th March 1944*, III/1, 18.3.44, 18 March 1944, cited in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), 175.

¹⁰² Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31-32.

¹⁰³ United Nations War Crimes Commission, *supra* note 101, 176; Vrdoljak, ‘Genocide and Restitution’, *supra* note 98, 23.

¹⁰⁴ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 31.

¹⁰⁵ *Ibid.*, 33.

¹⁰⁶ Lemkin, *Axis Rule*, *supra* note 86, 76. Lemkin abandoned vandalism and barbarism because these terms were prone to colloquial usage for almost any atrocity crime, see S. Power, ‘A Problem from Hell’: *America and the Age of Genocide*, 3rd ed. (2013), 42; see also P. S. Bechky, ‘Lemkin’s Situation: Toward a Rhetorical Understanding of Genocide’, 77 *Brooklyn Law Review* (2012), 551, 559-560.

¹⁰⁷ Lemkin, *Axis Rule*, *supra* note 86, 79.

¹⁰⁸ *Ibid.*

destroyed biologically.¹⁰⁹ He, therefore, did not claim to invent something new, but overtly referred to pre-used concepts that were, in their original contexts, considered to be grounded in the *laws of humanity*.

Lemkin considered genocide to be antithetical to the Rousseau Portalis Doctrine, which he found implicitly included in the Hague Conventions.¹¹⁰ Much to Lemkin's regret, the broad array of modes of criminal conduct had not been foreseen at the time of the Hague conferences,¹¹¹ hence the Conventions needed amendment.¹¹² But that alone was insufficient because genocide was also committed in times of peace – times during which the League of Nations' minority protection system had proven ineffective. Lemkin acknowledged the system's success in elevating the destruction of a whole nation to a matter shaking humanity's sense of justice just as much as the murder of a single person.¹¹³ Still, what he strived for was a specific multilateral treaty obliging its State parties to penalize genocide in national law and elevating the crime to the ranks of *delicta juris gentium*.¹¹⁴

The term *jus gentium* had famously been coined by the late scholastic Francisco Suárez when reasoning that the normative force of international law could be derived from natural law,¹¹⁵ i.e. that international law was ultimately grounded in moral facts. Lemkin's reasoning that genocide could only be elevated to a *delictum juris gentium* by way of a convention, i.e. a social fact, is either contradictory or presupposes a different understanding of *jus gentium*. His writings do not reveal whether he consciously referred to *delicta juris gentium* so as to build a more compelling normative force to trigger the social fact. He would repeat his call to action several times in scholarly articles until the international community finally agreed on the Genocide Convention.¹¹⁶ Lemkin's persistence indicates that he could either not identify a universally applicable and peremptory prohibition of genocide or was a realistic naturalist

¹⁰⁹ *Ibid.*, 79-80.

¹¹⁰ *Ibid.*, 80.

¹¹¹ These modes of criminal conduct are political, social, cultural, economic, biological, physical, religious, and moral, see *ibid.*, 82-90.

¹¹² *Ibid.*, 93.

¹¹³ *Ibid.*, 91.

¹¹⁴ *Ibid.*, 91, 93-94.

¹¹⁵ W. Preiser, 'History of International Law, Ancient Times to 1648' (2008), in A. Peters & R. Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, para. 70.

¹¹⁶ See R. Lemkin, 'Genocide: A Modern Crime', 4 *Free World* (1945) 39, 43; R. Lemkin, 'The Crime of Genocide', 15 *American Scholar* (1946) 2, 227, 230; R. Lemkin, 'Genocide as a Crime under International Law', 41 *American Journal of International Law* (1947) 1, 145, 150-151.

in an environment full of positivists. Such contradictions might be a necessary consequence of the interweaving threads of minority protection and international humanitarian law as illustrated earlier. Pushed by moral facts and pulled by the longing for social facts, international criminal law rapidly approached its *birth* in Nuremberg.

6. The Nuremberg Trial of the Major War Criminals

Subsequently hailed as the origin of international criminal law, the International Military Tribunal (IMT) at Nuremberg was an ambiguous experience for all proponents for a pre-existing prohibition of genocide ultimately and sufficiently grounded in moral facts.

In June 1945, the Allies began their final preparations for implementing the Moscow Declaration in London. Lemkin had contacted Robert Jackson, then the American delegate, while still in the US and called Jackson's attention to his publications on genocide.¹¹⁷ This communication likely influenced the memorandum prepared by Jackson for the other delegations: he listed "[...] genocide, sterilization, castration, or destruction of racial minorities and subjugated populations [...]" as crimes to be included in the charges against high-ranking Germans.¹¹⁸

The other diplomats, however, insisted that their right to prosecute originated only in the criminal acts' connection to Germany's aggressive war against the Allied nations.¹¹⁹ Put differently, the German Reich had made its affairs those of the other warring parties when it had commenced the conflict, and this alone allowed the Reich's opponents to penetrate its sovereignty by prosecutions. One of the few delegates arguing against such a rigorous nexus with war was the law professor André Gros, representing France at the London Conference. He referred to "[...] interventions for humanitarian reasons" conducted for the purpose of minority protection even during peacetime in the 19th century.¹²⁰ Still, the majority of represented States did not feel bound by their past actions and deemed sovereignty as too sacrosanct to agree on a universally applicable and enforceable prohibition of genocide.

¹¹⁷ J. Q. Barrett, 'Raphael Lemkin and "Genocide" at Nuremberg, 1945-1946', in C. Safferling & E. Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (2010), 35, 36.

¹¹⁸ R. H. Jackson, 'Draft, 14 May 1945, Planning Memorandum', in R. H. Jackson Papers, Library of Congress, 9, cited in Barrett, *supra* note 117, 40.

¹¹⁹ *Ibid.*, 41; Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 34-35.

¹²⁰ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 35.

The London Agreement with the Statute of the IMT referred to genocide as being prohibited but neither included the term genocide nor provided for clear systematic classification of the crime. The crimes against humanity provision in Article 6(c) of the IMT Statute encompassed “[...] persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”¹²¹ Jackson understood this to include genocide, even if it was merely a subcategory of crimes against humanity.¹²² The indictment drafted based on the IMT Statute, in contrast, mentioned genocide explicitly, but as a subset of war crimes:

“[The Accused] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.”¹²³

This classification of genocide as a war crime and the reference to occupied territories evoke the times after World War I, when the Hague Regulations were called on to prosecute crimes against minorities. The placement of genocide under war crimes might, however, rather be owed to the fact that this part of the indictment was inserted by the Americans last-minute after they had overcome British opposition against Lemkin’s neologism.¹²⁴ Notwithstanding these ambiguities, the Nuremberg major war crimes trial had already fostered the establishment of the genocide prohibition before its first session in court by spurring debate over its definition and systematicity.

At the end of the trial hearings, the Allied chief prosecutors Sir Hartley Shawcross and Auguste Champetier de Ribes pleaded, appealing to values, that the indictment on the *monstrous* crime of genocide had been confirmed.¹²⁵ The judgment omitted to mention the term genocide. The four Allied judges from the US, Britain, France, and the Soviet Union could not find a sufficient nexus

¹²¹ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, Art. 6(c), 82 UNTS 279, 288.

¹²² Barrett, *supra* note 117, 42.

¹²³ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I (1947), 43-44.

¹²⁴ Barrett, *supra* note 117, 45.

¹²⁵ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XIX (1948), 515, 531, 551.

between the pre-1939 persecution of the Jews and the war that would permit the Tribunal to exercise jurisdiction.¹²⁶ They hence rendered no abstract statement on the prohibition of State-organized genocide in times of peace,¹²⁷ but refused to go beyond the Charter and apply an uncodified crime of genocide based on ultimate moral facts. Still, the judges convicted the accused for the persecution of minorities during the war.¹²⁸ Lemkin, who monitored the developments at Nuremberg critically, considered the facts on which that conviction rested to fulfill his definition of genocide.¹²⁹

The situation around the IMT was of high relevance for legal theory: a legislator hesitates to pass a certain law, anxious about causing political disapproval amongst the electorate or other powerful stakeholders. Instead, an inchoate regulation is adopted, explicitly or implicitly leaving the completion of its objective to the judiciary. In court, the positive law will run out and the judges are left with morality. The potential conflict with *nulla poena sine lege* in criminal matters is evident. The judges at Nuremberg refused to have recourse to morality and did not convict for genocide, passing the ball back to the State community with its legislative powers. While such judicial activism is, in national systems, often ineffective, it was surprisingly fruitful in the case of the IMT as it created momentum within the UN.

7. Subsequent War Crimes Trials

Before moving on to the codification of the genocide prohibition by the UN, it is worthwhile to analyze subsequent war crimes trials where the tribunals in charge took less reserved approaches to genocide than the IMT.

In December 1945, the Allied Control Council, the body governing Germany after its defeat in World War II, adopted Law No. 10 based on which twelve trials were conducted by the Nuremberg Military Tribunals (NMT).¹³⁰ Article 2(1)(c) of Law No. 10 contained the same crimes against humanity clause as the IMT Statute. The judges in the so-called Justice Trial held that this

¹²⁶ International Military Tribunal, *supra* note 125, Vol. XXII, 498.

¹²⁷ Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 40.

¹²⁸ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XIX (1948), 548.

¹²⁹ Lemkin, 'Genocide as a Crime under International Law', *supra* note 116, 147; see also Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 38; Barrett, *supra* note 117, 52.

¹³⁰ *United States v. Alstoeffer et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. III (1951), XVIII.

provision encompassed genocide as the “[...] prime illustration of a crime against humanity [...]”.¹³¹ The judges cited Resolution 96 (I) and explained that the UN General Assembly was the “[...] most authoritative organ [...]” to examine *world opinion*.¹³² This indicates that the judges did not feel comfortable relying solely on the IMT judgment or to invoke ultimate moral facts, but that they closely looked to social facts. In their opinion, genocide was a joint product of both “[...] statute [...]” and “[...] common international law [...]”,¹³³ the second term probably referring to customary international law. The Tribunal eventually pronounced two guilty verdicts for genocide.¹³⁴ In later NMT trials conducted under Control Council Law No. 10, the respective judges no longer discussed the legal grounds for their genocide convictions and, at times, returned to general terms like extermination to label the crime.¹³⁵

Meanwhile, post-war Poland had set up the Supreme National Tribunal (SNT) to dispense with war criminals, and Lemkin’s mentor Emil-Stanislaus Rappaport was appointed as a judge.¹³⁶ The legal bases on which the SNT trials relied were both national and international law.¹³⁷ That dualism made it an early example for the national enforcement of international criminal law and, again, local ownership.

In 1946, the former Nazi governor Arthur Greiser was indicted before the SNT. The charges encompassed persecution and mass murder of Polish and Jewish people, but also the *Germanization*¹³⁸ of Polish culture – a term reminiscent of the Prussian Language Ordinance after the 1815 Congress of Vienna and the concept of denationalization around World War I. The prosecutors argued that these crimes followed a two-phase plan of the Nazis: first, the destruction of the

¹³¹ *Ibid.*, 983.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*, 1128, 1156.

¹³⁵ See also *United States v. Greifelt et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. V (1950), 88; *United States v. Ohlendorf et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IV (1949), 468; *United States v. Weizsaecker et al.* in Nuernberg Military Tribunals, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. XIV (1952), 467, 519, 620.

¹³⁶ Vrdoljak, ‘Human Rights and Genocide’, *supra* note 90, 1192.

¹³⁷ *Poland v. Goeth* in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. VII (1948), 4-5.

¹³⁸ *Poland v. Greiser* in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. XIII (1949), 70-117.

Polish nationality, society, economy, and culture, and second, the imposition of *Germanness*.¹³⁹ This prosecutorial approach precisely reflected the two phases Lemkin had described in *Axis Rule in Occupied Europe*. The judges found Greiser guilty of “[...] physical and spiritual genocide”, a crime both under national and international law.¹⁴⁰ By that verdict, they made Poland the first country where the term genocide appeared in a national criminal judgment.¹⁴¹

Both the NMT and the SNT trials show the importance of also looking to institutions that do not dominate the limelight like the IMT. They, too, are fora for debate, often more easily accessible to and receptive for new proposals, and eventually the sites from where theoretical test balloons are started.

C. To Codify or Not to Codify: A Look Into the Labor Ward of the International Community

Proceeding to the UN activities that, in 1948, culminated in the adoption of the Genocide Convention means reconstructing and analyzing a major evolutionary turn for the prohibition of genocide. Whereas the development of minority protection had been grounded predominantly in social facts and international humanitarian law found its grounds in fully-fledged natural law theories, the emergence of international criminal law until after World War II had meandered between naturalistic enthusiasm and the acknowledgment that an effective genocide prohibition depended on the non-normative contingencies of the international community. Dissatisfaction with the social facts produced at Nuremberg caused a surge of claims that an ultimately value-grounded prohibition of genocide already existed. These naturalistic arguments created the codifying momentum which led to the Genocide Convention, a new social

¹³⁹ *Ibid.*, 113.

¹⁴⁰ *Ibid.*, 114.

¹⁴¹ Vrdoljak, ‘Human Rights and Genocide’, *supra* note 90, 1163, 1193. Two more notable SNT trials involved the crime of genocide. Amon Goeth, the former commander of Płaszów concentration camp later made famous by the movie *Schindler’s List*, faced explicit genocide charges by prosecutors arguing that the offense was a *crimen laesae humanitatis*. The prosecution borrowed from Lemkin’s definition again and the SNT convicted Goeth of genocide and other crimes, see *Poland v. Goeth*, *supra* note 137, 7-9. Second, the commander of the notorious Auschwitz concentration camp, Rudolf Höß, was equally found guilty of genocide by the SNT in 1947. The judges were persuaded that he had committed biological and cultural genocide, while they considered the overarching German persecution of Jews and Slavic peoples as a violation of the right to life and the right to existence, see *Poland v. Hoess* in United Nations War Crimes Commission, *supra* note 138, 24.

fact that would gradually upstage the recourse to moral facts during the second half of the 20th century.

I. UN General Assembly Resolution 96 (I)

On 11 December 1946, shortly after the Nuremberg judgment, the UN General Assembly unanimously adopted Resolution 96 (I) titled “The Crime of Genocide”.¹⁴² The delegations of Cuba, India, and Panama had presented its first draft,¹⁴³ after Lemkin himself had persuaded the delegates of such a resolution’s necessity.¹⁴⁴ Ernesto Dihigo (Cuba) called the draft a response to the deficiencies of the IMT judgment; it ought not to happen again that only crimes committed during the war could be punished.¹⁴⁵ Dihigo convinced the General Assembly to refer the draft to the Sixth Committee for further refinement.¹⁴⁶

In the Sixth Committee, Britain and France jointly suggested an alternative preamble, opening with “Declares that genocide *is* an international crime [...]”.¹⁴⁷ Saudi Arabia even presented a comprehensive alternative draft, the preamble calling genocide one of the most obvious violations of international law and the law of humanity.¹⁴⁸ Sir Hartley Shawcross, now representing Britain, argued that the Holocaust could have been charged as a separate crime at the IMT if the States had accepted Lemkin’s 1933 Madrid proposal.¹⁴⁹ This failure with far-reaching consequences was the reason why the matter could no longer be left at the discretion of States and their current leaders’ will to sign treaties or conventions. Independent of any contractual agreements, “[...] humanitarian

¹⁴² GA Res. 96 (I), UN Doc A/RES/96(I), 11 December 1946.

¹⁴³ *The Crime of Genocide: Request from the Delegations of Cuba, India and Panama for the Inclusion of an Additional Item in the Agenda*, UN Doc A/C.6/SR.22, 22 November 1946, 101 [Cuba/India/Panama Request].

¹⁴⁴ Schabas, *Genocide Prior to 1948*, *supra* note 6, 20.

¹⁴⁵ *Cuba/India/Panama Request*, *supra* note 143, 101.

¹⁴⁶ P. H. Spaak, *Letter Dated 13 November 1946 from the President of the General Assembly to the Chairman of the Sixth Committee*, UN Doc A/C.6/64, 12 November 1946.

¹⁴⁷ Delegations of the United Kingdom, India, France and the Union of Soviet Socialist Republics, *Amendments to the Draft Resolution Relating to the Crime of Genocide*, UN Doc A/C.6/83, 22 November 1946 (emphasis added).

¹⁴⁸ Delegation of Saudi Arabia, *Draft Protocol for the Prevention and Punishment of the Crime of Genocide*, UN Doc A/C.6/86, 26 November 1946, 1.

¹⁴⁹ *Resolution on the Crime of Genocide (Document A/Bur/50)*, UN Doc A/C.6/84, 25 November 1946, 2.

intervention by international law [...]” now had to be permissible.¹⁵⁰ Shawcross essentially aimed for a prohibition of genocide with *jus cogens* status.

Other delegates likewise showed a keen interest in prohibiting genocide once and for all, but, in contrast, expressed more naturalistic views. Riad Bey (Saudi Arabia) elaborated that genocide already fulfilled all requirements for an international crime: it was committed on the territory of several States, it was morally and materially of international importance, and it was a serious offense against the principles of justice and respect for human dignity.¹⁵¹ Manfred Lachs (Poland) similarly qualified genocide as “[...] *quasi delicta juris gentium* [...]” which merely had to be codified for the sake of legal certainty.¹⁵² The debate had reached a stage where it was less about the existence of the prohibition and more about its precise status.

The preamble of Resolution 96 (I), as it was eventually adopted by the UN General Assembly, called genocide a matter of international concern. It further stated:

“The General Assembly, therefore, [a]ffirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable [...]”¹⁵³

This wording is a clear positioning that genocide had already been prohibited as a universal crime before December 1946. Notwithstanding the merits of such a resolution, the State community did not want to leave it with a non-binding appeal and entrusted the Economic and Social Council (ECOSOC) with the drafting of a convention.¹⁵⁴ It aimed for new stabilized social facts.

¹⁵⁰ *Ibid.*

¹⁵¹ *Resolution on the Crime of Genocide (Documents A/Bur/50, A/C.1/6/83 [sic], and A/C.6/86)*, UN Doc A/C.6/91, 30 November 1946, 2.

¹⁵² *Continuation of the Discussion of the Resolution of the Crime of Genocide*, UN Doc A/C.6/96, 2 December 1946, 4 (emphasis in original).

¹⁵³ GA Res. 96 (I), UN Doc A/Res/96(I), 11 December 1946.

¹⁵⁴ *Ibid.* Resolution 96 (I) may still have its own normative value in public international law, going well beyond those UN internal effects. The Czech delegate Zourek explained in a later meeting that the General Assembly was not competent to establish new law by passing resolutions – it did, however, have the power to confirm existing law; see N. Robinson, *The Genocide Convention: A Commentary* (1960), 56. The ICJ, on the other hand, held in

II. The *Travaux Préparatoires* of the Genocide Convention

The ECOSOC initiated the *travaux préparatoires* by passing the baton to the Secretary-General so that he may consult legal experts and work on a first draft.¹⁵⁵ These experts were Raphael Lemkin, Vespasian V. Pella, and Henri Donnedieu de Vabres, who mainly discussed the breadth of the definition, the scope of the convention, and whether the prohibition of genocide already existed.¹⁵⁶

The resulting Secretariat Draft *inter alia* addressed the question of whether the convention's effects should be limited to the parties or whether they could apply universally.¹⁵⁷ The experts favored the first option, arguing that the second one would not distinguish between signatories and third States.¹⁵⁸ Signatories, however, should have universal jurisdiction over the crime of genocide.¹⁵⁹ The reasoning for the limitation of the convention's effects seems weak: the distinction between parties and third States is rather a result of the first option than a discrete reason why one should opt for it. What the experts really did was to prioritize the *pacta tertiis* principle above the objectives of the genocide prohibition and accord more weight to social facts than to moral grounding. As for universal jurisdiction, they relied on certain indications in Resolution 96 (I) and its being indispensable for an effective convention.¹⁶⁰ The US did not support universal jurisdiction, arguing that its effects on third States violated the consent principle in public international law.¹⁶¹ This position reflects the still

its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that such resolutions can be evidence for the development of a norm or specifically for the *opinio juris* needed to create customary international law; see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 254-255 para. 70 [Nuclear Weapons Advisory Opinion]. Resolution 96 (I) was in fact repeatedly cited to identify the status of the prohibition of genocide since its adoption, starting with the NMT trials referred to above.

¹⁵⁵ Social Committee, *Resolutions on the Report of the Commission on Human Rights, on the Conference on Freedom of Information and on the Crime of Genocide*, UN Doc E/AC.7/15, 25 March 1947, 4; ECOSOC Res. 47 (IV), 28 March 1947, 5.

¹⁵⁶ Committee on the Progressive Development of International Law and Its Codification, *Draft Convention for the Prevention and Punishment of Genocide*, UN Doc A/AC.10/41, 6 June 1947, 16-17.

¹⁵⁷ ECOSOC, *Draft Convention on the Crime of Genocide*, UN Doc E/447, 26 June 1947, 17.

¹⁵⁸ *Ibid.*, 18.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Secretary of State, United States of America, *Draft Convention on Genocide, Communications Received by the Secretary-General*, UN Doc A/401/Add.2, 18 October 1947, 8-9.

significant hold of the 400-year-old idea of State sovereignty that underlies the *pacta tertiis* and consent principle, and a rejection of naturalistic approaches.

The debate of the Secretariat Draft in the ECOSOC revealed other diverging opinions on the pre-conventional legal status of the genocide prohibition. Finn Seyersted (Norway) pushed for a quick approval as international legislation was required for the future criminalization of genocide.¹⁶² Charles Malik (Lebanon) thought, in contrast, that the only new matter regarding genocide was the wish for a convention, implying that the international community's task did not go beyond the mere codification of an existing rule.¹⁶³

Shawcross also considered genocide as a crime previously prohibited by international law and found authority in the IMT judgment.¹⁶⁴ In his opinion, a convention might be detrimental because any negotiated treaty definition of genocide inevitably risked being too narrow.¹⁶⁵ Dihigo disagreed: the codification of international law was never useless and particularly wanted if criminal sanctions should apply.¹⁶⁶ Even if some States refused to sign the convention, they were still bound by the genocide-related UN resolutions and their strong moral impact.¹⁶⁷ Dihigo here adopted a positivistic view by putting the social fact of resolutions before the moral facts. Shawcross evidently mistrusted the clout of moral contentions in critical cases. He insisted on conventions being useful only in cases of legal uncertainty,¹⁶⁸ a situation which he could not discern in the case of genocide.

¹⁶² Social Committee, *Summary Record of the Fifteenth Meeting*, UN Doc E/AC.7/SR.15, 2 August 1947, 2.

¹⁶³ *Ibid.*, 4.

¹⁶⁴ Sixth Committee, *Draft Convention on the Crime of Genocide (Document A/362 and A/C.6/149)*, UN Doc A/C.6/SR.39, 29 September 1947, 21.

¹⁶⁵ *Ibid.*

¹⁶⁶ Sixth Committee, *Continuation of the Discussion on the Draft Convention on the Crime of Genocide (Documents A/362, A/382, A/401, A/C.6/147, A/C.6/149 and A/C.6/151)*, UN Doc A/C.6/SR.40, 2 October 1947, 27-28.

¹⁶⁷ *Ibid.*, 28.

¹⁶⁸ Sixth Committee, *Discussion on the Draft Convention on the Crime of Genocide (Documents A/362, A/401, A/401/Add.1, A/C.6/147, A/C.6/149, A/C.6/151, A/C.6/155, A/C.6/159 and A/C.6/160)*, UN Doc A/C.6/SR.42, 6 October 1947, 34.

After further diverse submissions¹⁶⁹ and another General Assembly resolution once more confirming genocide as an international crime,¹⁷⁰ the ECOSOC produced its own draft in February 1948. The ad hoc committee established for that task¹⁷¹ held that genocide was already prohibited by *international common law*, which would continue to bind all States not signing the convention.¹⁷² The diverging attitudes towards the concept of the genocide prohibition previously illustrated continued in all UN organs and bodies that were entrusted with a role in the drafting process. The final draft submitted by the ad hoc committee reflects the compromises that therefore had to be taken: it stated that acts similar to genocide had been punished under a different label at Nuremberg,¹⁷³ but it did not contain the universality principle, which never reappeared despite further discussion.¹⁷⁴

The draft was then sent from the ECOSOC to the General Assembly.¹⁷⁵ In one of the Sixth Committee's meetings, the Pakistani delegate Ikramullah accused India of currently committing genocide against Muslims.¹⁷⁶ Such an allegation presupposes that a legal rule prohibiting genocide existed. Ikramullah's Indian counterpart defended his State on a factual basis alone, denying the alleged acts

¹⁶⁹ Aside from those diplomats involved in the various UN fora, non-governmental organizations also submitted comments during the drafting procedure. The Jewish World Congress argued that genocide was not yet prohibited effectively. After all, the IMT had lacked jurisdiction over it and had been limited to adjudicate crimes with a war nexus. The UN should further implement adequate mechanisms to prevent and punish genocide in those States refusing to sign a convention; see Committee on Arrangements for Consultations with Non-Governmental Organizations, *List of Communications Received from Non-Governmental Organizations Granted Category (b) or (c) Consultative Status*, UN Doc E/C.2/52, 8 August 1947, 1.

¹⁷⁰ GA Res. 180 (II), UN Doc A/RES/180(II), 21 November 1947, 129.

¹⁷¹ ECOSOC Res. 117 (VI), 3 March 1948, 1.

¹⁷² Ad Hoc Committee on Genocide, *Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other*, Note by the Secretariat, UN Doc E/AC.25/3, 2 April 1948, 7-8.

¹⁷³ Ad Hoc Committee on Genocide, *Draft Convention on the Prevention and Punishment of the Crime of Genocide*, UN Doc E/AC.25/12, 19 May 1948, 1.

¹⁷⁴ Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633]*, UN Doc A/C.6/SR.66, 4 October 1948, 31; Schabas, *Genocide: Crime of Crimes*, *supra* note 29, 46.

¹⁷⁵ ECOSOC Res. 153 (VII), 26 August 1948, 27.

¹⁷⁶ Sixth Committee, *Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633]*, UN Doc A/C.6/SR.63, 30 September 1948, 10-11.

but not negating the legal rule.¹⁷⁷ By that, a State accused of genocide implicitly accepted its prohibition by law without ever having signed a convention. The legal weight of that episode is under-researched to date, but it must have left a strong impression on the other delegates: not much later, on 9 December 1948, the Genocide Convention was finally adopted as Resolution 260 (III).¹⁷⁸ After having obtained 20 ratifications, it entered into force on 12 January 1951.¹⁷⁹

These previous paragraphs showed two matters. First, a majority of contributions in the UN expressed an understanding that genocide was universally prohibited and a crime under international law. These expressions as such are social facts. They largely contained the idea that moral facts determined the existence of that legal fact. Whether these moral facts must be, next to social facts, an ultimate determinant of the prohibition of genocide depends on whether one follows a positivistic or a naturalistic legal theory. Positivism should not be bothered that the social facts, to which alone it ultimately looks, encompassed claims to morality. Naturalistic theories may revert to the various understandings of moral rules displayed in the UN for the additional ultimate determinant they consider necessary. For both approaches, the contributions made in the UN between 1946 and 1948 provide ample ultimate grounding for an international legal rule prohibiting genocide. They may disagree as to the exact point in time at which that legal fact had sufficient ultimate grounding, with naturalistic approaches tending to point to an earlier date than positivistic approaches. This article limits itself to conclude that the independent prohibition of genocide existed at the latest in 1948.

