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Comment

The Right to Vote of Non-Resident Citizens: Not Just How, But Whether

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I. A Contested Vote

In the German parliamentary elections of February 2025, the left-wing party *Bündnis Sahra Wagenknecht* (BSW) failed to reach the 5 % threshold required for representation in the Bundestag by fewer than 10,000 votes (0.019 %). Just a few additional votes would have had a significant impact – not only for the party itself but also for the ruling majority. With the entry of another party into Parliament, the black-red governing coalition would not have secured enough votes to elect the Chancellor, and the inclusion of a third party – most likely the Greens – would have been necessary. In light of the narrow margins, it is not surprising that BSW contested the election results, requesting a recount. Among other claims, the party also alleged that thousands of Germans living abroad could not cast their vote because they did not receive the election documents on time, or at all.[1]

Although the party's complaints appear to have little chance of success,[2] they are yet another example of the controversies that frequently arise in relation to external voting in several countries. For example, in the 2016 Austrian presidential election, the run-off held in May had to be repeated after the Austrian Constitutional Court annulled it because absentee ballots had been incorrectly counted in several districts.[3] The General Council of Spaniards abroad recently reported that some citizens received in February

1 See the account on the party's website: 'Was nach der Bundestagswahl geschah – Die Chronologie unserer Beschwerde', <https://bsw-vg.de>, last access 5 August 2025.

2 Following the decisions of inadmissibility of the Federal Constitutional Tribunal (see decision of the second Senate, 13 March 2025, 2 BvE 6/25, and decisions of the second Senate, 12 May 2025, 2 BvE 6/25 and 2 BvE 9/25) it is now for the parliamentary Committee for the Scrutiny of Elections to decide on the party's request of a nation-wide recount.

3 Verfassungsgerichtshof, judgment of 1 July 2016, W I 6/2016-125.

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2025 the ballots to vote in the European elections of June 2024.[4] In its report on the 2024 United Kingdom (UK) parliamentary general elections, the Electoral Commission acknowledged that 'overseas voters faced significant difficulties when trying to participate in the election', as it did in its reports of 2015, 2017, and 2019.[5] These difficulties, which concern the effectiveness of non-resident citizens' right to vote, are compounded by the risks of fraud inherent in postal voting – the most common method for citizens living abroad – whose secrecy and authenticity cannot be fully guaranteed, not to speak of the lack of regulation of the election campaign abroad.

As elections are frequently decided by just a few votes – consider the recent presidential elections in Poland (50.89 % vs. 49.11 %) – concerns about the effectiveness and fairness of the non-resident vote deserve the utmost attention: every vote counts. Still, legitimate concerns regarding how non-resident citizens exercise their vote should not overshadow a more fundamental issue. Indeed, absentee voting raises not only the procedural question of *how* non-resident citizens vote, but more fundamentally, the normative question of *whether and why* they should vote, which touches upon the core of the democratic principle.

II. A Question of Democracy

The number of electors permanently residing abroad, and their share of the total electorate, varies significantly from country to country. However, in European countries, it is generally considerably high. In the 2023 parliamentary elections in Spain, approximately 2.3 million electors were registered in the *Censo de Españoles Residentes Ausentes* (CERA); this amounted to 6.2 % of the entire electorate, which consisted of roughly 37.5 million voters.[6] In Italy, 50.8 million citizens were entitled to vote in the 2022 elections, 4.7 million of whom were living abroad[7] – more than 9 % of the total electoral body. This number is increasing, both in absolute terms and in proportion to in-country voters: in 2006, when Italians abroad first participated in a national

4 See Consejo General de la Ciudadanía Española en el Exterior, 'Informe del Consejo General de la Ciudadanía Española en el Exterior sobre las dificultades en el ejercicio de voto desde el exterior tras la reforma del a LOREG', <www.inclusion.gob.es>, 6, last access 5 August 2025.

5 The Electoral Commission, 'Report on the 2024 UK Parliamentary General Election and the May 2024 Elections', 22, last access 5 August 2025.

6 See <https://infoelectoral.interior.gob.es>, last access 5 August 2025.

7 See <https://elezioni.interno.gov.it>, last access 5 August 2025.

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election via postal voting, they numbered 'only' 2.7 million, comprising 5.5 % of the electorate.[8]

Surprisingly, Germany does not maintain a register of citizens living abroad, and the Federal Statistical Office is unable to provide an estimate of the total number of Germans residing overseas.[9] In the 2025 elections, 213,699 non-resident German electors registered to vote – the highest number ever recorded[10] – yet they represent only a small fraction of the estimated 3 million German citizens living abroad.[11] In the United Kingdom, the exact number of potential overseas electors is also unknown, but a government estimate suggests the figure exceeds 3 million,[12] while the total number of eligible voters in the 2024 general elections was approximately 48.2 million.[13]

These numbers make clear that the decision to enfranchise all citizens living abroad – or to impose limits on their right to vote – can significantly shape the composition of the electorate and, consequently, affect the outcome of general elections. Indeed, some countries delayed the enfranchisement of their diaspora for an extended period precisely because of the extremely high number of expatriates, whose inclusion could have profoundly disrupted the domestic political balance. This was the case in Greece: although, since 1975, Article 51, paragraph 4 of the Constitution required the legislature to specify 'the conditions governing the exercise of the right to vote by persons living outside the country', it was not until 2019 that a law granting voting rights to non-resident Greeks was enacted. The fact that the number of potential voters abroad may have exceeded those residing in the country likely explains this delay in implementing the Constitution – as Greek *ad hoc* judge Spyridon Flogaitis suggested in his dissenting opinion in *Sitaropoulos and Others v. Greece*.[14]

In recent decades, Western democracies have shown a clear trend toward enfranchising non-resident citizens – a development acknowledged and en-

8 See <https://elezionistorico.interno.gov.it>, last acces 5 August 2025.

9 See the website of the 'Statistisches Bundesamt', 'Wie viele Deutsche leben im Ausland?', <www.destatis.de>, last access 5 August 2025.

10 Die Bundeswahlleiterin, 'Deutsche im Ausland?', <https://www.bundeswahlleiterin.de>, last access 5 August 2025.

11 See the 2011 estimate of the association 'Deutsche im Ausland', referring to OECD data: 'Daten und Fakten. Zahlen zu deutschen Auswanderern', <https://www.deutsche-im-ausland.org>, last access 5 August 2025.

12 Cabinet Office, 'Elections Bill Impact Assessment', 1 July 2021, 48.

13 Neil Johnston, 'Overseas Voters, Research Briefing', House of Commons Library, 17 January 2025.

14 ECtHR, *Sitaropoulos and Others v. Greece*, judgment of 8 July 2010, dissenting opinion of judge Spyridon Flogaitis; see Michael Ioannidis, 'The ECtHR, National Constitutional Law, and the Limits of Democracy: Sitaropoulos and Others v. Greece', European Public Law 17 (2011), 661-671. The decision has been overturned by the Grand Chamber: ECtHR (Grand Chamber), *Sitaropoulos and Giakoumopoulos v. Greece*, judgment of 15 March 2012.

couraged by the Venice Commission in its 2011 *Report on out-of-country voting*.[15] The number of States that completely disenfranchise citizens residing abroad has significantly declined, to the point where only a few such examples remain within the European Union.[16] Where legislatures do impose limits on the voting rights of the diaspora, those limits have generally been loosened over time, like in the United Kingdom and Germany.

The 2019 decision of the Canadian Supreme Court in *Frank v. Canada* exemplifies this favourable trend, which involves not only legislatures, but also courts.[17] The Supreme Court struck down provisions of the Canadian Electoral Act that denied the right to vote in federal elections to Canadian citizens who had lived abroad for five years or more. The majority opinion stated emphatically that 'citizenship, not residence, defines our political community and underpins the right to vote', and hailed Canada as 'an international leader' in progressive enfranchisement.

Full enfranchisement of non-resident citizens is increasingly seen as a hallmark of an advanced democracy – one that fully respects equality among its members, just as previous democratic advances did with respect to the enfranchisement of women or people of colour.[18] Yet the democratic legitimacy of extending voting rights to non-resident citizens is less evident than it may appear. Since self-government by the people is democracy's most fundamental characteristic, it follows that 'a country is ruled democratically only if the people who are ruled are the very people who participate in ruling'.[19] If that is the case, democracy is compromised not only when those who are governed do not participate in governing, but also when those who are not governed do participate. Put simply, extending suffrage to all citizens, including those who have lost – or never had – a 'close connection' with the country, does not enhance the quality of democracy but rather threatens it. It undermines a polity's self-government by allowing a significant number of individuals without a close connection with the country to elect representa-

15 European Commission for Democracy Through Law (Venice Commission), Report on Out-of-Country Voting, Study n. 580/2010, 24 June 2011, paras 92 and 99.

16 See Eva-Maria Poptcheva, 'Disenfranchisement of EU Citizens Resident Abroad: Situation in National and European Elections in EU Member States', European Parliamentary Research Service, June 2015, PE 564.379.

17 Supreme Court of Canada, *Frank v. Canada (Attorney General)*, judgment of 11 January 2019, 2019 SCC 1; the following quotations are taken from paras 35 and 62.

18 See Richard Lappin, 'The Right to Vote for Non-Resident Citizens in Europe', ICLQ 65 (2016), 859-894, arguing that limitations to the right to vote of non-resident citizens 'exclude a group of citizens in a discriminatory manner, similar to how women and minorities were historically disenfranchised' (885).

19 Jeremy Waldron, 'Democracy' in: David Estlund (ed.), *The Oxford Handbook of Political Philosophy* (Oxford University Press 2012), 187-203 (188).

tives and influence national politics.[20] Accordingly, not all residence-based restrictions on the right to vote constitute infringements of this fundamental right, nor should they necessarily be viewed as violations of democratic principles. On the contrary, some limitations may not only be compatible with democracy, but necessary to preserve it.

That said, identifying a reasonable criterion to distinguish between justified and unjustified restrictions on non-resident citizens' right to vote is a complex task. The guiding principle should be the concept of 'close connection', which the European Court of Human Rights invoked in *Shindler* as the legitimate aim justifying limitations on the right to vote for citizens abroad.[21] This principle assumes that citizenship alone does not always reflect a connection strong enough to warrant inclusion in the political community; something more is required. While citizenship can be a merely formal tie to a country – particularly when individuals are born abroad and inherit citizenship from parents who have never lived there – the notion of 'close connection' refers to a substantial, actual link. Yet defining this concept with precision, and identifying the criteria necessary to prove such a connection, remains extremely difficult. A brief review of the legal frameworks of some European democracies may offer useful insights.

III. Electors Abroad: Equal, Partly Equal, Not Equal

Spain best exemplifies the rejection of any residence-based restriction on the right to vote. Citizenship is not only necessary but also sufficient to enjoy full voting rights in national elections, and no distinction is made between Spaniards residing in Spain and those living abroad. Specific provisions have been adopted to accommodate the practical needs of non-resident citizens, notably allowing for postal voting as well as the option to deliver the ballot directly to the consulate, instead of mailing it.[22] But as far as the right to vote itself is concerned, full equality exists between resident and non-resident

20 A full discussion of the criteria that should guide the inclusion in the polity exceeds the scope of this Comment. For an overview of the criteria considered in political philosophy see Claudio López-Guerra, 'Should Expatriates Vote?', The Journal of Political Philosophy 13 (2005), 216-234. In general, I follow the analysis and proposal of Rainer Bauböck, 'Morphing the Demos Into the Right Shape. Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens', Democratization 22 (2015), 820-839: 'those and only those individuals have a claim to membership whose individual autonomy and wellbeing is linked to the collective self-government and flourishing of a particular polity' (825).

21 ECtHR, *Shindler v. the United Kingdom*, judgment of 7 May 2013, para. 107.

22 For a recent account see Rosario García Mahamut, 'La reforma del voto CERA (2022). Análisis y balance a la luz de las elecciones autonómicas de 28 de mayo y a Cortes Generales de 23 de julio de 2023', Teoría y Realidad Constitucional 52 (2023), 173-208.

electors: the latter are assigned to a domestic constituency (in principle, the one of last residence), and their votes are counted alongside those of the residents in that constituency. Article 4 of Organic Law No. 40/2006 of 14 December 2006 best expresses this principle of full equality: 'Spaniards residing abroad have the right to be electors and to be elected, in each and every election, under the same conditions as citizens residing in the Spanish State, in the terms provided in the implementing norms.'

Accordingly, the Spanish system acknowledges no distinction between resident and non-resident citizens, nor among non-resident citizens themselves (e. g., between long- and short-term expatriates). As a result of this full-equality approach, Spanish electors abroad make up a significant portion of the electorate: more than 6 %, as previously noted. In some territories with a long tradition of emigration, however, the percentages are much higher. In the Galician province of Ourense, nearly one third of the constituency's electors reside abroad.[23]

A recent and detailed research on who the Spaniards abroad are and how they obtained their citizenship raises serious doubts about the reasonableness of such expansive enfranchisement.[24] It has been observed, for instance, that roughly two-thirds of Spaniards abroad were not born in Spain and are likely to be second- or third-generation expatriates – many of whom have possibly never lived in Spain and hold a second citizenship in addition to the Spanish one. In brief, since no requirements exist to ensure that citizens abroad maintain a substantial connection with the country, Spain's inclusive approach amounts to a questionable case of overinclusion. This overinclusive model has been strongly criticised by some Spanish constitutional law scholars, who have argued in favour of introducing certain restrictions on the right to vote for Spaniards abroad.[25]

By contrast, the United Kingdom has traditionally relied on past residence in the country as a criterion for determining the eligibility of overseas citizens.[26] Overcoming the initial disenfranchisement of expatriates, the *Rep-*

23 The data are available on the website of the *Instituto Nacional de Estadística*, <www.ine.es>, last access 5 August 2025.

24 Javier Sierra-Rodríguez, 'Tipología de los electores españoles en el exterior' in: Ricardo Luis Chueca Rodríguez and Luis Gálvez Muñoz (eds), *El voto de los españoles en el exterior* (Centro de Estudios Políticos y Constitucionales 2022), 131-176.

25 See Miguel Ángel Presno Linera, 'El voto de los extranjeros en España y el voto de los españoles residentes en el extranjero. A propósito del Informe del Consejo de Estado sobre las propuestas de modificación del régimen electoral general', Rev. Esp. Der. Const. 87 (2009), 183-214 (210), and Benito Aláez Corral, 'El nexo entre nacionalidad, ciudadanía y sufragio' in: Ricardo Luis Chueca Rodríguez and Luis Gálvez Muñoz (eds), *El voto de los españoles en el exterior* (Centro de Estudios Políticos y Constitucionales 2022), 21-50 (39).

26 Johnston (n. 13).

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resentation of the People Act 1985 extended the franchise to overseas citizens who remained on the electoral register for five years following emigration. This five-year limit was extended to 20 years by the *Representation of the People Act 1989* and then reduced to 15 years by the *Political Parties, Elections and Referendums Act 2000*. The rationale behind these provisions was to distinguish between short- and long-term expatriates – enfranchising the former and excluding the latter. A more radical reform was introduced by the *Elections Act 2022*, first applied in the 2024 general elections. Under the current rules, overseas British citizens are eligible to vote if they satisfy either the previous registration condition (i. e., having been listed in an electoral register at some point in the past) or the previous residence condition (i. e., having lived in the UK without having been registered). In practice, whereas previously only short-term expatriates were enfranchised, now all expatriates are eligible to vote, while only British citizens born abroad who have never lived in the UK remain excluded from suffrage.

Since the cut-off period has changed over time – set at 5, then 20, and then 15 years – and other durations have also been debated, one might agree with the statement made by the Home Office Minister during the debate on the *Representation of the People Act 1989*: 'I am perfectly willing to concede that, in a sense, we are plucking figures out of the air, and it is difficult to say that there is a distinction of principle between 20 and 25 years.'[27] Despite these uncertainties, however, the requirement of past residence within a specified time frame does reflect a clear rationale. It is reasonable to assume that the longer an individual is absent from the country, the weaker their connection to it becomes – such that, after a certain period, participation in general elections is no longer justified.

While the UK model avoids the risk of overinclusion, it fails to adequately protect the right to vote in a particular situation: that of a British citizen who has never lived in the UK and, for whatever reason, lacks a second citizenship. This individual is unable to vote either in their country of citizenship (where they have never resided) or in their country of residence (of which they are not a citizen). This produces a form of 'political statelessness' or 'civil death' that runs counter to the essential content of the fundamental right to vote.

Germany also relies on prior residence, although its legal framework is more complex than the British one.[28] Following a controversial decision by

27 Former Home Office Minister Douglas Hogg, quoted in Johnston (n. 13), 16.

28 For an updated and detailed account of the evolution of the right to vote of non-resident citizens in Germany (and a critique thereof) see Friedemann Larsen, *Die Bindung der Wahlberechtigung an den Wohnsitz im Inland. Eine verfassungsrechtliche und verfassungsgeschichtliche Kritik* (Duncker & Humblot 2021).

the German Federal Constitutional Court,[29] the current Federal Election Law allows Germans living abroad to vote if they have lived – after their fourteenth birthday – for at least three consecutive months in the territory of the Federal Republic of Germany in the last 25 years. Interestingly, alongside this general rule, the law provides for an exception: a German citizen who does not meet this requirement may still vote if they can demonstrate that they have 'for other reasons, acquired personal and direct familiarity with the political conditions in the Federal Republic of Germany and are affected by them'.[30] In what stands as a comparative outlier, German legislation thus combines a clear-cut rule with the possibility of a case-by-case assessment of each non-resident voter's situation. This exception, introduced to comply with the 2012 judgment of the *Bundesverfassungsgericht*, is unlikely to fill the gaps left by the general rule and may create more issues than it resolves. It is unclear how local authorities could assess an applicant's familiarity with German political conditions without being arbitrary or discriminatory.[31] While a bright-line rule may not fully capture the diversity of the diaspora, it is still preferable to a discretionary administrative decision on who is allowed to vote and who is not.

Following the constitutional reforms of 2000 and 2001, Italy adopted a distinctive system.[32] Unlike the other countries discussed above – where non-resident citizens vote alongside resident citizens in domestic constituencies – Italian citizens abroad vote in a separate extraterritorial constituency, the 'Foreign Constituency'. Italians abroad are thus separated from other voters and elect their own representatives. A minority of countries have adopted this type of separate constituency;[33] however, since Italy's imple-

29 BVerfGE 132, 39 (4 July 2012); strong criticisms in the dissenting opinion of judge Gertrude Lübbe-Wolff.

30 Art. 12 (2) of the *Bundeswahlgesetz*, translation by the author.

31 See the sharp critique by dissenting judge Lübbe-Wolff, who stresses that, according to the Constitutional Tribunal's decision, the local authority should consider how often a non-resident citizen has participated in the meetings of a town's Carnival Club: 'Eine Differenzierung der Wahlrechtsvoraussetzungen nach dem Maße gesellschaftlicher Integration, die dazu führt, dass Wahlbehörden sich mit der Frage befassen müssen, ob Bedeutung und Häufigkeit der Karnevalsvereinssitzungen übers Jahr es erlauben, von einer Teilnahme am gesellschaftlichen Leben der Bundesrepublik Deutschland "in erheblichem Umfang" zu sprechen, und ob der Wählenwollende die Parteiversammlungen, auf die er sich beruft, auch tatsächlich regelmäßig besucht hat, dürfte jedenfalls nicht in Betracht kommen.'

32 For a detailed account and a critical discussion of the Italian system, see Davide Paris, *Il diritto di voto preso sul serio. La partecipazione dei cittadini residenti all'estero alle elezioni politiche* (Egea 2025), 95 ff. This Comment summarises the book's main claim.

33 See Dieter Nohlen and Florian Grotz, 'The Legal Framework and an Overview of Electoral Legislation' in: *Voting from Abroad. The International IDEA Handbook* (International Institute for Democracy and Electoral Assistance / The Federal Electoral Institute of Mexico 2007), 65-88 (70).

mentation, the model has gained some traction and was notably adopted in France for the election of a number of representatives in the *Assemblée nationale*.[34]

Italian law imposes no requirements – such as the residence-based restrictions found in the UK or Germany – for non-resident citizens to be eligible to vote. As a result, all Italians abroad enjoy the right to vote, whether they left the country a few years ago for work or study, or were born and have always lived abroad. However, since including all Italians abroad in the electorate would have significantly impacted Italian politics, the constitutional reforms of 2000 and 2001 opted to strongly underrepresent them. While Italians abroad today make up approximately 9 % of the total electorate, they are allocated only 2 % of parliamentary seats.

Unlike the UK and Germany, Italy's current constitutional framework does not distinguish among expatriates: all Italians abroad are treated equally. However, unlike Spain, the system does distinguish between resident and non-resident citizens: the vote of the latter carries roughly one-fifth the weight of the former's. In other words, Italians abroad are separate, but not equal.

This decision to grant all Italians abroad a 'reduced' right to vote appears problematic from two angles. On the one hand, the system suffers from the same overinclusion as Spain's, extending voting rights – even if limited – to citizens who have lost or never had a meaningful connection with the country. On the other hand, it unjustly curtails the voting rights of Italians who have been abroad only briefly and intend to return: unlike in Germany or the UK, these individuals experience a kind of *deminutio capitis* as soon as they cross the border. Put simply, the system gives too much to some citizens abroad, and too little to others.

IV. Two Citizenships, One Vote?

In light of the criticisms raised against the systems examined so far, it is worth exploring an alternative criterion for delimiting the voting rights of non-resident citizens – one based not only on residence but also on dual citizenship. More specifically, serious consideration should be given to the option of disenfranchising non-resident citizens who reside in a country of

34 See *Ordonnance* no. 2009-935 of 29 July 2009, implementing the constitutional reform no. 2008-724 of 23 July 2008.

which they are also citizens.[35] That is, the right to vote in the home country should be suspended if a citizen residing abroad holds citizenship in the country of residence, and for as long as that person remains abroad. Two examples may help to illustrate this proposal and its underlying rationale.

A Spanish student who moves to Germany to pursue a PhD should retain the right to vote in Spanish elections. However, if she later decides – for whatever reason – to remain in Germany and apply for German citizenship, then from the moment she acquires her second citizenship, she should stop voting in Spain and begin voting in Germany. Should she decide at a later stage to return to her country of origin, she would reacquire the right to vote there as soon as she re-establishes residence in Spain. In this way, the home country ensures that its citizens retain the right to vote until (and as long as) they obtain political participation rights in another country. This framework ensures that citizens are never completely disenfranchised, either in their country of origin or in their country of residence; by contrast, as noted above, the sole past-residence criterion allows such disenfranchisement.

Consider also a person born in Argentina to an Italian parent. By birth, she holds both Argentinian citizenship *iure soli* and Italian citizenship *iure sanguinis*. As long as she resides in Argentina, it makes little sense to allow her to vote for the Parliament of a country she has never lived in. In reality, she is less an Italian abroad than an Argentinian residing in her own country. Should she later decide to move to Italy, thereby giving substance to what had been so far a merely formal citizenship, she would, under this proposal, immediately acquire the right to vote in Italy.

This proposal rests on the idea that acquiring citizenship by naturalisation – typically possible after a certain period of residence – demonstrates both the individual's desire to become a full member of the host community and the legal order's acknowledgment that the person meets the criteria to belong. Thus, when a citizen is naturalised in the country where she has chosen to

35 This proposal has been put forward, although from a different perspective, by David A. Martin, 'New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace', Geo. Immigr. L. J., 14 (1999), 1-34 (26), as an 'overarching electoral rule for global application' that could be summarised as follows: 'if you are a dual national, vote only where you are resident' (26). For criticisms see Peter J. Spiro, *At Home in Two Countries. The Past and Future of Dual Citizenship* (New York University Press 2016), 103 ff. In a European perspective see also Rainer Bauböck (ed.), *Debating European Citizenship* (Springer Open 2019), in particular the contributions by David Owen, 'How to Enfranchise Second Country Nationals? Test the Options for Best Fit, Easiest Adoption and Lowest Costs', 33-36; Rainer Bauböck, 'EU Citizens Should Have Voting Rights in National Elections, But in Which Country?', 23-26; Richard Bellamy, 'An Ever Closer Union Among the Peoples of Europe': Union Citizenship, Democracy, Rights and the Enfranchisement of Second Country Nationals', 47-50, and Kees Groenendijk, 'Five Pragmatic Reasons for a Dialogue with and Between Member States on Free Movement and Voting Rights', 51-53.

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live, it may reasonably be assumed that her connection to the country of origin – where she has not resided for many years – is weaker. It follows that suspending her voting rights in the country of origin is reasonable, provided that doing so does not deprive her of political participation altogether, as she now votes in a polity to which she has a closer connection at that time.

The same proposal also reflects a broader shift in the regulation of dual citizenship. Whereas states long opposed dual or multiple nationality, adhering to the notion that a person could belong to only one country, dual citizenship is now widely accepted.[36] An increasing number of states allow their citizens to acquire additional nationalities without forfeiting their original one. This trend should be welcomed, and one may reasonably hope it will endure in the coming decades, despite the global instability and uncertainty of our times. Yet if individuals can hold more than one citizenship, it is to be expected that not all of them reflect a real and current connection to the country in question, as citizenship is ideally meant to do. This proposal therefore allows dual and multiple citizenships to develop further – without leading to a multiplication of voting rights unsupported by a meaningful connection to the relevant country. From the perspective of electoral equality, such multiplication is also problematic.

For elections to be fair, the effectiveness of the right to vote is essential, and the democratic quality of a country is diminished when this is not guaranteed for non-resident citizens – as often happens, as discussed earlier. Still, concerns about the effectiveness of the right to vote must not eclipse the question of its legitimacy – namely, whether all citizens should be entitled to vote regardless of any real connection with the country. Restrictions on rights are, rightly, subject to suspicion. Yet at times, in order to secure a right, certain limitations are not only acceptable, but necessary.

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36 See Peter J. Spiro, 'Multiple Nationality' in: Rüdiger Wolfrum (ed.), MPEPIL (online edn, Oxford University Press 2008), para. 5.

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Re-Reading Historic Articles in the ZaöRV: Anniversary Series

Varying Degrees of Openness Towards the International and Supranational Legal Sphere in the German Constitutional Order

– A Contemporary Appraisal of and Reflection on Helmut Steinberger's 'Lines of Development in the Recent Case-Law of the Federal Constitutional Court on Questions of International Law' –

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Abstract

The article analyses key problem areas identified by Helmut Steinberger in his contribution on 'Lines of Development in the Recent Case-Law of the Federal Constitutional Court on Questions of International Law' (original German title 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen') from 1988 through the lens of the current body of the case-law of the Federal Constitutional Court. In particular, the focus is directed at the dualistic construction of the entanglement of the international legal order with the German constitutional order, the status and rank of the European Convention on Human Rights within the inner logic of German constitutional law, the possibility to invoke supranational fundamental rights within the constitutional complaint procedure before the Federal Constitutional Court, the aspect of the primacy of EU law, universal minimum standards as present within case-law of the Federal Constitutional Court and, finally, the limits of executive prerogatives within the international sphere. The article also reflects – from a broader perspective – on Steinberger's shift of professional identities – from a judge of the Federal Constitutional Court to an academic and, in particular, Director of the Max Planck Institute for Comparative Public Law and International Law commenting on decisions of the Court which he was co-responsible for.

Keywords

entanglement of the German Constitution with public international law and EU law – the 'open constitutional state' – possibility to invoke ECHR rights and supranational fundamental rights – judicial self-restraint and foreign affairs – Federal Constitutional Court

Helmut Steinberger's[1] contribution on the 'Lines of Development in the Recent Case-Law of the Federal Constitutional Court on Questions of International Law'[2] (original German title 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen') was published in 1988.[3] The article is written by a former judge of the

1 Helmut Steinberger served as a judge to the Federal Constitutional Court from 1975 to 1987. He held the Chair for Public Law and Public International Law at the University of Heidelberg. He served as director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg since 1987.

2 Translation by the author.

3 Steinberger, 'Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen', HJIL 48 (1988), 1-17 (1 et seq.) (translation by the author with the assistance of DeepL).

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Federal Constitutional Court (FCC) who had recently returned – after a long-running and illustrious career in the judiciary – to an academic role (I.). In the article, Steinberger reflects on the various problems arising from the entanglement of the national with the international legal sphere that the FCC has addressed in its case-law (II.),[4] which has frequently oscillated between legal progressiveness on the one hand and judicial self-restraint on the other (III.).

I. Former Judge to Academic – A Shift of Professional Identities

Helmut Steinberger was a judge of the FCC, who served in its second senate from 1975 to 1987.[5] The article in question was hence published in the year after his term came to an end. In his role as a judge of the FCC, Steinberger contributed to landmark decisions of the FCC which shaped the openness of the German constitutional order towards supranational and international law, particularly in the sphere of human rights protection: Amongst these are the *Solange II*-ruling,[6] as well as decisions acknowledging the normative significance of international (treaty) law, in particular, the European Convention on Human Rights[7] (ECHR)[8] (e. g. the *Pakelli*-order[9]) within the German constitutional order (and the legal possibility for individuals to invoke ECHR rights before German courts – at least indirectly).[10] One of the most controversial judgments shaped *inter alia* by Helmut Stein-

4 Steinberger (n. 3), 2 et seq.

5 His term expired on 16 November 1987.

6 FCC, order of 22 October 1986, 2 BvR 197/83 – *Solange II*, BVerfGE 73, 339 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1986/10/rs19861022_2bvr019783en.html>, last access 7 August 2025).

7 213 UNTS 221; ETS No. 005.

8 See commentary by Jochen Frowein, 'Anmerkung zur Pakelli-Entscheidung des Bundesverfassungsgerichts', HJIL 46 (1986), 286-289 (286) (comment).

9 FCC, order of 11 October 1985, 2 BvR 336/85 – *Pakelli* (participating judges Wolfgang Zeidler, Helmut Steinberger and Ernst-Wolfgang Böckenförde) (reprinted in HJIL 46 (1986), 289-294).

10 See e. g. FCC, *Pakelli* (n. 9), HJIL 46 (1986), 289-294 (290): 'A judicial decision adversely affecting an individual that is based on a provision of national law that is contrary to general international law or an interpretation and application of a provision of national law that is incompatible with general international law violates the right to free development of the personality protected by Article 2(1) of the Basic Law. This applies irrespective of whether the violated general rule of international law establishes rights or obligations for the individual or is directed exclusively at states or other subjects of international law.' (translation by the author with assistance by DeepL).

berger concerned the North Atlantic Treaty Organization (NATO) double-track decision,[11] which dealt with the constitutional limits of a transfer of sovereign rights in the sense of Art. 24 para. 1 Basic Law (BL – 'Grundgesetz') as well as questions of restrained judicial control in the spheres of foreign policy.[12]

Consequently, Steinberger's piece fits (partly) into the scholarship category of a 'former judge commenting on his own rulings'. From that perspective and somewhat inevitably, Steinberger's contribution appears as an effort to shape the academic narrative on key FCC lines of reasoning that Steinberger himself had participated in developing. This, in turn, raises deeper questions:

From a 'traditional' point of view, judges are expected to speak only *through* their judgments,[13] and refrain from speaking *about* their judgments. Lord Kilmuir famously stated: 'So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the focus of criticism. It would, moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment: and in no circumstances, of course, should a Judge take a fee in connection with a broadcast.'[14] More recently, this rule gave way to understanding the communication of judgments, within certain limits,[15] as an important task of the judicial branch.[16] Courts and judges communicate not only through their judgments but also beyond the

11 FCC, judgment of 18 December 1984, 2 BvE 13/83 – *Atomwaffenstationierung*, BVerfGE 68, 1 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1984/12/rs19841218_2bve001383en.html>, last access 7 August 2025); see Hans-Joachim Cremer, 'Nachruf Bundesverfassungsrichter a. D. Prof. Dr. iur. Helmut Steinberger', HJIL 74 (2014), 685-688 (686 et seq.).

12 See also comments further below at II. 6. (p. 24 et seq.).

13 See Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (V. S. Verlag 2010), 455. See on judges and media Daryl Dawson, 'Judges and the Media', UNSWLJ 10 (1987), 17-31.

14 Letter from Lord Kilmuir to Sir Ian Jacob K. B. E. (12 December 1955), reprinted in Anthony W. Bradley, 'Judges and the Media – the Kilmuir Rules', Public Law (1986), 383-386 (385).

15 Jannika Jahn, 'Verfassungsrichter in der Defensive', *Verfassungsblog,* 21 May 2025, doi: 10.17176/20200521-133146-0, <https://verfassungsblog.de/verfassungsrichter-in-der-defensive>, last access 7 August 2025. For a foundational analysis Jannika Jahn, *Die Medienöffentlichkeit der Rechtsprechung und ihre Grenzen* (Nomos 2021), 29 et seq.

16 See on this question very recently the panel 'From the Court to the Public and Back: Constitutional Courts in the Battlefield of Communication' (28 July 2025) with presentations by Rodrigo Garcia Cadore, Livia Guimaraes, Maria Pia Guerra and Pedro Henrique Gonçalves de Oliveira Ribeiro within the I•CON-S annual conference in Brasilia (28 to 30 July 2025).

mere judgment itself.[17] This is particularly important in times of backlash against major features of modern constitutionalism characterising the era of the 'post-factual' and conspiracy theories. Communicating judgments is a manifestation of the ideals of publicity[18] and transparency[19] within the legal order, which necessitate interactions with the public and professional audiences. In Germany, the idea of publicity regarding the process of rendering judgments took considerable time to gain traction: Actual practices and processes of adjudication outside the actual courtroom have remained in an inaccessible 'black box' that is only rarely reflected upon in scholarship.[20] It was not until 1970[21] that the FCC started publishing dissenting opinions. While the 'backstage'[22] of the FCC remains to some extent opaque (deliberations occur behind closed doors),[23] the FCC made greater efforts to communicate its judgements in the public sphere in its

17 See e. g. interviews given by Peter Huber, Andreas Voßkuhle and Koen Lenaerts on the PSPP judgment of the FCC (FCC, judgment of 5 May 2020, 2 BvR 859/15 – *PSPP*, BVerfGE 154, 17 (official translation: <https://www.bverfg.de/e/rs20200505_2bvr085915en.html>, last access 7 August 2025)), in which the court declared both EU secondary law and the CJEU judgment confirming its compatibility with EU primary law as acts *ultra vires*. See interview with Peter Huber, 'Das EZB-Urteil war zwingend notwendig', FAZ, 12 May 2020, <https://www.faz.net/aktuell/politik/inland/peter-huber-im-gespraech-das-ezb-urteil-war-zwingend-16766682.html>, last access 7 August 2025; interview with Andreas Voßkuhle, 'Erfolg ist eher kalt', Die Zeit, 13 May 2020, <https://www.zeit.de/2020/21/andreas-vosskuhle-ezb-anleihen kaeufe-corona-krise>, last access 7 August 2025; interview with Koen Lenaerts, 'Europese Hof komt meer center stage', NRC, 17 May 2020, <https://www.nrc.nl/nieuws/2020/05/17/president-koen-lenaerts-europese-hof-komt-meer-center-stage-a4000000>, last access 7 August 2025. On this see Jahn, '*Verfassungsrichter*' (n. 15).

18 Comprehensively Jahn, *Medienöffentlichkeit* (n. 15), 60 et seq. On the issue of 'publicity'and 'democracy' (with further references) already Paulina Starski, 'Art. 53a' in: Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz* (8th edn, C. H. Beck 2024), para. 102.

19 On transparency Jürgen Bröhmer, *Transparenz als Verfassungsprinzip: Grundgesetz und Europäische Union* (Mohr Siebeck 2004), 33 et seq. (with view to the BL).

20 But see Gertrude Lübbe-Wolff, *Beratungskulturen* (Konrad Adenauer Stiftung 2023), 31 et seq.

21 Viertes Gesetz zur Änderung des Gesetzes über das Bundesverfassungsgericht, BGBl. I 1970 S. 176. See § 30 para. 2 1st cl. of the Statute on the Federal Constitutional Court (BGBl. 1993 I S. 1473; BGBl. 2024 I Nr. 440).

22 See Barbara Stollberg-Rilinger, 'Privacy at Court? Reconsidering the Public/Private Dichotomy' in: Dustin M. Neighbors, Lars Cyril Nørgaard and Elena Woodacre (eds), *Notions of Privacy at Early Modern European Courts* (Amsterdam University Press 2024), 75-93 (77 et seq.). The term 'backstage practices' is – in its constitutional dimension – particularly shaped by *Rodrigo Cadore*, see 'The Constitution Is (Not Quite) What Judges Say It Is: How the 'Third Senate' of the German BVerfG and the Eleven Cabinets of the Brazilian STF Shape the Law from Behind the Scenes', presentation during the I•CON-S annual conference in Brasilia on 29 July 2025. On the 'backstage' at the ECtHR see Matthias Jestaedt, 'Case-law à la Strasbourg' in: Claudia Seitz, Ralf Michael Straub and Robert Weyeneth (eds), *Rechtsschutz in Theorie und Praxis* (Helbing Lichtenhahn 2022), 973-987.

23 See § 30 para. 1 cl. 1 of the Statute on the Federal Constitutional Court (see n. 21).

recent past.[24] Obviously, the challenges connected with the communication of judgments by the Court itself – e. g. within press releases or via particularly 'catchy' and clear 'Leitsätze' ('headnotes') – are distinct from those that entail when judgments are commented on by individual judges who are (co-)responsible for them. The latter practice raises challenging questions about its possible negative effects on the public trust in the judicial branch and the authority of the law in its adjudicated form.[25] Many scholars would agree that the sitting judges should at least critically reflect on the manner in which they comment on their rulings and pursue restraint, particularly when commenting outside the courtroom.[26] The expiry of a judge's term forms an important caesura that changes the relevant legal considerations to be made about commenting on judgments and will typically come along with a greater inclination of former judges to become more 'talkative'. This is particularly true of the judges with a professional background in academia who return to the role of mere observers and analysts of the case-law of 'their' court after their term of office expires.

Steinberger – who interests us here – writes his article in a rather distant style that does not openly address which piece of case-law he was responsible for. While more transparency in this regard would not have been ill-advised, Steinberger's analysis displays a careful tone, far from being lurid or pushy. This seems to correspond with his character: Steinberger was known to be rather reserved and not keen on any form of 'staging'.[27] As the footnotes explain, Steinberger's article 'is based on a lecture given on the occasion of the author's joining the Institute's Board of Directors'.[28] Hence, it can be assumed that the article at hand had also been crafted to shed light on Steinberger's future academic agenda and to highlight the topics that would become particularly prominent at the Max Planck Institute for Comparative Public and Public International Law (MPIL), with Steinberger's appointment as a director. From that perspective, Steinberger's contribution might serve as evidence of a shift of professional identities – from the 'academic who became judge' to a mere academic (who formerly served as a judge). Yet even after his full-time return to academia, Steinberger did not take the judge's robe off for a long time: Already in 1990, he was appointed as president of the arbitral

24 See the practice of press releases, the specific form of the delivery of decisions and the distribution of short pronouncements to journalists. On the topic of 'judgment communication' see Angelika Nußberger, 'Rechtsprechungskommunikation' in: Anna-Bettina Kaiser et al. (eds), *Über Recht sprechen* (Mohr Siebeck 2025), 107-123.