Secondly, these contributors in the UN initiated, by adopting the Genocide Convention, a fission of the prohibition of genocide. It continued to exist independent of the Convention and within the Convention where it is joined by rules for its enforcement. Both grounded in (claims to) morality, they shared the fate of all universal values that had entered the stage after World War II. They were “[...] rationalized, legalized, institutionalized, bureaucratized, and made unfit for use”.¹⁸⁰ The codified prohibition became the preferred rule of reference and its property of being positive black-letter law was decisive for its fate between 1950 and 2020.

¹⁷⁷ Sixth Committee, *Continuation of the Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633]*, UN Doc A/C.6/SR.64, 1 October 1948, 15-16.

¹⁷⁸ GA Res. 260 (III), UN Doc A/RES/260(III), 9 December 1948, 174.

¹⁷⁹ Tams, Berster & Schiffbauer, *supra* note 4, 371.

¹⁸⁰ A. Bianchi, *International Law Theories* (2016), 256-257, ascribing this view to Philip Allott.

D. Genocide After the Convention: Seven Decades of Demise into Legal Theoretical Neglect

Before the demise of the genocide prohibition into legal theoretical neglect began, the ICJ set out the markers in its 1951 *Reservations* Advisory Opinion. Due to the wide attention the Court enjoys as the principal judicial organ of the UN, its jurisprudence touching on the prohibition of genocide until 2020 will form the first section of this part. A second section will be concerned with other fora where the genocide prohibition's legal nature was addressed.

I. ICJ Jurisprudence Sets the Tone

The ICJ, based on its designation to adjudicate disputes concerning the codified prohibition of genocide by Article IX of the Genocide Convention, made the first serve in 1951 with a sweeping invocation of morality. The judges adopted many of the arguments brought forward in the UN between 1946 and 1948. What followed, however, was a line of jurisprudence that, decision by decision, relied to an even greater degree on the text of the codified prohibition and quotations from the 1951 Advisory Opinion than on the social and moral facts which originally informed the legal nature of both rules.

1. The 1951 *Reservations* Advisory Opinion

As early as 1950, the UN General Assembly requested the ICJ to render an Advisory Opinion on the Genocide Convention. Several States had declared reservations upon ratification, to which other States had objected. The question addressed to the ICJ was whether the former had nevertheless become contracting parties. The request also dealt with special features of the Genocide Convention.¹⁸¹

States and other stakeholders presented their legal opinions in written submissions to the ICJ, evidencing that not all ambiguities had yet been overcome. Britain argued that, as soon as a State became a treaty party, it owed the duty to prevent and punish genocide to the entire world. The decisive step triggering this obligation was still ratifying the Convention, but such ratification could not be accompanied by reservations because they would destroy the character of the

¹⁸¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, 16-17 [Reservations Advisory Opinion].

universal obligations contained in the document.¹⁸² The Israeli submissions were more resolute: the international criminal provisions codified in the Genocide Convention were binding for all States, no matter whether they had acceded to the Convention or not. As the obligations contained therein were not of a purely contractual character, it was neither permissible nor possible to effectively elude them through reservations.¹⁸³

The majority of the ICJ judges rendered a slightly Solomonic Advisory Opinion, distinguishing the reservations' compatibility with the Convention's object and purpose. Only if reservations are compatible with the latter, the State declaring the reservation becomes a party irrespective of any objections.¹⁸⁴ Considering the special features of the Genocide Convention, the judges deduced from the preamble of Resolution 96 (I) firstly that "[...] the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".¹⁸⁵ This secondly led to the universal character of both the condemnation of genocide and the duty to cooperate in its prevention. The states had not acted in their own interest, but in a common interest to implement the Convention's "[...] high purposes [...]".¹⁸⁶ These high purposes were sufficiently important to exclude the States' otherwise unlimited freedom to declare reservations, notwithstanding their sovereignty.¹⁸⁷

Due to the moral facts in which the prohibition of genocide was grounded – although the reference to the civilized nations' recognition leaves it open whether ultimately so or merely by claims thereto –, it could curtail the principle of consensus in public international law, rooted in the 1648 Peace of Westphalia. Not only are all States bound by the genocide prohibition, but they are even barred from derogating or modifying it in the context of a treaty – a situation perfectly falling under the definition of *jus cogens*.¹⁸⁸

¹⁸² Written Statement of the Government of the United Kingdom, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Pleadings 1951, 48, 64-70.

¹⁸³ Written Statement of the Government of Israel, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Pleadings 1951, 195, 202-203.

¹⁸⁴ *Reservations Advisory Opinion*, *supra* note 181, 29.

¹⁸⁵ *Ibid.*, 23.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, 24.

¹⁸⁸ See *supra* note 2.

Judges Guerrero, McNair, Read, and Hsu Mo jointly dissented, opining that any reservations were strictly prohibited.¹⁸⁹ They relied on the *travaux préparatoires* of the Genocide Convention according to which the treaty was not about the “[...] private interests of a State, but [about] the preservation of an element of international order”.¹⁹⁰ Judge Alvarez likewise flatly rejected the permissibility of reservations in his dissent, but his reasoning was more detailed. He explained that there were four types of special multilateral conventions: a) those creating international organizations on a global or regional level, b) those governing the territory of a State, c) those establishing new and important principles of international law, and d) those regulating issues of social or humanitarian interest in order to improve the status of individuals. For Judge Alvarez, the Genocide Convention fell under the last two categories.¹⁹¹ Such special conventions were always drafted and developed in the UN General Assembly, where each and every State could present its opinion. In light of such an open and accessible procedure, sovereignty had to bow to majority decisions which, after all, represented common global interest.¹⁹² Put differently, these conventions could bind States that had not acceded to them explicitly, meaning that the Genocide Convention established binding custom which had to be obeyed by all States. Therefore, reservations could not be allowed.¹⁹³ Like the majority, Judge Alvarez essentially considered the genocide prohibition to be of *jus cogens* character and, judging from his reliance on the nature of the Convention, that status would have been reached in 1948. He ultimately grounded it, as his focus on the UN General Assembly shows, in social facts alone.

2. The 1970 *Barcelona Traction* Judgement

After *jus cogens* comes *erga omnes*. In *Barcelona Traction*, the ICJ had to adjudicate on the nature of the laws that Spain had allegedly violated according to Belgium.¹⁹⁴ The Court distinguished obligations towards the

¹⁸⁹ Dissenting Opinion of Judges Guerrero, McNair, Read & Hsu Mo, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 31, 47.

¹⁹⁰ UN Secretary General, *Draft Convention on the Crime of Genocide*, UN Doc E/447, 26 June 1947, 55, cited in Dissenting Opinion of Judges Guerrero, McNair, Read & Hsu Mo, *supra* note 189, 40.

¹⁹¹ Dissenting Opinion of Judge Alvarez, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 49, 51.

¹⁹² *Ibid.*, 52.

¹⁹³ *Ibid.*, 52-54.

¹⁹⁴ *Barcelona Traction Case*, *supra* note 2, 6, para. 1.

entire international community from such vis-à-vis individual States. Only as to the former obligations, all States had a legal interest in their enforcement, resting on the importance of the rights concerned.¹⁹⁵ The judges called such obligations *erga omnes*,¹⁹⁶ and listed the prohibition of genocide as an example.¹⁹⁷ They made an even finer distinction: Some *erga omnes* obligations were part of *general international law*, for which the Court referred to the paragraph of its 1951 Advisory Opinion that had held the principles underlying the Convention to be recognized by civilized nations as binding on States, even without any conventional obligation.¹⁹⁸ Other obligations of such character could be found in (quasi-)universal treaties,¹⁹⁹ which would in fact also qualify the codified genocide prohibition for *erga omnes* dimensions.

The ICJ unambiguously attributed *erga omnes* character to the prohibition of genocide. Still, the majority judgment does not enlighten its readers as to the prohibition's customary or even peremptory status before 1948.²⁰⁰ If one reads the referenced paragraph of the 1951 Advisory Opinion as expressing the *jus cogens* quality of the genocide prohibition and notes that Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) defines *jus cogens* as peremptory norms of *general international law*, then all *jus cogens* rules entail obligations *erga omnes*.

The *Barcelona Traction* Judgement was accompanied by as many as ten separate opinions and one dissent, but Judge Ammoun alone elaborated on the prohibition of genocide. He explained that the principles laid down in the preamble of the UN Charter were put into effect by *jus cogens*, and UN General Assembly resolutions were one instrument for such an implementation.²⁰¹ Put

¹⁹⁵ *Ibid.*, 32, para. 33.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*, 32, para. 34.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ This omission is particularly regrettable as the judges' bench included Sir Gerald Fitzmaurice, Vladimir Koretsky, Manfred Lachs, and Sture Petré – men who had all been involved in the drafting and negotiating process of the Genocide Convention; compare *Barcelona Traction Case*, *supra* note 2, 4, with H. Abtahi & P. Webb, *The Genocide Convention: The Travaux Préparatoires*, Vol. II (2008), 2121-2131.

²⁰¹ Separate Opinion of Judge Ammoun, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgement, ICJ Reports 1970, 286, 304, para. 11. Instead of drafting an own list of examples, Ammoun cited the catalogue included in the 1966 edition of *Brownlie's Principles of Public International Law*, which included the entire Genocide Convention, see *Ibid.*, 304, n. 35; see also V. Gowlland-Debbas, 'Judicial Insights into the Fundamental Values and Interests of the International

differently, the UN General Assembly was competent to establish *jus cogens*. The judge further argued that the Convention, through its object and purpose being one with the interests of mankind, justified individual States in taking action for the prevention and prohibition of genocide.²⁰² One of the authorities supporting this suggestion was the 1951 ICJ Advisory Opinion.²⁰³ Although the recourse to UN General Assembly resolutions appeared positivistic, Judge Ammoun's argument was not devoid of recourse to morality in the form of the interests of mankind and can also be read as a naturalistic approach.

3. The 1996 *Nuclear Weapons* Advisory Opinion

While the 1951 *Reservations* Advisory Opinion and the 1970 *Barcelona Traction* Judgement were strong markers as to the concepts of *jus cogens* and *erga omnes* in abstracto and the genocide prohibition in concreto, the Court's later jurisprudence shows an irritating theoretical carelessness as to these and other concepts of international law.

In 1996, the ICJ had to answer the question of whether the threat with or use of nuclear weapons was prohibited by international law.²⁰⁴ The majority cited a statement by the UN Secretary-General on the clearly established customary law to be applied by the International Criminal Tribunal for the Former Yugoslavia, encompassing the entire Genocide Convention.²⁰⁵ It is unclear whether this was a merely inadvertent conflating of *jus cogens* and custom in face of a matter considered to have been settled long ago, and whether the UN Secretary-General and the ICJ judges deliberately extended the customary law qualification to the entire Convention. The majority opinion was, however, accompanied by several separate and dissenting opinions which included reasoning of higher instructive value.

Judge Ranjeva suggested that the State practice required for the formation of customary international law might simply lie in the repeated "[...] proclamation of principles, hitherto regarded as merely moral but of such importance that the irreversible nature of their acceptance appears definitive [...]".²⁰⁶ One example of customary law having successfully been formed by such proclamations was the prohibition of genocide.²⁰⁷ It is unclear which expressions of legal opinion

Community', in S. A. Muller, D. Raič & J. M. Thuránszky (eds), *The International Court of Justice: Its Future Role After Fifty Years* (1997), 327, 348.

²⁰² *Ibid.*, 326.

²⁰³ *Ibid.*

²⁰⁴ *Nuclear Weapons Advisory Opinion*, *supra* note 154, 227-228, para. 1.

²⁰⁵ *Ibid.*, 258, para. 81.

²⁰⁶ Separate Opinion of Judge Ranjeva, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 294, 297.

²⁰⁷ *Ibid.*

the judge had in mind – such before 1945 denouncing acts of genocide, or such as made during the negotiations and noted in the *travaux préparatoires* of the Convention. Although Judge Ranjeva focused on a social fact, he also brought in moral facts without clarifying their relational standpoint.

The opinion of Judge Shahabuddeen contained a short but strong reference to the prohibition of genocide. He pointed to Resolution 96 (I) as evidence of genocide having been prohibited under international law even before 1946 and supporting the contention that the Genocide Convention had been nothing but a repetition, albeit a permissible one, of pre-existing law.²⁰⁸ Although too brief for a serious evaluation, the first prong of his argument seems to tilt towards moral facts because, as the analysis in the first part of this article has shown, hardly any legality-creating social facts occurred before 1946.

Judge Weeramantry claimed that all rules of international humanitarian law were *jus cogens* because they were “[...] fundamental rules of humanitarian character from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect”.²⁰⁹ He considered the prohibition of genocide to be one of those fundamental rules. *Jus cogens* would hence be a morally determined quality of legal norms, the moral facts being basic considerations of humanity.

A different assessment of *jus cogens* is offered by Judge Koroma. He went so far as to write openly that it was the task of the ICJ to establish international legal standards for the entire State community. This bold statement was followed by a reference to the 1951 Advisory Opinion as being a textbook example for the exercise of such judicial legislating.²¹⁰ At first glance deeply positivistic, Judge Koroma’s view does not exclude that the ICJ fulfills its task by engaging in moral philosophical inquiries to tap moral facts that ultimately determine the law.

4. *Bosnian Genocide* – the 1996 Preliminary Objections Judgement

The confusions continued when, in 1993, Bosnia and Herzegovina sued Serbia and Montenegro at the ICJ. In its 1996 judgment on preliminary objections, the Court cited its 1951 Advisory Opinion, namely the paragraph in which it had declared that all States were obliged by the genocide prohibition.

²⁰⁸ Separate Opinion of Judge Shahabuddeen, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 375, 390.

²⁰⁹ Dissenting Opinion of Judge Weeramantry, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 429, 496.

²¹⁰ Dissenting Opinion of Judge Koroma, *Nuclear Weapons Advisory Opinion*, *supra* note 154, 556, 573.

The judges deduced that the “[...] rights and obligations enshrined by the Convention are rights and obligations *erga omnes*”.²¹¹ The subsequent deduction was that the duty to prevent and punish genocide was not limited to contracting parties but bound the entire State community irrespective of individual States’ express consent.²¹²

If one takes the 1951 Advisory Opinion to have confirmed or established the *jus cogens* status of the prohibition, then the ICJ performed a formidable spin almost 50 years later: it went from the *jus cogens* status to the *erga omnes* effect and, from that, to the *jus cogens* status again. This train of thought raises doubts as to a clear dogmatic structure behind both concepts. One explanation could be that *jus cogens* and *erga omnes* dimensions are legal properties grounded ultimately in moral facts, for the relation of which dogmatic precision naturally runs out.

Judge Kreča criticized that ambiguity and insisted that the legal nature of a rule and its effects or enforceability had to be distinguished.²¹³ Judge Kreča himself found the *jus cogens* status of the genocide prohibition in the 1951 Advisory Opinion,²¹⁴ which also led him to classify it as an obligation owed to all States.²¹⁵ This is only one conclusory step, and it is in line with the *Barcelona Traction* decision. The judge continued by cautioning that only the *jus cogens* prohibition of genocide could lead to obligations *erga omnes*, not those parts of the Genocide Convention going beyond the codification of *jus cogens*.²¹⁶ This is a rare statement suggesting that the prohibition of genocide had reached not merely the status of customary law but even that of *jus cogens* before 1948.

A strong naturalistic approach was taken by Judge Weeramantry, according to whom the condemnation of genocide “[...] has its roots in the convictions of humanity, of which the legal rule is only a reflection”.²¹⁷ He grounded the universally binding nature of the genocide prohibition in its large-scale protection of the right to life, the most fundamental human right at the “[...] irreducible core of human rights”.²¹⁸ The judge used the *Bosnian Genocide*

²¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, 595, 616, para. 31 [Bosnian Genocide].

²¹² *Ibid.*

²¹³ Separate Opinion of Judge Kreča, *Bosnian Genocide*, *supra* note 211, 658, 765, para. 99.

²¹⁴ *Ibid.*, 783, para. 112.

²¹⁵ *Ibid.*, 765, para. 99.

²¹⁶ *Ibid.*, 766, para. 102, 783, paras 112-113.

²¹⁷ Separate Opinion of Judge Weeramantry, *Bosnian Genocide*, *supra* note 211, 640, 648.

²¹⁸ *Ibid.*, 651-652.

case to argue more broadly what he had already included in his dissent from the *Nuclear Weapons* Advisory Opinion delivered by the ICJ just three days earlier, clearly highlighting the values ultimately determining a legal rule.

5. Legal Theoretical Neglect

The Court's omission of thoroughly clarifying the legal nature of the genocide prohibition continued beyond the turn of the millennium. It extended the state of legal theoretical neglect into which the prohibition had slowly slid during the second half of the 20th century. In 2007, the ICJ pronounced its final judgment in the *Bosnian Genocide* case. The Court cited those parts of its 1951 Advisory Opinion in which it had elaborated on the high moral significance of the genocide prohibition, now explaining that this was a recognition of it being customary international law.²¹⁹ The following statement is as irritating as it is worthy of full quotation:

“The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, paragraph 64, when it *added* that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*).”²²⁰

Taken in its context with the previous statement on the customary international law status of the genocide prohibition in 1951, the quotation seems to convey that the ICJ in its *Armed Activities* Judgment²²¹ made an innovative declaration of the *jus cogens* status of the prohibition. This holding would then have meant a remarkable deviation from ICJ jurisprudence since 1951. As it was not repeated in subsequent cases since 2007 and, with a view to the Court's previous inaccuracies as to custom, *jus cogens*, and obligations *erga omnes*, the historiography of the prohibition of genocide in the final judgment of *Bosnian Genocide* must have been yet another instance of lackadaisical perfunctoriness.

²¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 110-111, para. 161.

²²⁰ *Ibid.*, 111, para. 161 (emphasis added).

²²¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction, ICJ Reports 2006, 6.

In the 2012 *Prosecute or Extradite* Judgement, Judge Skotnikov ascribed the *erga omnes* dimension of the prohibition of genocide to the 1951 Advisory Opinion,²²² which is logical when one adds the *Barcelona Traction* holding that all *jus cogens* entails obligations *erga omnes*. While this was only a separate opinion, the majority in the 2015 *Croatian Genocide* Judgement explicitly confirmed the genocide prohibition's *jus cogens* character and *erga omnes* dimension by citing ICJ jurisprudence back to 1951.²²³ Notwithstanding these retrospect attributions of the *erga omnes* concept that had its jurisprudential première only in 1970, there is hope that the Court might still find coherence.

II. The (Lack of) Debate in Other Fora

The above analysis of the 1920s and 1930s, as well as the subsequent war crimes trials, gives reason to also have recourse to other fora than the ICJ for the second half of the 20th century. These fora include a national court, an international treaty conference, and two semi-scholarly reports. While the first and the last did not indulge in fundamental debates as to the legal nature of the genocide prohibition, the debate preceding the adoption of the VCLT should have been luminously fundamental but remained frustratingly inchoate.

1. The 1961 *Eichmann Case*

To bring one of the principal perpetrators of the Holocaust to justice, the Israeli secret service abducted the former high-level Nazi official Adolf Eichmann in Argentina in early 1960.²²⁴ At the District Court of Jerusalem, Eichmann was charged with “[...] crimes against the Jewish People [...]”, essentially encompassing genocide.²²⁵ The Court examined whether genocide had been a crime before 1945 and whether it could now be prosecuted based on the universality principle.

The judges acknowledged Lemkin's publications and cited Resolution 96 (I), the preamble and Article I of the Genocide Convention, as well as the 1951

²²² Separate Opinion of Judge Skotnikov, *Question Relating to Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement, ICJ Reports 2012, 481, 483, paras 11-12.

²²³ *Application of Convention on Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Judgement, ICJ Reports 2015, 3, 46-47, paras 87-88.

²²⁴ See SC Res. 138, UN Doc S/RES/138 (1960), 23 June 1960.

²²⁵ *Attorney General v. Eichmann*, Case No. 40/61, Judgement of 11 December 1960 (District Court of Jerusalem), 35 *International Law Reports* (1967) 5, para. 1, available at https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf (last visited 7 March 2021).

ICJ Advisory Opinion. Those sources led them to answer both questions in the affirmative, meaning that a conviction for Eichmann's participation in the Holocaust would not violate the principle *nullum crimen sine lege*.²²⁶

The judgment's part on universal jurisdiction contains another remarkable argument: the District Court recognized that Article VI of the Genocide Convention accorded the contracting States territorial jurisdiction alone. However, the Israeli judges interpreted the 1951 Advisory Opinion to mean that only the first part of the Convention was codified custom and the balance of the provisions, including Article VI, was new treaty law binding the parties *ex nunc*.²²⁷ They referenced the Advisory Opinion's paragraph that would later be pointed to by the ICJ itself when contending the norm's *jus cogens* nature in 1951: "[...] 'recognized by civilized nations' [...] and [...] 'binding on States, even without any conventional obligation.' [...]"²²⁸ In conclusion, the judges held the universality principle to still be applicable for genocide committed before 1945 and eventually found Eichmann guilty.²²⁹

Substantially, the District Court's consideration that a customary prohibition of genocide existed before 1945 is not based on any direct evidence of State practice and *opinio juris* before that date. The single social fact invoked preceding 1945 were the publications of an individual. Instead, the Court set aside the *pacta tertiis* concerns that very individual had brought forward when drafting the Genocide Convention. This reasoning implies that there are moral facts ultimately determining the law, of which the Convention falls short.

2. The 1969 Vienna Convention on the Law of Treaties

In 1969, the VCLT was adopted with its Article 53 confirming that treaties conflicting with a "[...] peremptory norm of general international law", so-called *jus cogens*, are void.²³⁰ It defines *jus cogens* as being "[...] a norm accepted and recognized by the international community of States as a whole as a norm

²²⁶ *Ibid.*, paras 17-19.

²²⁷ *Ibid.*, paras 20-22.

²²⁸ *Ibid.*, para. 21.

²²⁹ *Ibid.*, para. 25. Upon appeal, the Supreme Court of Israel fully confirmed the legal reasoning of the District Court; see *Attorney General v. Eichmann*, Criminal Appeal No. 336/61, Judgement of 29 May 1962 (Supreme Court of Israel), 36 *International Law Reports* (1968) 277, para. 12(e), available at https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf (last visited 7 March 2021).

²³⁰ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 53, 1155 UNTS 331.

from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.²³¹ This definition rests on acceptance and recognition, i.e. social facts, but does not rule out that these social facts themselves find their grounding in morality. A look into the *travaux préparatoires* of the VCLT reveals that there was in fact no uniform understanding.

A 1966 draft of the International Law Commission (ILC) noted that no more than a few jurists and a single government still questioned the existence of *jus cogens* as such.²³² While the ILC experts eventually decided not to include any examples in Article 53 VCLT, they appear to have widely agreed on some discrete “[...] obvious and best settled [...]” rules of peremptory character.²³³ The draft contains two potential explanations for the *jus cogens* status of the genocide prohibition: first, the act being criminal under international law, and second, it being an act “[...] in the suppression of which every State is called upon to cooperate”.²³⁴

Both grounds reflect formulations from the preamble of Resolution 96 (I), the Genocide Convention, and the 1951 *Reservations* Advisory Opinion. Logically, however, they do not hold as ultimate grounds of the legal rule prohibiting genocide. First, the international crime of genocide is itself a legal rule, not a social or moral fact. This aspect was either lackadaisically drafted or a straw man for morality which, in many societies, chimes with criminality. Second, the universal call to cooperate may just as well be a consequence of the *jus cogens* status and not a criterion for its legality. The passive phrasing employed by the ILC does not reveal who or what calls upon the States. The debate in the Commission was surprisingly inchoate.

The treaty conference in Vienna saw more definitive contributions. The delegates Mwendwa (Kenya) and Valencia-Rodriguez (Ecuador) simply shared the opinion that the ICJ meant *jus cogens* when writing that the prohibition of genocide was *binding law* in 1951.²³⁵ Others like Fattal (Lebanon) suggested two groups of *jus cogens*, the norms of which “[...] had a long history but had crystallized

²³¹ *Ibid.*

²³² *ILC Draft Articles on the Law of Treaties, Yearbook of the International Law Commission* (1966), Vol. II, 187, 247.

²³³ *Ibid.*, 247-248.

²³⁴ *Ibid.*, 248.

²³⁵ United Nations Conference on the Law of Treaties, *Official Records*, UN Doc A/CONF.39/11, 1969, 296 [UNCLT, Official Records – First Session]; United Nations Conference on the Law of Treaties, *Official Records*, UN Doc A/CONF.39/11/Add.1, 1970, 96 [UNCLT, Official Records – Second Session].

only after the Second World War²³⁶: one group based on international morality, the other containing the most important rules of international constitutional law. The genocide prohibition belonged to the first group.²³⁷ Fattal's naturalistic approach to genocide was shared by other delegations.²³⁸

These concise statements indicate dissatisfaction with the ambiguity of the ILC draft. Nevertheless, the debate at Vienna, too, was insofar inchoate as it led to a wording of Article 53 VCLT that can be read as plain positivistic or as leaving leeway for recourse to moral facts as ultimate determinants.

3. The 1978 Ruhashyankiko Report and the 1985 Whitaker Report

During the 1970s and 1980s, a number of reports and analyses addressing the concepts of *jus cogens* and *erga omnes* were published, two of which are particularly noteworthy as they comment on genocide. The sub-commission for minority protection of the UN Commission on Human Rights tasked Nicodème Ruhashyankiko with a report on the prevention and punishment of genocide.²³⁹ Ruhashyankiko interpreted the 1951 Advisory Opinion as having stated that the genocide prohibition had been universally binding even before the 1948 Convention.²⁴⁰ The report also covered the *Eichmann* judgment in relation to which Ruhashyankiko cited the attorney who had observed the trial on behalf of the ICJ. According to the observer, the District Court of Jerusalem simply renewed an *ethical postulate* of the prohibition of genocide which had first been awakened in the peoples' consciousness during World War II.²⁴¹ The wording once more indicates that the roots of the prohibition of genocide lie not in social facts alone.