25 See here e. g. Jahn, *Medienöffentlichkeit* (n. 15), 47.

26 On the debate Jahn, *Medienöffentlichkeit* (n. 15), 44 et seq.

27 Cremer (n. 11), 687. See Convention on Conciliation and Arbitration within the CSCE (adopted by the CSCE Council at Stockholm, on 15 December 1992).

28 Steinberger (n. 3), 1 (*) (translation by the author with the assistance of DeepL).

tribunal based on the Treaty on the Creation of a Monetary, Economic and Social Union between the Federal Republic of Germany and the German Democratic Republic;[29] since 1995 he served, furthermore, as judge to the Court of Conciliation and Arbitration of the Organization for Security and Co-operation in Europe (OSCE), and became its vice-president in 2001.[30] This inclination towards judicial roles may account for his rather distanced, ostensibly neutral treatment of the FCC's case-law.

II. Steinberger's Vision and the Constitutional Reality as of Today

In his final considerations, Steinberger notes a quantitative increase in FCC case-law on the questions of international law and regards this as 'partly a reflection of the constantly growing international integration of the Federal Republic of Germany'.[31] According to Steinberger, the Court has elaborated on significant issues of the entanglement of the German constitutional order with international and supranational law, while the 'difficulties in dealing with them judicially' have manifested themselves in the course of its judicial activity.[32] Quite easily, one would have reached a similar conclusion after analysing the engagement of the FCC with questions of international and supranational law in the period from 1988 to 2024.

In the years since the publication of Steinberger's contribution and the footprints he left on the corpus of FCC case-law, the Court has given shape to the idea of a constitutional order which is open towards the inter- and supranational sphere (the concept of the 'offene Verfassungsstaat' or the essentially dynamic 'open constitutional state'),[33] thereby simultaneously raising further foundational questions concerning its specific contours.

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29 See Art. 7 Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik vom 18. Mai 1990, BGBl. 1990 II S. 537.

30 Cremer (n. 11), 688.

31 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).

32 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).

33 On the idea of the 'open constitutional state' in general see Paulina Starski, 'Art. 59' in: Ingo v. Münch and Philip Kunig, *Grundgesetz-Kommentar*, vol. 1 (8th edn, C. H. Beck 2025), para. 12 with further references, in particular Christian Tomuschat,' § 226 Staatsrechtliche Entscheidung für die internationale Offenheit' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des deutschen Staatsrechts*, vol. XI (3rd edn, C. F. Müller 2013), 3-61; Bardo Fassbender, *Der offene Bundesstaat* (Mohr Siebeck 2007), 8 et seq. The notion of the 'open constitutional state' was shaped by Klaus Vogel, *Die Verfassungsentscheidung des GG für eine internationale Zusammenarbeit* (Mohr Siebeck 1964), 33 et seq., 46 et seq.

But how does Steinberger view the case-law of the FCC, and how does his 'vision' for the internationally and supranationally-entangled constitutional state relate to the constitutional reality of today?

In the following parts, I will focus on some of the problem areas identified by Steinberger in his piece from 1988, and reflect on the entanglement of the national legal order with the international and supranational legal sphere as it manifests in the current body of FCC jurisprudence (1.). I will subsequently address the case-law of the FCC on the status and rank of the ECHR (2.), display the recent turn in FCC jurisprudence on the possibility to invoke supranational fundamental rights within the constitutional complaint procedure (3.), and sketch the hierarchical relationship of European Union (EU) and German law ('limbo') from the perspective of current FCC case-law (4.). The following section will then shed some light on the 'universal minimum standard' in the context of extraditions (5.), and ultimately turn to questions of judicial review in the sphere of foreign policy (6.). In each case I will put Steinberger's propositions and predictions into the context of the current FCC jurisprudence, simultaneously critically engaging with some of Steinberger's claims.

1. The Entanglement of the National Legal Order With the International Legal Sphere and Aspects of Judicial Review

In his analysis Steinberger sketched – at the outset – the oscillation of the FCC between the so-called 'transformation theory'[34] on the one hand and the 'enforcement theory'[35] on the other hand.[36] Both theories aim to explain the relationship between international and national law from a constitutional perspective. As it is true for every constitutional order, it is up to the BL to decide how it constructs its relationship with international law.[37] Within the

34 See Silja Vöneky, '§ 236 Verfassungsrecht und völkerrechtliche Verträge' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland,* vol. XI (3rd edn, C. F. Müller 2013), 413-427, para. 10.

35 See only Karl J. Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Recht* (C. F. Müller 1964), 19 et seq.; Walter Rudolf, *Völkerrecht und deutsches Recht* (Mohr Siebeck 1967), 164 et seq.; Gerhard Boehmer, *Der völkerrechtliche Vertrag im deutschen Recht* (Carl Heymanns 1965), 36 et seq.; Erich Kaufmann, 'Normenkontrollverfahren und völkerrechtliche Verträge' in: Otto Bachof, Martin Draht, Otto Gönnewein and Ernst Walz (eds), *Forschungen und Berichte aus dem Öffentlichen Recht, Gedächtnisschrift für Walter Jellinek* (Isar Verlag 1955), 445-456 (447 et seq.).

36 See Steinberger (n. 3), 3 et seq.

37 My comments on 'transformation theory' v. 'enforcement theory' here and in the coming paragraphs draw from Starski, 'Art. 59', (n. 33), para. 99 et seq.

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German constitutional architecture, Art. 25 BL and Art. 59 BL serve as the key 'valves' which open its structure to customary international law (CIL) and general principles of law (Art. 25 BL) as well as international treaty law (Art. 59 BL). While Steinberger acknowledges that FCC jurisprudence turned to the 'transformation theory' in its early days, there was later a rapprochement to the idea of a 'reception' of international treaty law.[38] This trend in FCC jurisprudence should not be understood – as Steinberger argues – as a 'pleasing partisanship in an academic doctrinal dispute between the theories of formation and implementation, incorporation or reception'.[39] Behind this trend, instead, would lie 'factual problems of judicial legal determination'.[40] Steinberger is highly critical of the 'transformation theory', attesting to 'unevenness'; in terms of interpretation, it would engender 'severe distortions'.[41] Steinberger's critical stance towards the 'transformation theory' appears more than justified since this theoretical construct creates unnecessary problems:

Both theories – the 'transformation theory' on the one hand and the 'enforcement theory' on the other hand[42] manifest in divergent practical outcomes: Following a dualist logic in the sense of Heinrich Triepel,[43] the 'transformation theory' assumes[44] that international law becomes part of a national legal order by virtue of an act of transformation.[45] This transforming act (e. g. a parliamentary statute which 'approves' the respective interna-

38 Steinberger (n. 3), 4.

39 Steinberger (n. 3), 4 (translation by the author with the assistance of DeepL).

40 Steinberger (n. 3), 4 (translation by the author with the assistance of DeepL).

41 Steinberger (n. 3), 4 (translation by the author with the assistance of DeepL).

42 See also critically Dana Burchardt, 'Looking Behind the Façade of Monism, Dualism and Pluralism' in: Helmut Aust, Heike Krieger and Thomas Kleinlein (eds), *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar 2024), 261-279. From a constitutionalist perspective see Mattias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in: Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2007), 256-293 (256 et seq.); Joseph G. Starke, 'Monism and Dualism in the Theory of International Law', BYIL 17 (1936), 66-81 (66 et seq.); Pierre-Hugues Verdier and Mila Versteeg, 'Modes of Domestic Incorporation of International Law' in: Wayne Sandholtz and Christopher A. Whytock (eds), *Handbook on the Politics of International Law* (Edward Elgar 2017), 149-175 (149 et seq.). For an empirical analysis see Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems', AJIL 109 (2015), 514-533 (514 et seq.).

43 Dualism is prominently connected with Triepel according to whom international law and national law are 'two circles that at most touch but never intersect', see Heinrich Triepel, *Völkerrecht und Landesrecht* (C. L. Hirschfeld 1899), 111 (translation by the author).

44 Generally Florian Becker, 'Völkerrechtliche Verträge und parlamentarische Gesetzgebungskompetenz', NVwZ 24 (2005), 289-291 (289 et seq.).

45 Triepel (n. 43), 112 et seq.; Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, reprint of the 20th edn (C. F. Müller 1999), para. 102.

tional treaty) duplicates the relevant international legal rule within the national legal sphere. Following this concept, an international legal rule does not become binding within the national sphere simply because it forms part of international law; rather, its validity and binding nature originate in the national legislative act. Since the foundation of its validity becomes 'nationalised', the international legal rule is ultimately subjected to national legal logic. Consequently, its fate becomes independent of developments on the international plane (e. g. an internationally valid termination of the relevant international treaty).[46] These undesirable consequences have to be alleviated through operationalising conditions within the legal doctrine that ensure that the national legal reality is not detached from the international (in) validity of rules.[47] Following the 'transformation theory' resolutely, a 'transformed' and thereby 'nationalised' international legal rule would also have to be interpreted along the lines of national rules of exegesis.[48] The 'enforcement theory' follows a more 'monistic'[49] normative logic: An international legal rule retains its international legal nature and is declared to be enforceable within the national legal sphere.[50] This has significant consequences: Since the rule in question does not forfeit its quality as an element of international law, its existence, interpretation, and possible modifications are governed by the principles of international law. A 'moderate'[51] version of the 'transformation theory', which operates with a very generalised mode of transformation, arrives at results similar to the 'enforcement theory' (e. g. in terms of subjecting the international legal rule to international standards of interpretation).[52]

The FCC has refrained until now from explicitly taking sides in this conceptual dispute, and has remained ambiguous in its language regarding the two models: The oscillation of the FCC jurisprudence already pointed out by Steinberger has persisted for a considerable time, yet some trends are identifiable:[53] In 1952, the FCC declared that the parliamentary approval

46 See on the effects on comparative arguments in the interpretation of constitutional provisions Andreas v. Arnauld, *Völkerrecht* (5th edn, C. F. Müller 2023), para. 509: The 'transformation theory' would render it easier to block out the 'persuasive authority of comparative arguments' (translation by the author).

47 Steinberger (n. 3), 4.

48 See Steinberger (n. 3), 4.

49 See Hans Kelsen, *Reine Rechtslehre*, reprint of the 1st edn (Mohr Siebeck 2008), 143 (= 134 et seq.).

50 Partsch (n. 35), 19 et seq., 142 et seq., 147.

51 See Rudolf (n. 35), 164 et seq.

52 See on 'moderate dualism' Rudolf Streinz, 'Art. 25' in: Michael Sachs, *Grundgesetz* (10th edn, C. H. Beck 2024), para. 13.

53 See on a 'dualist trend' FCC, judgment of 30 July 1952, 1 BvF 1/52 – *Deutschlandvertrag*, BVerfGE 1, 396 (410 et seq.).

statute in the sense of Art. 59 para. 2 cl. 1 BL would convey 'the substance of the international treaty validity as domestic German law (transformation)'.[54] Later on, however, the FCC found that Art. 25 BL could be interpreted as a 'general order to apply the law'[55] ('Rechtsanwendungsbefehl') with regard to CIL.[56] At times, the FCC appears to opt for a combination model: Thus, the Court stated in its decisions that '[t]he federal legislator […] transposed the treaties into national law' thereby 'giving them legal effect'.[57] With regard to the ECHR,[58] EU law,[59] secondary legal acts of international organisations,[60] and other treaty law,[61] the FCC refers to an 'order on the application of the law',[62] to a 'national order giving effect' to inter-/supranational law 'at

54 FCC, *Deutschlandvertrag* (n. 53), 411 (translation by the author).

55 FCC, order of 13 December 1977, 2 BvM 1/76 – *Philippinische Botschaft*, BVerfGE 46, 342 (363).

56 FCC, order of 10 November 1981, 2 BvR 1058/79 – *Eurocontrol II*, BVerfGE 59, 63 (90); FCC, judgment of 12 July 1994, 2 BvE 3/92 – *Out-of-area Einsätze*, BVerfGE 90, 286 (364).

57 See FCC, order of 14 October 2004, 2 BvR 1481/04 – *Görgülü*, BVerfGE 111, 307 (official translation: <https://www.bverfg.de/e/rs20041014_2bvr148104en.html>, last access 7 August 2025), para. 31. 'Rechtsanwendungsbefehl' should, however, rather be translated with 'command to apply as/the law' or 'order on the application of the law'. With reference to the *Görgülü* order also FCC, order of 18 December 2008, 1 BvR 2604/06, NJW 2009, 1133, para. 23.

58 FCC, judgment of 4 May 2011, 2 BvR 2365/09 – *Sicherungsverwahrung*, BVerfGE 128, 326 (official translation: <https://www.bverfg.de/e/rs20110504_2bvr236509en.html>, last access 7 August 2025), para. 87; FCC, judgment of 12 June 2018, 2 BvR 1738/12 – *Streikverbot für Beamte*, BVerfGE 148, 296 (official translation: <https://www.bverfg.de/e/rs20180612_2bvr173812en.html>, last access 7 August 2025), para. 127. But see FCC, *Görgülü* (n. 57), para. 31 et seq.

59 FCC, judgment of 30 June 2009, 2 BvE 2/08 – *Lissabon*, BVerfGE 123, 267 (official translation: <https://www.bverfg.de/e/es20090630_2bve000208en.html>, last access 7 August 2025) ('order giving effect to European law contained in the act of approval'), para. 343. See furthermore FCC, order of 15 December 2015, 2 BvR 2735/14 – *Identitätskontrolle*, BVerfGE 140, 317 (official translation: <https://www.bverfg.de/e/rs20151215_2bvr273514en.html>, last access 7 August 2025), para. 40; FCC, judgment of 21 June 2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 – *OMT*, BVerfGE 142, 123 (official translation: <https://www.bverfg.de/e/rs20160621_2bvr272813en.html>, last access 7 August 2025), para. 120; FCC, order of 13 February 2020, 2 BvR 739/17 – *Einheitliches Patentgericht*, BVerfGE 153, 74 (official translation: <https://www.bverfg.de/e/rs20200213_2bvr073917en.html>, last access 7 August 2025), para. 115.

60 FCC, order of 24 July 2018, 2 BvR 1961/09 – *Europäische Schulen*, BVerfGE 149, 346 (361).

61 Concerning a double taxation treaty: FCC, order of 15 December 2015, 2 BvL 1/12 – *Treaty Override,* BVerfGE 141, 1 (official translation: <https://www.bverfg.de/e/ls20151215_2bvl000112en.html>, last access 7 August 2025), para. 46. Concerning the Convention Relating to the Status of Refugees see FCC, order of 8 December 2014, 2 BvR 450/11, NVwZ 2015, 361, para. 35. With view to the European Mutual Assistance Convention FCC, order of 8 June 2010, 2 BvR 432/07, NJW 2011, 591, para. 27.

62 With regard to the ECHR see FCC, *Sicherungsverwahrung* (n. 58) para. 87.

national level'[63] or an 'order giving effect to an international treaty at the national level'.[64]

However, the 'non-determination' of the FCC in terms of the 'conceptual frame' does not come as a surprise:

First, since the 'transformation theory' and 'enforcement theory' are 'theories' in the original sense of the term – aiming to describe and explain a (legal) reality that the FCC contributes to[65] – there has been no formal necessity for the Court to take a stand on either side. Secondly, the FCC is able to avoid addressing the 'severe inconsistency'[66] of the 'transformation theory' regarding the rules guiding the interpretation of international treaties by referring to the principle of the 'friendliness' or 'cordiality' of the German constitutional order towards international law derived from Art. 1 para. 2, Art. 9 para. 2, Art. 24 to Art. 26 and Art. 59 BL.[67] This principle requires an interpretation of the national statutes in accordance with international law ('völkerrechtskonforme Auslegung'), which is compatible with both of the theories. Hence, the Court found 'work-arounds', which allow it to remain (theoretically) ambiguous. The appeal of operating with 'work-arounds' rather than taking a clear position remains, however, opaque.

2. Status and Rank of International Treaties and the European Convention on Human Rights – The *Görgülü* Turn

The friendliness of the BL towards international law also serves as a key concept to grasp the status of the ECHR within the German constitutional order. Along these lines, Steinberger attests the case-law of the FCC an

63 FCC, *Identitätskontrolle* (n. 59), para. 40. See also FCC, judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21 – *Next Generation EU*, para. 114 ('order giving effect to European law').

64 FCC, *Treaty Override* (n. 61), para. 46.

65 See Rudolf (n. 35), 158 et seq.

66 Steinberger (n. 3), 4 (translation by the author: 'schweren Verwerfungen').

67 See Mehrdad Payandeh, 'Verfassungsrechtliche Grundlagen der Völkerrechtsfreundlichkeit in Deutschland', HJIL 83 (2023), 609-628 (613) and Mehrdad Payandeh, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip', JöR 57 (2009), 465-502 (483); Andreas Paulus, 'Völkerrechtsfreundlichkeit in der Rechtsprechung des Bundesverfassungsgerichts', HJIL 83 (2023), 869-892; Daniel Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze* (Mohr Siebeck 2013), 200 et seq. See recent decisions of the FCC, order of 6 November 2019, 1 BvR 16/13 – *Recht auf Vergessen I*, BVerfGE 152, 152 (official translation: <https://www.bverfg.de/e/rs20191106_1bvr001613en.html>, last access 7 August 2025), para. 61; FCC, order of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18 – *Rumänien II*, BVerfGE 156, 182 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/12/rs20201201_2bvr184518en.html>, last access 7 August 2025), para. 63.

enhanced openness towards the ECHR,[68] and already points towards the *Görgülü*-rationale which took the Court another 16 years to adopt.[69] In a way, *Görgülü* can be seen as the crystallisation of the doctrinal groundwork laid out by the jurisprudence of the FCC during Steinberger's term. Here, the broader context is of importance:

Art. 25 BL[70] provides that general rules of international law, including CIL and general principles of law (Art. 38 para. 1 lit. c ICJ Statute[71]), rank within the normative hierarchy between the BL and ordinary statutes.[72] This status does, however, not apply to international treaties.[73] In principle, both the 'enforcement theory' as well as the 'transformation theory' would lead to the result that international treaty law shares the rank of the statute which transforms it into national law or renders it applicable within the national legal order (see Art. 59 para. 2 cl. 1 BL).[74] A parliamentary statute cannot confer a higher rank to an international rule than it carries itself. The ECHR, whose validity and applicability rests on Art. 59 para. 2 cl. 1 BL in conjunction with the parliamentary approval statute, shares the formal rank of statutory law.[75] Theoretically, a more recent parliamentary statute could overwrite a normatively conflicting applicable international treaty according to the legal collision principle of *lex posterior derogat legi priori*.[76] The FCC has acknowledged that 'subsequent legislatures must be able to revise, with the limits set by the Basic Law, legislative acts undertaken by earlier legislatures'.[77] This idea of a 'treaty override'[78] brings us to a normative conflict between two constitutional principles – the principle of democracy (see Art. 20 para. 1, 2 BL) on the one hand, and the openness of the German constitutional order towards international law on the other. Both require a

68 Steinberger (n. 3), 8.

69 FCC, *Görgülü* (n. 57).

70 For the BL translation see <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html>, last access 7 August 2025.

71 UNCIO XV, 355.

72 The following considerations draw from Starski, 'Art. 59' (n. 33), para. 104 et seq.

73 See Ferdinand Wollenschläger, 'Art. 25' in: Horst Dreier (ed.), *Grundgesetz Kommentar* (3rd edn, Mohr Siebeck 2015), para. 17.

74 On the special case of administrative treaties see Art. 59, para. 2, cl. 2 BL.

75 FCC, order of 14 October 2004, 2 BvR 1481/04 – *Berücksichtigung der Entscheidungen des EGMR durch deutsche Gerichte*, NJW 2004, 3407, 3412; Christian Hillgruber, 'Art. 1' in: Volker Epping and Christian Hillgruber (eds), *BeckOK Grundgesetz* (62th edn, C. H. Beck, 15 June 2025), para. 57.

76 Starski, 'Art. 59', (n. 33), para. 104.

77 FCC, *Treaty Override* (n. 61), para. 53.

78 See Starski, 'Art. 59' (n. 33), para. 104 (with further references). See generally Robert Frau, *Der Gesetzgeber zwischen Verfassungsrecht und völkerrechtlichem Vertrag* (Mohr Siebeck 2015), 27 et seq.

careful balance.[79] Since any 'treaty override' would lead to a violation of the respective treaty and form the basis of international legal responsibility on the part of Germany, the FCC presumes that the legislator does not intend to contradict international treaties binding on Germany with the statutes it adopts[80] – a thought which is also taken up by Steinberger in his piece.[81] The intent to deviate from international treaty law would have to be manifest within a statute passed by the legislative organs, Steinberger argues, 'which is hardly ever to be assumed'.[82] Here, Steinberger appears to be slightly too optimistic: The decision of the FCC on the Agreement for the Avoidance of Double Taxation with respect to Taxes on Income and Capital between Turkey and Germany[83] evidences that a 'treaty override' is, from the perspective of the FCC, actually more than just a theoretical option.[84]

The ECHR presents, however, a distinct case regarding a possible 'treaty override' *inter alia* because of its entanglement with supranational law (see e. g. Art. 6 para. 3 Treaty on European Union [TEU]).[85] Nevertheless, the presumption of the legislator intending to act in conformity with international law forms also an element of the FCC jurisprudence on the ECHR. It is a manifestation of an international law-friendly interpretation ('völkerrechtsfreundliche Auslegung')[86] and normatively linked to Art. 59 para. 2 BL. Yet, according to the FCC, it is particularly Art. 1 para. 2 BL which contains a constitutional commitment to 'inviolable and inalienable human rights' and attributes an enhanced normative significance to the ECHR.[87]

79 See the separate opinion by Doris König in the Treaty Override Decision *Treaty Override* (n. 61), paras 1 et seq.

80 FCC, order of 26 March 1987, 2 BvR 589/79 – *Unschuldsvermutung*, BVerfGE 74, 358 (370); FCC, *Treaty Override* (n. 61), para. 30. Concerning the ECHR see also Mehrdad Payandeh and Heiko Sauer, 'Menschenrechtskonforme Auslegung als Verfassungsmehrwert', Jura 4 (2012), 289-298 (295); Johannes Masing, '§ 2 Verfassung im internationalen Mehrebenensystem und völkerrechtliche Verträge' in: Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Handbuch des Verfassungsrechts* (C. H. Beck 2021), paras 127, 130, 131; Johannes Masing, '§ 2 Constitution and Multi-Level Governance Under the Conditions of Internationalisation' in: Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Constitutional Law in Germany* (C. H. Beck 2025), para. 53 et seq.

81 E. g. Steinberger (n. 3), 9.

82 Steinberger (n. 3), 9 (translation by the author with the assistance of DeepL).

83 BGBl. 2012 II 17, 526 et seq.

84 FCC, *Treaty Override* (n. 61), para. 53.

85 See also and further remarks below at II. 3.

86 FCC, *Görgülü* (n. 57), para. 33; Andreas Voßkuhle, 'Art. 93' in: Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz* (8th edn, C. H. Beck 2024), para. 88.

87 FCC, *Streikverbot für Beamte* (n. 58), para. 130; FCC, *Sicherungsverwahrung* (n. 58), para. 90; Hillgruber (n. 75), para. 57.

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The key questions are then, first, to what extent the ECHR is relevant for the interpretation of the BL; second, whether the FCC is constitutionally obliged to apply the ECHR in line with the case-law of the European Court of Human Rights (ECtHR); and third, whether, and if so, under which conditions the ECHR could be invoked within a constitutional complaint procedure (see Art. 94 para. 1 no. 4a BL).

In its *Görgülü* ruling, the FCC underlined that the guarantees of the ECHR, which lack a formal constitutional rank, do not constitute 'a direct constitutional standard of review in Germany'.[88] However, the Court accorded a special, indirectly constitutional[89] status to the ECHR by acknowledging that the ECHR as interpreted by the ECtHR is to be considered by the German courts when interpreting fundamental rights enshrined in the BL.[90] The ECHR and the case-law of the ECtHR serve as 'guidelines for interpretation when determining the contents and scope of fundamental rights'.[91] This interpretative strategy is intended to 'give effect to the guarantees of the European Convention on Human Rights as extensively as possible in Germany, and, in addition, it may contribute to avoid the Federal Republic of Germany being held in violation'.[92] An 'orienting and guiding function' ('Orientierungs- und Leitfunktion') is accorded to the judgments and decisions of the ECtHR,[93] even beyond the specific case in question. ECtHR case-law is relevant even if it concerns other complainants and/or even other

88 FCC, *Görgülü* (n. 57), para. 32.

89 Payandeh and Sauer (n. 80), 295.

90 FCC, *Görgülü* (n. 57), para. 32; FCC, *Sicherungsverwahrung* (n. 58), para. 90; FCC, *Streikverbot für Beamte* (n. 58), para. 130; see also Heiko Sauer, 'Principled Resistance to and Principled Compliance with ECtHR Judgments in Germany' in: Marten Breuer (ed.), *Principled Resistence to ECtHR Judgments – A New Paradigm* (Springer 2019), 55-87; Jens Meyer-Ladewig and Herbert Petzold, 'Die Bindung deutscher Gerichte an Urteile des EGMR', NJW 58 (2005), 15-20; Raffael Cammareri, 'Die Bedeutung der EMRK und der Urteile des EGMR für die nationalen Gerichte', JuS 9 (2016), 791-794. See from a comparative perspective Marco Antonio Simonelli, *The European Court of Human Rights and Constitutional Courts* (Springer 2024), 45 et seq.

91 *Inter alia* FCC, order of 30 June 2022, 2 BvR 737/20 – *Kernbrennstoffsteuer*, BVerfGE 162, 325 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rs20220630_2bvr073720en.html>, last access 7 August 2025), para. 64.

92 FCC, *Streikverbot für Beamte* (n. 58), para. 130; see also FCC, *Sicherungsverwahrung* (n. 58), para. 91.

93 FCC, order of 23 April 2024, 1 BvR 1595/23 – *Kindesrückführung*, NJW 2024, 2389, para. 32; FCC, order of 3 June 2022, 1 BvR 2103/16 – *Schiedsklausel*, NJW 2022, 2677, para. 30; FCC, order of 18 September 2018, 2 BvR 745/18 – *Aufrechterhaltung von Untersuchungshaft*, NJW 2019, 41, para. 41; FCC, order of 29 January 2019, 2 BvC 62/14 – *Wahlrechtsausschluss*, BVerfGE 151, 1 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/01/cs20190129_2bvc006214en.html>, last access 7 August 2025), para. 64.

parties to the ECHR. This 'orienting and guiding function' therefore reaches beyond the *inter partes* binding effect envisaged by Art. 46 ECHR.[94]

In terms of enforcement of ECtHR judgments and decisions, *Görgülü* opened up the possibility to lodge a constitutional complaint (Art. 94 para. 1 no. 4a BL) based on the submission that German authorities have not sufficiently considered the ECtHR case-law.[95] The FCC has made it clear that such disregard could violate Art. 20 para. 3 BL (enshrining the principle of the 'Rechtsstaat' or 'state governed by law') in conjunction with the fundamental right in question.[96]

Inherent to the BL is hence the idea of 'human rights convergence'[97] which manifests itself in a duty to consider the normative commands of the ECHR as interpreted by the ECtHR. This obligation neither creates a strict legal obligation to adapt nor allows for unjustified deviations.[98] According to the FCC, a 'schematic parallelisation of individual constitutional concepts' is not permitted.[99] ECHR guarantees 'must be "adapted" to the context of the receiving constitutional system in an active process (of acknowledgment)'.[100] In its decision on the ban on strikes for civil servants, the FCC has emphasised the necessity to contextualise ECtHR judgments,[101] thereby relativising the guiding function introduced by the prior FCC jurisprudence.[102] The constitutional 'duty to consider', hence, has its limits. Beyond these strategies of contextualisation and distinction[103] that can be incorporated into the proportionality test

94 FCC, *Kindesrückführung* (n. 93), para. 32; FCC, *Aufrechterhaltung von Untersuchungshaft* (n. 93), para. 41.

95 Hillgruber (n. 75), para. 57.2; Voßkuhle (n. 86), para. 89.

96 FCC, *Görgülü* (n. 57), para. 47; FCC, *Sicherungsverwahrung* (n. 58), paras 85-86; generally Raffaela Kunz, *Richter über internationale Gerichte?* (Springer 2020), 92 et seq.

97 See Heiko Sauer, 'Art. 1, para. 2' in: Horst Dreier (founder), *Grundgesetz-Kommentar* (4th edn, C. H. Beck 2023), para. 24; Paulina Starski, *Bericht der Kommission zur Reproduktiven Selbstbestimmung und Fortpflanzungsmedizin*, 2024, 221-288 (267). With view to term 'convergence' see Carla Buckley, Alice Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law* (Brill Nijhoff 2017).

98 Payandeh and Sauer (n. 80), 295; Thomas Giegerich, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in: Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar* (3rd edn, Mohr Siebeck 2022), para. 74.

99 FCC, *Aufrechterhaltung von Untersuchungshaft* (n. 93), para. 42 (translation by the author); FCC, *Streikverbot für Beamte* (n. 58), para. 131; FCC, *Sicherungsverwahrung* (n. 58), para. 91. See on this already Starski, 'Art. 59' (n. 33), para. 108.

100 FCC, *Streikverbot für Beamte* (n. 58), para. 131; FCC, *Sicherungsverwahrung* (n. 58), para. 92 ('must be "reconceived" in an active process (of reception) in the context of the receiving constitutional system') (excerpts from the official translations).

101 FCC, *Streikverbot für Beamte* (n. 58), para. 132. See on this also Starski, *Bericht der Kommission* (n. 97), 276 et seq.

102 Matthias Jacobs and Mehrdad Payandeh, 'Das beamtenrechtliche Streikverbot: Konventionsrechtliche Immunisierung durch verfassungsgerichtliche Petrifizierung', JZ 74 (2019), 19-26 (23).

103 Jacobs and Payandeh (n. 102), 22 et seq.

('Verhältnismäßigkeitsprüfung') inherent to establishing the infringement of a fundamental right,[104] an interpretation in line with ECtHR judgments is ruled out 'where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution'.[105] This would be the case, first, if it went beyond the wording, secondly, if multipolar constellations required a differentiated balancing approach and, in any case, if it contradicted the 'constitutional identity' of the BL (see the so-called 'eternity clause' in Art. 79 para. 3 BL).[106] Hence, the ECHR as interpreted by the ECtHR might be set aside 'exceptionally', if 'this is the only way to avert a violation of fundamental constitutional principles'.[107] While the concept of a 'duty to consider' with limited grounds for deviation appears overall to be a convincing approach, the legitimate constitutional grounds for deviation should be sharpened.[108]

The FCC has so far proven hesitant to extend its approach regarding the ECHR to international human rights treaties. Although human rights instruments at the universal level (e. g. the International Covenant on Civil and Political Rights[109]) also reflect a commitment to 'inalienable human rights' as addressed by Art. 1 para. 2 BL,[110] the FCC does not attribute a rank comparable to the ECHR to them within the normative hierarchy. The question of whether and under which conditions the 'duty to consider' extends to the pronouncements and interpretations of respective human rights treaty bodies appears particularly problematic.[111] *Views*, *General Comments*,[112] and *Concluding Observations*[113] of treaty bodies are merely 'address[ed]'[114] quite

104 FCC, *Sicherungsverwahrung* (n. 58), para. 94.

105 FCC, *Sicherungsverwahrung* (n. 58), 2nd headnote. See Voßkuhle (n. 86), para. 88a.

106 FCC, *Streikverbot für Beamte* (n. 58), paras 133-134; Payandeh and Sauer (n. 80), 295.

107 FCC, *Wahlrechtsausschluss* (n. 93), para. 63. A doctrinally different approach is to be taken if ECHR rights reflect human rights which enjoy the status of customary international law. Here Art. 25 BL would apply.

108 See Starski, *Bericht der Kommission* (n. 97), 272 et seq.

109 999 UNTS 171.

110 Art. 1, para. 2 BL reads: 'The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.' See on the relevant legal issues Sauer, 'Art. 1' (n. 97), para. 33.

111 The following considerations draw from Starski, *Bericht der Kommission* (n. 97), 225 et seq. See Sauer, 'Art. 1' (n. 97), para. 34.

112 On *General Comments* see Helen Keller and Leena Grover, in: Helen Keller and Geir Ulfstein (eds), UN Human Rights Treaty Bodies (Cambridge University Press 2012), 116-198.

113 On these see Starski, *Bericht der Kommission* (n. 97), 226 et seq., 270 et seq. (with further references).

114 FCC, *Wahlrechtsausschluss* (n. 93), para. 65: 'While statements from committees or similar treaty bodies have significant weight, they are not binding on international or domestic courts [.] […] [D]omestic courts should address the view of such treaty bodies; they do not, however, have to endorse it.'

loosely and the FCC proceeds rather selectively therein. If the pronouncements of the treaty bodies support a favoured interpretation of fundamental rights, they are referred to, but if they do not fit the line of argument, then the FCC is quick to stress their non-binding nature as *soft law*.[115] In its recent *Ramstein* judgment the FCC has made a case for the obligation of the FCC to engage in a 'reasoned discussion' of human rights body pronouncements.[116] It stressed that whilst '[t]he statements of human rights committees also carry considerable weight in the interpretation of the respective human rights agreements', they would be 'not binding under international law for international and national courts. When interpreting a treaty, a national court should engage in a reasoned discussion of the views of the competent international treaty body, but it is not required to adopt them.'[117] A 'reasoned discussion' hints at a very soft 'duty to consider'.

In that regard, there seem to be ruptures within the normative logic of the FCC and its grounds for differentiation appear vague.[118] The justification for such a distinction between the ECHR and other human rights treaties remains controversial. Possibly, one could refer to the fact that the ECHR creates a human rights court – i. e. the ECtHR – and entrusts it with the obligatory competence to issue binding decisions (Art. 46 ECHR). *Au contraire*, neither are human rights treaty bodies courts nor do they issue formally binding decisions.[119] Whilst the individual complaint procedure established within international human rights treaty regimes[120] (e. g. Art. 1 of

115 Here and previously FCC, order of 26 July 2016, 1 BvL 8/15 – *Zwangsbehandlung*, BVerfGE 142, 313 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/07/ls20160726_1bvl000815en.html>, last access 7 August 2025), para. 90; FCC, *Wahlrechtsausschluss* (n. 93), para. 65. On the concept of *soft law* with further references see Paulina Starski, 'Jenseits des Kernbereichs exekutiver Verantwortung', Der Staat 62 (2023), 373-418 (412 et seq.).

116 FCC, judgment of 15 July 2025, 2 BvR 508/21 – *Ramstein,* para. 107 (translation by the author with the assistance of DeepL) ('argumentativ auseinandersetzen').

117 FCC, *Ramstein* (n. 116).

118 Mehrdad Payandeh, 'Rechtsauffassungen von Menschenrechtsausschüssen der Vereinten Nationen in der deutschen Rechtsordnung', NVwZ 3 (2020), 125-129 (128); Kristina Schönfeldt, 'Soft Law Makes Hard Cases: Transformation von Soft Law in Hard Law durch nationale Behörden und Gerichte?' in: Sebastian Piecha, Anke Holljesiefken et al. (eds), *Rechtskultur und Globalisierung* (Nomos 2017), 189-212 (207 et seq.).

119 See with further references Starski, *Bericht der Kommission* (n. 97), 226 et seq. Generally Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in: Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies. Law and Legitimacy* (Cambridge University Press 2012), 356-413; Geir Ulfstein, 'Individual Complaints', in: Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies. Law and Legitimacy* (Cambridge University Press 2012), 73-115.

120 See e. g. Dinah Shelton, 'Human Rights, Individual Communications/Complaints' in: MPEPIL (online edn, Oxford University Press 2006), para. 9 et seq.

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the Optional Protocol on the International Covenant on Civil and Political Rights[121]) resembles a quasi-judicial proceeding, the *View* concluding this procedure remains non-binding. Additionally, the Committees established within the human rights treaty system on the global plane are expert bodies and not courts.

Yet, it is acknowledged on the international plane that human rights body pronouncements are relevant when interpreting human rights guarantees. According to the ICJ, 'great weight' should be attributed 'to the interpretation adopted by this independent body [HRC] that was established specifically to supervise the application of that treaty'.[122] Beyond that, the FCC has acknowledged that ECHR judgments and decisions explain, uphold, and develop ECHR guarantees and that this effect – which goes beyond the *inter partes* binding effect of a judgment – is constitutionally significant.[123] While Art. 32 para. 1 ECHR extends the jurisdiction of the ECtHR within the framework of the envisaged procedures 'to all matters concerning the interpretation and application of the Convention',[124] it does not extend the *inter partes* binding nature of its rulings. Within the ECHR, there is no explicit norm which declares that the interpretation of the ECHR by the ECtHR on which a specific declaratory judgment rests is formally binding.[125] One might also question the procedural pathways leading to the adoption of human rights body pronouncements.[126] This would raise deeper legitimacy questions that the FCC indeed omits to address.

Finally, the special rank attributed to the ECHR could be explained by its interwovenness with the EU. The ECHR is intertwined with the Charter of Fundamental Rights of the European Union (EUChFR)[127] (see its Art. 52 para. 3) and serves as a source for deriving unwritten EU fundamental rights as 'general principles' (Art. 6 para. 3 TEU). The ECHR forms one important

121 999 UNTS 171.

122 ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), merits, judgment of 30 November 2010, ICJ Reports 2010, 639, para. 66.

123 Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in: Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: the Impact of the ECHR on National Legal Systems* (Oxford University Press 2008), 3-28 (6); Schönfeldt (n. 118), 206; Norman Weiß, 'Von Paukenschlägen und steten Tropfen', Europäische Zeitschrift für Arbeitsrecht 3 (2010), 457-468 (467).

124 See with view to Art. 32 ECHR Sauer, 'Art. 1' (n. 97), para. 35; Stefan Kadelbach, 'Internationale Durchsetzung' in: Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar* (3rd edn, Mohr Siebeck 2022), para. 7.

125 See here and before Payandeh, 'Rechtsauffassungen von Menschenrechtsausschüssen' (n. 118), 126.

126 Starski, *Bericht der Kommission* (n. 97), 227 et seq.

127 2012/C 326/02.

element of 'common European standards'[128] of fundamental rights protection. Accordingly, Germany's membership in the EU also fosters an alignment of fundamental rights enshrined within the BL with the ECtHR.[129] Nevertheless, the distinction between international human rights treaties and the ECHR is not free from inconsistencies, especially if Art. 1 para. 2 BL and its reference to 'inalienable human rights' are perceived as the normative hook for attributing a special status to the ECHR.