For political reasons, the ECOSOC demanded a revision of the Ruhashyankiko Report as early as 1983.²⁴² In the report presented by Benjamin Whitaker two years later, he joined the ranks of those assuming that genocide had been prohibited before 1948 by crisply noting that the Genocide Convention

²³⁶ UNCLT, *Official Records – First Session*, *supra* note 235, 297.

²³⁷ *Ibid.*

²³⁸ *Ibid.*, 302-303; UNCLT, *Official Records – Second Session*, *supra* note 235, 99.

²³⁹ J. Waller, *Confronting Evil: Engaging Our Responsibility to Prevent Genocide* (2016), 50.

²⁴⁰ Special Rapporteur on Prevention and Punishment of the Crime of Genocide, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/416, 4 July 1978, 97.

²⁴¹ *Ibid.*, 163.

²⁴² Waller, *supra* note 239, 50.

merely codified a “[...] fundamental principle of civilization [...]”.²⁴³ His appraisal that *genocide* was only a new word for an old crime added to building a historical record of its condemnation.²⁴⁴

Although much shorter than the Ruhashyankiko Report, the Whitaker Report was equally clear as to the existence of a prohibition of genocide before the codification efforts within the UN and equally grounded it in morality. This clarity makes the imprecisions and confusions in the ICJ decisions discussed above even more regrettable. However, the Court may just have commenced a turn towards deeper theoretical reflection.

E. The 2020 ICJ *Myanmar Genocide* Case: Back to Natural Law Enthusiasm?

The latest case in the context of which the ICJ focuses on the prohibition of genocide is the ongoing proceedings instituted by The Gambia against Myanmar on 11 November 2019. The case so far contains three argumentative exchanges that may illuminate the facts in which the genocide prohibition is grounded.

The Gambia had requested provisional measures when instituting the proceedings, alleging that Myanmar had violated and continued to violate its obligations under the Genocide Convention in relation to the Rohingya group.²⁴⁵ The applicant instituted the proceedings “[...] mindful of the *jus cogens* character of the prohibition of genocide and the *erga omnes* and *erga omnes partes* character of the obligations that are owed under the Genocide Convention [...]”.²⁴⁶ The Gambia further referred to the paragraph of the 1951 Advisory Opinion addressing the objects of the Convention and the “[...] most elementary principles of morality” endorsed by it.²⁴⁷ It added that the Court had acknowledged the *jus cogens* character and *erga omnes* dimension of the

²⁴³ Special Rapporteur on Prevention and Punishment of the Crime of Genocide, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/1985/6, 2 July 1985, 11.

²⁴⁴ *Ibid.*, 6.

²⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures, ICJ General List No. 178, 11 November 2019, 1, para. 2 [Myanmar Genocide Application].

²⁴⁶ *Ibid.*, 6, para. 15.

²⁴⁷ *Ibid.*, 41, para. 122.

prohibition of genocide on multiple occasions, footnoting the decisions in *Bosnian Genocide*, *Armed Activities*, and *Croatian Genocide*.²⁴⁸

Despite the Genocide Convention providing a sufficient legal fact for the applicant's claim to rest on, The Gambia invoked the authority of morality as a determinant of the Convention. Beyond that, it relied on the independent *jus cogens* prohibition of genocide with its *erga omnes* obligations as an additional legal fact, determined even more clearly by moral facts.

The ICJ rendered its order on provisional measures on 23 January 2020.²⁴⁹ As Article IX of the Genocide Convention provides the jurisdictional basis on which The Gambia aims to bring its claims before the Court,²⁵⁰ it is Myanmar's obligations under the Convention that are in the judges' focus. Therefore, it is not surprising that the ICJ, when dealing with the standing of the applicant, quoted the part of the 1951 Advisory Opinion addressing the "[...] high purposes which are the *raison d'être* of the convention".²⁵¹ They added:

“In view of their *shared values*, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.”²⁵²

In interpreting the Genocide Convention, the Court grounded the *erga omnes partes* dimension of the conventional genocide prohibition in moral facts. This reasoning invoking “high purposes” and “shared values” arguably bears the potential of being scaled to the *jus cogens* prohibition existing independent of the treaty document and of clarifying the link between a norm's *jus cogens* status and its *erga omnes* dimensions. If the argument for a rule's *erga omnes (partes)* dimension relies on moral facts, and if every *jus cogens* rule is an obligation *erga omnes*, it has to be tested whether these moral facts and the ones determining a norm's *jus cogens* quality are identical. For genocide, the substantial intersection of the moral facts invoked for both points towards identity.

²⁴⁸ *Ibid.*, 41-42, para. 122-123.

²⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 1 [Myanmar Genocide Provisional Measures].

²⁵⁰ *Myanmar Genocide Application*, *supra* note 245, 6-10, paras 16-24.

²⁵¹ *Myanmar Genocide Provisional Measures*, *supra* note 249, 13, para. 41.

²⁵² *Ibid.* (emphasis added).

More restrained than the majority, Vice-President Xue filed a separate opinion, arguing that, “[l]ofty as it is, the *raison d’être* of the Genocide Convention [...] does not, in and by itself, afford each State party a jurisdictional basis and the legal standing before the Court”.²⁵³ However, she also put forward that even those States which have made reservations to Article IX of the Convention “[...] share the common interest in the accomplishment of [the Convention’s] high purposes”.²⁵⁴ In the end, Vice-President Xue also found the Rohingya to be a group remaining vulnerable and concurred with the provisional measures.²⁵⁵ Her positivistic restraint nevertheless remarkably contrasts with the majority’s reasoning.

The second matter of interest pertains to the peculiarities of a request for provisional measures. Although not mentioned in Article 41(1) of the ICJ Statute, the Court requires that the rights asserted by the requesting party be *plausible*²⁵⁶ – an unwritten prerequisite the interpretation of which has not been settled yet, as the *Myanmar Genocide* Order shows. Myanmar advocated a high threshold for disputes where the alleged violations are of such *exceptional gravity* as for genocide.²⁵⁷ The judges did not follow that argument,²⁵⁸ and Judge ad hoc Kress, nominated to the bench by Myanmar, appended a declaration with more substantial remarks:

“[R]ather than saying [...] that a strict standard to be applied at the merits stage in case of exceptional grave allegations, must apply ‘a fortiori’ ‘at the provisional measures phase’ [...], one might wonder whether the distinct – that is, the protective – function of provisional measures does not point in the opposite direction, precisely because *fundamental values* are at stake.”²⁵⁹

²⁵³ Separate Opinion of Vice-President Xue, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 2, para. 6.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, 3, paras 11-12.

²⁵⁶ Compare *ibid.*, 14, para. 43.

²⁵⁷ *Ibid.*, 15, para. 47.

²⁵⁸ *Ibid.*, 18, para. 56.

²⁵⁹ Declaration of Judge ad hoc Kress, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 1, para. 4 (emphasis added).

Again, we find ourselves in an interpretive context. Yet, in contrast to the applicant's standing under the Genocide Convention, the prerequisites for provisional measures are part of the ICJ Statute and, as such, independent of and neutral towards the law on which an applicant's claim rests. This systematic difference could lead one to assume that such procedural rules rest primarily and predominantly on social facts with moral facts as determinants being hard to discern and seldomly decisive for a case's outcome. However, Myanmar's defensive argument and Judge ad hoc Kress' overt reference to *fundamental values* point to procedural rules being, when interpreted, porous and susceptible towards the moral values in which the law, decisive for the merits of the case, is grounded. While procedural rules may be neutral, they are not blind.

Judge Cançado Trindade went even further in a separate opinion guided by his understanding that "[...] human conscience stands above the will of States".²⁶⁰ His rejection of *plausibility* as an unwritten prerequisite for provisional measures under Article 41(1) of the ICJ Statute and his concern for vulnerability are two major threads in Judge Cançado Trindade's work that unite in this separate opinion. He finds the increasing attention of the ICJ to "[...] extreme adversity or vulnerability of human beings [...]" symbolizing "[...] the new paradigm of the *humanized* international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability".²⁶¹ The judge acknowledges that such a turn towards human vulnerability "[...] 'requires the ICJ to go beyond the strict inter-State dimension [...]',²⁶² but he finds this unavoidable if the "[...] *raison d'humanité* [...]" is to prevail over the "[...] *raison d'État*".²⁶³ In consequence, at least in situations of continuing vulnerability, orders of provisional measures should not depend on a plausibility standard but on whether fundamental rights and basic principles are to be safeguarded.²⁶⁴ Judge Cançado Trindade moves on to allocate fundamental human rights in the domain of *jus cogens* and criticizes

²⁶⁰ Separate Opinion of Judge Cançado Trindade, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Request for the indication of provisional measures, Order, ICJ General List No. 178, 23 January 2020, 2, para. 5.

²⁶¹ *Ibid.*, 14-5, para. 62 (emphasis in original). The term *jus gentium* reminds us of the abovementioned references to genocide as *delicta juris gentium* by Raphael Lemkin, *supra* note 88, 28, 53, and Manfred Lachs, *supra* note 152, 4.

²⁶² *Ibid.*, 15, para. 64.

²⁶³ *Ibid.*, 17, para. 74.

²⁶⁴ *Ibid.*, 17-8, para. 75, 19, para. 79-80.

that the *jus cogens* character of the genocide prohibition was not sufficiently addressed in the *Myanmar Genocide Order*.²⁶⁵

Grasping the judge's distinct naturalistic approach to international law would require a holistic analysis of his work going beyond this article. As it is often minorities that are extremely vulnerable, one may understand him as wishing that the ICJ became a new protective power for minorities continuing what individual States and the League of Nations had previously attempted. The Court's motivation, however, should be distanced from any power politics and rest solely on the most elementary content of international law. Judge Cançado Trindade adopts a modern natural law theory where *raison d'humanité* or human conscience is the major moral fact which informs general principles of law and fundamental rights. Against these general principles and fundamental rights, all international law must be tested. He identifies or at least very closely approximates *jus cogens* with general principles of law and, by that, with moral facts that ultimately determine the entire international legal system.

Moving on to the third interesting aspect of the *Myanmar Genocide Order* shows that, although Judge Cançado Trindade opined that the Order did not go far enough towards a naturalistic humanist approach to international law, it was not devoid of it either. Where the majority judges address the risk of irreparable prejudice and urgency – further requirements for a provisional order under Article 41(1) of the ICJ Statute – they again quote the 1951 Advisory Opinion, this time focusing on the “[...] conscience of mankind [...]” that is shocked by genocide as the “[...] denial of the right of existence of entire human groups [...]”.²⁶⁶ The majority quoted that genocide is “[...] contrary to moral law and to the spirit and aims of the United Nations” and that the Genocide Convention “[...] confirm[s] and endorse[s] the most elementary principles of morality”.²⁶⁷ In concluding, the Court States, “[i]n view of the *fundamental values* sought to be protected by the Genocide Convention [...]”, the rights relevant in the present proceedings “[...] are of such a nature that prejudice to them is capable of causing irreparable harm”.²⁶⁸

These extensive and repeated references to moral facts mark a new peak in the turn to such notions outside of positive law in post-1951 international jurisprudence on genocide. Even though the majority did not abandon the plausibility prerequisite for Judge Cançado Trindade's alternative proposals,

²⁶⁵ *Ibid.*, 19, para. 81, and 20, para. 87.

²⁶⁶ *Myanmar Genocide Provisional Measures*, *supra* note 249, 21, para. 69.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*, 21, para. 70 (emphasis added).

they embraced the fundamental nature of these moral values as a significant consideration in assessing the risk of irreparable prejudice, another criterion for protective measures. As for the plausibility requirement, these elements of a procedural rule are porous and open to embracing the moral facts on which the relevant substantive law of the claim may be founded. For the genocide prohibition specifically, the references to the conscience of mankind and human groups' right to existence arguably point towards the majority's idea of what these moral facts are. Assessing these principles of morality as *most elementary* opens the door to understanding them as *ultimately* determining the nature and content of the international legal system and, by that, the majority as taking a naturalistic approach to international law.

At this point, however, such a bold proposition based on a relatively short decision alone, heavily reliant on the 1951 Advisory Opinion, can be but a hypothesis to sharpen the observer's view on the further course of the proceedings. Although still in an early phase, the *Myanmar Genocide* case provides reasonable grounds to ask whether we witness a new turn to natural law or its revival in *new natural law* thinking.²⁶⁹

F. Conclusion

The totality of sources analyzed reveals a widespread understanding that, first, a customary prohibition of genocide existed before the preparatory works for the Genocide Convention began in 1946. That prohibition is secondly understood to have reached its *jus cogens* status by 1951 at the latest, which thirdly concurrently equipped it with an *erga omnes* dimension.

Strikingly, the proponents of a customary prohibition before 1946 do not present empirical inquiries to bolster their thesis with evidence of State practice and *opinio juris*. Similarly, the accepted definition of *jus cogens* refers to the recognition of a norm as peremptory, but how such a recognition practically proceeded in specific cases remained unclear. Instead of subsuming empirical evidence under these requirements of social facts, the participants in the legal discourse invoked moral and evaluative considerations. Ostensibly positivistic, most *midwives* of the genocide prohibition gravitated around morality and values. Their invocation instead of empirical evidence points to an at least subconscious idea that this legal rule was ultimately grounded in moral facts.

Essentially, the evolution of the prohibition of genocide, which saw its major densification phase between 1946 and 1951, was propelled by naturalistic

²⁶⁹ Compare J. Finnis, *Natural Law and Natural Rights*, 2nd ed. (2011).

approaches to international law. Even during that densification phase, many of these approaches were suppressed and masked behind a positivistic veil that this article has pierced.

Once the custom was codified, the *jus cogens* status was firmly settled, and it was winged by an *erga omnes* dimension, the ICJ banished its theoretical scrutiny and handled the genocide prohibition with lackadaisical judicial perfunctoriness. Other fora likewise showed a retreat to superficial reasoning, either putting forward blunt claims to morality without commenting on its relationship to social facts or making inchoate arguments by setting up other legal rules as straw men. By 2000, the genocide prohibition had slid into a disenchanted legal banality.

The recent *Myanmar Genocide* case at the ICJ has the potential of heralding a new enthusiasm for the prohibition's naturalistic flavor. It remains to be seen whether the proceedings will retrieve the moral grounding of the prohibition of genocide and spur the debate of new natural law theories, or whether the Court will discreetly sail around such shoals in today's positivistic mainstream approaches to international law.

Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute

Ammar Bustami^{*} and Marie-Christine Hecken^{**}

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Abstract

This article draws attention to the need of a reform of the environmental protection by means of international criminal law as enshrined in the Rome Statute of the International Criminal Court. After giving a short overview of the contemporary environmental protection in war- and peacetime offered by international criminal law, it becomes clear that international criminal law fails to succeed at offering sufficient environmental protection. This paper outlines that there is no convincing reason for a differentiated approach in international criminal law to environmental damage in wartime and in peacetime, and that a shift from an anthropocentric to an ecocentric approach would positively contribute to a more effective protection of the environment. It is therefore argued for the introduction of a new integral and ecocentric international crime against the environment in the Rome Statute. The paper then elaborates on existing proposals on such a new crime against the environment before some proper observations on the exact contours of the crime are made. A focus lies on the new crime's threshold of seriousness as well as on the necessary mens rea requirements. The insufficiency of the contemporary legal framework and the merits of a new crime against the environment are exemplified by an archetype example of peacetime environmental damage, the Chevron/Texaco oil spill scenario in Ecuador.

A. Introduction

The Preamble of the Rome Statute of the International Criminal Court [Rome Statute] enshrines that the International Criminal Court [ICC] has jurisdiction over “[...] *the most serious crimes of concern to the international community as a whole* [...]”¹ So far, these crimes include genocide, crimes against humanity, war crimes and the crime of aggression. Other crimes had however been considered during the drafting process of the Rome Statute, *inter alia* the “[w]ilful and severe damage to the environment”.²

Although this crime did ultimately not find its way into the Rome Statute, modern times demonstrate that the environment, representing the “[...] *living space, the quality of life and the very health of human beings, including generations unborn*”,³ is threatened on a daily basis. Such threats occur both in the context of armed conflicts,⁴ and in peacetime constellations. Peacetime threats to the environment can *inter alia* be large amounts of carbon dioxide emissions, deforestation, contamination of natural resources by pollution or the unsustainable extraction of natural resources.⁵ Particularly, environmental crimes became an imminent threat not only to wildlife but to whole ecosystems,⁶ and consequently to peace and security of humankind.⁷

Individuals and corporations thereby massively contribute to the endangerment of the environment. It thus becomes a legitimate question whether

¹ *Rome Statute of the International Criminal Court*, 17 July 1998, Preamble, 2187 UNTS 3 (emphasis added) [Rome Statute].

² *Report of the ILC on the work of its 47th session*, UN Doc A/50/10, 21 July 1995, Art. 26, paras 119-121 (emphasis added).

³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, para. 29 (emphasis added) [Nuclear Weapons Advisory Opinion].

⁴ ICRC, ‘Natural environment: Neglected victim of armed conflict’ (2019), available at <https://www.icrc.org/en/document/natural-environment-neglected-victim-armed-conflict> (last visited 10 February 2021); G. Bartolini & M. Pertile, ‘The work of the ILC on the environment and armed conflicts: Enhancing protection for the ‘silent victim of warfare’?’, 34 *Questions of International Law* (2016), 1.

⁵ P. Higgins, D. Short & N. South, ‘Protecting the planet: a proposal for a law of ecocide’, 59 *Crime, Law and Social Change* (2013) 3, 251, 252-254.

⁶ C. Nellemann et al., *The Rise of Environmental Crime – A Growing Threat To Natural Resources, Peace, Development And Security, A UNEP-INTERPOL Rapid Response Assessment* (2016), 17.

⁷ INTERPOL-UNEP, *Strategic Report: Environment, Peace and Security – A Convergence of Threats* (2016).

international criminal law⁸ might contribute to protection of the environment. This interconnection was acknowledged by the Office of the Prosecutor [OTP] of the ICC in a policy paper on the case selection and prioritization in 2016, in which it announced to “[...] give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”.⁹ This Policy Paper was not able to establish new jurisdictional grounds for the ICC,¹⁰ but only addressed the criteria the Prosecutor would take into consideration in its future case selection while prosecuting the already existing Rome Statute crimes.¹¹

While the Policy Paper raises hopes for a more efficient environmental protection via the methods of international criminal law, there have only been a few instances, in which environmental issues had been taken into account during international criminal investigations,¹² and no cases of prioritized prosecution of environmental damages under the Rome Statute have become public.¹³ Two examples addressing environmental concerns are the alleged land grabbing

⁸ This term is understood to mean “[...] the body of international law governing the criminal responsibility of individuals for crimes under international law”, A. Mistura, ‘Is There Space for Environmental Crimes Under International Criminal Law?’, 43 *Columbia Journal of Environmental Law* (2018) 1, 181, 188.

⁹ OTP, *Policy Paper on Case Selection and Prioritisation* (2016), available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (last visited 10 February 2021), para. 41 (emphasis added) [OTP Policy Paper].

¹⁰ R. Pereira, ‘After the ICC Office of the Prosecutor’s 2016 Policy Paper on Case Selection and Prioritisation – Towards an International Crime of Ecocide?’, 31 *Criminal Law Forum* (2020) 2, 179, 208; On the impact of the Policy Paper on the ICC’s jurisdiction, see in detail Mistura, *supra* note 8, 215-220.

¹¹ See on this Policy Paper: L. Prosperi & J. Terrosi, ‘Embracing the “Human Factor”, Is There New Impetus at the ICC for Conceiving and Prioritizing Intentional Environmental Harms as Crimes Against Humanity?’, 15 *Journal of International Criminal Justice* (2017) 3, 509, 514-516; P. Patel, ‘Expanding Past Genocide, Crimes Against Humanity, and War Crimes’, 14 *Loyola University Chicago International Law Review* (2016-2017), 175, 191-192; Pereira, *supra* note 10, 179.

¹² See examples in Prosperi & Terrosi, *supra* note 11, 511-512 (notes 7-8 with references to situations in Honduras and the Democratic Republic of the Congo). In its second decision on an Arrest Warrant for *Omar Al Bashir*, the Pre-Trial Chamber [PTC] agreed with the Prosecutor’s Application regarding the contamination of wells in the context of the crime of genocide: *Situation in Darfur, Sudan in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution’s Application for a Warrant of Arrest, ICC-02/05-01/09 (Pre-Trial Chamber I), 12 July 2010, paras 36-38.

¹³ This could also be a consequence of the preliminary examination’s confidentiality, Prosperi & Terrosi, *supra* note 11, 512.

resulting from environmental degradation in Cambodia,¹⁴ as well as the more recent submission of a file by Palestinian Human Rights Organizations claiming *inter alia* crimes of “[...] [p]illage, [a]ppropriation and [d]estruction of Palestinian [n]atural [r]esources”.¹⁵ So far, the OTP did neither seem to have declined these requests nor to have opened preliminary examinations on their account.¹⁶

Faced with the increasing dangers to the environment, independent from a wartime context,¹⁷ and with insufficient tools to enforce environmental protection within international criminal law, this paper seeks to contribute to the existing discourse by arguing that it is necessary to consider an integral environmental protection by the means of international criminal law. The focus of the paper thereby lies within international criminal law as laid down in the Rome Statute of the International Criminal Court but does not address international criminal law in its entirety.

It does so by, first, examining the contemporary framework of international criminal law addressing the environment (B). In the following, it argues for an integral and ecocentric approach to the prosecution of environmental crimes

¹⁴ The Commission of Crimes Against Humanity in Cambodia, ‘Communication Under Article 15 of the Rome Statute of the ICC, July 2002 to Present’ (2014), available at https://www.fidh.org/IMG/pdf/executive_summary-2.pdf (last visited 10 February 2021); Prosperi & Terrosi, *supra* note 11, 512 (note 10 with further references); P. Patel, *supra* note 11, 194-195; R. Rogers, ‘ICL and Environmental Protection Symposium: The Environmental Crisis—Cases for ‘Particular Consideration’ at the ICC’, *Opinio Juris* (2020), available at <http://opiniojuris.org/2020/06/01/icl-and-environmental-protection-symposium-the-environmental-crisis-cases-for-particular-consideration-at-the-icc/> (last visited 10 February 2021); J. Durney, ‘Crafting a Standard: Environmental Crimes Against Humanity Under the International Criminal Court’, 24 *Hastings Environmental Law Journal* (2018) 2, 413, 426-429; M. Sarliève, ‘Can criminal courts help save the environment?’, *Justice Info* (2018), available at <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/39189-can-criminal-courts-help-save-the-environment.html> (last visited 10 February 2021).

¹⁵ Al-Haq Organisation, ‘Palestinian Human Rights Organisations Submit File to ICC Prosecutor: Investigate and Prosecute Pillage, Appropriation and Destruction of Palestinian Natural Resources’ (2018), available at <http://www.alhaq.org/advocacy/6144.html> (last visited 10 February 2021) (emphasis added).

¹⁶ With regard to a request to investigate on the situation in Ecuador, see Request to the OTP of the ICC from the Legal Representatives of the Victims, P. F. Mendoza & E. B. Toledo, ‘Communication: Situation in Ecuador’ (2014), available at <https://chevrontoxico.com/assets/docs/2014-icc-complaint.pdf> (last visited 10 February 2021); OTP, Letter to R. Doak Bishop, Chevron’s lawyer (2015), available at <http://freebeacon.com/wp-content/uploads/2015/04/ICC-letter.pdf> (last visited 10 February 2021). For more detail, see *infra* notes 31-32.

¹⁷ INTERPOL-UNEP, *supra* note 7, 4.

under international criminal law (C). In the subsequent part, an outline of possible perspectives for a new crime against the environment, often named *crime of ecocide*, will be given (D). Beginning with an elaboration on existing proposals, this paper then provides observation on the substantive contours of a crime of ecocide.

In order to exemplify the existing practical relevance for a new environmental international crime as well as the lacuna it would address, archetypes of peacetime environmental harm can serve as illustration.¹⁸ Incidents of peacetime environmental harm are numerous. To provide but a few examples for such peacetime threats: several pig-iron producers illegally deforested at least 105 square miles of the world's largest rainforest in Brazil,¹⁹ immense amounts of fracking waste had been dumped in the *Vaca Muerta* shale play in Argentina by multinational oil companies²⁰ and millions of cubic meters of mine tailings were released into the *Doce River* in Brazil due to a failure of the Mariana Dam.²¹

The Chevron/Texaco oil spill scenario in Ecuador²² constitutes another prominent incident and is taken as a case example of industrial pollution in this paper. From 1964 to 1993, the oil company Texaco, later acquired by Chevron,²³ explored and exploited the *Lago Agrio* region in Ecuador for oil. For more than

¹⁸ See for different key archetypes of environmental harm: Prosperi & Terrosi, *supra* note 11, 512-514; Higgins, Short & South, *supra* note 5, 252-254.

¹⁹ L. Coimbra & P. Murphy, 'Vale halts dealings with company over deforestation', Reuters (2011), available at <https://www.reuters.com/article/us-vale-amazon-idUSTRE7AN1SR20111124> (last visited 11 February 2021); see also on illegal deforestation in Brazil by a steel company: Climate Change Litigation Databases, *Federal Environmental Agency (IBAMA) v. Siderúrgica São Luiz Ltd. and Martins* (2019), available at <http://climatecasechart.com/non-us-case/federal-environmental-agency-ibama-v-siderurgica-sao-luiz-ltda-and-martins/?cn-reloaded=1> (last visited 11 February 2021).

²⁰ J. Raine, 'Argentina: toxic waste from fracking in Patagonia', Latin American Bureau (2019), available at <https://lab.org.uk/argentina-toxic-waste-from-fracking-in-patagonia/> (last visited 11 February 2021); see also on a criminal complaint: Climate Change Litigation Databases, *Mapuche Confederation of Neuquén v. YPF et al.* (2018), available at <http://climatecasechart.com/non-us-case/mapuche-confederation-of-neuquen-v-ypf-et-al/> (last visited 11 February 2021).

²¹ D. Philipps & D. Brasileiro, 'Brazil dam disaster: firm knew of potential impact months in advance', The Guardian (2018), available at <https://www.theguardian.com/world/2018/feb/28/brazil-dam-collapse-samarco-fundao-mining> (last visited 11 February 2021).

²² For an overview of the legal proceedings: Business & Human Rights Resource Centre, 'Summary profile: Texaco/Chevron lawsuits (re Ecuador)' (2003), available at <https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1> (last visited 7 April 2021).