Overall, it would appear as a sensible approach for the Court to differentiate between the different categories of human rights body pronouncements: *General Comments*, *Concluding Observations* and *Views* differ not only in their creation processes but also in their substance.[130] Intuitively, it appears to make sense that the *Views* that particularly concern Germany should be more difficult to disregard within a 'reasoned discussion'[131] than general interpretation guidelines presented with *General Comments*.[132] However, such a differentiated approach is as yet missing in FCC case-law. Beyond that, and in any case, the FCC should substantiate and differentiate its reference to Art. 1 para. 2 BL.

It remains still true that the FCC refrained from allowing individuals to invoke ECHR guarantees directly within the individual complaint procedure. In that regard, things have not changed since the Steinberger analysis of 1988.[133]

3. The Possibility to Invoke Supranational Individual Rights – The '*Right to Be Forgotten*' Paradigm Shift

However, allowing for the direct invocation of supranational individual guarantees became constitutional reality after the FCC carried out a paradigm shift[134] in its case-law.

The FCC left its separation thesis behind, which had suggested that German fundamental rights and EU fundamental rights belong to two spheres

128 On this concept see Peter Häberle, 'Gemeineuropäisches Verfassungsrecht', EuGrZ 18 (1991), 261-274; Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck 2011), 269 et seq. Mentioning the principle itself: ECtHR (Grand Chamber), *X, Y, Z v. United Kingdom*, judgment of 22 April 1997, no. 21830/93, para. 44. See Rudolf Bernhardt, Commentary: The European System, Conn J Int'l L. 2 (1987), 299-301 (299 et seq.).

129 Sauer, 'Art. 1' (n. 97), para. 24.

130 See Starski, *Bericht der Kommission* (n. 97), 271.

131 FCC, *Ramstein* (n. 116), para. 107 (translation by the author).

132 See on this already Starski, *Bericht der Kommission* (n. 97), 270 et seq.

133 Steinberger (n. 3), 7 et seq.

134 Daniel Thym, 'Freundliche Übernahme, oder: die Macht des "ersten Wortes" – "Recht auf Vergessen" als Paradigmenwechsel', JZ 75 (2020), 1017-1027 (1017).

that do not overlap.[135] Following the Court of Justice of the European Union (CJEU) approach,[136] it has accepted that EUChFR guarantees which bind member states 'when they are implementing Union law' (Art. 51 para. 1 EUChFR) may overlap with the sphere protected by fundamental rights enshrined in the BL. The FCC redefined the 'fundamental rights federalism'[137] within the EU on the basis of this axiomatic assumption.

Through its *Right to be Forgotten*-jurisprudence, the FCC established that the acts of German state authority which find their basis in EU law, which grant the member states discretion in their execution, can be reviewed by the FCC based on fundamental rights enshrined in the BL.[138] It is to be presumed – the FCC argues – that fundamental rights of the BL entail protective standards that are also sufficient from the perspective of EU fundamental rights.[139] If, however, the EU law does not allow for any discretion, EU fundamental rights might be invoked within a constitutional complaint procedure. Hence, under such a reading, the term 'fundamental rights' in the sense of Art. 94 para. 1 no. 4 a BL also encompasses supranational fundamental rights.[140] The FCC thus assumes the function of a court which is competent to effectuate EU fundamental rights, and thereby compensates for the deficits in the EU system regarding the judicial protection of individuals. The basic rationale of the FCC is that the high threshold for individuals to initiate an annulment procedure (Art. 263 Treaty on the Functioning of the European Union [TFEU])[141] (*Plaumann* test)[142] and the deficits of the pre-

135 FCC, *Solange II* (n. 6), para. 117; FCC, order of 7 June 2000, 2 BvL 1/97 – *Bananenmarktordnung*, BVerfGE 102, 147 (official translation: <https://www.bverfg.de/e/ls20000607_2bvl000197en.html>, last access 7 August 2025), para. 57.

136 CJEU, *Åkerberg Fransson*, judgment of 26 February 2013, case no. 617/10, ECLI:EU:C:2013:105, para. 29; CJEU, *Melloni*, judgment of 26 February 2013, case no. 399/11, ECLI:EU:C:2013:107, para. 60; CJEU, *Pelham and Others*, judgment of 29 July 2019, case no. 476/17, ECLI:EU:C:2019:624, paras 80 and 81.

137 Thorsten Kingreen, 'Die Grundrechte des Grundgesetzes im europäischen Grundrechtsföderalismus', JZ 68 (2013), 801-811; Thomas Kleinlein, *Grundrechtsföderalismus: eine vergleichende Studie zur Grundrechtsverwirklichung in Mehrebenen-Strukturen – Deutschland, USA und EU* (Mohr Siebeck 2020), 12 et seq.; Martin Nettesheim and Sabine Schäufler, 'Europäischer Grundrechtsföderalismus und Bundesverfassungsgericht' in: Europäisches Zentrum für Föderalismus-Forschung (eds), *Jahrbuch des Föderalismus* 2020 (Nomos 2020), 119-134.

138 FCC, *Recht auf Vergessen I* (n. 67), para. 42.

139 FCC, *Recht auf Vergessen I* (n. 67), para. 55.

140 FCC, order of 6 November 2019, 1 BvR 276/17 – *Recht auf Vergessen II*, BVerfGE 152, 216 (official translation: <https://www.bverfg.de/e/rs20191106_1bvr027617en.html>, last access 7 August 2025), para. 67.

141 *OJ C 326, 26 October 2012, 47-390.*

142 ECJ, *Plaumann & Co. v. Commission of the European Economic Community*, judgment of 15 July 1963, case no. 25-62, ECLI:EU:C:1963:17, 107 et seq.

liminary reference procedure (Art. 267 TFEU) necessitate compensatory instruments at the national level.[143] The authority of the CJEU is respected via the preliminary reference procedure (Art. 267 TFEU), in case there remain any doubts about the interpretation of EU fundamental rights in accordance with the principle of loyal cooperation (Art. 4 para. 3 TEU).[144] In the end, the *Right to be Forgotten*-rationale echoes the idea of Art. 19 para. 1 subpara. 2 TEU, which requires the 'Member States [to] provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This provision attributes the function of EU courts to the courts of member states.

The *Right to be Forgotten*-reasoning has shifted tectonics[145] in the entangled fundamental rights architecture of the EU and is to be seen in light of the 'responsibility with regard to European integration'[146] of the FCC. It gives sharper contours to the 'constitutional compound' ('Verfassungsverbund') envisaged by Ingolf Pernice.[147] The general sense of a 'revolution' within the multilevel complex of human rights protection has been, however, relativised by two facts: First, only rarely since 2019 has there been a constitutional complaint based directly on EuChFR rights.[148] Secondly, it remains to be seen how frequently the FCC will utilise the preliminary reference procedure in cases in which EU fundamental rights are directly invoked within a constitutional complaint procedure, which is a key procedural mechanism to uphold the authority of the CJEU. Yet, the direct invocation of individual rights originating outside the BL within the constitutional complaint procedure, as reflected upon by Steinberger,[149] became reality. This step was, however, only possible in the context of the specific constitutional entanglement within the EU which is singular in its conceptual architecture. This singularity brings us to the question of the primacy of EU law and its limits.

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143 FCC, *Recht auf Vergessen II* (n. 140), paras 60, 61: 'Legal recourse under EU law is not sufficient to fill the gap in protection arising from the application of EU fundamental rights by the ordinary courts. This is because individuals have no direct recourse to the Court of Justice of the European Union for asserting a violation of EU fundamental rights in such cases.', (para. 61).

144 FCC, *Recht auf Vergessen I* (n. 67), para. 72; FCC, *Recht auf Vergessen II* (n. 140), para. 69. Official citation of the TEU: OJ C 202, 7 June 2016, 13 et seq. (consolidated version).

145 Various authors spoke of a 'paradigm change' see only Thym (n. 134), 1017.

146 FCC, *Recht auf Vergessen II* (n. 140), para. 53.

147 Ingolf Pernice, *Der Europäische Verfassungsverbund* (Nomos 2020), particularly pieces at 385 et seq.

148 See FCC, order of 24 January 2025, 2 BvR 1103/24 – *Maja T*, NJW 2025, 955, para. 52, 71 et seq. (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2025/01/rk20250124_2bvr110324en.html>, last access 7 August 2025).

149 Steinberger (n. 3), 7 et seq.

4. Basic Law and EU Law, FCC and CJEU – Judicial Dialogue and Competences of Judicial Review

A crucial lesson learnt based on past experience regarding the European Economic Community is, according to Steinberger, 'that it is not the worst thing for the functioning of federal political entities to leave questions of sovereignty in limbo'.[150] 'For this state of affairs', he goes on, 'keeps legal awareness alive, keeps alive the obligation to seek a concordance of basic legal concepts between the community and its members'.[151] Steinberger furthermore posits that the EU is to be seen as 'an attempt to overcome the excesses of nationalist thinking, not least in order to preserve the diversity of European legal culture'.[152]

The 'limbo'[153] identified by Steinberger requires some contextualisation leading us to the framing of the EU shaped by conflicting poles: On the one hand, certain aspects of EU law follow the classical logic of public international law where the member states are seen as the 'Masters of the Treaties' ('Herren der Verträge').[154] Because the EU is not endowed with non-derivative hence original public authority, it *prima facie* fits into the concept of an international organisation (IO). On the other hand, the EU and EU law display certain features which do not fit into the logic of public international law and IO: Majority voting permeates EU organs like the Council (see e. g. Art. 16 para. 3 TEU). Rules of EU law, which are directly applicable, enjoy primacy in the national jurisdictions of member states,[155] member states have transferred sovereign rights onto the EU extensively via attributing competences to it within primary law (yet it is not endowed with 'Kompetenz-Kompetenz'[156]); not only has an 'internal market' (Art. 26 para. 2 TFEU) been created within the EU, but at the core of the EU lies also a 'monetary union' (Art. 3 para. 4 TEU) (while not all member states have introduced the common currency).

150 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
151 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).
152 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
153 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
154 Starski, 'Art. 59' (n. 33), para. 49 with further references.
155 ECJ, *Costa v. ENEL*, judgment of 15 July 1964, case no. 6/64, ECLI:EU:C:1964:66, 593; Monica Claes, 'The Primacy of EU Law in European and National Law' in: Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), 178-211.
156 From an interesting comparative perspective Erin Delaney, 'Managing in a Federal System Without an "Ultimate Arbiter": Kompetenz-Kompetenz in the EU and the ante-bellum United States', Regional and Federal Studies 15 (2005), 225-244 (230 et seq.).

Reflecting on Steinberger's observation of the 'limbo'[157] – which still has truth to it – from the current perspective, we might approach it from two opposite angles: the inner logic of the EU legal order as it manifests in the case-law of the CJEU on the one hand, and the logic of constitutional law as reflected in the case-law of the FCC on the other hand. EU treaties accept the sovereign statehood of the member states as, for example, Art. 4 para. 2 TEU evidences. The guiding principle of the competence architecture of the EU is the principle of limited conferral (see Art. 5 para. 1 cl. 1 TEU). The exercise of EU competences beyond that is limited by the principle of proportionality (Art. 5 para. 4 TEU) and, in spheres of non-exclusive EU competences, subsidiarity (Art. 5 para. 3 TEU). While the EU is not bestowed with 'Kompetenz-Kompetenz',[158] the CJEU interprets EU law in a way that ensures its effectivity (*effet utile*)[159] and its uniform application throughout all member states (also in light of Art. 18 TFEU and its principle of non-discrimination).[160] This interpretative method confers a certain dynamic on EU law resulting in a constant deepening of the EU legal order. From the perspective of the FCC, the member states are the sole bearers of formal and full sovereignty within the EU's architecture. The FCC has even derived a 'right to statehood' from the constitutional commands of the BL.[161] The creation of a European federal state would not be possible based on the current German constitution and would require a revolutionary moment (see Art. 146 BL).[162] The so-called 'eternity clause' also, i. e. Art. 79 para. 3 BL, bars the *pouvoir constitué* from eradicating the sovereign statehood of the Federal Republic of Germany.[163]

157 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).

158 On the concept of 'Kompetenz-Kompetenz' FCC, judgment of 12 October 1993, 2 BvR 2134/92 – *Maastricht,* BVerfGE 89, 155 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/10/rs19931012_2bvr213492en.html>, last access 7 August 2025), para. 90 et seq. See also n. 156.

159 See, for example, ECJ, *Franz Grad v. Finanzamt Traunstein*, judgment of 6 October 1970, case no. 9/70, ECLI:EU:C:1970:78, para. 5; Sibylle Seyr, *Der effet utile in der Rechtsprechung des Europäischen Gerichtshofs* (Duncker & Humblot 2008), 94 et seq.

160 ECJ, *Costa v. ENEL* (n. 155), 594.

161 FCC, judgment of 30 July 2019, 2 BvR 1685/14 – *Europäische Bankenunion*, BVerfGE 151, 202 (official translation: <https://www.bverfg.de/e/rs20190730_2bvr168514en.html>, last access 7 August 2025), para. 121 with further references; Erich Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis', GLJ 14 (2013), 75-112; Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* judgment of the German Constitutional Court', CML Rev. 46 (2009), 1795-1822 (1797 et seq.).

162 FCC, *Lissabon* (n. 59), para. 179: 'Only the constituent power is authorised to relinquish the state under the Basic Law; the constituted power is not authorised to do so.'

163 See also FCC, *Lissabon* (n. 59), para. 232.

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What still remains in 'limbo',[164] however, is the question of supremacy in case of a conflict between EU law and national, in particular, constitutional law.[165] Here, the case-law of the FCC has evolved significantly since Steinberger wrote his piece. After the groundwork was laid in *Solange I* and *II*,[166] the Court's approach was sharpened in its rulings on the *Maastricht Treaty*,[167] the *Banana Market Organization*,[168] the *Treaty of Lisbon*,[169] *Honeywell*,[170] the *European Arrest Warrant*,[171] *OMT*[172] and ultimately its *PSPP*-judgment.[173] In the sequence of FCC case-law dialectical trends manifest as thus:

While *Solange I* posed a severe challenge to the primacy of EU law,[174] the FCC took an integration-friendly stance in its *Solange II*-order by famously declaring a (revocable) waiver of its constitutional control competences '[a]s long as the European Communities, in particular the decisions of the Court of Justice of the European Communities, generally guarantee the effective protection of fundamental rights vis-à-vis the public authority of the Communities in a manner that is essentially equivalent to the protection that is inalienable under the Basic Law […].'[175] Provided an equivalent fundamental rights protection is guaranteed within the (then) Communities, the FCC would 'no longer exercise its jurisdiction over derived Community law that serves as a legal basis for the conduct of German courts or authorities within the sovereign sphere of the Federal Republic of Germany'.[176] The *Solange-*

164 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).

165 On this see, for example, Paul Craig and Gráinne de Búrca, 'The Relationship Between EU Law and National Law: Supremacy' in: Paul Craig and Gráinne de Búrca (eds), *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020), 303 et seq.; Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021), 187-227; Justin Lindeboom, 'Why EU Law Claims Supremacy', Oxford J. Legal Stud. 38 (2018), 328-356. See here and also with view to the following analysis already Paulina Starski, '§ 79 Bundestreue, Unionstreue und Europarechtsfreundlichkeit' in: Markus Ludwigs and Wolfgang Kahl (eds), *Handbuch des Verwaltungsrechts*, vol. III (C. F. Müller 2022), 877-919 (908 et seq.).

166 FCC, order of 29 May 1974, BvL 52/71 – *Solange I,* BVerfGE 37, 271 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1974/ls19740529_2bvl005271en.html>, last access 7 August 2025); FCC, *Solange II* (n. 135).

167 FCC, *Maastricht* (n. 158).

168 FCC, *Bananenmarktordnung* (n. 135).

169 FCC, *Lissabon* (n. 59).

170 FCC, order of 6 July 2010, 2 BvR 2661/06 – *Honeywell*, BVerfGE 126, 286 (official translation: <https://www.bverfg.de/e/rs20100706_2bvr266106en.html>, last access 7 August 2025).

171 FCC, *Identitätskontrolle* (n. 59).

172 FCC, *OMT* (n. 59).

173 FCC, *PSPP* (n. 17).

174 See FCC, *Solange I* (n. 166).

175 FCC, *Solange II* (n. 135), ('Leitsatz 2'/'headnote 2').

176 FCC, *Solange II* (n. 135), ('Leitsatz 2'/'headnote 2').

II-rationale formed a major step in safeguarding the effectivity of EU law within the German legal order, yet the pendulum swung back towards a clearer demarcation of the ultimate limits of the 'permeability'[177] of the German constitutional order in the later decisions (particularly within the Court's *Lisbon*-judgment).[178]

The current architecture of FCC control competences stands as follows:

The FCC accepts the direct effect and primacy or 'precedence of application'[179] of EU law also with regard to constitutional law[180] (based on Art. 23 para. 1 cl. 2, 3 BL in conjunction with the relevant parliamentary approval statute to the EU treaties). It understands Art. 23 para. 1 BL as a general 'commitment to ensure the effectiveness and enforcement of EU law'.[181]

The primacy of EU law is judicially curtailed, even beyond the FCC's fundamental rights review,[182] through mechanisms such as its *ultra vires* review[183] and constitutional identity control[184] (the latter appearing as an overarching instrument).[185] The friendliness towards the EU reaches its limits with 'responsibility with regard to European integration' ('Integrationsverantwortung')[186] which is also borne by the FCC.[187] According to the idea of the 'Integrationsverantwortung', the German state and its organs are obliged to safeguard the constitutional conditions of integration (Art. 23 para. 1 cl. 1 cl. 3 BL in conjunction with Art. 79 para. 3 BL). The respective control competences are, in turn, limited by the friendliness ('Europarechtsfreundlichkeit') of the BL towards EU law, which mirrors the principle of loyal cooperation (Art. 4 para. 3 TEU),[188] and serves as a 'conflict management instrument'.[189]

177 Wendel (n. 128), 5 et seq.

178 FCC, *Lissabon* (n. 59).

179 FCC, *Recht auf Vergessen II* (n. 140), headnote 2; FCC, *Lissabon* (n. 59), para. 343.

180 FCC, *Recht auf Vergessen II* (n. 140), para. 47 with further references.

181 FCC, *Honeywell* (n. 170), para. 53.

182 *FCC, Solange I* (n. 166), para. 24 et seq.

183 FCC, *Maastricht* (n. 158), para. 106.

184 FCC, *Recht auf Vergessen II* (n. 140), para. 49.

185 Heiko Sauer, 'Der novellierte Kontrollzugriff des Bundesverfassungsgerichts auf das Unionsrecht', EuR 52 (2017), 186-205 (190). But see Robert Uerpmann-Wittzack, 'Art. 23' in: Ingo v. Münch and Philip Kunig, *Grundgesetz-Kommentar*, vol. 1 (8th edn, C. H. Beck 2025), para. 101.

186 On this concept see FCC, *Recht auf Vergessen II* (n. 140), para. 53.

187 See FCC, *Recht auf Vergessen II* (n. 140), para. 53; Uerpmann-Wittzack (n. 185), para. 23. See Max Erdmann, 'Gesetzgebungsautonomie und Unionsrecht', EuR 56 (2021), 62-77 (67).

188 FCC, *Honeywell* (n. 170), para. 100. See Wendel (n. 128), 135, 138. Also Uerpmann-Wittzack (n. 185), para. 16. On its closeness to the idea of the 'Völkerrechtsfreundlichkeit', FCC, *Lissabon* (n. 59), paras 225 et seq.