²³ From here on, referred to as "Chevron".

twenty years, Chevron had *inter alia* discharged formation water, drilling waste and produced water in unlined pits which thereby got into the environment.²⁴ These *by-products* of oil production contain ecologically harmful contents like “[...] leftover oil, metals, and water with high levels of benzene, chromium-6, and mercury”.²⁵ Each day, 3,2 million gallons of this toxic waste were deliberately dumped into the environment.²⁶ Chevron’s practices resulted, amongst others, in the following environmental degradation: soils in the region were polluted, the vegetation had been negatively impacted, innumerable rivers were contaminated, the source of drinking water was reduced, and fishing was rendered impossible.²⁷ Additionally, huge plumes of black smoke from burning of oil and waste entered the ozone layer and further noxious gases were released into the atmosphere.²⁸ Furthermore, the livelihood of the people was deeply affected by Chevron’s practices, as rates of deadly, digestive and respiratory diseases, miscarriages and skin disorders increased.²⁹ Two of the indigenous peoples inhabiting the region became extinct, whereas the other four are fighting to survive.³⁰

This summary of facts does not claim to be exhaustive, but it is sufficient for the analysis undertaken in this paper. The Chevron/Texaco incident constitutes an illustrative example of the existing lacuna of international criminal law in that it concerns heavy impacts on the natural environment by a private company’s activities without adequate legal accountability. Further, it is particularly interesting since a group of plaintiffs had requested the ICC in 2014

²⁴ J. Kimerling, ‘The Environmental Audit of Texaco’s Amazon Oil Fields: Environmental Justice or Business as Usual’, 7 *Harvard Human Rights Journal* (1994), 199, 204-205; A. Crasson, ‘The Case of Chevron in Ecuador: The Need for an International Crime against the Environment’, 9 *Amsterdam Law Forum* (2017) 3, 29, 30-32; S. Patel, ‘Delayed Justice: A Case Study of Texaco and the Republic of Ecuador’s Operations, Harms, and Possible Redress in the Ecuadorian Amazon’, 26 *Tulane Environmental Law Journal* (2012) 1, 71, 78.

²⁵ Patel, *supra* note 24, 78 (emphasis added).

²⁶ *Ibid.*, 79; Kimerling, *supra* note 24, 204-205.

²⁷ Crasson, *supra* note 24, 31; Amazon Defense Coalition, ‘Summary of Overwhelming Evidence against Chevron in Ecuador Trial’ (2012), available at <https://chevrontoxico.com/assets/docs/2012-01-evidence-summary.pdf> (last visited 11 February 2021); Environmental Justice Organizations, Liabilities and Trade, ‘The Texaco-Chevron Case in Ecuador’ (2015), available at <http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-42.pdf> (last visited 11 February 2021).

²⁸ *Ibid.*

²⁹ Crasson, *supra* note 24, 31; see also Kimerling, *supra* note 24, 206.

³⁰ Crasson, *supra* note 24, 31-32; Kimerling, *supra* note 24, 206-207.

to open investigations regarding the situation in Ecuador,³¹ which was rejected by the OTP.³² The following legal observations (in Parts B and D) will therefore be measured against their applicability in the outlined Chevron/Texaco oil spill case.

B. Contemporary International Criminal Law Protection of the Environment

To start with, it is necessary to examine the extent that international criminal law currently allows for the prosecution of crimes impacting the environment. Since the potential of international criminal law to address environmental damage in war- and peacetime has already been analyzed in a number of publications,³³ this paper will only give a short overview of the historical development of environmental crimes (I) and the current regime of wartime (II) and peacetime (III) protection of the environment.

I. Historical Development

First proposals to include a crime against the environment into international criminal law were made in the 1970s, in response to the massive environmental

³¹ Request to the OTP of the ICC from the Legal Representatives of the Victims, *supra* note 16.

³² Letter from the OTP to R. Doak Bishop, Chevron's lawyer, *supra* note 16. The Prosecutor of the ICC rejected the Lago Agrio's victims argument concerning the temporal jurisdiction of the ICC, see C. Lambert, 'Environmental Destruction in Ecuador: Crimes Against Humanity under the Rome Statute?', 30 *Leiden Journal of International Law* (2017) 707, 712-713.

³³ For wartime protection, e.g. ILC, *Protection of the environment in relation to armed conflicts, Text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading*, UN Doc A/CN.4/L.937, 6 June 2019; T. Smith, 'Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law', in W. A. Schabas, Y. McDermott & N. HaHayes (eds), *The Ashgate Research Companion to International Criminal Law* (2013), 45, 52-57; M. A. Drumbl, 'Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes', 22 *Fordham International Law Review* (1998) 1, 122, 145; J. C. Lawrence & K. J. Heller, 'The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute', 20 *Georgetown International Environmental Law Review* (2007) 1, 61, 95. For peacetime protection, e.g. Proserpi & Terrosi, *supra* note 11, 509; Durney, *supra* note 14, 413; P. Patel, *supra* note 11, 189-192; R. Mwanza, 'Enhancing Accountability for Environmental Damage under International Law', 19 *Melbourne Journal of International Law* (2018) 2, 586, 596-599.

damages inflicted by the US Army during the Vietnam War.³⁴ Further, in the development of the Rome Statute, the ILC considered the “[w]ilful and severe damage to the environment” as a major crime against the peace and security of mankind, regardless of its connection to an armed conflict.³⁵ Article 26 of the Draft Code of Crimes against the Peace and Security of Mankind (Draft Code of Crimes) stipulates that willfully causing or ordering to cause “[...] widespread, long-term and severe damage to the natural environment [...]” by an individual is an international crime.³⁶ It has been considered that environmental damage would not only encompass serious consequences for the present generations, but also for future generations, and thus needed to be addressed separately from other crimes pursuing the protection of human beings.³⁷ The ILC intended to achieve unity with the law of State responsibility, which was examined by the Commission at the same time and which originally provided for “serious breach[es] of an international obligation of essential importance for the safeguarding and preservation of the human environment” as an international crime.³⁸

Despite long and intensive discussions to include the serious violation of environmental obligations into the realm of international criminal law,³⁹ draft Article 26 was not adopted and the protection of the environment, as a separate provision, was not incorporated in the final draft of the Rome Statute.⁴⁰ There are however strong indicators that most States were influenced by economic considerations to object to its inclusion.⁴¹

³⁴ R. A. Falk, ‘Environmental Warfare and Ecocide, Facts, Appraisal, and Proposals’, 4 *Bulletin of Peace Proposals* (1973) 1, 80, 93-96; N. Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/416, 4 July 1978, paras 462-478.

³⁵ *Report of the ILC on the work of its 47th session*, *supra* note 2, paras 119-121 (emphasis added).

³⁶ *Ibid.*, Article 26, note 65.

³⁷ *Ibid.*, para. 120.

³⁸ *Report of the ILC on the work of its 28th session*, UN Doc A/CN.4/SER.A/1976/Add.I (Part 2), 3 May-23 July 1976, 95-96 (emphasis added).

³⁹ *Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission*, *Yearbook of the International Law Commission* (1996), Vol. II (1), 16-27 [Proposal by Tomuschat].

⁴⁰ *ILC Draft Code of Crimes against the Peace and Security of Mankind with Commentaries*, *Yearbook of the International Law Commission* (1996), Vol II (2), 17-56. Cf. for a conclusive history of ecocide as a proper crime: P. Higgins, ‘Ecocide Law, History’, available at <https://eradicatingecocide.com/the-law/history/> (last visited 11 February 2020).

⁴¹ Human Rights Consortium, *The Ecocide Project: ‘Ecocide is the missing 5th Crime Against Peace’* (2013), 9-11; C. Tomuschat, ‘Crimes Against Environment’, 26 *Environmental Policy and Law* (1996) 6, 242, 243.

Consequently, international criminal law in its totality remains an anthropocentric regime, putting the human being in the center of its protection.⁴² The only explicit reference to the environment remains the wartime provision of Article 8(2)(b)(iv) of the Rome Statute.⁴³

II. Protection in Wartime Scenarios

Armed conflict scenarios bear the inherent risk of negatively impacting the environment either by direct attacks or as a collateral damage. This is well-illustrated by the conflicts in Kuwait,⁴⁴ the Former Yugoslavia,⁴⁵ Colombia,⁴⁶ or Vietnam.⁴⁷ It should thus come as no surprise that the ILC is currently addressing this issue and recently adopted draft principles concerning the protection of the environment in relation to armed conflicts.⁴⁸ International criminal law itself confers a certain status to the environment in international armed conflicts (1) while providing for implicit protection in non-international armed conflicts (2).

⁴² S. Jodoin, 'Crimes against Future Generations – A New Approach to Ending Impunity for Serious Violations of Economic, Social, and Cultural Rights and International Environmental Law', WFC & CISDL Legal Working Paper, Final Version, 15 August 2010, 13-14.

⁴³ Articles without further reference are Articles of the Rome Statute.

⁴⁴ D. McLaren & I. Willmore, 'The environmental damage of war in Iraq', *The Guardian* (2003), available at <https://www.theguardian.com/world/2003/jan/19/iraq5> (last visited 11 February 2020).

⁴⁵ ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (2000), available at <https://www.icty.org/x/file/Press/nato061300.pdf> (last visited 11 February 2021), para. 14 [NATO Bombings Report].

⁴⁶ 'Colombia ELN rebel attack on Cano Limon pipeline extends pumping halt', *Reuters* (6 February 2018), available at <https://www.reuters.com/article/colombia-oil/colombia-eln-rebel-attack-on-cano-limon-pipeline-extends-pumping-halt-idUSL2N1PW10I> (last visited 11 February 2021).

⁴⁷ *Supra* note 34.

⁴⁸ *Protection of the environment in relation to armed conflicts, Text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading*, UN Doc A/CN.4/L.937, 6 June 2019.

1. International Armed Conflict

a) Explicit Protection of the Environment

Article 8(2)(b)(iv) is the only provision in the Rome Statute that explicitly sets out individual responsibility for attacks against the environment. The prohibition of environmental degradation in international humanitarian law, as found in Articles 35(3) and 55(1) of the Additional Protocol I [AP I],⁴⁹ forms the basis for this crime.⁵⁰ Article 8(2)(b)(iv) criminalizes intentionally launching an attack with the knowledge that the attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the military advantage anticipated. The provision is the first purely ecocentric crime and, therefore, has the potential to offer protection to the natural environment in wartime.⁵¹ Albeit, it is not free from criticism.⁵²

To begin with, the objective elements of Article 8(2)(b)(iv) are far from settled.⁵³ The exact meaning of the terms *widespread*, *long-term* and *severe* remains ambiguous⁵⁴ since neither the Rome Statute nor the Elements of Crime⁵⁵ provide for any clarification of the *actus reus* of Article 8(2)(b)(iv). Moreover, the ICC has not yet have the chance to elaborate on this issue. While there is common agreement that the understanding of similar terms in the ENMOD Convention⁵⁶ was not meant to be applied to other conventions,⁵⁷ guidance can

⁴⁹ *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, Art. 55(1), 1125 UNTS 3.

⁵⁰ K. Dörrman, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003), 166.

⁵¹ Lawrence & Heller, *supra* note 33, 71.

⁵² *Ibid.*, 75-85.

⁵³ *Ibid.*, 71-72.

⁵⁴ T. Weinstein, 'Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities', 17 *Georgetown International Environmental Law Review* (2005), 697, 707-708.

⁵⁵ *Report of the Preparatory Commission for the International Criminal Court: Addendum, Part II, Finalized draft text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2, 2 November 2000, 24 [ICC Elements of Crimes].

⁵⁶ *Convention on the prohibition of military or any hostile use of environmental modification techniques*, 10 December 1976, Art. I(1), 1108 UNTS 151.

⁵⁷ UN General Assembly, *Report of the Conference of the Committee on Disarmament (Volume I), Understanding Relating to Article I*, UN Doc A/31/27, 1976: *long-lasting* meaning "lasting for a period of months, or approximately a season". Cf. J. de Preux, in C. Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), Art. 35, paras 1450-1454.

be drawn from the similar terms in Article 35(3) of AP I which was the main source of inspiration for Article 8(2)(b)(iv).⁵⁸

Further, Article 8(2)(b)(iv) sets out an overall threshold which can barely be reached and thereby renders the environmental crime considerably illusory.⁵⁹ It is cumulatively required that the attack on the environment causes widespread, long-term and severe damage.⁶⁰ The accumulation of these three requirements places “[...] *the prohibition of ecological warfare incomprehensively higher than what modern weapons could possibly achieve [...]*”.⁶¹ This is exemplified, for instance, by the fact that no environmental damage caused in recent decades has been considered sufficiently intense to reach the outlined threshold.⁶²

The scope of the crime is further heavily restricted by requiring that the attack is excessively disproportionate.⁶³ The inclusion of a proportionality test raises the already high threshold even higher. Due to the combination of ambiguous terms, the high threshold and the proportionality test, it is questionable whether Article 8(2)(b)(iv) has protective or preventive effects regarding the protection of the environment.⁶⁴ Thus, an international crime

⁵⁸ R. Arnold & S. Wehrenberg, in O. Triffterer & K. Ambos (eds), *The Rome Statute of the International Criminal Court*, 3rd ed. (2016), Art. 8, para. 253. For a detailed analysis of the three terms (in the context of a proposed crime of ecocide), see *infra* D.II.2.

⁵⁹ Smith, *supra* note 33, 55.

⁶⁰ Y. Dinstein, ‘Protection of the Environment in International Armed Conflict’, 5 *Max Planck Yearbook of United Nations Law* (2001), 523, 536; Arnold & Wehrenberg, *supra* note 58, Art. 8, para. 253.

⁶¹ K. Hulme, ‘Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Natural Environment’, 2 *Journal of Conflict and Security Law* (1997) 1, 45, 61 (emphasis added); see also D. Fleck, ‘The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules’, 82 *Nordic Journal of International Law* (2013) 1, 7, 8; Arnold & Wehrenberg, *supra* note 58, Art. 8, para. 253.

⁶² Smith, *supra* note 33, 55. For damage caused by Iraqi forces in Kuwait, see *ibid.*, 56, fn. 65; C. Droegge & M.-L. Tougas, ‘The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection’, 82 *Nordic Journal of International Law* (2013) 1, 21, 33. For damages caused by NATO forces in the Former Yugoslavia, see: NATO Bombings Report, *supra* note 45, para. 25. For the environmental impacts of the Vietnam War, see G. Lacombe & A. Pierret, ‘Hydrological impact of war-induced deforestation in the Mekong Basin’, 6 *Ecologyhydrology* (2013), 903.

⁶³ Lawrence & Heller, *supra* note 33, 75; Arnold & Wehrenberg, *supra* note 58, Art. 8, para. 253.

⁶⁴ Smith, *supra* note 33, 53.

against the environment certainly exists on paper but it is doubtful if it is more than a lip-service.⁶⁵

b) Implicit Protection of the Environment

The Rome Statute contains three other provisions that might *implicitly* lead to individual criminal responsibility for attacks on the natural environment. First, according to Article 8(2)(b)(ii), intentionally directing an attack against civilian objects constitutes a war crime. Second, the first alternative of Article 8(2)(b)(iv) prohibits launching an attack that would cause incidental loss clearly excessive in relation to the military advantage anticipated.⁶⁶ Since the natural environment is considered a civilian object,⁶⁷ direct attacks or incidental loss on the environment would constitute a war crime.⁶⁸ There is however a considerable difference between Article 8(2)(b)(ii) and (iv). Contrary to the ecocentric Article 8(2)(b)(iv),⁶⁹ the crimes concerning attacks against civilian objects are ultimately anthropocentric in nature.⁷⁰ Third, the natural environment is implicitly protected by the provision on the crime of pillage⁷¹ as it encompasses natural resources and would therefore protect the natural environment from being plundered.⁷²

It is however important to bear in mind that these provisions protect the environment implicitly since they were not drafted with this intention.⁷³

⁶⁵ *Ibid.*, 52.

⁶⁶ J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (2009), Rule 156, 576-577.

⁶⁷ Fleck, *supra* note 61, 9; ICRC, Henckaerts & Doswald-Beck, *supra* note 66, 34.

⁶⁸ It might however lose its protected status if, by the manner it is used, it is transformed to a military object, see Fleck, *supra* note 61, 7, 10; G. Werle & F. Jessberger, *Principles of International Criminal Law*, 3rd ed. (2014), para. 1307.

⁶⁹ Lawrence & Heller, *supra* note 33, 71.

⁷⁰ Werle & Jessberger, *supra* note 68, paras 1279-1280; opposing view: S.-E. Pantazopoulos, 'Protection of the environment during armed conflicts: An appraisal of the ILC's work', 34 *Questions of International Law* (2016), 7, 17.

⁷¹ Article 8(2)(b)(xvi).

⁷² *Armed Activities on the Territory of the Congo Case (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 252, para. 245. However, on the lack of jurisprudence on the connections between pillage and the impact on natural resources: Pereira, *supra* note 10, 179.

⁷³ Cf. T. Carson, 'Advancing the Legal Protection of the Environment in Relation to Armed Conflict', 82 *Nordic Journal of International Law* (2013) 1, 83, 93. The author is referring to the companion provisions in AP I, the argument is however also valid regarding the crimes set out in Article 8.

2. Non-International Armed Conflict

Article 8(2)(b)(iv) only applies to international armed conflict scenarios and there exists no counterpart provision in conflicts of a non-international character in contemporary international criminal law.⁷⁴ The same is true for the crime concerning attacks against civilian objects.⁷⁵ Closer scrutiny to conventional international humanitarian law leads to a similar finding. Unlike in international armed conflicts, there exists neither an *explicit* conventional prohibition of attacks against the environment⁷⁶ nor a prohibition of attacks against civilian objects.⁷⁷ Solely customary humanitarian law provides for the said prohibitions.⁷⁸ Due to the lack of a counterpart of Article 8(2)(b)(iv) in non-international armed conflicts, criminal liability for wartime environmental damage under the Rome Statute hence ultimately depends on the opposing party, i.e. whether the State armed forces are facing another State party or non-State armed groups.⁷⁹

III. Protection in Peacetime Scenarios

Beyond this narrow protection of the environment in wartime scenarios, international criminal law does not provide for explicit *peacetime* protection comparable to Article 8(2)(b)(iv). Protection of the natural environment can however be deduced from the crime of genocide (1) and crimes against humanity (2) since these crimes are not limited to a specific scenario and may consequently be committed in both peace- and wartime.

⁷⁴ Lawrence & Heller, *supra* note 33, 84-85.

⁷⁵ *Situation in Darfur, Sudan in the Case of the Prosecutor v. Abu Garda*, Public Redacted Version, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-red (Pre-Trial Chamber I), 8 February 2010, para. 85; J.-P. Pérez-León-Acevedo, 'The Challenging Prosecution of Unlawful Attacks as War Crimes at International Criminal Tribunals', 26 *Michigan State International Law Review* (2018) 3, 407, 412.

⁷⁶ Dinstein, *supra* note 60, 540.

⁷⁷ Pérez-León-Acevedo, *supra* note 75, 410-411; N. Quéniévet, in M. Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (2017), 79; *Prosecutor v. Abu Garda*, *supra* note 75, para. 85.

⁷⁸ Henckaerts & Doswald-Beck, *supra* note 66, Rule 45, 151; *ibid.*, Rule 7, 25-29.

⁷⁹ This divergence of protection is a general shortcoming of international humanitarian law, see L. Moir, 'Towards the unification of international humanitarian law?', in R. Burchill, N. D. White & J. Morris, *International Conflict and Security Law* (2009), 127.

1. Genocide

The crime of genocide might, in the first place, offer such incidental protection. Article 6 punishes *inter alia* the act of “[d]eliberately inflicting on [a national, ethnical, racial or religious] group conditions of life calculated to bring about its physical destruction in whole or in part”. Destruction of the environment, which might itself lead to a group’s physical destruction, could fulfill the *actus reus* criteria of the crime of genocide.⁸⁰ The difficulty of attributing environmental crimes to the crime of genocide rests in its high *mens rea* threshold – i.e. the intent to destroy the envisaged group in whole or in part. This strong subjective requirement entails an almost unsurmountable obstacle for a proper prosecution.⁸¹ Though, the destruction of the environment will be covered by Article 6 if the perpetrator seeks to destroy a protected group, in cases of environmental damage this will be even more difficult to prove.⁸²

2. Crimes Against Humanity

Article 7, punishing crimes against humanity, is another possible means of implicitly protecting the environment by international criminal law.⁸³ Crimes against humanity are conceived as one of the enumerated acts “[...] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack [...]”.⁸⁴ The most important distinction to genocide lies within the *mens rea* element. The respective objective elements of Article 7 must be committed with intent and knowledge pursuant to Article 30.⁸⁵ The perpetrator must further have knowledge regarding the contextual element of the crime, i.e. that the conduct was committed as part

⁸⁰ Mwanza, *supra* note 33, 596; *ICC Elements of Crimes*, *supra* note 55, 7; Mistura, *supra* note 8, 204-207. This form of genocidal act is sometimes referred to as ecocide (T. Lindgren, ‘Ecocide, Genocide and the Disregard of Alternative Life-Systems’ 22 *International Journal of Human Rights* (2018) 525, 531-534), in distinction to the separate concept of *ecocide* as a proper crime against the environment, see *infra* D.I.

⁸¹ Smith, *supra* note 33, 48; Mistura, *supra* note 8, 207.

⁸² See for some examples: Smith, *supra* note 33, 48-50; P. Patel, *supra* note 11, 190.

⁸³ Lambert, *supra* note 32, 707; Prospero & Terrosi, *supra* note 11; S. I. Skogly, ‘Crimes Against Humanity – Revisited: Is There a Role for Economic and Social Rights?’ 5 *International Journal of Human Rights* (2001) 1, 58; Weinstein, *supra* note 54, 720; Durney, *supra* note 14, 413.

⁸⁴ Werle & Jessberger, *supra* note 68, paras 881-911.

⁸⁵ *Ibid.*, paras 467-507, 913-915; D. K. Pigaroff & D. Robinson, in Triffterer & Ambos (eds), *supra* note 58, Art. 30, paras 9-13, 22-23.

of a widespread or systematic attack directed against any civilian population.⁸⁶ Since Article 7 does not require an intention to destroy a protected group, as far as environmental damage is concerned, its *mens rea* element is less strict than in the context of the crime of genocide.⁸⁷

Environmental damage is not explicitly enumerated in Article 7(1) but various of the listed conducts could be fulfilled by means of environmental degradation, such as extermination, forcible transfer of population, persecution and “[o]ther inhumane acts of a similar character [...]”.⁸⁸ Particularly, Article 7 (1)(k) could be fitting for punishing crimes against the environment, as it deals with inhumane acts “[...] intentionally causing great suffering, or serious injury to body or to mental or physical health”.⁸⁹

However, three limitations must be borne in mind: First, like all crimes under Article 7, the conduct must be “[...] committed as part of a widespread or systematic attack [...]”, constituting the contextual element of crimes against humanity.⁹⁰ This requires the act to be part of a series of multiple acts, “[...] pursuant to or in furtherance of a State or organizational policy to commit such attack”.⁹¹ Second, regarding environmental damage, it is important to underline the prerequisite impact of humanitarian character: a behavior is not punished unless it affects human beings in a way as atrocious as to amount to a crime against humanity.⁹² Third, the existing crimes must not be applied too broadly to cases of environmental degradation, in order to not contradict the principle of legality.⁹³

⁸⁶ C. K. Hall & K. Ambos, in Triffterer & Ambos (eds), *supra* note 58, Art. 7 para. 26.

⁸⁷ Smith, *supra* note 33, 51.

⁸⁸ *Rome Statute*, Art. 7(1)(b),(d),(h),(k). See Prospero & Terrosi, *supra* note 11, 517-524; Lambert, *supra* note 32, 726-728.

⁸⁹ Notice that the requirement of intentionally causing such suffering or injury does not introduce a deviation from the general requirement in Article 30; it is sufficient that the perpetrator knew that the conduct was likely to cause such consequences: Werle & Jessberger, *supra* note 68, para. 1023.

⁹⁰ *ICC Elements of Crimes*, *supra* note 55, 9.

⁹¹ *Rome Statute*, Art. 7(2)(a). See on this *policy element* and its implications on the accountability of private organizations Werle & Jessberger, *supra* note 68, paras 904-909. Mwanza interprets the provision as leaving room for a successful punishment of environmental damage committed by a corporation: Mwanza, *supra* note 33, 597.

⁹² Mwanza, *supra* note 33, 597; Smith, *supra* note 33, 52; Lambert, *supra* note 32, 713.

⁹³ M. S.-A. Wattad, “The Rome Statute and Captain Planet: What Lies between “crimes against humanity” and the “natural environment””, 19 *Fordham Environmental Law Review* (2009) 2, 265, 268-269; Pereira, *supra* note 10, 217-218; J. Nilsson, in Klamberg (ed), *supra* note 77, 60-61.

IV. Summarizing Remarks and Application to the Situation in Ecuador

De lege lata, international criminal law does not provide for comprehensive criminal liability for environmental damage.⁹⁴ In wartime, explicit protection of the environment is only granted by Article 8(2)(b)(iv) in conflicts of an international character. However, the high threshold of this provision renders its application extremely limited. Outside wartime scenarios, explicit protection is foreign to contemporary international criminal law, thus, protection of the environment can only be deduced from the crime of genocide or crimes against humanity. Again, this protection appears insufficient due to the anthropocentric limits of the contemporary framework which disregard future impacts of environmental crimes on ecosystems and future human beings alike.⁹⁵

This insufficiency is well-illustrated by the oil spill in Ecuador. Even if the ICC had jurisdiction *rationae temporis* concerning the acts of pollution,⁹⁶ the environmental degradation caused by Chevron's oil exploitation would not entail any criminal responsibility under the Rome Statute.⁹⁷

In the absence of an armed conflict in Ecuador, criminal responsibility under Article 8 does not come into question. Further, none of the acts in Ecuador were committed with the genocidal intent necessary for a violation of Article 6. But even the most promising provision of Article 7 would not entirely encompass the situation in Ecuador: Admittedly, there are strong arguments that the objective elements, particularly of the *chapeau*, could have been satisfied by Chevron's behavior due to the visible corporate policy behind the dumping and the widespread as well as systematic nature of the acts.⁹⁸ However, the difficulty would be to establish the mental element which is required for all of

⁹⁴ Mistura, *supra* note 8, 213; K. Cornelius, 'Der Umweltschutz im Völkerstrafrecht', 58 *Archiv des Völkerrechts* (2020) 1, 21-23.

⁹⁵ P. Patel, *supra* note 11, 197; Mistura, *supra* note 8, 214. Cf. on the anthropocentric nature of environmental protection in general: S. Malhotra, 'The International Crime that could have been but never was: An English School perspective on the Ecocide Law', 9 *Amsterdam Law Forum* (2017) 3, 49.

⁹⁶ Cf. *supra* note 32.

⁹⁷ The specific reasons for this conclusion have been analysed in more detail by several commentators, e.g. Lambert, *supra* note 32, 717-729; Crasson, *supra* note 24, 37-38; Pereira, *supra* note 10, 212-218.