189 See Ulrich Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie', NVwZ 39 (2020), 817-823 (819).

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In this spirit,[190] the FCC has outlined restrictive procedural and material prerequisites[191] for the successful activation of its control competences rendering them mere 'reserve competences' or a form of 'back-up jurisdiction'.[192] The prerequisites of the *ultra vires* review evidence the FCC's restraint in a pronounced manner: An *ultra vires* act can only be established by the FCC if there is a sufficiently qualified violation of Union law (encompassing a structurally relevant shift in the distribution of competences between the member states and the EU).[193] In any case, the CJEU must be given the opportunity to decide upon the interpretation/validity of EU law before the primacy of EU law is levered.[194] Hence, a twofold determination of an *ultra vires* act is required: Both the EU secondary law and the CJEU judgment declaring it to be *intra vires* must be *ultra vires*.[195]

The dialectical relationship between control competences and 'judicial self-restraint' characterising the cooperative relationship between the CJEU and the FCC[196] have been put to a test by the *PSPP*-judgment[197] – the premiere of a successful invocation of the *ultra vires* control. Here, the ultimately unresolved questions of supremacy within the 'constitutional compound'[198] of the EU and, to use Steinberger's words, the 'limbo'[199] resurfaced. Some regard the *PSPP* judgment as a cathartic event leading to a new finetuning of the judicial dialogue between the FCC and the CJEU, and in the end strengthening not only the EU[200] but also the 'compound of (constitutional)

190 FCC, *Honeywell* (n. 170), para. 57; see also Andreas Voßkuhle, *'Der Europäische Verfassungsgerichtsverbund'*, NVwZ 29 (2010), 1-8 (7).

191 *FCC, Honeywell* (n. 170), para. 61: 'in other words, it must be established, that the violation of competences is sufficiently serious'; FCC, order of 15 December 2015, 2 BvR 2735/14 – *Europäischer Haftbefehl*, BVerfGE 140, 317 (official translation: <http://www.bverfg.de/e/rs20151215_2bvr273514en.html>, last access 7 August 2025), para. 45: 'Therefore, if the Federal Constitutional Court, in exceptional cases and under narrowly defined conditions, declares an act of an institution or an agency of the European Union to be inapplicable in Germany […].'

192 See FCC, *Lissabon* (n. 59), para. 341.

193 FCC, *Europäische Bankenunion* (n. 161), para. 150; FCC, *OMT* (n. 59), para. 147: 'Therefore, a qualified exceeding of competences within this meaning must be manifest […] and of structural significance for the distribution of competences between the European Union and the Member States […].'

194 FCC, *PSPP* (n. 17), para. 118.

195 FCC, *PSPP* (n. 17), paras. 118, 155, 165.

196 FCC, *Maastricht* (n. 158), 175, 178.

197 FCC, *PSPP* (n. 17).

198 See n. 147.

199 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).

200 For a rather 'relaxed view' on *PSPP* see Ulrich Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them: The Relationship Between the Court of Justice of the European Union and the German Federal Constitutional Court', I•CON 19 (2021), 208-240 (239): '[…] European integration has not gone up in flames.'

courts'[201] that shapes the EU. From this perspective, the *PSPP* judgment could be seen as an instance of 'clearing the air'.[202] Others attribute a negative effect to the judgment, that of serving as a precedent for a further contestation of the EU and CJEU which might destabilise its structure[203] having been rendered amidst the climax of the 'rule of law crisis' challenging the EU and resulting from the detachment of some member states from the foundational values of Art. 2 TEU.[204] In his article, *Steinberger* urged us to take the *Solange II*-waiver 'seriously',[205] and attested an 'admonishing undertone' to the *Solange-II*-rationale, which 'may point less toward the Court of Justice of the European Communities than toward the Brussels administrations'.[206] The 'admonishing tone'[207] is also present in the *ultra vires* as well as the identity-control of the FCC, yet in the relevant case-law the FCC apparently addresses the CJEU itself. In the end, the non-decision regarding the ultimately supreme authority within the 'constitutional compound'[208] of the EU and the relativity of the answer to the primacy question depending on the perspective taken (internal legal logic of German constitutional law or internal legal logic of EU law) together with judicial conflict management strategies appear to function as safeguards of cohesion within the EU provided judicial control competences are exercised carefully.

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201 On the concept of 'Gerichtsverbund'/'Verfassungsgerichtsverbund' see Voßkuhle, *Der Europäische Verfassungsgerichtsverbund*' (n. 190), 1-8.

202 See e. g. Ana Bobić and Mark Dawson, 'Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court', CML Rev. 57 (2020), 1953-1998 (1997): 'Just as importantly, this tale tells of a decision which ended not in rupture but in refounding a more cooperative relationship between two of Europe's most prominent courts.'

203 Franz Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's ultra vires Decision of May 5, 2020', GLJ 21 (2020), 1116-1127 (1122); Annamaria Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank', European Papers 5 (2020), 671-685 (679, n. 45) with further references. Framing the PSPP judgment as a 'highly paradoxical decision' Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', GLJ 21 (2020), 979-994 (994).

204 See on the 'rule of law crisis' generally Michal Szwast, Marcin Szwed and Paulina Starski, 'The Evolution and Gestalt of the Polish Constitution' in: Armin von Bogdandy, Peter Huber and Sabrina Ragone (eds), *The Max Planck Handbooks in European Public Law. Volume II: Constitutional Foundations* (Oxford University Press 2023), 431-492 (457 et seq.); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019), 58 et seq.; already Paulina Starski, Stellungnahme zum Gesetzentwurf der SPD, CDU/CSU, BÜNDNIS 90/DIE GRÜNEN und FDP sowie des Abgeordneten Stefan Seidler, Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 93 und 94), BT-Drs. 20/12977, 11 November 2024, 2 et seq.

205 Steinberger (n. 3), 10 (translation by the author with the assistance of DeepL).

206 Steinberger (n. 3), 10 (translation by the author with the assistance of DeepL).

207 Steinberger (n. 3), 16 (translation by the author with the assistance of DeepL).

208 See n. 147.

5. Universal Minimum Standards Under International Law and Human Rights Law – The *Soering* Principles and International Human Rights Law in the FCC Jurisprudence

Returning to the international legal plane, Steinberger reflects in his piece on a 'minimal standard of human rights protection' as acknowledged by the FCC particularly as a bar to extraditions. This line of reasoning has remained remarkably steady in the FCC case-law throughout the years: Referring back to its foundational decisions in 1982[209] and 1983[210] respectively, the FCC found in 1991 that while German courts are in principle not tasked with reviewing the legality of foreign criminal judgments for the execution of which a person's extradition is sought, they may very well be constitutionally obliged to assess whether the extradition and the acts on which it is based are compatible with the minimum standards of international law, as these are elements of the German legal order under Art. 25 BL.[211]

It is noteworthy that already during the provisional measures stage leading to the 1982 order, the FCC undertook a significant comparative analysis of the consideration of public international legal standards in the extradition review procedures of France, the Netherlands, Switzerland, and the UK.[212] It also referred to the relevant resolution of the Council of Europe Committee of Ministers,[213] the Second Additional Protocol to the European Convention on Extradition[214] as well as the European Convention on the International Validity of Criminal Judgments.[215]

Ever since, this reasoning has been followed in most of the subsequent cases dealing with extradition review.[216] While the FCC emphasises on the principle of

209 FCC, order of 26 January 1982, 2 BvR 856/81 – *Auslieferungshaft*, BVerfGE 59, 280 (282).

210 FCC, order of 9 March 1983, 2 BvR 315/83 – *Auslieferung Italien*, BVerfGE 63, 332 (337).

211 FCC, order of 24 January 1991, 2 BvR 1704/90 – NJW 1991, 1411.

212 FCC, *Auslieferungshaft* (n. 209), 283 et seq.

213 See FCC, *Auslieferungshaft* (n. 209), 284. Reference to Conseil de l'Europe, Comité des Ministres, Resolution (75) 11 Sur les Critères à suivre dans la Procedure de Jugement en l'absence du prévenu, 21 May 1975.

214 FCC, *Auslieferungshaft* (n. 209), 285 et seq. Reference to the Second Additional Protocol to the European Convention on Extradition of 17 March 1978, ETS No. 98.

215 FCC, *Auslieferungshaft* (n. 209), 286. Reference to the European Convention on the International Validity of Criminal Judgments of 28 May 1970, ETS No. 70.

216 See e. g., FCC (Chamber), order of 9 November 2000, 2 BvR 1560/00 – NJW 2001, 3111, para. 22; FCC, order of 24 June 2003, 2 BvR 685/03 – *Auslieferung nach Indien*, BVerfGE 108, 129 (official translation: <https://www.bverfg.de/e/rs20030624_2bvr068503en.html>, last access 7 August 2025), para. 29; FCC (Chamber), order of 3 March 2004, 2 BvR 26/04 – BVerfGK 3, 27, para. 14; FCC (Chamber), order of 26 February 2018, 2 BvR 107/18, para. 24; FCC (Chamber), order of 8 December 2021, 2 BVR 1282/21 – NStZ-RR 2022, 91, para. 14; FCC (Chamber), order of 3 August 2023, 2 BvR 1838/22 – NVwZ 2024, 1568, para. 45.

non-reviewability, it simultaneously introduces certain restraints which effectively lead to a limited review: 'German courts are to examine in extradition proceedings whether the extradition and the acts on which it is based are compatible: (1) with the minimum standard under international law that is binding on the Federal Republic of Germany pursuant to Article 25 of the Basic Law; and (2) with the inalienable constitutional principles of its public policy […].'[217]

Having established that the minimum standards under international law form an exceptional review criterion, the FCC consequently had to specify the compatibility of the standards with participation in a system of extradition cooperation. It did so by stressing the 'necessity of placing trust in the requesting State's adherence to principles of the rule of law and the protection of human rights', particularly if 'carried out on a basis in international law' and shaken only by the establishment of 'contradictory facts'.[218] In the meantime, the extradition constellation had also been prominently addressed by the ECtHR on 7 July 1989 in its *Soering*-judgment. Here, the ECtHR found that the extradition of *Soering* from the United Kingdom (UK) to the USA violated Art. 3 ECHR since *Soering* would be put on the death row and suffer from the 'death row phenomenon'.[219] The *Soering* judgment marked the beginning of a long tradition of the ECtHR's jurisprudence. Having already established such a review as a constitutional requirement for extradition decisions before *Soering*, the FCC nonetheless relied heavily on the reasoning of the ECtHR. In particular, its standard of '[…] significant reasons for a substantial likelihood of a real risk of treatment in violation of human rights guarantees […]'[220] echoes the substantive core of the *Soering* judgment, later recalling explicitly the ECtHR standard of 'substantial grounds' for a 'real risk'.[221]

217 FCC, *Auslieferung nach Indien* (n. 216), para. 29.

218 FCC, order of 5 November 2003, 2 BvR 1243/03 – *Lockspitzel I*, para. 73; BVerfGE 109, 13 (35) (translation by the author). See also the German version: '[…] [ist] dem ersuchenden Staat im Hinblick auf die Einhaltung der Grundsätze der Rechtsstaatlichkeit und des Menschenrechtsschutzes grundsätzlich Vertrauen entgegenzubringen[.] Dieser Grundsatz kann so lange Geltung beanspruchen, wie er nicht durch entgegenstehende Tatsachen erschüttert wird […]'; citing FCC, *Auslieferung nach Indien* (n. 216).

219 ECtHR (Plenary), *Soering v. United Kingdom*, judgment (merits and just satisfaction) of 7 July 1989, no. 14038/88, paras 100-111.

220 FCC (Chamber), order of 22 June 1992, 2 BvR 1901/91, para. 12 (translation by the author). See also the German version: '[…] wesentliche Gründe für die beachtliche Wahrscheinlichkeit einer realen Gefahr von menschenrechtswidriger Behandlung […]'.

221 Explicitly FCC, *Auslieferung nach Indien* (n. 216), para. 35: '[…] substantiated evidence concerning the danger of inhuman treatment. This standard of review corresponds to […] the case-law of the European Court of Human Rights (cf. European Court of Human Rights, judgment of 7 July 1989, Series A No. 161, p. 35 No. 91 = *Neue Juristische Wochenschrift* 1990, pp. 2183, 2185 – Soering; Reports of Judgments and Decisions 1996-V, 1853, Nos. 73-74 – Chahal), which, with an identical meaning as regards the content of the terms, refers to "substantial grounds" (*begründete Tatsachen*) of a "real risk" (*tatsächliches Risiko*) of torture.'

The *Soering*-rationale has been incorporated into positive law within the EU system of fundamental rights protection in Art. 19 para. 2 EUChFR.[222] It has impacted the EU asylum law and the EU arrest warrant system,[223] ultimately leading to the idea of a 'horizontal Solange'[224] within the EU, which shook up the idea of 'mutual trust'.[225] Renditions of individuals between member states of the EU can be barred if a member state does not safeguard fundamental rights sufficiently.[226] The FCC clarified, that even within the EU context, 'the principle of mutual trust applies in extradition proceedings', but it may invalidated.[227] The extraditions based on the European Arrest Warrant would be steered by 'principles that govern extraditions based on international agreements […] by analogy'.[228] In this regard the FCC in its order of 2015 also restated the applicable standard as follows: That '[t]here have to be convincing reasons to believe that there is a considerable probability that the requesting state will not observe the minimum standards required by public international law in the specific case.'[229]

One of Steinberger's observations in the context of 'minimum standards of protection' is particularly interesting: Acknowledging that some 'universal human rights declarations and treaties' appear as mere 'lip services', Steinberger points out that international law is frequently normatively volatile and in a flux.[230] Steinberger then attributes a specific role to the Courts in cases in which a 'legal concept has already gained universal acceptance without being

222 See Explanation to Draft Article 19, para. 2, Explanations relating to the Charter of Fundamental Rights of the European Union of 14 December 2007, Official Journal of the European Union C 303/02, 17, also citing ECtHR (Chamber), *Ahmed v. Austria*, judgment (Merits and Just Satisfaction) of 17 December 1996, no. 25964/94.

223 See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

224 Iris Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe"', CML Rev. 50 (2013), 383-421.

225 See CJEU, *Minister of Justice/LM*, judgment of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586, para. 35: 'In order to answer the questions referred, it should be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected […].' From scholarship see e. g. *Georgios Anagnostaras,* 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection', GLJ 21 (2020), 1180-1197 (1188 et seq.). On the 'rule of law crisis' see n. 204.

226 Canor (n. 224), 395 et seq.

227 FCC, *Identitätskontrolle* (n. 59), para. 67.

228 FCC, *Identitätskontrolle* (n. 59).

229 FCC, *Identitätskontrolle* (n. 59), para. 71.

230 Steinberger (n. 3), 13 (translation by the author with the assistance of DeepL).

supported by correspondingly broad state practice […]'. It would be – Steinberger argues – 'permissible under international law for a state – acting, for example through its courts – to refer to a norm that is in the process of being established or to a norm that has already been established but whose scope of application is still unstable, and thereby to attach legal consequences at least for its own jurisdiction'.[231] To a certain extent, Steinberger here seems to accord a law-generative role to the national courts within the dialogical and dialectical process of the genesis of international legal rules. Steinberger speaks of processes that are shaped by 'legality claims and counter-claims, compromise, thesis, antithesis and synthesis'.[232] This stands in line with Conclusion 6 para. 2 of the International Law Commission (ILC) Draft Conclusions on the identification of CIL which regards 'decisions of national courts' as manifestations of state practice.[233] This active role that he ascribes to Courts is contrasted with Steinberger's view on the restraints of judicial review in the context of foreign matters that the following section addresses.

6. The International Legal Sphere – Executive Prerogatives and Judicial Review

The 'normative volatility'[234] that Steinberger describes, and which is a characteristic of international law, poses challenges in situations where the courts have to decide on the question of whether a certain action or omission is in conformity with international law (following the binary logic based on a dichotomy between 'legal'/'illegal').[235] These challenges are to be seen in light of deeper questions of the separation of powers: Foreign relations have traditionally been regarded in various constitutional orders[236] as a matter

231 Steinberger (n. 3), 13 (translation by the author with the assistance of DeepL).

232 Steinberger (n. 3), 14 (translation by the author with the assistance of DeepL).

233 Draft conclusions on identification of customary international law, Yearbook of the International Law Commission II, Part Two (2018).

234 See on this term Paulina Starski, 'Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility', Journal on the Use of Force and International Law 4 (2017), 14-65 (14 et seq.).

235 See for an in-depth reflection on the concepts of violations of the international legal order Christian Marxsen, *Völkerrechtsordnung und Völkerrechtsbruch* (Mohr Siebeck 2021), 151 et seq.

236 See from a comparative perspective e. g. Jenny S. Martinez, 'The Constitutional Allocation of Executive and Legislative Power over Foreign Relations: A Survey' in: Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019), 97-114; Karl Loewenstein, 'The Balance Between Legislative and Executive Power: A Study in Comparative Constitutional Law', U. Chi. L. Rev. 5 (1938), 566-608; Saikrishna B. Prakash and Michael D. Ramsey, 'The Executive Power Over Foreign Affairs', Yale L. J. 111 (2001), 231-356.

solely or primarily belonging to the executive sphere. According to Steinberger, it would be important for a state to speak with a uniform voice[237] in situations of 'normative volatility'.[238]

Following this line of thought, Steinberger stresses referring to the *Hess*-ruling (that he participated in),[239] the FCC has accepted that a wide sphere of discretion is to be granted to the executive in the field of foreign relations, which he regards as convincing.[240] This merits a critical reflection:[241]

The conceptual mirror of a wide sphere of discretion is the idea of 'judicial self-restraint' in areas of foreign policy.[242] Yet, the picture that German constitutional law paints is more complex: Art. 19 para. 4 BL (the right to an effective judicial remedy) and Art. 1 para. 3 BL (all state authority is bound by human rights)[243] suggest that executive foreign action is not solely to be governed by politics, but is constrained by constitutional limits.[244] Fundamental rights apply when and where the German state authority acts,[245] albeit the extent of protection granted by fundamental rights may be limited in transborder constellations. The actual protective scope of fundamental rights might also depend on the relevant dimension of the fundamental right which is triggered in the specific case (duties to protect, duties to respect).[246] To employ the Court's own words: 'Under Art. 1(3) of the Basic Law, German state authority is bound by fundamental rights; this binding effect is not

237 Steinberger (n. 3), 15.

238 See n. 234.

239 FCC, order of 16 Dezember 1980, 2 BvR 419/80 – *Hess-Entscheidung*, BVerfGE 55, 349 (365).

240 Steinberger (n. 3), 15.

241 Some considerations on this matter have already been elaborated here see Starski, 'Art. 59' (n. 33), para. 117 et seq.

242 FCC, judgment of 31 July 1973, 2 BvF 1/73 – *Grundlagenvertrag Bundesrepublik Deutschland und Deutsche Demokratische Republik*, BVerfGE 36, 1 (14 et seq.).

243 Ingolf Pernice, 'Art. 59 GG' in: Horst Dreier (founder), *Grundgesetz-Kommentar* (2nd edn, Mohr Siebeck 2006), para. 53. But see Werner Heun, 'Art. 59' in: Horst Dreier (founder), *Grundgesetz-Kommentar* (3rd edn, Mohr Siebeck 2015), para. 52.

244 Christian Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen', VVDStRl 36 (1978), 8-58 (49 et seq.).

245 FCC, judgment of 19 May 2020, 1 BvR 2835/17 – *BND*, BVerfGE 154, 152 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2024/10/rs20241008_1bvr174316en.html>, last access 7 August 2025), headnote 1. See also Bardo Fassbender, '§ 244 Militärische Einsätze der Bundeswehr' in: Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol. XI (3rd edn, C. F. Müller 2013), paras. 156 et seq.

246 FCC, *BND* (n. 245), headnote 1; FCC, order of 4 May 1971, 1 BvR 636/68 – *Spanier-Beschluß*, BVerfGE 31, 58 (77). Recently also FCC, order of 24 March 2021, 1 BvR 2656/18 and 1 BvR 78, 96, 288/20 – *Klimabeschluss*, BVerfGE 157, 30 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr265618.html>, last access 7 August 2025), para. 175.

restricted to German territory. The protection afforded by individual fundamental rights within Germany can differ from that afforded abroad.'[247]

Foreign policy does not lie beyond judicial review by the FCC,[248] given that the 'act of state doctrine' is alien to the BL.[249] Yet, the FCC, despite being both competent to review state action in foreign policy matters[250] as well as to adjudicate on aspects of international law[251] (e. g. to declare what the specific substance of a norm of CIL is, see Art. 100 para. 2 BL),[252] has demonstrated sensitivity regarding the political necessities and intrinsic rationalities of state action at the international level.[253] The FCC reviews state action in the sphere of foreign policy mainly for arbitrariness.[254] This reluctance also manifests in its more recent case-law: In its judgment concerning a possible preliminary injunction against the conclusion of the Comprehensive Economic and Trade Agreement (CETA), the FCC stressed that the 'margin of discretion and of prognosis granted to the Federal Government with respect to the potential implications of a trade agreement between the European Union and its Member States and Canada on the basis of the negotiated CETA draft and its comparison to [the implications of] alternative scenarios predicting Canada's behaviour in case of the failure of CETA' would be 'only subject to a limited review by the Federal Constitutional Court'.[255] In its

247 FCC, *BND* (n. 245), headnote 1.

248 FCC, judgment of 4 May 1955, 1 BvF 1/55 – *Saarstatut*, BVerfGE 4, 157 (169); Gunnar Schuppert, *Die verfassungsgerichtliche Kontrolle der Auswärtigen Gewalt* (Nomos 1973); Kay Hailbronner, 'Kontrolle der auswärtigen Gewalt', VVDStRl 56 (1997), 7-34. From a comparative perspective Rainer Grote, 'Judicial Review' in: Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *MPECCoL* (online edn, July 2018); Lawrence Collins, 'Foreign Relations and the Judiciary', ICLQ 51 (2002), 485-510.

249 See Bernhard Kempen and Björn Schiffbauer 'Art. 59' in: Peter M. Huber and Andreas Voßkuhle (eds), *Grundgesetz Kommentar* (8th edn, C. H. Beck 2024), para. 138.

250 FCC, *Saarstatut* (n. 248), 169.

251 FCC, order of 21 October 1987, 2 BvR 373/83 – *Teso*, BVerfGE 77, 137 (167); see. Ulrich Fastenrath and Thomas Groh, 'Art. 59' in: Karl Heinrich Friauf and Wolfram Höfling (eds), *Berliner Kommentar zum Grundgesetz*, 22nd suppl. (Erich Schmidt Verlag 2007), 75, para. 118 et seq. But see FCC, *Hess-Entscheidung* (n. 239), 367 et seq.

252 'If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.' (see <https://www.gesetze-im-internet.de/englisch_gg/>, last access 7 August 2025).

253 FCC, *Saarstatut* (n. 248), 168 et seq.

254 FCC, *Atomwaffenstationierung* (n. 11) (see already headnote 3), para. 168; FCC, order of 18 April 1996, 1 BvR 1452, 1459/90 and 2031/94 – *Bodenreform II*, BVerfGE 94, 12 (35). See FCC *Hess-Entscheidung* (n. 239), 368 et seq.; FCC, *Teso* (n. 251), 167.

255 FCC, judgment of 13 October 2016, 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16 – *Eilantrag gegen CETA*, BVerfGE 143, 65 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013_2bvr136816en.html>, last access 7 August 2025), para. 47.

OMT judgment the FCC held that '[i]n the field of foreign policy, too, it is incumbent upon the competent constitutional organs to reach duty-based political decisions and decide for themselves which measures to take. They must consider existing risks and take political responsibility for their decisions […].'[256] In its order on the *European Patent Office,* the FCC has granted 'competent [...] constitutional organs' a 'broad margin of appreciation […] also in foreign and European policy where, in principle, it falls within their discretion and responsibility to decide which measures to take. They must consider the existing risks and take political responsibility for their decisions […].' 'The same' would apply 'in principle, to the question of how they can best fulfil their duties of protection arising from fundamental rights when dealing with non-German public authority […].'[257] In its order on German participation within the multilateral operation against Islamic State of Iraq and Syria (ISIS), the FCC stressed that '[i]n foreign policy matters, the Basic Law grants the Federal Government wide latitude for autonomous decision-making in the exercise of its functions. To this extent, the role of both Parliament as the legislature and courts as the judicial authority is restricted so as to afford Germany the necessary leeway in foreign and security policy matters; otherwise, the division of state powers would not be appropriate to the respective state functions […].'[258]

This rationale has influenced the jurisprudence of other courts: The Federal Administrative Court, for example, referred to FCC case-law and showed considerable reluctance in assessing the validity of positions taken by the executive in terms of the substance of an international legal rule. It highlighted that 'courts are obliged to exercise the utmost restraint when assessing possible errors of law by these bodies that may violate international law as a

256 FCC, *OMT* (n. 59), para. 169.

257 Here and before FCC, order of 8 November 2022, 2 BvR 2480/10, 2 BvR 561/18, 2 BvR 786/15, 2 BvR 756/16, 2 BvR 421/13 – *Rechtsschutz des Europäischen Patentamts*, GRUR 125 (2023), 549 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/11/rs20221108_2bvr248010en.html>, last access 7 August 2025), para. 128.

258 FCC, order of 17 September 2019, 2 BvE 2/16 – *Anti-IS-Einsatz,* BVerfGE 152, 8 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/09/es20190917_2bve000216en.html>, last access 7 August 2025), para. 34. See also FCC, judgment of 3 July 2007, 2 BvE 2/07 – *Afghanistan-Einsatz*, BVerfGE 118, 244 (official translation: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/07/es20070703_2bve000207en.html>, last access 7 August 2025), para. 43: 'In the area of foreign policy, the Basic Law has left the Government a broad latitude to carry out its tasks on its own responsibility. Both the role of parliament as the legislative body and also that of the judiciary are restricted in this area, in order that Germany's capacity to act in foreign and security policy is not restricted in a manner that would amount to a functionally inappropriate separation of powers […].'

discretionary error. This would only be considered if the adoption of the legal opinion in question were to be seen as arbitrary towards the citizen, that is, if it could no longer be understood from any reasonable point of view, including foreign policy […]'.[259] The key question is, what renders foreign policy so different from other policy areas that the difference could justify limited judicial review? From the perspective of the FCC, it would be the fact that the political circumstances at the international level are dependent on various actors and unpredictable courses of action,[260] thereby limiting Germany's capacity as a subject of international law to achieve specific outcomes.[261] It would not be compatible with the openness of the BL towards the international legal sphere and its inherent 'friendliness' or 'cordiality' towards international law[262] if Germany were to become *de facto* incapable of concluding treaties and remaining a reliable member of alliances.[263] The concept of the 'Bündnisfähigkeit', the 'ability to honour [its] alliances' is now explicitly present within the BL – namely in Art. 87a para. 1a cl. 1 BL – a provision that establishes a special trust dedicated to strengthen Germany's defence capability with a view to the Russian aggression against Ukraine.

The most recent culmination point of the judicial self-restraint of the FCC has been the judgment of the FCC in the *Ramstein* case in which the FCC opted for a plausibility standard of judicial review. The *Ramstein* case concerned protective obligations on the part of Germany with regard to persons beyond the German territorial sphere affected by the actions of a third party – in the case at hand, the USA – in situations where there (possibly) exists a sufficient nexus to German state authority – *in concreto,* via the military base *Ramstein,* which plays a significant role for transferring data to operate drones in Yemen.[264] The Court acknowledged, first, that there is a general mandate ('allgemeiner Schutzauftrag') on the part of the German authorities to ensure 'that the protection of fundamental human rights and the core norms of international humanitarian law is upheld even in cases with an

259 Federal Administrative Court, judgment of 25 November 2020 – 6 C 7.19, para. 57 – *Ramstein* (BVerwGE 170, 346) (translation by the author with the assistance of DeepL).

260 See Henning Schwarz, *Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik* (Duncker & Humblot 1995), 251 et seq.; Martin Nettesheim, 'Art. 59' in: Günter Dürig, Roman Herzog and Rupert Scholz, *Grundgesetz Kommentar*, 106th suppl. (C. H. Beck 2024), para. 238; Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle – Das Bundesverfassungsgericht im Spannungsfeld zwischen Judicial Activism und Judicial Restraint', NwVBl 8 (1994), 241-249 (245 et seq.).

261 FCC, *Saarstatut* (n. 248), 168 et seq.

262 Vogel (n. 33), 33 et seq., 42.

263 FCC, order of 23 June 1981, 2 BvR 1107, 1124/77 and 195/79 – *Eurocontrol I,* BVerfGE 58, 1 (41); Schmidt-Aßmann, 'Art. 19 Abs. 4' in: Günter Dürig, Roman Herzog and Rupert Scholz, *Grundgesetz Kommentar* (C. H. Beck 2024), para. 83.

264 See FCC, *Ramstein* (n. 116), para. 115.

international dimension'.[265] Secondly, the FCC assumed that this duty may concretise into a specific duty to protect, provided that a 'sufficient nexus' exists 'between the dangerous situation triggering the need for protection and the state authority of the Federal Republic of Germany'.[266] The FCC refrained from deciding on whether the US military base *Ramstein* qualified as a sufficient nexus (leaving the option open that the mere transfer of data could be seen as 'normatively neutral').[267] It found, however, that a specific duty to protect was not activated since the United States (US) position that its targeted killings on Yemeni soil conform with international humanitarian law (and human rights law) would be plausible, and the German government's assumption in favour of the plausibility of the US position would in itself be plausible.[268] The substantive legal questions in the case at hand concerned elements of a 'direct participation in hostilities',[269] the criteria for membership within an armed group as well as the concept of the 'continuous combat function'.[270]

While this 'double plausibility standard' appears to include a gradually stricter judicial control than a mere test for arbitrariness – the exact distinction between an arbitrariness and plausibility-test being controversial –, it remains problematic. The Court retreats from adjudicating on questions of law, and from deciding upon the state of international treaty and customary law, referring to international controversies regarding the scope and substance of certain International Humanitarian Law (IHL) rules without delving itself into a broad analysis of state practice. This stands in stark contrast to Art. 100 para. 2 BL which explicitly confirms the Court's authority to assess the existence and content of a rule of CIL.

What characterises the jurisprudence of the FCC is hence a 'trade off' between securing the legality of state action and the effectivity of fundamental rights protection in spheres of foreign policy on the one hand, and safeguarding Germany's position as a reliable 'global player' speaking with a

265 FCC, *Ramstein* (n. 116), first headnote (translation by the author with the assistance of DeepL).

266 FCC, *Ramstein* (n. 116), para. 98 (translation by the author with the assistance of DeepL).

267 FCC, *Ramstein* (n. 116), para. 119 (translation by the author with the assistance of DeepL).

268 FCC, *Ramstein* (n. 116), para. 132.

269 See generally Nils Melzer, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, International Committee of the Red Cross 2009, 46 et seq.; Rewi Lyall, 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Obligations of States', Melbourne Journal of International Law 9 (2008), 313-333.

270 See FCC, *Ramstein* (n. 116), para. 135 et seq.

uniform voice on the other hand. This 'trade off' appears in sum disadvantageous to an effective fundamental rights protection and is not without constitutional tensions. On the one hand, Steinberger would, overall, based on the reasoning he presents in his piece and also along the lines of the NATO double-track decision[271] as well as the *Hess*-ruling,[272] be supportive of the FCC's *Ramstein* judgment. On the other hand, Steinberger's perspective on the role of courts in situations of processes of rule-generation points in the opposite direction.[273] We can only speculate whether his view would have evolved.

III. Conclusion: Between Progressiveness and Judicial Restraint

In the contribution analysed here, Steinberger commented on issues in the case-law of the FCC; some of them shaped by himself. Steinberger's article marks a change of professional identities – from a judge of the FCC back to merely an academic role (while the 'academic-only' phase did not last long).[274] Commenting as both a scholar and a former judge of the FCC, his piece can be read as an attempt to influence the academic narrative surrounding the judgments he shaped, while simultaneously laying out his future research interests as an MPIL director.

This ultimately leads us to the question whether Steinberger would have been pleased by the evolution of FCC jurisprudence as it presents itself today:

Beyond doubt, the FCC has proven to be a driving force behind the international and supranational legal integration of the German legal order in numerous areas, but the Court has also sharpened the constitutional limits of this 'openness' in its case-law.

In some of its more recent decisions, the FCC has shown 'courage' and 'progressiveness': It repositioned itself as a Court within the multilevel system of fundamental rights protection (evidenced by the shift of tectonics in the *Right to be Forgotten* cases)[275] and clarified that fundamental rights enshrined in the BL bind the German state authority not only extraterritorially, but also when fundamental rights are triggered in their positive dimen-

271 FCC, *Atomwaffenstationierung* (n. 11) (headnote 3).
272 FCC, *Hess-Entscheidung* (n. 239).
273 On this see n. 241 et seq. together with the accompanying text.
274 See n. 30.
275 FCC, *Recht auf Vergessen I* (n. 67); FCC, *Recht auf Vergessen II* (n. 140).

sion as obligations to protect (*BND* case,[276] the *Climate Change* case[277] as well as the *Ramstein* case).[278]

The declaration that EU organs (European Central Bank [ECB] and the CJEU) have acted *ultra vires* in the *PSPP* case was a 'first' and sharpened its reserve control competences – an occurrence which seemed like quite a distant possibility when *Solange II* was decided.[279] As a matter of course, the activation of the *ultra vires* control and its outcome in this specific case have not been without systemic effects on the 'limbo',[280] which defines the EU's architecture as well as the judicial dialogue between the CJEU and the FCC. The successful activation of the *ultra vires* control stands in a contentious relationship with the cordiality towards EU law manifesting in the *Solange II*-ruling and the primacy of supranational law.[281] Most probably, Steinberger would have been critical of this turn in the case-law of the FCC, especially since it potentially carries the seed of a 'renationalisation'.[282]

While the FCC strengthened the significance of the ECHR and the jurisprudence of the ECtHR within the German constitutional realm, it reserved itself some leeway to deviate from ECtHR case-law.[283] In this context, the obligation to consider pronouncements of human rights bodies deserves a further judicial refinement. The FCC's judicial self-restraint in foreign affairs requires a critical reconsideration; Steinberger's perspective on it would be of particular interest.

When revisiting and reflecting upon Steinberger's contribution after all these decades, the following three points particularly stand out: First, the corpus of a court's case-law is the perfect example of path dependencies.[284] Each ruling is a further brick in the edifice of constitutional law (the *Right to be Forgotten* stands on the shoulders of, at first, cautious trends pointing towards the direct application of supranational rights). Secondly, while the legal landscape has changed in various respects and the jurisprudence of the FCC has evolved, the key – and partly unresolved – questions surrounding the 'open constitution state'[285] have not lost significance. Thirdly, the juris-

276 FCC, *BND* (n. 245).
277 FCC, *Klimabeschluss* (n. 246), para. 175.
278 FCC, *Ramstein* (n. 116), para. 85.
279 FCC, *Solange II* (n. 135).
280 Steinberger (n. 3), 11 (translation by the author with the assistance of DeepL).
281 FCC, *Solange II* (n. 135).
282 See Steinberger's critical comments cited at n. 152.
283 FCC, *Streikverbot für Beamte* (n. 58).
284 On the concept of path dependence in political sciences Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics', The American Political Science Review 94 (2000), 251-267.
285 See n. 33.

prudence on the 'open constitution state'[286] displays in various respects a dialectical character, and is in constant motion.

In the current international legal landscape characterised by severe violations of and cynicism towards international law,[287] the national courts – in particular national apex courts – appear as essential counterweights to fatalism and a capitulation of the law in light of political realities and abuses of power.[288] Today, judicial 'courage' is the order of the day – not in the sense of activism or utopian endeavours, but in the sense of clearly stating what supranational and international law say and demand – even if this seems politically inconvenient. Most probably, Steinberger would have agreed with such a vision and understanding of the function of courts within an internationally and supranationally entangled constitutional state. As it is documented, his general understanding of his judicial role has been as follows: 'A judge has to be independent, not neutral.'[289]

286 See n. 33.

287 See Paulina Starski and Friedrich Arndt, 'The Russian Aggression against Ukraine – Putin and His "Legality Claims"', Max Planck UNYB 25 (2022), 756-796 (794 et seq.).

288 See Starski, 'Art. 59' (n. 33), para. 106.

289 See Cremer (n. 11), 687 (translation by the author).

Abhandlungen / Articles

Do We Need a World Climate Court?

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Abstract

We are at a critical juncture in the history of international law, as international courts and dispute settlement bodies grapple with the unfolding climate crisis. This article theorises a World Climate Court as a way of evaluating existing institutions which are being called upon to handle climate-related cases. By

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discussing the potential composition, jurisdiction and remedial regimes of a World Climate Court, we argue that existing international courts are less than ideally equipped for dealing with climate change cases. As a counterpoint, we suggest a World Climate Court composed of international law experts with broad legal expertise and supported by climate scientists. The article argues that a specialised court with a broad mandate to assess the international legal impacts of climate change could offer a structural and redistributive approach to remedies, and decide on climate cases in a more expeditious manner.

Keywords

Climate change – international dispute settlement – World Climate Court – jurisdiction – remedies for climate change – trans-judicial dialogue

I. Introduction

Do we need a World Climate Court (WCC)? From a realistic view of the current geopolitical situation, proposing such an institution may sound as presumptuous as it is futile. Despite staggering from one extreme weather event to another, the global community remains unable to agree on effective instruments to prevent the worsening climate catastrophe. The centrality of state sovereignty in the architecture of international climate change law undermines its ability to effectively address climate change. Despite broad participation in the Paris Agreement, states tend to 'choose fairness principles that favour their situation'[1] and avoid binding dispute resolution mechanisms in this realm. At the same time, an avalanche of climate litigation is rolling into national and international courts, including high-profile cases concerning the enjoyment of constitutional and human rights.[2] These developments

1 Joeri Rogelj, Oliver Geden, Annette Cowie and Andy Reisinger, 'Three Ways to Improve Net-Zero Emissions Targets', Nature 591 (2021), 365-368 (368).

2 Examples include the recent climate rulings from the Grand Chamber of the European Court of Human Rights (ECtHR) (see below, as well as a number of additional pending cases like ECtHR, *Müllner v. Austria*, no. 18859/21, Communicated Case of 18 June 2024) and before UN Human Rights bodies (UN Human Rights Committee, *Daniel Billy et al. v. Australia*, Communication no. 3624/2019, UN Doc CCPR/C/135/D/3624/2019, 22 September 2022; Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.* (dec.), UN Doc CRC/C/88/D/104/2019, 22 September 2021), but also domestic cases such as Dutch Supreme Court (Hoge Raad), *Urgenda Foundation v. the Netherlands*, judgment of 20 December 2019, no. 19/00135, ECLI:NL:HR:2019:2006; Montana First District Court for Lewis and Clark County, *Held and Others v. State of Montana and Others*, Findings of Fact, Conclusions of Law, and Order, 14 August 2023, case no. CDV-2020-307 (not yet final). In addition, on 29 March 2023, the United Nations General Assembly (UNGA) adopted a resolution requesting an advisory opinion from the ICJ on the obligations of states with respect to climate change. See UNGA Res A/77/L.58. The article was finalised in May 2025.

stem from the perceived failures of other (legal and political) avenues to secure adequate protection against climate change. It is thus apparent that climate protection measures will ultimately end up before national and international judicial bodies.