⁹⁸ See particularly Lambert, *supra* note 32, 720-725 with reference to, *inter alia*, the number of victims as well as the immense geographical scope of polluted area, but also to the continued pattern of avoidance of civil liability by Chevron. Lambert further affirms the "knowledge" of the widespread or systematic attack.

the possible enumerated acts listed in Article 7: Whereas the exploitation was certainly intended to achieve maximum profit, it was however not intended to cause humanitarian harm as a consequence of the environmental devastation.⁹⁹

C. Reasons for an Integral Protection of the Environment Under International Criminal Law

While international criminal law is certainly not the only or the main means to achieve better environmental protection, it could at least contribute to a more coherent framework of protection in coexistence with other areas of international law.¹⁰⁰ Several reasons exist to further develop international criminal law towards a proper environmental protection. There is no convincing reason for a differentiated approach in international criminal law to environmental damage in wartime and in peacetime (I). It is further time to shift the predominately anthropocentric perspective of international criminal law towards a more ecocentric approach (II). The introduction of a new international crime against the environment is thus reasonable and appropriate (III).

I. Towards an Integral Protection From Wartime and Peacetime Environmental Damage

As exemplified, the environment's protection differs depending on the context in which certain conduct occurs – i.e. whether it occurs in wartime or in peacetime. However, this differentiation is not justified under international law, neither on normative nor on factual grounds.

By qualifying damage to the environment as a war crime under Art. 8(2)(b)(iv), the Rome Statute acknowledges the importance of the environment's preservation for humankind in wartime. The outstanding value of the environment is also acknowledged in other areas of international law.¹⁰¹ During the last decades, the legal regime of international environmental law has expanded rapidly, developing from soft law considerations¹⁰² to legally

⁹⁹ Lambert, *supra* note 32, 726-728.

¹⁰⁰ F. Mégret, 'The Case for a General International Crime against the Environment', in M.-C. Cordonier Segger & S. Jodoin (eds), *Sustainable development, international criminal justice, and treaty implementation* (2013), 50, 56 [Mégret, Crime against the Environment].

¹⁰¹ Overview in: P. Sands & J. Peel, *Principles of International Environmental Law*, 4th ed. (2018), 3-6.

¹⁰² E.g. *Declaration of the United Nations Conference on the Human Environment*, UN Doc A/Conf.48/14/Rev. 1 (1973), 16 June 1972 [Stockholm Declaration].

binding instruments.¹⁰³ International courts similarly underlined the value of the environment on various occasions, e.g. in connection with the principle of sustainable development.¹⁰⁴ This value is however inherent to the environment itself; thus not dependent on whether harms occur in peacetime or wartime. If international criminal law considers the environment to be worthy of protection for its own sake during an international armed conflict, it is therefore normatively inconsistent with international law not to recognize such worthiness of protection outside wartime scenarios.¹⁰⁵

Whereas the explicit protection of the environment in wartime is certainly motivated by the increased endangerment of the environment in an armed conflict,¹⁰⁶ it is at least questionable whether this increased endangerment in comparison to peacetime environmental degradation stands up to further scrutiny. Wartime environmental damage only constitutes a small proportion in comparison to other factors threatening the environment during peacetime.¹⁰⁷ Environmental crime contributes to a large extent to the endangerment of wildlife and ecosystems as a whole, regardless of war and peace.¹⁰⁸ While military considerations may increase the potential dangers for the environment in wartime, economic considerations of States and private corporations constitute the corresponding self-justification in peacetime scenarios. These economic considerations have factually become a much larger threat to the global human and non-human environment than any military operation could ever be.¹⁰⁹ Consequently, there is no conclusive reason for an enhanced protection of the

¹⁰³ E.g. *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 [UNFCCC]; *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 [CBD].

¹⁰⁴ *Nuclear Weapons Advisory Opinion*, *supra* note 3, para. 29; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, paras 140-141 [Gabčíkovo-Nagymaros Project].

¹⁰⁵ Mégret, 'Crime against the Environment', *supra* note 100, 56-57; Crasson, *supra* note 24, 43.

¹⁰⁶ UNEP, *Protecting the Environment During Armed Conflict, An Inventory and Analysis of International Law*, (2009), 8.

¹⁰⁷ Mistura, *supra* note 8, 222.

¹⁰⁸ Nellesmann *et al.*, *supra* note 6, 17-21.

¹⁰⁹ See on the contribution of carbon majors to climate change: P. Griffin, 'The Carbon Majors Database, CDP Carbon Majors Report 2017', available at <https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772> (last visited 18 February 2021); for the exploitation of natural resources by transnational corporations cf. *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc S/2002/1146, Annex III, 16 October 2002.

environment by international criminal law during times of war in contrast to the non-existent protection in peacetime.

II. Towards an Ecocentric Protection From Environmental Damage

The focus of international criminal law on an integral protection of the natural environment should further be accompanied by a shift of perspective. The existing provisions of international criminal law, except for Article 8 (2)(b)(iv), are based on strong anthropocentric considerations.¹¹⁰ However, these merely anthropocentric mechanisms ignore the fact that humans are environmentally embedded beings.¹¹¹ At least since the 1970s, the inherent interdependence¹¹² between the environment and the enjoyment of human rights has been acknowledged and restated in many documents and judicial decisions.¹¹³ Additional developments in human rights law, i.e. the *greening of human rights*¹¹⁴ as well as literature and jurisprudence on a potential “[...] human right to a [...] healthy environment [...]”¹¹⁵ have contributed to shape this relationship.¹¹⁶ These recent developments in human rights law also depart from an anthropocentric perspective on the environment, envisaging it as a means to the guarantee of fundamental human rights.¹¹⁷ Notwithstanding, the IACHR clarified in 2017

¹¹⁰ P. Patel, *supra* note 11, 191-192. See *supra* B.II., B.III.

¹¹¹ Mwanza, *supra* note 33, 593.

¹¹² J. Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/22/43, 24 December 2012, para. 10 (emphasis added).

¹¹³ *Stockholm Declaration*, *supra* note 102, Principle 8; *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/37/59, 24 January 2018; *Gabčíkovo-Nagymaros Project*, *supra* note 104, para. 112.

¹¹⁴ This notion was shaped by *Alan Boyle*: see A. E. Boyle, ‘Environment and Human Rights’, in R. Wolfrum, *Max Planck Encyclopedia of Public International Law* (2009), paras 16-22.

¹¹⁵ *Ibid.*, paras 9-15.

¹¹⁶ The most recent confirmation of the existence of such a right was made by the Inter-American Court on Human Rights [IACHR] in its Advisory Opinion in 2017: *The Environment and Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017, IACHR Series A, No. 23, paras 47–55 [The Environment and Human Rights]. For the interconnectedness between these developments and international criminal law, see Durney, *supra* note 14, 418-425.

¹¹⁷ K. Wolfe, ‘Greening the international human rights sphere, Environmental rights and the draft declaration of principles on human rights and the environment’, 9 *APPEAL: Review of Current Law and Law Reform* (2003) 1, 45, 55-56, 58; Boyle, *supra* note 114, para. 4.

that nature and the environment are worth a specific protection “[...] *not only because of the benefits they provide to humanity [...], but because of their importance to the other living organisms [...] that also merit protection in their own right*”.¹¹⁸

An environmental crime should be based on that very rationale: to envision the protection of the environment for its own sake.¹¹⁹ This is plausible for two reasons: The first reason is mainly consequential as it departs from the foregoing assessment that environmental protection can be better achieved by means of an ecocentric perspective on international law.¹²⁰ In many of the existing provisions, it is their anthropocentric requirement of an actual harm to human beings, that results in an ineffective environmental protection under current international criminal law. Second, the risk of exceeding the planetary boundaries increases and thus can lead to destabilizing damage to the complex global ecosystems.¹²¹ This directly impacts on human and non-human life in general without that there is always a linear causal relationship between specific environmental harms and specific lives.¹²² As long as the prosecution of conducts damaging the environment depends on the occurrence of harm to individual human beings,¹²³ these complex interrelations between impacts of human behavior on the planet and subsequent harm to life in general is not properly taken into consideration.¹²⁴ For this reason, some commentators argue in favor of a mere ecocentric view of environmental ethics and law, which would ascribe proper value to the environment and thereby better address the contemporary environmental challenges.¹²⁵

¹¹⁸ The Environment and Human Rights, *supra* note 116, para. 62 (emphasis added).

¹¹⁹ Mwanza, *supra* note 33, 590-595; R. Rauxloh, ‘The Role of International Criminal Law in Environmental Protection’, in F. N. Botchway (ed.), *Natural Resources Investment and Africa’s Development*, (2011), 423, 446; Drumbl, *supra* note 33, 129-130.

¹²⁰ Lawrence & Heller, *supra* note 33, 67.

¹²¹ Stockholm Resilience Centre, The Nine Planetary Boundaries, available at <https://www.stockholmresilience.org/research/planetary-boundaries/planetary-boundaries/about-the-research/the-nine-planetary-boundaries.html> (last visited 18 February 2021).

¹²² Mwanza, *supra* note 33; Cornelius, *supra* note 94, 24-25.

¹²³ Mwanza, *supra* note 33, 597; Smith, *supra* note 33, 52; Lambert, *supra* note 32, 713.

¹²⁴ Mwanza, *supra* note 33, 592-595; Lindgren, *supra* note 80, 528-531.

¹²⁵ R. E. Kim & K. Bosselmann, ‘Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law’, *24 Review of European Comparative & International Environmental Law* (2015), 194; Mwanza, *supra* note 33, 592-595 with further references. The statement of the IACHR could be understood in a similar way: *The Environment and Human Rights*, *supra* note 116, para. 62. An exhaustive analysis of the theoretical foundations of ecocentric approaches to international law would however exceed the scope of the present work.

Even if one remains reluctant to fully endorse such an ecocentric approach, the introduction of a crime against the environment can also be justified with intermediary approaches between ecocentric and anthropocentric considerations.¹²⁶ Due to the inescapable dependence of human beings on the preservation of global ecosystems, the latter's protection amounts to a necessary means to secure the survival of humankind in the long-term.¹²⁷ As *Tomuschat* puts it: “*The human being is the ultimate beneficiary of the efforts undertaken, but the disruptive effect of damage to the environment does not necessarily need to be measured in terms of injury to human life and physical integrity*”.¹²⁸

For these reasons, this paper dismisses proposals for a new “[crime] against future generations”,¹²⁹ since such a crime ultimately remains anthropocentric in character.¹³⁰ While it draws on the principle of intergenerational equity,¹³¹ it only incidentally relies on long-term harm by considering the notion of “future generations” to be only of “[...] *conceptual, rather than legal, importance*[...]”.¹³² Particularly, most of its prohibited acts still require a direct impact on identifiable groups, thus on the present generation.¹³³ Thereby, this crime remains ill-suited

¹²⁶ Cornelius, *supra* note 94, 24-25. Cf. Lawrence & Heller, *supra* note 33, 66-67. Arguing for an approach of *weak anthropocentrism* which would reach the same results: B. G. Norton, ‘Environmental Ethics and Weak Anthropocentrism’, 6 *Environmental Ethics* (1984) 2, 131, 133.

¹²⁷ *Proposal by Tomuschat*, *supra* note 39, para. 29.

¹²⁸ *Ibid* (emphasis added).

¹²⁹ Jodoin, *supra* note 42, 2, proposes as such crimes: “[...] *acts within any sphere of human activity [...] when committed with knowledge of the substantial likelihood of their severe consequences on the long-term health, safety and means of survival of any identifiable group or collectivity*” (emphasis added). Cf. S. Jodoin & Y. Saito, ‘Crimes against Future Generations: Harnessing the Potential of Individual Criminal Accountability for Global Sustainability’, 7 *McGill International Journal of Sustainable Development Law & Policy* (2012) 115; see also E. Gaillard, ‘Des crimes contre l’humanité aux crimes contre les générations futures’, 7 *McGill International Journal of Sustainable Development Law & Policy* (2012) 181

¹³⁰ The only ecocentric exception to this is sub-paragraph (1)(h) of the Draft Definition.

¹³¹ Jodoin, *supra* note 42, 20-22 with further references.

¹³² Jodoin & Saito, *supra* note 129, 129 (emphasis added). Considering this as misleading: F. Mégret, ‘Offences against Future Generations: A Critical Look at the Jodoin/Saito Proposal and a Suggestion for Future Thought’, 7 *McGill International Journal of Sustainable Development Law & Policy* (2012) 2, 157, 160-162 [Mégret, ‘Offences against Future Generations’].

¹³³ *Ibid.*, 165-168. Cf. para. 2 of the Draft Definition of Crimes against Future Generations, Jodoin, *supra* note 42, 2, 8, 34; Jodoin & Saito, *supra* note 129, 128-129.

to enhance the protection of the environment itself by the means of international criminal law.

Instead, a new crime against the environment should depart from such strict anthropocentric understandings of harm. It should endorse a more ecocentric – or at least an intermediary – perspective by protecting the essential parts of the environment from human-made destruction, regardless of whether human beings might be directly affected or not.

III. Towards an International Protection Under International Criminal Law

The aforementioned does not yet answer the question why such protection should be granted by the means of international criminal law. Although an exhaustive assessment of international criminal law's effectiveness in this regard would exceed the present work's scope, a few arguments are given in the following analysis.¹³⁴ First, the deterrent effect of criminal law constitutes a crucial reason for criminal prosecution of conduct that significantly harms the environment.¹³⁵ Criminal sanctions are more effective than remedies of civil and administrative sanctions to prevent ecologically reckless behavior.¹³⁶ Environmental criminal prosecution can have such a promising deterrent effect in cases where the environmental harm is caused by the result of a cost-benefit assessment and as long as there is a sufficient probability of prosecution and strong applicable sanctions.¹³⁷

Beyond that, it is justified to include a new crime against the environment into the corpus of *international* criminal law. A coordinated and institutionalized global approach of prosecution for environmental crimes would have positive effects in contrast to a patchwork system which governs such prosecution on the domestic level.¹³⁸ At the minimum, criminal prosecution can encourage States

¹³⁴ For a detailed analysis, see Mégret, 'Crime against the Environment', *supra* note 100, 53-64; Crasson, *supra* note 24, 41-47.

¹³⁵ Crasson, *supra* note 24, 41-42; B. Cho, 'Emergence of an International Environmental Criminal Law', 19 *UCLA Journal of Environmental Law and Policy* (2000) 1, 11.

¹³⁶ M. Watson, 'The Enforcement of Environmental Law: Civil or Criminal Penalties', 17 *Environmental Law and Management* (2005) 3, 6; Mégret, 'Crime against the Environment', *supra* note 100, 53-54.

¹³⁷ G. Becker, 'Crime and Punishment: An Economic Approach', 76 *Journal of Political Economy* (1968) 2, 169; Cho, *supra* note 135, 11-47.

¹³⁸ Mégret, 'Crime against the Environment', *supra* note 100, 57-59; *Proposal by Tomuschat*, *supra* note 39, para. 20. See also Mistura, *supra* note 8, 181, 189-192, although eventually rejecting the introduction of a new international crime, *ibid.*, 223-226.

to bring their domestic laws into conformity with environmental obligations of international law,¹³⁹ going beyond isolated attempts of regional harmonization.¹⁴⁰

Other arguments address the question of *what* turns a criminal offence to an international crime.¹⁴¹ The Rome Statute itself stipulates in its Preamble that it is dedicated to measure against “[...] atrocities that deeply shock the conscience of humanity [...]” and “[...] grave crimes [that] threaten the peace, security and well-being of the world [...]”.¹⁴² For instance, according to *Tomuschat*, conduct has to fulfill two criteria in order to qualify as an international crime: it has to reach a certain seriousness and must have disruptive effects on the foundations of human society.¹⁴³ If a crime satisfies these criteria, it is of such universal concern that it *can* become subject to international criminal prosecution.¹⁴⁴ As previously mentioned,¹⁴⁵ some cases of environmental destruction can have horrible effects on the well-being of present and future human society.¹⁴⁶ While this might not be true for all environmental crimes, there are certainly instances in which the effects are similar or worse.¹⁴⁷ This holds especially true for cases in which environmental degradation reaches an irreversible status and has seriously negative long-term impacts on future generations.¹⁴⁸ Further, environmental

¹³⁹ Rauxloh, *supra* note 119, 445; Crasson, *supra* note 24, 45-46.

¹⁴⁰ For such an attempt, see *Convention on the Protection of the Environment through Criminal Law*, 4 November 1998, ETS No. 172 [CoE Convention]. This convention has only been ratified by one State so far.

¹⁴¹ Mégret, ‘Crime against the Environment’, *supra* note 100, 59-61.

¹⁴² *Rome Statute*, Preamble (emphasis added). See also *Report of the ILC on the work of its 39th session*, UN Doc A/42/10, 17 July 1987, 13, Art. 1, para. 2; M. A. Gray, ‘The International Crime of Ecocide’, 26 *California Western International Law Journal* (1995) 2, 215, 264-265; Mégret, ‘Crime against the Environment’, *supra* note 100, 59-61; M. Cherif Bassiouni, *A draft international criminal code and draft statute for an international criminal tribunal* (1987), 36.

¹⁴³ *Proposal by Tomuschat*, *supra* note 39, paras 14-19.

¹⁴⁴ Cf. also McLaughlin, ‘Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes’, 11 *Colorado Journal of International Environmental Law and Policy* (2000) 2, 377, 393; Cornelius, *supra* note 94, 26-27.

¹⁴⁵ Stockholm Resilience Centre, *supra* note 121; Higgins, Short & South, *supra* note 5, 252-254.

¹⁴⁶ B. Lay et al., ‘Timely and Necessary, Ecocide Law as Urgent and Emerging’, 28 *Journal of Jurisprudence* (2015) 431, 437; Rauxloh, *supra* note 119, 446. In this context, see UN Secretary-General, *Climate change and its possible security implications*, UN Doc A/64/350, 11 September 2009.

¹⁴⁷ Mégret, ‘Crime against the Environment’, *supra* note 100, 55.

¹⁴⁸ Rauxloh, *supra* note 119, 446. On intergenerational equity, see Sands & Peel, *supra* note 101, 221-222.

crimes typically concern behavior that has global impacts since the environment itself is not bound by national borders.¹⁴⁹ These instances thereby touch upon public interests of the whole international community.¹⁵⁰

The question should not be *whether*, in general, crimes against the environment merit a prosecution under international criminal law, but *under which specific circumstances* a crime against the environment is to be considered an international crime.

D. Perspectives for an Integral Protection of the Environment Under International Criminal Law

Based on the abovementioned arguments, an international environmental crime would have to address environmental damage in war- and peacetime and depart from a strictly anthropocentric approach. Further, it would have to be of certain objective and subjective seriousness in order to qualify as a crime of international concern. Various suggestions have been made on an integral protection of the environment through the lens of international criminal law. After shortly summarizing the main proposals (I), some observations and analysis on a *crime of ecocide* are made (II).

I. Existing Proposals for a New Crime Against the Environment

In line with the originally proposed draft Article 26 of the Draft Code of Crimes,¹⁵¹ there have been multiple calls for the inclusion of an international crime against the environment.¹⁵² Particularly, *Poly Higgins'* proposal to the ILC in 2010 of the introduction of a fifth core crime of "ecocide" has been the focus of recent attention.¹⁵³ *Higgins'* proposal defines ecocide as "[...] extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of

¹⁴⁹ Mégret, 'Crime against the Environment', *supra* note 100, 60-61.

¹⁵⁰ *Ibid.*, 64; Pereira, *supra* note 10, 191-192. Cf. *supra* notes 101-104.

¹⁵¹ *Supra* notes 35-37.

¹⁵² E.g. Crasson, *supra* note 24, 40-47; Rauxloh, *supra* note 119, 432-434, 446; Gray, *supra* note 142, 270; Mwanza, *supra* note 33, 612-613.

¹⁵³ P. Higgins, *Eradicating ecocide. Laws and governance to prevent the destruction of our planet*, 2nd ed. (2015), 61-71 [Higgins, *Eradicating ecocide*]; see also Human Rights Consortium, *supra* note 41; End Ecocide on Earth Initiative, 'Ecocide Amendments Proposal' (2016), available at <https://www.endecocide.org/wp-content/uploads/2016/10/ICC-Amendments-Ecocide-ENG-Sept-2016.pdf> (last visited 18 February 2021).

that territory has been or will be severely diminished".¹⁵⁴ Comparable proposals only differ in detail or denomination.¹⁵⁵

An important similarity that these proposals share is their shift from exclusively anthropocentric protection to a perspective which is at least partly ecocentric.¹⁵⁶ By punishing the loss, damage or destruction of *ecosystem*, the crime of ecocide shifts away from international criminal law's focus on humanitarian protection and introduces a genuine environmental protection.¹⁵⁷ It does not limit the relevant effects to *human inhabitants* but explicitly includes non-human life,¹⁵⁸ and recognizes the profound interconnectedness between human beings and their surrounding ecosystems in an abstract way.¹⁵⁹ It further addresses environmental crimes in an integral way, extending the scope from mere wartime to also include peacetime scenarios.

In order to keep the prosecution by international criminal law limited to the gravest crimes, *Higgins'* proposal introduces a counterbalance in form of a threshold of seriousness: *serious* loss, damage or destruction is thus connected to impacts which are widespread, long-term or severe.¹⁶⁰ Although slightly differing in the specific delimitations, approaches of ecocide commonly incorporate limitations of seriousness.¹⁶¹ However, they largely differ with regard to the *mens rea* standard.¹⁶² While most of the proposals agree to that point that they seek to move away from the strict *mens rea* requirement of genocide according to Article 6,¹⁶³ controversy persists as to what would be an appropriate standard.¹⁶⁴ Comparable controversy exists with regard to the crime's potential perpetrators.¹⁶⁵

¹⁵⁴ P. Higgins, *Earth Is Our Business. Changing the Rules of the Game* (2012), 157 (emphasis added) [Higgins, *Earth Is Our Business*].

¹⁵⁵ See as well the propositions of Gray, *supra* note 142, 258; Mégret, 'Crime against the Environment', *supra* note 100, 65-67; Rauxloh, *supra* note 119, 445-448; L. Berat, 'Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law', 11 *Boston University International Law Journal* (1993), 327, 342-343.

¹⁵⁶ It thereby differs decisively from the anthropocentric basis of *crimes against future generations* mentioned earlier, *supra* notes 129-133.

¹⁵⁷ Malhotra, *supra* note 95, 61-66.

¹⁵⁸ End Ecocide on Earth Initiative, *supra* note 153.

¹⁵⁹ Mwanza, *supra* note 33, 607.

¹⁶⁰ Higgins, *Earth Is Our Business*, *supra* note 154, 162.

¹⁶¹ In detail *infra* D.II.2.

¹⁶² Mwanza, *supra* note 33, 599-600.

¹⁶³ *Supra* B.III.1.

¹⁶⁴ In detail *infra* D.II.3.

¹⁶⁵ See *infra* D.II.1.

II. Substantive Observations on a Potential *New Crime of Ecocide*

The introduction of a new international crime of ecocide¹⁶⁶ would have to meet different requirements in order to put it on par with the other international core crimes.¹⁶⁷ At the same time, its requirements must not be as restrictive as those of Article 8(2)(b)(iv) to provide for added value in the protection of the environment.

Many issues require a sophisticated analysis in more detail: the crime's threshold of seriousness, the necessary *mens rea* requirement, an appropriate list of its punishable acts, its potential perpetrators, its relationship to other international crimes, as well as matters of causation and evidence. It goes beyond the scope of this article to exhaustively address all these issues. Nonetheless, a few remarks on the crime's general structure and requirements will be made (1.) before turning in detail to the question of ecocide's threshold of seriousness (2.) and its *mens rea* requirement (3.).

1. Structure and Requirements of a Crime of Ecocide

In order to fit the context of the other four core crimes of international criminal law, the elements of ecocide should be as far as possible parallel to the structure of these other crimes.¹⁶⁸ It follows that it should consist of an introductory *chapeau*, followed by a detailed enumeration of potential acts to be punished.¹⁶⁹ While the *chapeau* could contain the potential perpetrators, the *mens rea* requirement of the crime, its threshold of seriousness and a reference to the necessary causal link,¹⁷⁰ the enumerative catalogue would include possible punishable forms of conduct.¹⁷¹

For the *chapeau*, this article makes the following proposal, which is partly inspired by the aforementioned proposals:

¹⁶⁶ Despite different terms used, *supra* note 155, this paper subsequently labels the proposed new crime as *crime of ecocide*.

¹⁶⁷ See *supra* C.III.

¹⁶⁸ Mégret, 'Crime against the Environment', *supra* note 100, 55; Pereira, *supra* note 10, 196.

¹⁶⁹ As to the risk of otherwise violating the principle of legality, see Mistura, *supra* note 8, 198-199.

¹⁷⁰ See on this aspect briefly *infra* D.II.2.

¹⁷¹ Rauxloh, *supra* note 119, 447-448.

“Ecocide” means any of the following acts or omissions committed in times of peace or conflict which cause or may be expected to cause widespread or long-term and severe damage to the environment.

This chapeau would be followed by the enumerative catalogue of punishable acts, which is mainly inspired by the structure of crimes against humanity. Punishable acts or omissions can neither depend on the domestic law of any individual State¹⁷² nor on the existence of specific prohibitions in international environmental law.¹⁷³ Inspiration *could* however be drawn from international environmental treaties,¹⁷⁴ such as the Basel Convention, or CITES,¹⁷⁵ in order to find a broad and common understanding what States consider binding obligations under international environmental law.¹⁷⁶ The enumerative catalogue would properly define the crime’s *actus reus* and could include, *inter alia* the pollution of certain environmental mediums, the disposal of hazardous wastes, nuclear testing, the trade in endangered species or systematic deforestation.¹⁷⁷ To prevent improperly limiting the punishable acts and to leave room for the further evolution of environmental law, the list’s final provision should be shaped in a flexible and open way, comparable to Article 7(1)(k).¹⁷⁸ For example, it could read: *“other acts or omissions of a similar character causing widespread or long-term and severe damage to the environment”*.

The new crime could further include subsequent paragraphs which are able to clarify certain elements. One of these paragraphs could set out the crime’s *mens rea* requirement.¹⁷⁹ Another issue to be addressed is the crime’s potential perpetrators. There are basically two main groups of perpetrators: individuals or a corporation itself, hence a legal entity. The Rome Statute’s default rule of

¹⁷² See also McLaughlin, *supra* note 144, 396.

¹⁷³ *Proposal by Tomuschat*, *supra* note 39, paras 34-36.

¹⁷⁴ Mégret, ‘Crime against the Environment’, *supra* note 100, 65; Rauxloh, *supra* note 119, 447-448. Cf. McLaughlin, *supra* note 144, 396.

¹⁷⁵ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 1673 UNTS 57; *Convention on international trade in endangered species of wild fauna and flora*, 3 March 1973, 993 UNTS 243. See also *CoE Convention*, *supra* note 140.

¹⁷⁶ Rauxloh, *supra* note 119, 448.

¹⁷⁷ For some of these examples, see Rauxloh, *supra* note 119, 447-448; Higgins, *Eradicating ecocide*, *supra* note 153, 63; L. Neyret, *Des écocrimmes à l’écocide. Le droit pénal au secours de l’environnement* (2015), 288; McLaughlin, *supra* note 144, 396.

¹⁷⁸ *Rome Statute*, Article 7(1)(k) reads: *“Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”*.

¹⁷⁹ See *infra* D.III.3.

Article 25 provides for a legal framework of individual criminal responsibility.¹⁸⁰ There is common agreement that an individual may either perpetrate a crime on their own¹⁸¹ or alternatively, by subordinates over whom the individual is exercising a certain degree of control,¹⁸² such as it may be the case with corporate executives. It is therefore beyond all doubt, that the first group of potential perpetrators is perfectly consistent with the general rules of current international criminal law.¹⁸³ A specific inclusion into the new crime's provision is therefore unnecessary.

The much more debated question is whether corporations themselves are to be admitted to the circle of potential perpetrators of ecocide.¹⁸⁴ *De lege lata*, corporate liability does not fall within the remit of the Rome Statute.¹⁸⁵ The inclusion of corporations as potential perpetrators would therefore require an amendment of Article 25¹⁸⁶ and should additionally be clarified in the definition of the crime of ecocide. It has been advocated in the context of ecocide to recognize such form of responsibility.¹⁸⁷ While criminal corporate liability might contradict domestic legal orders requiring culpability for criminal responsibility,¹⁸⁸ developments in other domestic systems tend towards the recognition of such forms of criminal accountability.¹⁸⁹ In any case, the issue of criminal corporate liability entails numerous legal issues that need to be examined.

Further, it is important to emphasize the new crime's relation to the already existent crimes, particularly to the war crime of Article 8(2)(b)(iv).¹⁹⁰

¹⁸⁰ K. Bowman, in Klamberg (ed.), *supra* note 77, 262.

¹⁸¹ *Rome Statute*, Article 25.

¹⁸² *Rome Statute*, Article 28.

¹⁸³ Lay et al., *supra* note 146, 435-436.

¹⁸⁴ D. Scheffer, 'Corporate Liability under the Rome Statute', 57 *Harvard International Law Journal* (2016) 35, 38.

¹⁸⁵ K. Ambos, 'General Principles of Criminal Law in the Rome Statute', 10 *Criminal Law Forum* (1999), 1, 7; M. Davoise, 'Business, Armed Conflict, and Protection of the Environment: What Avenues for Corporate Accountability?', 10 *Goettingen Journal of International Law* (2020) 1, 151, 173-178.

¹⁸⁶ Scheffer, *supra* note 184, 38; Mwanza, *supra* note 33, 601.

¹⁸⁷ Rauxloh, *supra* note 119, 449-450; Mwanza, *supra* note 33, 604; Crasson, *supra* note 24, 43-44; End Ecocide on Earth Initiative, *supra* note 153, Art. 25.

¹⁸⁸ Bowman, *supra* note 180, 262. See in detail: N. Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights', 15 *Journal of International Criminal Justice* (2017) 527, 530-533.

¹⁸⁹ Gray, *supra* note 142, 266; C. de Maglie, 'Models of Corporate Criminal Liability in Comparative Law', 4 *Washington University Global Studies Law Review* (2005) 547.

¹⁹⁰ Cornelius, *supra* note 94, 28.

One possible approach would be the *lex specialis* of this war crime in relation to ecocide, as it had been envisaged for example for crimes against future generations.¹⁹¹ However, such a subordination of ecocide under the precedence of war crimes would defeat the aspiration of ecocide to introduce a new ecocentric approach to international criminal law which is worth its name. Instead, the prosecution of ecocidal behavior under the new provision must be possible in war- and peacetime alike to effectively strengthen the environment by means of international criminal law. It is therefore proposed that the new crime fits in the existing system of crimes that does not consider a crime as *lex specialis* but all as coordinate.¹⁹² This would factually lead to Article 8(2)(b)(iv) being deprived from its autonomous meaning since each violation of the environmental war crime would coincidentally be a violation of ecocide.¹⁹³ In order to advance the protection of the environment by international criminal law in an integral and ecocentric manner,¹⁹⁴ this is the result this paper aims to achieve.

2. Threshold of Seriousness

A common argument of opponents of a crime of ecocide is the fear that it would open the competent court to a “[...] flood of frivolous litigation”¹⁹⁵ due to its unlimited scope of application. Indeed, an inclusion of the new crime into international criminal law would only be reasonable if it is limited to the “[...] most serious crimes of international concern [...]”.¹⁹⁶ Its parallel standing and equal status with the existing crimes can only be justified if the punished crimes satisfy a certain threshold of seriousness.¹⁹⁷ Drawing from existing proposals (a), this paper suggests specific definitions for the criteria of such a threshold (b) before turning to their interrelationship (c).

¹⁹¹ Jodoin, *supra* note 42, 22.

¹⁹² Werle & Jessberger, *supra* note 68, para. 754.

¹⁹³ Though, this would not be the case the other way round due to Article 8(2)(b)(iv) strict requirements.

¹⁹⁴ See *supra* C.I., C.II.

¹⁹⁵ Mwanza, *supra* note 33, 605.

¹⁹⁶ *Rome Statute*, Art. 1.

¹⁹⁷ *ILC Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission* (1991), Vol. II (2), 94, Art. 26 para. 5 [ILC Draft Code of Crimes]. On the role of *gravity* for prosecution under international criminal law, see OTP Policy Paper, *supra* note 9, paras 35-41; Mistura, *supra* note 8, 217-219.

a) Existing Proposals for a Threshold of Seriousness

The threshold of seriousness serves the same purpose as the contextual elements necessary for crimes against humanity and war crimes,¹⁹⁸ namely to constitute the essential element of an international crime.¹⁹⁹ Thereby, it limits the crime of ecocide to those instances of environmental damage that have the necessary global impact.²⁰⁰

There is consensus in the different proposals that the prosecuted crimes must exceed a certain threshold of seriousness.²⁰¹ However, the exact contents of such a threshold differ:²⁰² Higgins leans on the criteria stipulated in the existing ecocentric war crime of Article 8(2)(b)(iv) as well as the proposals of the ILC²⁰³ and requires impacts which are widespread, long-term or severe.²⁰⁴ By replacing the original cumulative conjunction of the three elements with an alternative *or*, Higgins's proposal is broader than its sources of inspiration.²⁰⁵ The same alternative approach is taken by Mégret, who adds the notion of irreversibility.²⁰⁶ Similarly, *Rauxloh* mentions geographical (“[...] scale of damage [...]”)²⁰⁷ as well as temporal elements (“[...] longevity of the environmental harm”)²⁰⁸ as criteria to assess the severity threshold, while *McLaughlin* only makes reference to geographical and severity aspects (“[...] large scale or serious [...]”).²⁰⁹ Further, *Gray* uses comparable terminology as *Higgins* but requires serious damage in any case, and only puts the geographical (“[...] extensive [...]”) and temporal (“[...] lasting [...]”) qualifications in an alternative relation.²¹⁰

¹⁹⁸ Werle & Jessberger, *supra* note 68, paras 443, 458.

¹⁹⁹ An additional contextual element, such as *committed as part of a widespread or systematic action*, is not necessary since the threshold of seriousness itself guarantees the crime's gravity. See however Neyret, *supra* note 177, 288; Mégret, *Crime against the Environment*, *supra* note 100, 65.

²⁰⁰ *Ibid.*, 67; see also *supra* C.III. Gray considers the damage's “[i]nternational [c]onsequences” as a separate criteria, see *Gray*, *supra* note 142, 217.

²⁰¹ Cf. Mégret, ‘Offences against Future Generations’, *supra* note 132, 171.

²⁰² Lay *et al.*, *supra* note 146, 447; Mwanza, *supra* note 33, 605-606.

²⁰³ *Report of the ILC on the work of its 47th session*, *supra* note 2, Art. 26.

²⁰⁴ Higgins, *Earth Is Our Business*, *supra* note 154, 162.

²⁰⁵ In contrast: Neyret, *supra* note 177, 288.

²⁰⁶ Mégret, ‘Crime against the Environment’, *supra* note 100, 65.

²⁰⁷ Rauxloh, *supra* note 119, 448.

²⁰⁸ *Ibid.*

²⁰⁹ McLaughlin, *supra* note 144, 396. See also *ibid.*, 397-398.

²¹⁰ Gray, *supra* note 142, 217.

b) Delimitation of the Threshold's Criteria

It is systematically consistent to lean on established provisions of international criminal law.²¹¹ Therefore, the triad of features *widespread*, *long-term* and *severe* is a reasonable terminology for a new international crime of ecocide. Despite the scientific substantiation necessary for these terms,²¹² the following understanding should be the starting point for efforts to codify the crime of ecocide.

Severe is to be understood as referring to the scale of the harm and the numbers of people and species ultimately affected.²¹³ In contrast to the requirement in Art. 8(2)(b)(iv),²¹⁴ it is due to the new crime's partly ecocentric nature that not only effects on human beings would be of concern for the environmental damage's severity, but the damage's impact on human and non-human beings alike.²¹⁵ As shown by the proposed enumerated acts of the new crime, its *victims* could also be parts of the ecosystem or biodiversity as such.²¹⁶

The second criteria, the *widespread* nature of the damage, implies a certain geographical coverage of the environmental harm.²¹⁷ In order to satisfy the general prerequisite for international criminalization,²¹⁸ the term *widespread* could be fulfilled in one of three possible ways: First, the requirement could be met by the transboundary nature of environmental damage caused or, second, in the case that global commons are harmed by the act in question.²¹⁹ However,

²¹¹ Cornelius, *supra* note 94, 27.

²¹² *ILC Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee: Parts One and Two; articles 1–26*, UN Doc A/CN.4/L.459 + Corr.1 + Add.1, 5 July 1991, 236, para. 81 [ILC Draft Code of Crimes, Titles and texts of articles adopted].

²¹³ Gray, *supra* note 142, 217; cf. Rauxloh, *supra* note 119, 448; Higgins, *Eradicating ecocide*, *supra* note 153, 64. With regard to Article 8(2)(b)(iv) Rome Statute, see Arnold & Wehrenberg, *supra* note 58, Art. 8, para. 253.

²¹⁴ Lawrence & Heller, *supra* note 33, 73; M. D. Kouba, International and Operational Law Department, US Army, 'Operational Law Handbook' (2017), available at https://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2017.pdf (last visited 21 February 2021), 350.

²¹⁵ Pointing to the difficulty in defining *victims* of ecocide: McLaughlin, *supra* note 144, 398. See *supra* C.II.

²¹⁶ Proposed for example by McLaughlin, *supra* note 144, 395-396; Higgins, *Eradicating ecocide*, *supra* note 153, 63. See also Neyret, *supra* note 177, 288; Jodoïn & Saito, *supra* note 129, 129.

²¹⁷ Gray, *supra* note 142, 217; *ILC Draft Code of Crimes*, *supra* note 197, 107, para. 5.

²¹⁸ See *supra* C.III.

²¹⁹ As to this distinction, see *Proposal by Tomuschat*, *supra* note 39, para. 32.

since modern international law does not necessarily require a transboundary element for its applicability,²²⁰ the geographical coverage of ecocide does not need to amount to a transboundary or global nature if the geographically affected area is large enough in itself.²²¹ Therefore, third, for the establishment of such a non-transboundary but widespread scale of damage, the mark of “[...] several hundred square kilometers [...]” could be used, as suggested in the context of Article 8(2)(b)(iv).²²²

Lastly, and of a particularly controversial nature,²²³ long-term damage introduces a temporal element into the threshold. It refers to the *long-lasting* consequences of environmental damage as can be seen in the various alternative proposals for a crime of ecocide.²²⁴ Parallel to understandings with regard to Art. 55 of AP I,²²⁵ *long-term* should be understood as “[...] decades rather than months”.²²⁶ Although the *irreversible* nature of the damage is not suggested as a separate condition here,²²⁷ it could constitute one particular case of long-term damage, i.e. damage which is lasting because of the difficulties or even the impossibility to reverse its consequences.²²⁸ At this point, the environmental concern for the impacts on future generations comes into play since long-term effects are a typical characteristic of environmental degradation.²²⁹

In this context, it is important to stress the suggested formulation that the acts *cause or may be expected to cause* this damage: Thus, it suffices if the

²²⁰ Cornelius, *supra* note 94, 28-29.

²²¹ *Proposal by Tomuschat*, *supra* note 39, para. 32.

²²² Higgins, *Eradicating ecocide*, *supra* note 153, 64. With regard to Article 8(2)(b)(iv): Lawrence & Heller, *supra* note 33, 73; Arnold & Wehrenberg, *supra* note 58, Art. 8, para. 253; Weinstein, *supra* note 54, 707-708; Kouba, *supra* note 214, 350.

²²³ *ILC Draft Code of Crimes, Titles and texts of articles adopted*, *supra* note 212, paras 67-92.

²²⁴ Gray, *supra* note 142, 217; Rauxloh, *supra* note 119, 448; *ILC Draft Code of Crimes*, *supra* note 197, 107, para. 5.

²²⁵ *ILC Draft Code of Crimes, Titles and texts of articles adopted*, *supra* note 212, para. 60.

²²⁶ *Report of the Secretary-General on the protection of the environment in times of armed conflict*, UN Decade of International Law, UN Doc A/48/269, 29 July 1993, 7, para. 34. See also *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Vol. XV, UN Doc CDDH/215/Rev.1, 1978, 268, para. 27; NATO Bombings Report, *supra* note 45, para. 15. Contrary to that, Higgins suggests an understanding in the sense of “period of months, or approximately a season”: Higgins, *Eradicating ecocide*, *supra* note 153, 64.

²²⁷ Contrary to Mégret’s proposal: Mégret, *Crime against the Environment*, *supra* note 100, 65.

²²⁸ Gray, *supra* note 142, 217.

²²⁹ *Supra* notes 146, 148; Mégret, *Crime against the Environment*, *supra* note 100, 65; See also Mégret, *Offences against Future Generations*, *supra* note 132, 168-172.

probability of long-term damage to the environment is foreseeable to a sufficient certainty at the time of the prosecution.²³⁰ Criteria for the exact elaboration of the level of sufficient certainty could be deduced from applicable principles of international environmental law, such as the principle of prevention.²³¹ However, the sufficient certainty of the causal link has to go beyond a mere possibility, therefore beyond the criteria required by the environmental precautionary principle.²³² The causal link has to be confined to a certain degree to secure that international criminal law is not to be misused to prosecute all kinds of distant, untraceable consequences of a conduct.²³³ On the other hand, it is not necessary that the long-term damage, which might manifest itself only years after the commission, *has* already occurred.²³⁴ Otherwise, the requirement of an actually occurred long-term damage would constitute an almost insurmountable evidentiary hurdle which would make any effective prosecution of a new environmental crime illusory.²³⁵

Due to these difficulties of causation, international criminal law has sometimes been criticized as being unable to deal with issues of damage to the environment, particularly in the context of climate change.²³⁶ One possibility to counter this argument could be the exclusion of too remote consequences of punishable acts from the crime's scope of application. However, further research on this issue would still be necessary to properly define the degree of certainty for long-term damage.

c) Interrelation of the Three Threshold Criteria

After having established the meaning of *severe*, *widespread* and *long-term*, their relation to each other, i.e. their cumulative or alternative requirement is

²³⁰ Rauxloh, *supra* note 119, 448.

²³¹ E.g. A. Proelß, 'Prinzipien des *Internationalen Umweltrechts*', in A. Proelß (ed.), *Internationales Umweltrecht* (2017), 75, 79-80.

²³² *Ibid.*, 85.

²³³ On the requirement of causation under international criminal law: Werle & Jessberger, *supra* note 68, paras 455-456.

²³⁴ Rauxloh, *supra* note 119, 448; Mégret, 'Crime against the Environment', *supra* note 100, 66.

²³⁵ Mégret, 'Crime against the Environment', *supra* note 100, 66; *ILC Draft Code of Crimes, Titles and texts of articles adopted*, *supra* note 212, para. 69; *ILC Draft Code of Crimes*, *supra* note 197, 107, para. 5.

²³⁶ Mistura, *supra* note 8, 224; G. Gilbert, 'International Criminal Law is not a Panacea – Why Proposed Climate Change 'Crimes' Are Just Another Passenger on an Overcrowded Bandwagon', 14 *International Criminal Law Review* (2014) 3, 551, 555-556.

important. While Article 8(2)(b)(iv) requires all three characteristics of the damage in a cumulative way,²³⁷ such a high threshold has been characterized as being too restrictive and it could deprive the new crime of any practical relevance.²³⁸ While it is necessary to limit prosecution by introducing clear-cut and limitative criteria of damage, these should be determined by a careful balance between diverse situations and consequences involving differing severities of harm, geographical ambits and temporal impacts.²³⁹

Therefore, it is suggested to require the damage in any case to be *severe* in order to exceed a certain minimum level of harm which could otherwise be addressed on the national level. On top of this, the damage would need to be either widespread or long-term, but not necessarily both.²⁴⁰ The reason for this distinction is that severe damage should in itself be *necessary* for international criminal prosecution but not *sufficient*. However, a severe damage which exceeds a certain geographical area amounts to a crime worth of international concern and prosecution – without it having to be long-lasting.²⁴¹ On the other hand, a severe damage which has lasting impacts on ecosystems and future human beings equally satisfies this international concern-threshold by its temporal gravity – regardless of its geographical scope.

3. *Mens Rea* Requirement

The *mens rea* element might be the most disputed element of the concept of ecocide, as it establishes the basis of subjective wrong, which is necessary for every criminalized behavior.²⁴² In regard to the *mens rea* element, the existing proposals vary from “[...] objective recklessness”²⁴³, over “[...] desire or knowledge with substantial certainty”²⁴⁴ to strict liability.²⁴⁵

²³⁷ Dinstein, *supra* note 60, 536; Arnold & Wehrenberg, *supra* note 58, Art. 8, para. 253.

²³⁸ With view to Art. 8(2)(b)(iv), see *supra* notes 61-64. See also Pereira, *supra* note 10, 197-198.

²³⁹ Cf. McLaughlin, *supra* note 144, 398, fn. 117.

²⁴⁰ Gray, *supra* note 142, 217; Cornelius, *supra* note 94, 29-30. This is illustrated by the proposed formulation of “widespread or long-term and severe” damage.

²⁴¹ Again, this holds particularly true with regard to the evidentiary hurdles linked to that criteria, *supra* note 235.

²⁴² Werle & Jessberger, *supra* note 68, paras 438, 447.

²⁴³ Rauxloh, *supra* note 119, 449.

²⁴⁴ Berat, *supra* note 155, 343.

²⁴⁵ Higgins, *Eradicating ecocide*, *supra* note 153, 68-69; in detail Mwanza, *supra* note 33, 609-612.

A perpetrator would in any event be criminally liable for ecocide when committed with intent and knowledge in the sense of Article 30. While scenarios of targeted damage of the environment are rare,²⁴⁶ the crime's main field of application presumably is a different one; that is to say environmental damage is a side-effect of an action that aimed at different, for instance, economic purposes.²⁴⁷

For that reason, in order to provide for criminal liability for the outlined scenarios, it is proposed to introduce a broader *mens rea* requirement for the ecocide crime (b) as well as adequate rules for the provision of evidence (c) than the standard set out by Article 30 (a). It is however suggested to decline more moderate *mens rea* standards than *dolus eventualis* (d).

a) Existing *Mens Rea* Standards Under the Rome Statute

Article 30 is the general provision addressing the mental element required to be criminally responsible under the Rome Statute.²⁴⁸ This default rule applies to all crimes²⁴⁹ and would extend to the crime of ecocide. The provisions' interpretation has been subject to a vivid debate.²⁵⁰ The ICC itself had occasion to elaborate on the provision.²⁵¹ The PTC I proclaimed in the *Lubanga Case* that the provision first and foremost accommodates intent in the form of *dolus directus* of the first degree,²⁵² but additionally, *dolus directus* of the second degree and *dolus eventualis*.²⁵³ This broad interpretation accommodating *dolus eventualis* had however been convincingly turned down in the subsequent jurisprudence of

²⁴⁶ Pereira, *supra* note 10, 195.

²⁴⁷ Ibid, 195; Crasson, *supra* note 24, 39-40; Mwanza, *supra* note 33, 605.

²⁴⁸ M. E. Badar & S. Porro, in Klamberg (ed.), *supra* note 77, 314; Werle & Jessberger, *supra* note 68, para. 473.

²⁴⁹ Werle & Jessberger, *supra* note 68, para. 467.

²⁵⁰ Badar & Porro, *supra* note 248, 316-320.

²⁵¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of the Charges, ICC-01/04-01/06 (Pre-Trial Chamber I), 29 January 2007, 119, para. 351 [Prosecutor v. Lubanga]; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) on the Charges, ICC-01/05-01/08 (Pre-Trial Chamber II), 15 June 2009, 122, para. 360 [Prosecutor v. Bemba]; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of the Charges, ICC-01/04-01/07 (Pre-Trial Chamber I), 30 September 2008, 77, para. 251, fn. 329 [Prosecutor v. Katanga].

²⁵² *Prosecutor v. Lubanga*, *supra* note 251, 119, para. 351.

²⁵³ *Prosecutor v. Lubanga*, *supra* note 251, 119, para. 352; endorsed by *Prosecutor v. Katanga*, *supra* note 251, 77, para. 251, fn. 329.

the Court,²⁵⁴ a view that is shared by most commentators.²⁵⁵ The common thread of the Chambers' decisions is that Article 30 does not cover more moderate *mens rea* standards than *dolus directus* of the first and second degree. Consequently, ecocide may in any event be committed with these two types of intent.

When applied to ecocide, the crime would be committed with *dolus directus* of the first degree, if the perpetrator knows and intends to cause widespread or long-term and severe damage to the environment.²⁵⁶ With regard to the standard of *dolus directus* of the second degree, the voluntary element is attenuated. Irrespective of whether the perpetrators have the intention to cause the required damage to the environment, it would suffice if they, whilst undertaking an act or omission, knew that such damage would result.²⁵⁷

b) Proposed *Mens Rea* Requirement for the Crime of Ecocide

The general provision on the mental element of a crime “[...] is based on a rule-exception dynamic”²⁵⁸, with Article 30(1) allowing exceptions to the general rule.²⁵⁹ Since there is no indication that the provision intends to set out a *minimum* standard of intent, the phrase “*unless otherwise provided*” permits the introduction of a form of intent in the crime of ecocide that is less strict than the general rule of Article 30(1).²⁶⁰

It is proposed to incorporate a new, more moderate mental element for the crime of ecocide that is below the standard set out in Article 30.²⁶¹ Since environmental damage is ordinarily not an action's first and primary purpose but rather the consequence or a side effect of acts whose primary aim

²⁵⁴ *Prosecutor v. Bemba*, *supra* note 251, 122, para. 360.

²⁵⁵ A. Cassese *et al.*, *International Criminal Law*, 3rd ed. (2013), 56; Ambos, *supra* note 185, 21-22; S. Finnin, ‘Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis’, 61 *International and Comparative Law Quarterly* (2012) 2, 325, 349; For the opposing view, see M. E. Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court’, 19 *Criminal Law Forum* (2008) 3-4, 473, 494.

²⁵⁶ Cf. *Prosecutor v. Lubanga*, *supra* note 251, 119, para. 351.

²⁵⁷ *Prosecutor v. Lubanga*, *supra* note 251, 119, para. 352(i).

²⁵⁸ Badar & Porro, *supra* note 248, 314 (emphasis added); see also Pigaroff & Robinson, *supra* note 85, Art. 30, para. 14; W. A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd ed. (2016), 628.

²⁵⁹ Badar & Porro, *supra* note 248, 314-315; Finnin, *supra* note 255, 351.

²⁶⁰ Finnin, *supra* note 255, 354; A. Eser, ‘Mental Elements – Mistake of Fact and Law’, in A. Cassese, P. Gaeta & J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court, Vol. I* (2002), 889, 933, 946.

²⁶¹ See on the opposing view Cornelius, *supra* note 94, 33.

is a different one,²⁶² the crime of ecocide must be tailored to these respective circumstances. Therefore, the new crime should contain the following paragraph that incorporates the standard of *dolus eventualis*.

In addition to Article 30, a person is criminally responsible and liable for punishment if the person considers it possible that the act or omission may be expected to cause widespread or long-term and severe damage to the environment and accepts such outcome.

Generally, *dolus eventualis* is evident in scenarios in which the person considers it possible or not entirely excluded that their acts or omissions may bring about the objective elements of a crime, but the person accepts such outcome by reconciliation or consent.²⁶³ Compared to *dolus directus* of the first and second degree, both the cognitive and the volitional elements are attenuated. Whereas regarding the cognitive element, awareness of the possibility of a certain consequence is perfectly sufficient, for the volitional element a conscious risk-taking suffices.²⁶⁴

Applied to ecocide, *dolus eventualis* is given if the perpetrator considers it possible to cause widespread or long-term and severe damage to the environment but accepts this outcome. Therefore, it is not necessary for the perpetrator to be aware of the exact details or the exact causal link between the conduct and its consequences; it is sufficient to knowingly take the risk that these consequences occur in the ordinary cause of events. Other than for *dolus directus* of first or second degree, the person neither needs to know nor to intend that environmental damage is the necessary outcome.

c) *Dolus Eventualis* and the Provision of Evidence

The incorporation of a new form of intent would present a challenge to the international criminal system. The concrete criteria of *dolus eventualis* and principles on its proof would need to be developed, since this form of intent is, so far, foreign to the Rome Statute. The burden of proof regarding the mental element is generally a heavy burden²⁶⁵ and will, in relation to ecocide, be brought

²⁶² Pereira, *supra* note 10, 195; Crasson, *supra* note 24, 39-40; Mwanza, *supra* note 33, 605.

²⁶³ Werle & Jessberger, *supra* note 68, para. 477; see also *Prosecutor v. Lubanga*, *supra* note 251, 119, para. 352; see also *Prosecutor v. Tadic*, Judgment, IT-94-1-A, 15 July 1999, para. 220.

²⁶⁴ *Prosecutor v. Tadic*, *supra* note 263, para. 220; Badar, *supra* note 255, 489; Ambos, *supra* note 185, 21.

²⁶⁵ *Proposal by Tomuschat*, *supra* note 39, para. 37.

about with *dolus eventualis*. Whereas the degree of likelihood of environmental damage may be determined based on objective criteria, the prosecution might face great challenges to prove the perpetrator's acceptance of the outcome. The underlying rationale of the *runaway decision* in the *Lubanga* Case may and should be used as helpful guidance when addressing this issue. Therein, the ICC proposed to distinguish between two different scenarios that differ in regard of the degree of certainty that the objective criteria of a crime are brought about.²⁶⁶ If there is a substantial risk that an act or omission realizes the objective criteria of a crime, the acceptance of this outcome may be inferred from the mere fact that the person carries out said act or omission despite the awareness of that substantial risk.²⁶⁷ If there exists however a mere likelihood, it is required that the person clearly accepts that their acts or omissions may bring about the objective elements of a crime.²⁶⁸

In line with this approach, the degree of likelihood of an outcome should affect the provision of evidence. One should however part from the two rigid scenarios of substantial certainty and mere likelihood. Instead, the requirements put on the prosecution for proving the *acceptance of an outcome* should decrease linearly to the extent that the degree of certainty of the realization of these outcomes increases. In other words, the likelier it is that the objective criteria of the crime of ecocide are brought about, the less strict the requirements for proving the acceptance of the outcome are.

d) Declined *Mens Rea* Standards

Even though there is consensus to lower the *mens rea* threshold, the potential standards vary distinctively in the different proposals.²⁶⁹ The most extensive proposal even pleads for ecocide as a crime of strict liability.²⁷⁰

However, this paper suggests that there should be no broader standard than *dolus eventualis*. An observation of the existing crimes suggests that the accumulation of objective criteria and a special misanthropic intent seems to qualify these crimes as the "[...] most serious crimes of concern to the international community [...]".²⁷¹ Negligence or strict liability would however only take into

²⁶⁶ *Prosecutor v. Lubanga*, *supra* note 251, 120, paras 353-354; see also Badar, *supra* note 255, 491.

²⁶⁷ *Prosecutor v. Lubanga*, *supra* note 251, 120, para. 353.

²⁶⁸ *Ibid.*, 120, para. 354.

²⁶⁹ See also *supra* note 243-245.

²⁷⁰ Higgins, *Eradicating ecocide*, *supra* note 153, 68-69.

²⁷¹ *Rome Statute*, Preamble.

account the consequence of an act or omission, i.e. the environmental damage, without considering the intentions of the perpetrators National criminal law could certainly provide for criminal liability for environmental damage caused by negligence or a strict liability ecocide crime.²⁷² However, the international criminal system as set out by the Rome Statute adheres to a subjective understanding of the *mens rea* element.²⁷³ Standards of criminal liability that do not require a volitional element at all do not seem to fit within this conception.

Additionally, it is intended to present a realistic proposal of the ecocide crime. The *travaux préparatoires* of Article 30 reveal that there was originally no consensus to integrate *dolus eventualis* or negligence into the Statute's general provision on the mental elements of a crime.²⁷⁴ If ecocide is considered to become a fifth international crime alongside the four capital crimes, its mental element must also amount to a comparable level to the existing crimes. Since Article 30 certainly leaves room for less strict standards of intent,²⁷⁵ an integration of *dolus eventualis* does not seem impossible since it does not entirely waive any form of volitional element. It is however improbable that there will be considerable support for an incorporation of standards of culpability that do not require any voluntary element and are to be determined according to purely objective criteria.²⁷⁶

III. Summarizing Remarks and Application to the Situation in Ecuador

If one applies the foregoing observations to the oil spill in Ecuador, the discharge of several million gallons of formation water, drilling waste and produced water into the environment by Chevron²⁷⁷ would fit into one or more of the enumerated acts of a new crime of ecocide. Further, criminal prosecution would be directed against any superior of Texaco who was sufficiently aware

²⁷² Strict liability crimes are already recognized by many Anglo-American legal systems, see A. Ashworth, 'Criminal Law, Human Rights and Preventative Justice', in B. McSherry, A. Norrie & S. Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (2009), 87.

²⁷³ Eser, *supra* note 260, 902. See also Mistura, *supra* note 8, 223-224.

²⁷⁴ Pigaroff & Robinson, *supra* note 85, Art. 30, para. 3.

²⁷⁵ Finnin, *supra* note 255, 354; Eser, *supra* note 260, 946.

²⁷⁶ Eser, *supra* note 260, 902-903.

²⁷⁷ Kimerling, *supra* note 24, 204-205; Crasson, *supra* note 24, 30-32; S. Patel, *supra* note 24, 78-79.

of the committed acts at that time.²⁷⁸ Turning to the elaborated threshold of seriousness, the damage caused by the pollution would have to be severe as well as being either widespread or long-term. The consequences of the pollution included the contamination of rivers and streams, the pollution of soils and sources of drinking water, negative impacts on flora and fauna, as well as the release of noxious gases into the atmosphere.²⁷⁹ The impacts on the local population were similarly intense, including increased rates of deadly diseases, and miscarriages, as well as the extinction of at least two indigenous communities in the affected region.²⁸⁰ Since the suggested crime of ecocide is not understood in a strictly anthropocentric sense, these direct impacts on the ecosystem and biodiversity as such would already be of a sufficient scale to meet the criteria of *severe* damage to the environment. Moreover, the enormous impacts on the local human population even trigger this criterion in an anthropocentric understanding.²⁸¹

Beyond this, the situation in Ecuador easily reaches the conditions for being widespread as well as long-term, although only one of these criteria would have to be met according to the present suggestion. The geographical area affected by the pollution covers 1.235.000 acres of rainforest,²⁸² thereby clearly exceeding the threshold of “[...] several hundred square kilometers [...]”²⁸³. Lastly, the long-term damage of Chevron’s activities in the region is beyond doubt: Most of the punishable acts occurred between the 1970s and the 1990s. Since the impact of the pollution are still suffered today by the local population and the ecosystem,²⁸⁴ they lasted more than a few months, but indeed decades, as required by the proposed crime of ecocide. Further, the impossibility to return the ecosystem in the region to its natural state renders the damage irreversible in great parts,²⁸⁵ thereby adding to its long-lasting character. Consequently, the repercussions of Chevron’s activities in Ecuador would meet the threshold of seriousness of a new crime of ecocide.²⁸⁶

²⁷⁸ Crasson, *supra* note 24, 47.

²⁷⁹ *Ibid*, 31; Amazon Defense Coalition, *supra* note 27; Environmental Justice Organizations, Liabilities and Trade, *supra* note 27.

²⁸⁰ Crasson, *supra* note 24, 31-32; see also Kimerling, *supra* note 24, 206-207.

²⁸¹ With regard to crimes against humanity, see also Lambert, *supra* note 32, 724.

²⁸² Request to the OTP of the ICC from the Legal Representatives of the Victims, *supra* note 16, 20; Lambert, *supra* note 32, 724.

²⁸³ E.g. Lawrence & Heller, *supra* note 33, 73.

²⁸⁴ Crasson, *supra* note 24, 31-32.

²⁸⁵ *Ibid*, 31.

²⁸⁶ For a comparable analysis, see also K. Martin-Chenut & C. Perruso, ‘L’affaire Chevron-Texaco et l’apport des projets de conventions écocrimes et écocide à la responsabilisation pénale des entreprises transnationales’, in Neyret (ed.), *supra* note 177, 67, 84.

Further, the *mens rea* requirement would have to be proven with regard to the actions of Chevron executives. The prosecution would most certainly succeed in proving at least *dolus eventualis* in committing the crime of ecocide. Regarding the cognitive element, it is not necessary that Chevron's superiors were aware of the exact causal link between the disposal of waste waters and the specific environmental damage caused, but it would be sufficient that they considered the possibility of negative impacts on the environment. In respect of the volitional element, the superiors' practice would have to qualify as *acceptance of an outcome*, thus, as a conscious risk-taking despite the awareness of the risk.

While the exact collection and consideration of evidence would be on the prosecution, and cannot be anticipated in this paper, there are strong indicators pointing to the existence of all requirements. For more than two decades huge amounts of toxic waste had been disposed in pits that were not lined by any material able to prevent or minimize the waste to find its way into the soils. The existence of a high risk of large-scale environmental damage could without doubt be proven by expert opinions.²⁸⁷ Witness statements could serve as proof for the fact that the relevant superiors at least did not entirely exclude these risks. Due to the immense amounts of waste and the considerable time it had been discharged in the region, the likelihood of the widespread or long-term and severe environmental damage is that high that the prosecution would further be held to less strict requirements in proving the acceptance of this outcome. Therefore, the proof that the relevant superiors consciously took the risk of environmental degradation could be easily deduced from the fact that the toxic waste was disposed despite the awareness of the likely environmental degradations.

E. Conclusion

With regard to the insufficiencies of current international criminal law under the Rome Statute for the protection of the environment, the merits of a new crime of ecocide are apparent.²⁸⁸ Recent decades have shown that the contemporary regime of international criminal law is not able to sufficiently contribute to the protection of the environment. Whereas Article 8(2)(b)(iv) sets such strict requirements that can barely be achieved, the other war- and peacetime provisions of the Rome Statute either contain a *mens rea* element

²⁸⁷ The Rome Statute does not limit the potential types of evidence, expert opinions may thus serve as evidence, see *Rome Statute*, Art. 69; *ICC Rules of Procedure and Evidence*, ICC-ASP/1/3 and Corr. 1, 3-10 September 2002, Rules 63-75.

²⁸⁸ Martin-Chenut & Perruso, *supra* note 286, 82-86

which is unrealistic for the commission of environmental crimes; or they are too anthropocentric and therefore disregard the complex interrelations between human beings and the surrounding ecosystems. The comparison of the existing regime with the proposed crime of ecocide in the context of the oil spill example in Ecuador illustrates the difficulties of the current system, on the one hand, and the merits of a new crime of ecocide, on the other. The aforementioned lack of impacts of the 2016 OTP Policy Paper on the prosecution of environmental destructions gives further proof of the insufficiency of the actual framework.²⁸⁹

Consequently, there can be no doubt that the time has come to counter current environmental atrocities by all possible means, including the effective blade of international criminalization. Objections of States or commentators regarding the crime's potentially excessive application as well as a fear of overcriminalization should be responded with the proposal of a clear-cut definition of ecocide. Such a delimitation of the crime's scope is necessary with view to the principle of legality as well as the justification to add it to the existing core crimes on an equal footing.

However, inevitably the question of the practical implementation of the new crime arises. While sometimes an alone-standing convention on ecocide is suggested,²⁹⁰ the introduction of the proposed crime into the Rome Statute by amendment seems preferable.²⁹¹ An amendment would admittedly not be easy to achieve and the proposed ecocide crime would be prone to discussions and objections by States,²⁹² as can be seen by the developments surrounding the removal of Article 26 from the Draft Code of Crimes.²⁹³ Nonetheless, at least two reasons support seeking an amendment. First, the incorporation into the pre-existing system of the Rome Statute would profit from an already established institution that gained noteworthy experience in the field of international criminal prosecution and additionally achieved a certain status in the international legal system.²⁹⁴ One would therefore not only create the

²⁸⁹ For a detailed analysis, see *supra* notes 12-16.

²⁹⁰ Berat, *supra* note 155, 343-348.

²⁹¹ Mwanza, *supra* note 33, 612-613; Cornelius, *supra* note 94, 33-36; G. Kemp, 'Climate Change, Global Governance and International Criminal Justice', in O. C. Ruppel, C. Roschmann & K. Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (2013), 711, 737-738. With regard to *crimes against future generations*: Jodoin & Saito, *supra* note 129, 148-150. E.g. End Ecocide on Earth Initiative, *supra* note 153.

²⁹² Smith, *supra* note 33, 62.

²⁹³ For a detailed analysis, see *supra* notes 39-41.

²⁹⁴ Rauxloh, *supra* note 119, 445.

fifth core crime but simultaneously equip it with a well-developed enforcement machinery. Second, the new crime of ecocide would automatically be put on equal footing with the existing international crimes.

Overall, it is reassuring that there is increasing public awareness of the endangerment of the environment. International social movements like *Fridays for Future* and the increased amount of environmental litigation²⁹⁵ prove that there is awareness and a refusal to accept the reckless destruction of the natural environment, especially on the part of the younger generation. The *zeitgeist* is in flux; and an emerging consensus not to condone environmental degradation may soon crystalize. In order to acknowledge this changing *zeitgeist* and most importantly, to preserve the natural environment, it is required that all possible protective measures be adopted, including the introduction of an ecocide crime in the Rome Statute. After all, the Rome Statute aims at punishing “[...] grave crimes [that] threaten the peace, security and well-being of the world [...]”.²⁹⁶ Twenty years after its entry into force, the time might have come to reconsider the extent that environmental atrocities are part of these grave crimes.

²⁹⁵ See Climate Change Litigation Databases, available at <http://climatecasechart.com/> (last visited 21 February 2021).

²⁹⁶ *Rome Statute*, Preamble.

The European Court of Human Rights Through the Looking Glass of Gender: An Evaluation

Natalie Alkiviadou* and Andrea Manoli**

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Abstract

Gender equality is of paramount importance for a functioning democracy and for economic growth. It is a central tenet of human rights law and has seen significant developments on the legislative, judicial, and policy levels of the Council of Europe. Through a *mélange* of theory, legislation, and jurisprudential analysis, this paper will assess developments in the European Court of Human Rights' approach to the issue of gender equality. This will be achieved through a survey of case law involving domestic violence, child-bearing, and the wearing of religious dress by women. The paper will demonstrate that, despite the existence of significant milestones in the ambit of promoting gender equality, and, notwithstanding effective advancements made by this body, particularly *vis-à-vis* domestic violence case law, improvements to its approach remain necessary. More specifically, on one level, the Court denounces and works against gender inequality and discrimination but, on another, consciously or unconsciously, its approach and findings are marred by its own stereotypes, patriarchal influences, misconceptions, and preconceptions about what gender equality *actually* is and how it *should be* pursued.

A. Introduction

Gender equality is a central tenet of a democratic society, of “utmost importance for productive and economic growth”¹ and a cornerstone of human rights law. In 2015, eighty world leaders committed to halting discrimination against women by the year 2030.² For the Council of Europe, gender equality means “[...] the same visibility, empowerment [...] and participation [of both sexes] in all spheres of public and private life”.³ Its judicial organ, the European Court of Human Rights (ECtHR) proclaims gender equality to be “[...] one of the key principles underlying the Convention [...]”⁴ despite the fact that the term or other similar terms are not incorporated therein. Nevertheless, discrimination and inequality against women do continue to affect the lives of this group of people across the globe. In light of the significance of gender equality on a moral, ethical, legal, and practical level, this paper will assess the extent to which the ECtHR, conceptualizes and applies what it professes to be a cornerstone of the Convention it is mandated to supervise. Scholarship, to date, which is relevant to gender equality and the ECtHR has looked at women’s rights in conjunction with particular themes such as religion,⁵ Article 14 in a broader scope,⁶ and the issue of stereotypes in ECtHR jurisprudence.⁷ Radacic’s 2008 piece *Gender Equality Jurisprudence of the European Court of Human Rights*⁸ is of direct relevance to the current piece as it looks at sex discrimination

¹ P. C. Salinas & C. Bagni, ‘Gender Equality from a European Perspective: Myth and Reality’, 96 *Neuron* (2017) 4, 721, 721.

² *Ibid.*, 721.

³ Council of Europe, ‘Gender Equality Strategy 2018-2023’ (2018), available at <https://rm.coe.int/strategy-en-2018-2023/16807b58eb> (last visited 9 December 2020), 5.

⁴ *Leyla Şahin v. Turkey*, ECtHR Application No. 44774/98, Judgment of 10 November 2005, para. 115 [*Leyla Şahin v. Turkey*].

⁵ C. Elkayam-Levy, ‘Women’s Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights’, 35 *University of Pennsylvania Journal of International Law* (2014) 4, 1175 [Elkayam-Levy, Women’s Rights and Religion].

⁶ S. Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’, 16 *Human Rights Law Review* (2016) 2, 273 [Fredman, Substantive Equality].

⁷ A. Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, 11 *Human Rights Law Review* (2011) 4, 707 [Timmer, Anti-Stereotyping Approach].

⁸ I. Radacic, ‘Gender Equality Jurisprudence of the European Court of Human Rights’, 19 *European Journal of International Law* (2008) 4, 841, 842 [Radacic, Gender Equality Jurisprudence].

and gender equality in the ECtHR. This article looks at developments post-2008 but further applies a lens of intersectional feminist legal scholarship to the case law of the ECtHR. Moreover, it uses the principles of the *European Convention on Human Rights* (ECHR) and the ECtHR's own declarations *vis-à-vis* gender equality for the purposes of demonstrating the Court's approach to gender equality and the manner in which it deals with stereotypes and prejudices emanating from patriarchy, misogyny, and sexism. Feminist legal theory or feminist jurisprudence has considered the three themes previously mentioned and their impacts on the law. Theorists may look at the specific disadvantages faced by women,⁹ while others, such as Gilligan, argue that the law is, in fact, male and that we have been conditioned to viewing life through a male eye.¹⁰ MacKinnon argues that legal neutrality "equates substantive powerlessness with substantive power, and calls threatening these the same 'equality'."¹¹ To this end, if sameness is how equality is conceptualised then sex equality "[...] is conceptually designed in law never to be achieved."¹² All the above must be applied, while simultaneously taking account of the fact that, as underlined by Butler, "[...] gender is not traceable to a definable origin because it itself is an originating process incessantly taking place."¹³ While it is certainly beyond the scope of this paper to embark on a theoretical analysis of feminist jurisprudence, the fundamental aspect of all theorization on law and gender should be borne in mind throughout. This is, more specifically, the realization and identification of patriarchal influences on the creation, application, and interpretation of the law and the subsequent impact on the reality of women.

Examining the position of the ECtHR towards gender equality and the Court's handling of social phenomena, such as patriarchy, is of paramount importance given (i) the persistence of gender discrimination and gender-based violence (GBV) in the Council of Europe region, as will be illustrated by the case law developed hereinafter, and (ii) the innovation and power of the ECtHR as a one-of-a-kind regional judicial body that supervises and upholds human rights law in the form of the ECHR and its underlying principles and doctrines. In this

⁹ E. Jackson, 'Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal', 19 *Journal of Law and Society* (1992) 2, 195 [Jackson, Catharine MacKinnon].

¹⁰ C. Gilligan, *In a Different Choice: Psychological Theory and Women's Development* (1982).

¹¹ C.M. MacKinnon, 'Feminism Unmodified' (1987) 82 as cited in E. Jackson, 'Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal', 19 *Journal of Law and Society* (1992) 2, 208 [Jackson, Catharine MacKinnon].

¹² *Ibid.*

¹³ J. Butler, 'Variations on Sex and Gender: Beauvoir, Wittig and Foucault', in S. Benhabib & D. Cornell (eds), *Feminism as Critique* (1987), 131.

light, analyzing how the Court approaches the question of gender equality is of central importance for the purposes of tracking the development of the doctrine and the level of protection women actually enjoy to be free from discrimination. This will be pursued through an assessment of the Court's perception of gender equality and non-discrimination. The above will be achieved by firstly looking at the issue of non-discrimination within the ambit of the ECtHR and an analysis of Article 14 ECHR. This will be followed by an examination of GBV as an issue of equality and will close with a particular focus on Islamic veiling. This is chosen as a case study for the Court's perceptions and potential misperceptions *vis-à-vis* a very different *other* but also for purposes of examining the extent to which, if at all, intersectionality is embraced in the ECtHR's jurisprudential analysis.

A broad range of cases involving a variety of themes, ranging from discrimination to violence to religious dress, have been chosen for purposes of illustrating the Court's approach to gender.

B. The European Court of Human Rights on Gender Equality: Some Starting Points

I. Non-Discrimination and the European Court of Human Rights

The ECHR protects first generation human rights, and particularly civil rights, with the exception of two second generation rights in the form of a social and an economic right, namely the right to marry and the right to property. The *European Social Charter* (ESC) includes rights which are closer to the theme under consideration, such as equal pay between men and women and the special protection of mothers. However, the ECtHR is not mandated to supervise the application of the ESC and, as such, the cases that reach the Court need to illustrate a violation of Convention rights. On an ECHR level, Protocol 12 to the Convention is a general non-discrimination document while Protocol 7 incorporates the principle of equality between spouses *vis-à-vis* marriage and its dissolution. However, Article 14 of the Convention, the generic non-discrimination clause, is the most relevant provision. This is similar to that of, for example, Article 2 of the *International Covenant of Civil and Political Rights* and Article 2 of its counterpart, the *International Covenant on Economic, Social, and Cultural Rights*. In the same spirit, Article 14, which was drafted and came into force before the two preceding articles, provides that:

„The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.“

Article 14 is corollary to the rest. It exists only if one or more of the other articles exist and, as such, has been described as “parasitic”¹⁴, “subsidiary”¹⁵, and “insipid”¹⁶. The manner in which the Court extrapolates on Article 14 commenced in 1968 with the *Belgian Linguistics* case. There, the European Commission of Human Rights found that there was no need for there to be a breach of a substantive right in order for Article 14 to come into play. It was sufficient for the discrimination in question to “touch the enjoyment”¹⁷ of a Convention right. This threshold was endorsed by the Court and is a central part of non-discrimination cases until today. More particularly, “[...] for Article 14 to become applicable, it suffices that the facts of a case fall within the ambit of another substantive provision of the convention or its protocols”.¹⁸ Instead of setting out a particular test to determine whether or not discrimination exists, the Court incorporates the requirement of equal treatment unless there is a justifiable and legitimate reason not to. If a right has been breached and differential treatment does exist between men and women, the Court necessitates *very weighty reasons* for it not to find a case of discrimination.¹⁹ In this realm, the Court established that discrimination means differential treatment of persons in relevantly similar situations without an objective and reasonable justification.²⁰

In its analysis of the domestic violence case of *Opuz v. Turkey*, the ECtHR incorporated Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), namely that discrimination against women is:

¹⁴ Fredman, ‘Substantive Equality’, *supra* note 6, 273.

¹⁵ Radacic, ‘Gender Equality Jurisprudence’, *supra* note 8, 842.

¹⁶ Fredman, ‘Substantive Equality’, *supra* note 6, 273.

¹⁷ *Ibid.*, 276.

¹⁸ *Ibid.*, 276; Radacic, ‘Gender Equality Jurisprudence’, *supra* note 8, 842.

¹⁹ See, amongst others, *Van Raalte v. The Netherlands*, ECtHR Application No. 20060/92, Judgment of 21 February 1997, para. 39; *Willis v. the United Kingdom*, ECtHR Application No. 36042/97, Judgment of 11 June 2002, para. 39.

²⁰ See *Ibid.*, para. 48; *Okpiz v. Germany*, ECtHR Application No. 59140/00, Judgment of 25 October 2005, para. 33.

“[...] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”²¹

In *Opuz v. Turkey*, the Court recognized the generic nature of its Convention’s clauses and explicitly noted that, when dealing with discrimination against women, “[...] the Court has to have regard to the provisions of more specialised legal instruments [...]”²² such as the CEDAW. Although, due to its nature as a document which provides generic protection to (mostly) civil and political rights, the ECHR does not contain, for example, an article on gender-based violence. However, the case-law of the Court has maneuvered around ECHR articles such as Article 8 and Article 3 in conjunction with Article 14.

II. Article 14: Formal v. Substantive Equality

In older case law, the Court viewed discrimination “[...] through a lens of formal equality”.²³ The central characteristic of this approach is that persons in similar positions must be treated in an equal manner with no distinction on the grounds of protected characteristics, such as their sex or gender, unless and until a legitimately reasonable justification of this treatment can be put forth. Exemplary of the beginning of this approach was the 1985 case of *Abdulaziz, Cabales and Balkandi v. UK*, which considered the legitimacy of UK immigration rules at the time which allowed migrant women to join their spouses but did not extend this right to migrant men seeking to join their wives. The UK held that this rule was needed to protect the labour market in the UK during a time of high unemployment, putting forth this justification by citing an allegedly “statistical fact”²⁴, namely that “[...] men were more likely to seek work than women, with the result that male immigrants would have a greater impact than

²¹ *Opuz v. Turkey*, ECtHR Application No. 33401/02, Judgment of 9 June 2009, para. 186 [Opuz v. Turkey].

²² *Ibid.*, para. 164.

²³ Timmer, ‘Anti-Stereotyping Approach’, *supra* note 7, 710 (emphasis omitted).

²⁴ *Abdulaziz, Cabales and Balkandali v. The UK*, ECtHR Application Nos. 9214/80, 9473/81 and 9474/81, Judgment of 28 May 1985, para. 75 [Abdulaziz, Cabales and Balkandali v. The UK].

female immigrants on the said market”.²⁵ The Court was not convinced by the reasonableness of this rule and tackled it by firstly setting out the significance of ensuring equality between men and women which it found to be “[...] a major goal in the member States of the Council of Europe”.²⁶ Against this backdrop, the “very weighty reasons”²⁷ test was born, which led the way when deciphering whether or not a distinction is reasonable and, thus, legitimate. As a result, it found that Article 14 taken together with Article 8, the right to respect for private and family life, was violated by reason of discrimination on the grounds of sex. Without seeking to diminish the importance of a positive finding in favour of the applicants of the case and of the Court’s recognition that men and women should be equal, its approach to the doctrine of equality is not without its tribulations. In fact, formal equality could be argued that it has “serious shortcomings”²⁸ which, as Timmer recognizes “[...] are well documented in feminist legal literature.”²⁹ These shortcomings emanate from the premise that the doctrine essentially confines gender equality to ensuring that men and women enjoy the same rights without substantially investigating or taking into account the particularities of a woman because of her sex or gender. Such a formal approach to equality could be deemed to disregard the biological differences between men and women and disregards the intersectional nature of discrimination in many instances.³⁰ In brief, equal does not actually mean the same as persons are equal but different and those differences should be taken into account when conceptualizing the issues at stake. The formalistic approach, set out in the above case, did work for the applicants and the just outcome was achieved. This was because the rule before the Court was clear cut: women are not entitled to the same rights as men. This rule was set in stone without any coveting or covering. However, the approach itself which is simplistic and ignorant of, for example, “[...] the historical and social reality of women and other non-dominant or vulnerable groups [...]”³¹ is not sufficiently coherent and would fall short if faced with a case involving an apparently neutral provision or a provision which involves positive action for purposes of promoting the rights of women. The Court, aware of such criticisms, has demonstrated “the preparedness to develop the concept of discrimination to include more

²⁵ *Ibid.*, para. 75.

²⁶ *Ibid.*, para. 78.

²⁷ *Ibid.*, para. 78.

²⁸ Timmer, ‘Anti-Stereotyping Approach’, *supra* note 7, 711.

²⁹ *Ibid.*

³⁰ *Ibid.*, 711.

³¹ *Ibid.*, 711.

substantive conceptions such as indirect discrimination”.³² A good example of this is the case of *Andrle v. Czech Republic*, which involved an application against the lower pensionable ages for women as compared to men, with the pension scheme providing that the pensionable age for men is 60 years and for women 53-56 years old (depending on how many children they have raised) or 57 years old if they have raised no children. Here, the Court took into account the reality of women in communist Czechoslovakia, where they were expected to work full-time, raise their children, and maintain their family home. It accepted the government’s argument that the lower pension ages for women existed to “[...] compensate for the factual inequality and hardship [...]”³³ arising from the above-described reality of women. The Court recognized that the reality may not be the same today but that “[...] changes in perceptions of the roles of the sexes are by their nature gradual [...]”³⁴ and it would be difficult to pinpoint when the affirmative action in favor of women, as in this case, would violate the rights of men.³⁵ As such, it found that the government had not violated the Convention rights under consideration and, importantly, set out a substantive, structural, and socio-historical understanding of the measure in question. It is a possibility that a formal approach would have found in favor of the applicant and would have, therefore, disregarded the social reality of women then and now.

The role of women in the home and workplace, and the resulting social benefits, was also a matter of consideration, albeit in a different manner, in the case of *Konstantin Markin v. Russia*. The applicant, who worked for the military and had custody of his three children, asked for parental leave when his baby was born. The military unit rejected his request for a three-year leave of absence on the grounds that this was reserved for women only and allowed him to take three months’ leave, although he was called back to work before the end of that period. He complained to the ECtHR of the domestic authorities’ refusal to grant him parental leave because he belonged to the male sex. The Court found that Markin’s rights under Article 8 in conjunction with Article 14 had been violated. It took the “very weighty reasons” approach and held that phenomena such as stereotypes, preconceptions, and cultural norms do not

³² S. Fredman, *Discrimination Law*, 2nd ed. (2011), 2.

³³ *Andrle v. Czech Republic*, ECtHR Application No. 6268/08, Judgment of 17 February 2011, para. 53.

³⁴ *Ibid.*, para. 58.

³⁵ *Ibid.*, para. 56.

constitute such reasons.³⁶ It went further to reiterate its previous findings in *Ünal Tekeli v. Turkey*, that the use of the husband's name derives from the "[...] man's primordial role and the woman's secondary role in the family"³⁷ and that in light of the "[...] advancement of the equality of the sexes [...] prevent[s] States from imposing that tradition on married women".³⁸ The Court drew a correlation between different types of discrimination, holding

"[...] the perception of women as primary child-carers and men as primary breadwinners cannot, by themselves, [...] amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation".³⁹

Although, on one level this case is a success as the Court "[...] clearly drew together the relevant dimensions of substantive equality,"⁴⁰ there is an untapped opportunity found therein. For example, the Court did not consider the impact of the parental leave policy on the experiences of women in the Russian military. In fact, everything that the Court agreed with in the abovementioned Czech case, namely, the need for positive action to compensate for burdensome roles allocated to women, was not recalled in *Markin*, in that the Court did not take that step further to consider "[...] the fact that not only (service)men are affected and burdened with stereotypes in this case [...]".⁴¹ The significance of elaborating on and rejecting gender stereotypes, notwithstanding the sex and claim of the applicant, cannot be understated given the continuous disadvantage in which women find themselves in the workplace. This disadvantage can be illustrated by, *inter alia*, the persistence in the gender pay gap in Europe, lower paying work for women, and a significant motherhood penalty.⁴²

³⁶ *Konstantin Markin v. Russia*, ECtHR Application No. 30078/06, Judgment of 22 March 2012, para. 127 [*Konstantin Markin v. Russia*].

³⁷ *Ünal Tekeli v. Turkey*, ECtHR Application No. 29865/96, Judgment of 16 November 2004, para. 63.

³⁸ *Ibid.*, para. 63.

³⁹ *Konstantin Markin v. Russia*, *supra* note 35, para. 110.

⁴⁰ Fredman, 'Substantive Equality', *supra* note 6, 291.

⁴¹ Timmer, 'Anti-Stereotyping Approach', *supra* note 7, 728.

⁴² European Commission, 'Commission Recommendation on Pay Transparency and the Gender Pay Gap – Frequently Asked Questions' (2014), available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_160 (last visited 9 December 2020).

A particularly interesting case which demonstrates the Court's evolving approach to equality is *Carvalho Pinto de Sousa Morais v. Portugal*. Here, the Court dealt with a 50-year-old woman who suffered from a gynaecological condition for which she had to undergo surgery. The operation failed, as the applicant experienced serious pain, incontinence, trouble sitting and walking, and could not have sexual relations. She became depressed and suicidal. After winning damages at lower courts, the Supreme Administrative Court of Portugal reduced the compensation for non-pecuniary damages from 80,000 to 50,000 Euros. It also reduced the compensation for a domestic worker from 16,000 to 6,000 Euros. It reasoned its judgements on the fact that (i) the operation had only aggravated her already existing situation, and (ii) that the applicant at the time already had two children and was at "[...] an age when sex is not as important as in younger years, its significance diminishing with age".⁴³ Regarding the reduction of the amount allocated for the costs of a domestic worker, the Supreme Court justified this on the grounds that, given the age of her children, she "[...] probably only needed to take care of her husband".⁴⁴ The applicant went to the ECtHR and argued that her Article 8 right to private life in conjunction with Article 14 had been violated. In reaching its decision, the ECtHR pointed to the stereotypes in Portugal's Supreme Administrative Court's reasoning in relation to the way in which the sexual life of a 50-year-old woman was conceptualized. More particularly, the Court emphasized that

"[t]he question at issue here is not considerations of age or sex as such, but rather the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people".⁴⁵

In highlighting the stereotypical and prejudicial approach of the national court, the ECtHR drew similarities between the applicant's case and two other judgements concerning medical malpractice against two men aged fifty-five and fifty-nine, respectively. In these cases, the Portuguese Court did not find the

⁴³ *Carvalho Pinto de Sousa Morais v. Portugal*, ECtHR Application No. 17484/15, Judgment of 25 July 2017, para. 16 [*Carvalho Pinto de Sousa Morais v. Portugal*].

⁴⁴ *Ibid.*, para. 50 (quotation marks omitted).

⁴⁵ *Ibid.*, para. 52.

awards as excessive, considering the “tremendous shock”⁴⁶ or “strong mental shock”⁴⁷ experienced by plaintiffs who suffered irreversible consequences to their sex lives due to medical errors. In neither of the above cases did the Supreme Court take into account the plaintiffs’ age or elements of their personal life. In essence, it is expected and accepted that men desire sexual relationships, regardless of age, but a woman’s sexual activity is directly linked to her child-bearing role and sex after that age span is not considered to be necessary or relevant to her life. Through the above comparative analogy, the ECtHR identified the patriarchal perception through which the Supreme Court made its decisions. The theoretical backdrop was a blend of formal equality in that the ECtHR drew a direct parallel between the judicial treatment of the two men and the applicant in analogous situations and elements of substantive equality. Further, the ECtHR conceptualized the perceptions of the national court and the patriarchy, as well as the prejudices marring these perceptions. Nonetheless, discrimination can be established without a comparative approach which might, in fact, hinder the essence of unlawful discrimination and the disadvantages of subordination that are drawn from such discrimination, a point which was aptly set out by Judge Yudkivska. The Judge expressed the view that “[...] the more equality is provided for by law, the more subtle gender discrimination becomes, precisely because stereotypes about the ‘traditional’ roles of men and women are so deeply rooted”.⁴⁸ In light of this statement, for discrimination to be eradicated, the roles of men and women need to be reformulated to the extent that there is no male comparator for purposes of demonstrating gender inequality.

Beyond the framework of cases in which the applicant himself/herself/themselves argued for a violation of Article 14 in conjunction with other articles are those cases where the applicant did not allege a violation of the non-discrimination clause, and, therefore, the elements of gender, gender inequality, and/or gender discrimination were not developed and/or did not impact the judgement. To advance this argumentation, reference is made to *Rantsev v. Cyprus and Russia*.⁴⁹ This case involved the trafficking of a woman to Cyprus for purposes of sexual exploitation. The woman, Oxana Rantseva, was found dead. In failing to protect her from her trafficker, Cyprus was found to have

⁴⁶ *Carvalho Pinto de Sousa Morais v. Portugal*, *supra* note 42, Joint Dissenting Opinion of Judges Ravarani and Bošnjak, para. 37.

⁴⁷ *Ibid.*, para. 37.

⁴⁸ *Ibid.*, para. 52.

⁴⁹ *Rantsev v. Cyprus and Russia*, ECtHR Application No. 25965/04, Judgment of 7 January 2010.

breached the procedural aspects of Articles 2, 4, and 5 whereas Russia was found to have breached the procedural aspects of Article 4. At the centre of this case was the “pink visa” scheme, which facilitated the trafficking of women between the two countries at the time. Notwithstanding the coherent contextual analysis of trafficking and sexual exploitation of women in Cyprus at the time, the Court completely disregarded the gender element of the case,⁵⁰ and all its aspects, from the moment that she was trafficked to the moment her death needed investigating. The previously discussed cases incorporated a clear-cut element of differential treatment between men and women in that the applicants themselves argued that there was an Article 14 violation. However, for one to perceive *Rantsev* as such, one would be required to substantiate and conceptualize trafficking in the broader social framework, something which, as demonstrated in the Court’s position therein, it was not able and/or willing to do.

III. Gender-based Violence: An Equality Issue?

GBV has “[...] only relatively recently been recognised as an equality issue”.⁵¹ In 2016, the ECtHR passed a partly disappointing judgement. After years of abuse and time in a shelter for abused women, Selma Civek was murdered by her husband. Her children lodged an application at the ECtHR for a violation of Article 2 in conjunction with Article 14. The Court found a breach of Article 2 but, given this finding, decided that it was not necessary to examine the potential discrimination element of the case. This is particularly troublesome for two central reasons. Firstly, the Court did not even consider the possible role that the deceased’s gender could have affected (i) her status as a victim of domestic violence, or (ii) the authorities’ handling of her case. Instead, it viewed this case without any inkling of gender goggles, disregarding the vulnerability of women *vis-à-vis* domestic violence. In fact, it went further to note that men and children can also fall victims to domestic violence. While this is not doubted, the gender element of domestic violence has even infiltrated the Council of Europe’s Istanbul Convention, which recognizes that “[...] domestic violence affects women disproportionately, and that men may also be victims of domestic violence”.⁵² In addition, the decision of the Court that a consideration of Article 14 is not necessary makes no legal sense at all in that it

⁵⁰ Timmer, ‘Anti-Stereotyping Approach’, *supra* note 7, 731.

⁵¹ Fredman, ‘Substantive Equality’, *supra* note 6, 291.

⁵² *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, Preamble, CETS No. 210.

ignores the nature of Article 14 as corollary and essentially exploits this nature by choosing to disregard it. Reading this case, one might ask what the point of Article 14 is if the Court can so easily overlook it without any justification. A few months later, the Court, consciously or unconsciously, rectified its record in relation to its conceptualization of domestic violence and the relevance of Article 14 in the landmark case of *Opuz v. Turkey*, which involved a long history of violence against the applicant and her mother, the latter having been shot dead by the violent partner. Since 1995, the applicant and her mother had been filing complaints against the partner but, as argued by the applicant and agreed by the Court, the authorities failed to provide adequate protection. On this ground, the applicant complained to the Court under Article 14 read in conjunction with Articles 2 and 3, arguing that she and her mother had been discriminated against on the basis of their gender. The reliance on CEDAW provisions and findings of the Committee on the Elimination of All Forms of Discrimination against Women under the prism of relevant international obligations compensated for potential gaps in the toolbox of the ECtHR to tackle GBV and discrimination against women. Against this background, the Court took into account statistics, demonstrating that the highest number of reported victims of domestic violence was in Diyarbakir, where the applicant and her mother lived at the material time, that the victims were women, and that the majority of these women were of Kurdish origin, illiterate, and with no independent source of income.⁵³ Although the Court did mention such characteristics, it did not say whether the applicant herself was a member of such groups and did not proceed to consider the element of intersectionality in its conceptualization of the alleged discrimination. Further, the Court found that police officers do not investigate the reports but rather try to convince victims to return home, viewing it as a “[...] family matter with which they cannot interfere [...]”.⁵⁴ It is significant to note that, in the earlier case of *Bevacqua and S. v. Bulgaria*, it had underlined that domestic violence could not be deemed a private matter. Viewing it as such, and thus offering no assistance to victims, would be contrary to the positive obligation of States to ensure the enjoyment of Convention rights.⁵⁵ Other weaknesses in the process were deemed to include delays in processing such claims by the courts and dissuasive penalties on the grounds of custom, tradition, or honour.⁵⁶ In

⁵³ *Opuz v. Turkey*, *supra* note 21, para. 94.

⁵⁴ *Ibid.*, para. 195 (quotation marks omitted).

⁵⁵ *Bevacqua and S. v. Bulgaria*, ECtHR Application No. 71127/01, Judgment of 12 June 2008, para. 83.

⁵⁶ *Opuz v. Turkey*, *supra* note 21, para. 103.

light of these social, contextual, and judicial realities supported by statistical information which went “unchallenged”⁵⁷, the Court found “[...] the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence”.⁵⁸ Within this sphere, the ECtHR found a breach of Articles 2 and 3 in conjunction with Article 14. Thus, the Court looked at the contextual setting of the problem and the position of women within this context, with Fredman arguing that, important for the case’s outcome, was the Court’s emphasis on “[...] the ways in which stigma, stereotypes and prejudice against women can lead the authorities to refuse to recognize the victims as worthy of State protection [...]”⁵⁹

In terms of intention, the Court clarified its position in *Eremia v. Republic of Moldova*, which came soon after *Opuz* and also involved a domestic violence case whereby the State was found to be in breach of Article 3 in conjunction with Article 14. In *Eremia*, it underlined that a failure of the State to protect women against domestic violence does not need to be intentional.⁶⁰ This statement is of paramount importance to the handling of GBV cases and to the general framework of gender discrimination, since it is reflective of the unconscious nature of some forms of bias and prejudice that fuel discriminatory acts and behaviour and that emanate from stereotypes, cultural norms, and perceptions. Once again, as with *Opuz*, the Court looked at international obligations and findings of institutions and at conceptual issues, such as patriarchy and its link with abuse, the perception of domestic violence as a private matter, and the hazardous impact of such realities. Another interesting element of *Opuz* and *Eremia* was the argument of the States involved that the applicants themselves had withdrawn their reports. However, the Court went down the correct path in substantively contextualizing and conceptualizing properly and comprehending the position and power of the women in the respective contexts. Such an approach, as adopted by the ECtHR, demonstrates that “[...] choices are not automatically regarded as an exercise of participation or agency”.⁶¹ This is one of the most promising elements of both cases as it demonstrates that the

⁵⁷ *Ibid.*, para. 198.

⁵⁸ *Ibid.*, para. 198.

⁵⁹ Fredman, ‘Substantive Equality’, *supra* note 6, 292.

⁶⁰ *Eremia v. Republic of Moldova*, ECtHR Application No. 3564/11, Judgment of 28 May 2013, para. 103.

⁶¹ Fredman, ‘Substantive Equality’, *supra* note 6, 294.

Court does not bind itself to formal and technical appraisals of these socially, psychologically, and contextually intricate cases of GBV.

C. Gender Equality: Perceptions and Misperceptions of the European Court of Human Rights

On a multitude of occasions, the ECtHR has referred to the significance of gender equality. For example, it notes that it is an important target for Council of Europe countries, “[...] one of the key underlying principles of the Convention [...]”,⁶² and that “very weighty”⁶³ reasons would be necessary to justify differential treatment between men and women. However, there is no real substance in the manner with which the Court approaches gender equality in that it has not yet conceptualized what it means by this. The lack of such a definitional and semantical framework has led to difficulties in cases involving the wearing of Islamic dress. Given the intricacies involved with this theme, relevant case law will be dealt with in this section, separate from the rest of the case law. This is because this theme has been marred by generalizations, misperceptions, and sweeping statements *vis-à-vis* gender equality. In all cases discussed below, gender equality has arisen in one way or another. For example, in *Dahlab v. Switzerland*, the Court described the headscarf as “[...] a powerful external symbol [...]”,⁶⁴ the wearing of which “[...] appears to be imposed on women [...] and which [...] is hard to square with the principle of gender equality”,⁶⁵ In this light, the Court argued that:

“It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils”.⁶⁶

The way which this judgement developed was inherently correlated to the fact that the applicant was a primary school teacher. The Court appeared concerned with the impact that a headscarf could have on the young school

⁶² *Leyla Şahin v. Turkey*, *supra* note 4, para. 115.

⁶³ *Abdulaziz, Cabales and Balkandali v. The UK*, *supra* note 24, para. 78.

⁶⁴ *Dahlab v. Switzerland*, ECtHR Application No. 42393/98, Judgment of 15 February 2001, 13.

⁶⁵ *Ibid.*, 13.

⁶⁶ *Ibid.*, 13.

children. It did not, however, extrapolate on the meaning of gender equality, it did not clarify the perceived link between the wearing of the headscarf and gender inequality, and it did not explain why or how the hijab could impact the young children. Further, it did not explain how the wearing of a hijab could not be reconciled with, *inter alia*, the principle of non-discrimination and made no effort to consider the inverse argument: namely, that prohibiting a woman from choosing to cover her hair could, in fact, constitute a discriminatory practice in itself. It followed this rhetoric in *Şahin v. Turkey* which, although it did not involve young children but, rather the wearing of a headscarf by a university student, embraced the position developed in *Dahlab*, namely, that the headscarf could not be reconciled with gender equality.⁶⁷ For example, there was never any consideration of the position that the headscarf has been perceived as a “[...] tool of identity, freedom, empowerment and emancipation”.⁶⁸ To this end, in her dissenting opinion in *Leyla Şahin v. Turkey*, Judge Tulkens underlined that the hijab “[...] does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women.”⁶⁹ Furthermore, nowhere in either judgement was there a theoretical and conceptual examination of the issue of choice *vis-à-vis* the wearing of the headscarf. Instead, the Court satisfied itself with an unsubstantiated reference to the term gender equality as a tenet upon which the State could prevent adult women from wearing it. In fact, in her dissenting judgement in *Şahin*, Judge Tulkens underlined that:

“Wearing the headscarf is considered [...] to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? [...] What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who chose not to”.⁷⁰

⁶⁷ *Leyla Şahin v. Turkey*, *supra* note 4, para. 111.

⁶⁸ Elkayam-Levy, ‘Women’s Rights and Religion’, *supra* note 5, 1201.

⁶⁹ *Leyla Şahin v. Turkey*, *supra* note 4, Dissenting Judgement of Judge Tulkens, 48, para. 11.

⁷⁰ *Ibid.*, para. 11.

In this light, and as argued by Judge Tulkens, the Court was paternalistic⁷¹ and disregarded the right to personal autonomy as protected by Article 8.⁷² In fact, in *Şahin*, the Court noted that “[t]he defining feature Republican ideal was the presence of women in public life and their active participation in society”.⁷³ Although this is significant, the Court did not consider the ramifications that removing a woman’s headscarf would have on facilitating her participation in society, nor did it consider that this could potentially hamper such participation. As Evans aptly points out, the bans are a “[...] peculiar way to achieve gender equality [...]”.⁷⁴

In addition to this, the Court took no steps to adopt an intersectional view of the matters at stake, namely that the issue was also one of gender, since it was women who veil themselves. Adopting an intersectional approach is significant for purposes of ensuring proper results, an approach which has been taken by, *inter alia*, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*). An illustration of this is a 2015 judgement involving the prohibition of religious manifestations by teachers. In this case, the Court found that the provision “[...] *de facto* quite predominantly affects Muslim women who wear a headscarf for religious reasons”.⁷⁵ In this light, therefore, the Court viewed the constitutional questions posed, not only through the right of religious expression, but, also, through the framework of gender-based discrimination. Corollary to this was the fact that the ECtHR did not conduct any sort of analysis to assess the impact of such judgements on the rights of women. Would these women continue working? Would they be confined to their homes? What is the psycho-social impact of forcing them to remove their headscarves? Instead, the Court fleetingly referred to gender equality as a justifying reason to prevent women from exercising their freedom of religion and, in *Şahin*, relied on the Turkish Constitutional Court’s position that the headscarf could not be reconciled with gender equality and without exercising European supervision, adhered to that opinion.⁷⁶ As argued by Evans, the Court’s opinions essentially emanate from generalizations and stereotypes about Islam and oppressed Muslim women being forced to wear the headscarf.⁷⁷ Where they receive this information from and how they reach

⁷¹ *Ibid.*, para. 12.

⁷² *Ibid.*, para. 12.

⁷³ *Leyla Şahin v. Turkey*, *supra* note 4, para. 30.

⁷⁴ C. Evans, ‘The ‘Islamic Scarf in the European Court of Human Rights’, 7 *Melbourne Journal of International Law* (2006) 1, 52, 68-69.

⁷⁵ BVerfG, Order of the First Senate of 27 January 2015. 1 BvR 471/10, para. 143.

⁷⁶ *Leyla Şahin v. Turkey*, *supra* note 4, Dissenting Opinion of Judge Tulkens, para. 3.

⁷⁷ Elkayam-Levy, ‘Women’s Rights and Religion’, *supra* note 5, 1200.

these positions and opinions is not disclosed. In all this, the Court perceives Muslims as “[...] belonging to one homogenous group, sharing the same norms, religious practices and beliefs, rather than as different individuals who may wish to adhere to religion from varied perspectives”.⁷⁸

As a result of the above, “[t]he generality of the rulings sheds light on the regrettable absence of women’s human rights analysis”.⁷⁹ Judge Tulkens argued that the Court dealt with principles, such as secularism and equality “[...] in general and abstract terms [...]”.⁸⁰ She reminds the Court that “[...] where there has been interference with a fundamental right, the court’s case-law clearly establishes that mere affirmations do not suffice [...]”.⁸¹ However, in handling principles such as gender equality, the Court, in the particular case but also in the abovementioned case of *Dahlab*, makes narrative affirmations with no substance, as demonstrated in the examples above. As with all controversial issues, there is more than one school of thought on whether or not wearing a headscarf violates women’s rights. There are scholars, such as Bennoune, who agree with the Court on the ground that “[...] religious contexts have become a serious challenge to efforts to secure women’s human rights”⁸² and, as such, “[...] it is most crucial to maintain secularism”.⁸³ One of the major problems with the Court’s decisions, however, is that it did not make a concerted effort to explore both sides of the coin. It does not extrapolate on literature and findings on the headscarf and women’s rights. It equates, in a narrative and unsubstantiated manner, with no extrapolation as to why and how, the headscarf with oppression. As a result, its judgements on the headscarf, some of which are described above, do not enjoy legitimacy.

Then, quite significantly, came *S.A.S. v. France*, which involved the wearing of the burqa. Although finally finding in favour of France on the grounds of preserving the French doctrine of “living together”⁸⁴, the Court made a significant observation:

⁷⁸ C. Chinkin, ‘Women’s Human Rights and Religion: How Do They Co-Exist’, in J. Rehman & S. C. Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (2007), 71-72.

⁷⁹ Elkayam-Levy, ‘Women’s Rights and Religion’, *supra* note 5, 1182.

⁸⁰ *Leyla Şahin v. Turkey*, *supra* note 4, Dissenting Opinion of Judge Tulkens, para. 4.

⁸¹ *Ibid.*, 45, para. 5.

⁸² UN Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, UN Doc A/61/122/Add.1, 6 July 2006, 81.

⁸³ Elkayam-Levy, ‘Women’s Rights and Religion’, *supra* note 5, 1210.

⁸⁴ This justification was also used in the Belgian cases of *Belkacemi and Oussar v. Belgium*, ECtHR Application No. 37798/13, Judgment of 11 July 2017, para. 61 and *Dakir v.*

“[...] [A] State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”⁸⁵

The issue of *invoking* gender equality as a pretext to ban this practice had not come up in the previous cases on the headscarf and it is, at best, rather odd that this was considered in the realm of a full-face veil. Furthermore, the element of choice came up in the sense that the Court referred to a practice defended by women, another element that was completely disregarded in the headscarf cases. However, the fact that the Court went on to find in favour of the State and on grounds which do not even fit into the limitation grounds of Article 9, reduces the legitimacy of the decision in another sense.

D. Conclusion

In conclusion, the Court has found that differential treatment between men and women can only be regarded as compatible with the Convention if there is a “very weighty reason”⁸⁶ to justify such treatment. Further, it holds that elements such as “[...] traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex”.⁸⁷ Notwithstanding that, on one level, the Court denounces and works against gender inequality and discrimination, this paper demonstrated that, at times, consciously or unconsciously, this institution’s approach and findings are marred by its own stereotypes, patriarchal influences, misconceptions, and preconceptions about what gender equality *actually* is and how it *should be* pursued. The ECtHR has repeatedly underlined that gender equality is of paramount importance to it and reminds us of this at every opportunity. However, the Court has given different signals when dealing with cases involving gender equality. Apart from its dismal failure in *Civek*, the Court

Belgium, ECtHR Application No. 4619/12, Judgment of 11 July 2017, para. 60.

⁸⁵ *S.A.S. v. France*, ECtHR Application No. 43835/11, Judgment of 1 July 2014, para. 119.

⁸⁶ *Abdulaziz, Cabales and Balkandali v. The UK*, *supra* note 24, 78.

⁸⁷ *Konstantin Markin v. Russia*, *supra* note 35, para. 127.

has adequately conceptualized the position of women *vis-à-vis* domestic violence and has comprehended, after conducting relevant contextual analysis, that national authorities may be marred by stereotypes and prejudices, preventing them from acting adequately when confronted with domestic violence cases. Beyond domestic violence, the picture is less positive. The Court has repeatedly failed to be anything more than narrative and stereotypical in relation to the wearing of Islamic veils by Muslim women. In finding in favour of the States in each instance, the Court has heavily relied on gender equality, which it never actually theorizes or defines, to justify headscarf bans. Bizarrely, this position is not followed in the burqa cases, where the Court essentially tells States that gender equality is not a trump card to allow them to do what they want with Islamic veiling. Moreover, the intersectionality of discrimination in a multitude of instances including, for example, religious and ethnic minorities, refugee women, LGBT women, and single mothers, as recognized by, *inter alia*, the Council of Europe's Steering Committee for Equality, is a pivotal element to take into account if true gender equality is to be achieved. The Court, nonetheless appears unable and/or unwilling to grasp the notion of intersectionality as would be necessary in, for example, cases involving persons such as S.A.S, who is an (i) immigrant (ii) woman (iii) member of a religious minority. However, steps have been taken in the right direction and the Court has even been innovative in cases, such as *Carvalho Pinto de Sousa Morais*, demonstrating an understanding of how social norms and structures lead to prejudice and inequality and blending forms of substantive with formal equality.