In academic debates, the role of international adjudication in addressing climate change, although still challenged,[3] is steadily gaining acceptance.[4] However, controversy has grown around the limitations of specific international judicial avenues to effectively deal with climate change.[5] This article examines the main criticisms of the existing fora, such as the International Court of Justice (ICJ) and human rights courts. Despite the importance of their existing and anticipated contributions to clarifying climate-related obligations, these bodies are neither specialised in climate law issues, nor do they have a specific mandate to review international environmental and climate law. As the existential threat of climate change intensifies, it seems timely to reflect on a possible WCC. Our proposal serves as a thought experiment, allowing us to create a yardstick for better understanding the existing institutions and how they could be reformed or reinterpreted to address the reality of climate change. This is more than a concrete practical proposal; it is also a way of evaluating existing institutions. In other words, regardless of likely political intransigence around the creation of the proposed WCC, it can be a productive exercise to compare existing courts and tribunals, especially human rights courts, with the proposal for an ideal WCC.

While proposals for a specialised international court for environmental issues have failed in the past, this discussion has been recently reinvigorated in response to the climate crisis and global environmental degradation. Current proposals for an international climate court vary widely as to the

3 See e. g. Aref Shams, 'Tempering Great Expectations: The Legitimacy Constraints and the Conflict Function of International Courts in International Climate Litigation', RECIEL 32 (2023), 193-205; Benoit Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?', AJIL 115 (2021), 409-451; Usha Natarajan, 'Who Do We Think We Are?: Human Rights in a Time of Ecological Change', in: Usha Natarajan and Julia Dehm (eds), Locating Nature: Making and Unmaking International Law (Cambridge University Press 2022), 200-228.

4 See e. g. Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', J. Envtl. L. 28 (2016), 19-35 (20); Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections', Ariz. St. L. J. 49 (2017), 689-712.

5 See e. g. Fabian Schuppert, 'Beyond the National Resource Privilege: Towards an International Court of the Environment', International Theory 6 (2014), 68-97 (88-89); Mayer (n. 3); Maine Burkett, 'A Justice Paradox: Climate Change, Small Island Developing State, and the Absence of International Legal Remedy', University of Hawai'i Law Review 35 (2013), 633-670.

mandate and parameters of such an institution. For example, some propose a court with the sole mandate of implementing the Paris Agreement[6] or a criminal tribunal covering climate change.[7] Meanwhile, others claim that long-standing proposals for an international court for the environment (ICE) could present a realistic step towards more sustainable governance and challenge the current system of national resource privilege.[8] This article critically analyses the common set of arguments regarding the necessity of a WCC. Overall, the objective is to theorise the possibility of a WCC as an institution that would assess the international legal impacts, particularly the human rights and international (environmental) law implications, of climate change.

A WCC can only be operationalised through the political decision of a critical number of states. The feasibility of establishing such an institution is ultimately a political matter, which falls outside the primary scope of this article. Instead, we will consider what a WCC could look like in the ideal case, as a way of learning about current institutional realities. Additionally, we will explore the viability of our proposal and whether moments of crisis, including climate catastrophe, and developments in climate science can make states more accepting of new solutions.

The article proceeds as follows. Section II will consider lessons to be drawn from initiatives for a specialised international environmental court which have failed to gain traction in the past (1) and highlight the limitations of the existing international avenues to adjudicate climate cases (2). Section III then reflects on the feasibility of a WCC (1) and sets out our proposals for such a court, thinking counterfactually to create a yardstick for evaluating existing institutions, especially in terms of their composition (2), jurisdiction (3) and remedies (4).

II. Lessons Learned

The idea of establishing an international court that can deal with environmental law issues is not new. Such proposals have been made several times since the 1990s. The present section outlines these proposals, which were never translated into reality. In doing so, we particularly want to show why these proposals were criticised or rejected, and what we can learn from this

6 Vinita Banthia, 'Establishing an "International Climate Court"', Journal of Environmental Law & Litigation 34 (2019), 111-128.

7 Shirley V. Scott, Patrick J. Keenan and Charlotte Ku, 'The Creation of a Climate Change Court or Tribunal' in Shirley V. Scott and Charlotte Ku (eds), Climate Change and the UN Security Council (Edward Elgar Publishing 2018), 66-84.

8 Schuppert (n. 5), 87.

experience. Furthermore, to justify the need for a WCC, this section will provide a broad overview of the existing international and national judicial fora for resolving international disputes concerning climate change. In doing so, we will touch briefly on some of the key questions concerning the role and adequacy of these mechanisms for clarifying states' international legal obligations in this context. As climate change litigation is part of a broader category of (international) environmental litigation, we will also draw on the scholarly debate surrounding the existing avenues for resolving international environmental disputes, where relevant.

1. Past Initiatives

One of the earliest and most detailed proposals for a specialised ICE was made by the International Court of the Environment Foundation (ICEF),[9] which in 1992 presented the Draft Statute of the International Environmental Agency and the International Court of the Environment at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro.[10] This proposal called for an ICE with a particularly broad jurisdiction, namely:

'to decide any international environmental disputes involving the responsibility of States to the International Community […]; to decide any disputes concerning any environmental damage, caused by private or public parties, including the State […]'.[11]

The Draft Statute was further developed into a 1999 Draft Treaty for the Establishment of an ICE and discussed at an ICEF-sponsored conference held at George Washington University Law School in April 1999.[12] While this initiative had a clear strategy for implementing its goals and some countries expressed their interest in the idea of the ICE in response to a lobbying campaign by the ICEF,[13] it was unable to gain support from states.

9 See ICEF's website: <https://www.icef-court.org/history-of-an-idea-history-of-the-icef/>, last access 15 May 2025.

10 Draft Statute of the International Environmental Agency and the International Court of the Environment, as discussed in Cathrin Zengerling, *Greening International Jurisprudence: Environmental NGOs Before International Courts, Tribunals, and Compliance Committees* (Brill 2013), 303, 304-305.

11 Zengerling (n. 10), 304-305.

12 Zengerling (n. 10), 305.

13 For example, see Campaign for an International Court of the Environment (1996-2000), 'Some of the Answers Received by Governments and Parliaments' (Extracts from the ICEF 2000 Report), <https://www.icef-court.org/wp-content/uploads/2023/07/some-extracts.pdf>, last access 15 May 2025.

One of the prevailing reasons for this is that the ICEF's proposal defined the jurisdiction of its new court very broadly, using vague terms such as 'environmental dispute'. Ellen Hey has argued that an 'international environmental dispute' refers to a dispute involving what is generally considered to be an environmental treaty, as indicated by the object and purpose of the treaty in question.[14] However, other authors argue that it is illusory to believe that we can define what constitutes an international environmental dispute solely by reference to the applicable law, or that such disputes can be separated into a self-contained category for the purposes of litigation.[15] The inability to clearly define the boundaries of the ICE's jurisdiction and provide certainty about its mandate is problematic since experience shows that states grant compulsory jurisdiction more easily to specialised courts with delimited jurisdiction, for example those empowered to enforce certain treaty-specific claims.[16]

Despite these limitations, another proposal for an ICE has been made by the ICE Coalition, a UK-based initiative involving environmental, legal, business, academic, and non-governmental organisation (NGO) stakeholders. Since 2008, this group has advocated for an international rule of law that protects the global environment for present and future generations through the creation of an environmental dispute resolution mechanism with, ideally, binding jurisdiction.[17] Its proposals include an ICE that would be sufficiently specialised to weigh competing interpretations of scientific evidence against geopolitical and socio-economic development priorities; an international convention on the right to a healthy environment with broad coverage that would enshrine *erga omnes* obligations; direct access to the ICE by NGOs and private parties as well as states; transparency in proceedings; a scientific body to assess technical issues; and a mechanism to prevent forum shopping.[18]

Some scholars consider the idea of an ICE as the beginning of a new era, breaking with the established international order in the name of individual

14 Ellen Hey, *Reflections on an International Environmental Court* (Kluwer Law International 2000), 4.

15 Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems', Journal of International Dispute Settlement 4 (2013), 245-276 (249).

16 Joost Pauwelyn, 'Judicial Mechanisms: Is There a Need for a World Environment Court' in: Bradnee Chambers and Jessica Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press 2005), 150-178 (159).

17 See the ICE website: <http://www.icecoalition.org/>, last access 15 May 2025.

18 Audra Dehan, 'An International Environmental Court: Should There Be One?', Touro Journal of Transnational Law 3 (1992), 31-58 (51-52); Stephen Hockman, 'The Case for an International Court for the Environment', Journal of Court Innovation 3 (2010), 215-320 (223).

environmental rights and planetary well-being, and consider it as somewhat utopian.[19] More specific objections were also raised to these proposals, including their lack of clarity regarding the applicable law; doubts about whether existing juridical or dispute resolution institutions could take on the role envisaged for an ICE; and concerns over the inability of an ICE to enforce its decisions.[20]

The first objection, concerning the applicable law, relates to the scope of the proposed ICE's jurisdiction *ratione materiae*. Stephen Hockman, then chairman of the ICE Coalition, has suggested that international law is sufficiently developed to enable the court to decide on the appropriate law to apply to a dispute. If the dispute arises in an area covered by a specific bilateral or multilateral treaty, the terms of that treaty will be influential or decisive.[21] However, the proposal for a new court with broad jurisdiction risks creating excessive competition with law-based forums for dispute settlement and resonates with larger debates about fragmentation and forum-shopping.[22] The second objection is not clearly addressed in the proposal either. It raises two questions: whether a new international court is well-suited to decide cases that cannot be heard in any other international court; and whether international environmental adjudication is feasible, particularly in relation to existing non-compliance procedures (NCPs) under environmental treaties. The third objection, concerning the lack of mandatory enforcement powers of an ICE, is less convincing, as this argument holds true for most international courts and tribunals. For example, the ICJ does not have enforcement powers, yet ICJ judgments are highly regarded and provide considerable political and public pressure for compliance.[23] This could also be the case with an ICE.

The proposals by the ICEF and the ICE Coalition are not the only ones made in this direction to date. A range of proposals for a new international environmental court exist in various forms, suggesting ideas similar to those discussed above.[24] However, all of these proposals have so far failed to come to fruition. This may be partly due to substantive reasons, particularly

19 Schuppert (n. 5), 88.

20 As noted by Hockman (n. 18), 225.

21 Hockman (n. 18), 228.

22 See Hey (n. 14), 14.

23 Philip Riches and Stuart Bruce, 'Brief 7: Building an International Court for the Environment: A Conceptual Framework', Governance and Sustainability Issue Brief Series (2013), 1-8 (5).

24 For an overview of the main initiatives, see Susan Hinde, 'The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw', Hofstra Law Review 32 (2003), 759-793 (759-736); Zengerling (n. 10), 303-308; Ole Pedersen, 'An International Environmental Court and International Legalism', J. Envtl. L. 24 (2012), 547-558 (548-553).

because the gaps in international environment dispute settlement that need to be addressed were not clearly defined. Furthermore, states' environmental governance choices represent an important obstacle to establishing an ICE, as they have not been forthcoming in granting courts or tribunals the necessary jurisdiction to allow other states or non-state actors to challenge their environmental policies or conduct.[25]

While these earlier proposals for an ICE failed, the reality of anthropogenic climate change seems to have reinvigorated interest in such an institution in recent years.[26] For example, in 2014 the International Bar Association recognised the need to provide individuals with redress for environmental harms. It supported the creation of an international environmental court while simultaneously noting the political difficulties of doing so.[27] Another example is the creation of an international *climate* court, as discussed within the negotiations of the Paris Agreement. Specifically, the 'Geneva Negotiation Text', the outcome document of the Ad Hoc Working Group on the Durban Platform for Enhanced Action session held in Geneva in February 2015, listed the possibility of an International Climate Justice Tribunal among other compliance options.[28] The Parties, however, ultimately opted for a non-adversarial mechanism to facilitate implementation of and promote compliance with the provisions of the Paris Agreement.[29] The resulting Paris Agreement Implementation and Compliance Committee (PAICC) is a facilitative and non-punitive body of experts that can consider cases where Parties to the Paris Agreement do not communicate or maintain nationally determined contributions (NDCs), submit required information, participate in the 'consideration of progress', or submit mandatory information.[30] These procedures became operational in 2023, when the PAICC notified two state Parties

25 Pauwelyn (n. 16), 152.

26 See e. g. Banthia (n. 6); Scott, Keenan and Ku (n. 7); Stuart Bruce, 'The Project for an International Environmental Court' in: Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law* (Brill 2017); Pedersen (n. 24); Riches and Bruce (n. 23); Stephen Hoffman QC, 'The Case for an International Court for the Environment', Effectius Newsletter 14 (2011).

27 International Bar Association, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (2014) 86, <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04>, last access 15 May 2025.

28 UNFCCC, Negotiation Text (12 February 2015) ('Geneva Negotiating Text'), found at: <https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf>, last access 15 May 2025, as discussed in Christina Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement', RECIEL 25 (2016), 161-173 (164).

29 Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, T. I. A. S. no. 16-1104, Article 15.

30 Paris Agreement (n. 29); Conference of the Parties Decision 20/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019).

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to the Paris Agreement of a 'consideration of issues' against them.[31] However, the PAICC does not have jurisdiction to hear and decide adversarial cases, leaving the Paris Agreement with little to no enforcement machinery.

States are unlikely to backtrack on this decision or expand the possibility of being exposed to suits concerning their climate policies before courts, whether international or domestic. At the same time, with a view of improving the implementation of the Paris Agreement, Vanita Banthia has argued that one solution is to establish an international climate court.[32] Such a court's mandate, in the author's view, would be limited to the interpretation and application of the Paris Agreement.[33] Specifically, it is suggested that states might accept the jurisdiction of this court because it 'will only be holding each nation to its own standards', as states are allowed to set their own emission reduction goals.[34]

However, if the proposed court does not have the competence to evaluate the substance of states' national emissions reductions, then its mandate would be even more limited than the existing involvement of human rights courts and bodies. For example, although the European Court of Human Rights (ECtHR) in the *KlimaSeniorinnen* judgment assessed positive obligations based on the European Convention on Human Rights (ECHR) in view of setting and implementing national mitigation measures,[35] it still retains the possibility of substantively examining the ambition of state climate policies. In the pending case of *Müllner v. Austria*, the ECtHR is faced with the argument that by failing to sufficiently reduce emissions to meet its climate goals, the respondent state has made it impossible to achieve the 1.5C warming target set out in the Paris Agreement.[36] In *Engels v. Germany*, the ECtHR is tasked with determining whether Germany's specific emissions reduction target is compatible with its positive obligations under Articles 2 and 8 of the ECHR.[37] Although the ECtHR is a regional court and thus a poor proxy for a global one, other human rights-based adjudicators are expected to continue hearing climate cases as well. Creating an international climate court with the narrow mandate of being exclusively tasked with

31 Annual Report of the PAICC to the Conference of the Parties, FCCC/PA/CMA/2023/4, 25 September 2023, paras 12 and 13 (concerning the Holy See's failure to communicate an NDC and Iceland's failure to submit its mandatory biennial communication of information).

32 Banthia (n. 6), 119-120.

33 Banthia (n. 6), 121.

34 Banthia (n. 6), 121.

35 ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, no. 53600/20, paras 541-555.

36 *Müllner* (n. 2).

37 *Engels v. Germany*, 46906/22 (ECtHR, application filed in September 2022, not yet communicated).

overseeing the implementation of the Paris Agreement would not add significant value to the existing legal framework. Such a court would have limited capacity to address the most pressing issues of states' obligations to mitigate climate change.

Another recent proposal by Shirley V. Scott, Patrick J. Keenan, and Charlotte Ku discusses the possibility of the United Nations Security Council creating a climate change-focused criminal tribunal.[38] The authors acknowledge that while it would be within the Council's authority to create a 'climate crimes court', it is too early to consider climate change from the perspective of criminal law.[39] The primary doctrinal challenges in addressing climate crimes through international criminal law stem from issues related to the legality principle, standards of proof, and the difficulty of establishing an appropriate theory of liability.[40] Moreover, as Fabien Schuppert astutely points out, with three of the world's most significant environmental polluters – China, Russia, and the United States – holding veto power in the Security Council, one might question whether relying on this body is akin to 'putting the fox in charge of the henhouse'.[41]

At the same time, despite state inaction (or inadequate ambition) in terms of mitigation and adaptation measures, the number of climate cases has risen exponentially in recent years, creating unprecedented challenges for existing courts and tribunals.[42] In view of this reality, the following section will theorise a WCC, as both an innovative institutional proposal and a yardstick for better understanding the limitations and potential of existing institutions. In doing so, we will endeavour to learn from the earlier proposals discussed above, while exploring the possibility of bringing existing institutions closer into line with our own proposal.

38 Scott, Keenan and Ku (n. 7), 66-84.

39 Scott, Keenan and Ku (n. 7), 67. The possibility of incorporating 'ecocide' into international criminal law is currently being debated in the scholarship. See Romaine de Rivaz, 'Ecocide: défis et perspectives en droit international pénal', Jusletter (2024), 2-41; CoE, Terms of Reference for a New Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV): <https://search.coe.int/cm?i=0900001680a91ebb>, last access 15 May 2025.

40 Scott, Keenan and Ku (n. 7), 69-70.

41 Schuppert (n. 5), 85.

42 For an overview, see Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2023 Snapshot', Grantham Research Institute et al., <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf>, last access 15 May 2025; Climate Litigation Database, maintained by the researchers of the Climate Rights and Remedies Project at the University of Zurich, <https://climaterightsdatabase.com/database/>, last access 15 May 2025.

2. Existing Avenues

The key proposition discussed in this section is that existing international courts are insufficiently equipped – in terms of international environmental law expertise and mandate – to make decisions that address global environmental needs, including those related to climate change.[43] Proponents of this view note that some of the relevant bodies, such as the World Trade Organization, may be too heavily weighted in favour of trade and investment, and not enough in the direction of environmental protection (or, it can be added, human rights protection).[44] Similar complaints are raised about the ICJ, although this court has recently displayed an increasing willingness to engage with scientific evidence in environmental cases,[45] expanded environmental impact assessment requirements,[46] and taken a hands-on approach to the causal nexus between wrongful acts and environmental damage.[47] While the ICJ has not yet had an opportunity to adjudicate a contentious climate case, it is currently hearing an advisory opinion request in this regard.[48] However, the ICJ is not specialised in environmental matters; in fact, its dedicated seven-judge environmental Chamber, created in 1993, was disbanded in 2006 without hearing a single case.[49] And, in the past, the ICJ has been criticised for its failure to adequately protect environmental interests.[50] For example, in the *Gabčíkovo-Nagymaros* case, it failed to accept Hungary's argument that anticipated environmental damage excused performance under a treaty, arguably giving insufficient weight to the environmental interests at stake.[51]

Let us assume, for example, that a climate-vulnerable developing state making serious efforts to mitigate emissions and/or adapt to global warming

43 Schuppert (n. 5), 88-90; Nagendra Singh, *The Role and Record of the International Court of Justice* (Nijhoff 1989), 164.

44 See Hinde (n. 24), 740.

45 ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), merits, judgment of 31 March 2014, ICJ Reports 2014, 226.

46 ICJ, *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), merits, judgment of 16 December 2015, ICJ Reports 2015, 665.

47 ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), compensation, judgment of 2 February 2018, ICJ Reports 2018, 15 (para. 34).

48 See UNGA Res A/77/L.58.

49 ICJ, Press release no. 93/20 (19 July 1993); on the Chamber's informal dissolution, see Basile Chartier, 'Chamber for Environmental Matters: International Court of Justice (ICJ)', Max Planck Encyclopedia of International Procedural Law (2018).

50 See on this Bruce (n. 26), 138.

51 Sean Murphy, 'Does the World Need a New International Environmental Court', Geo. Wash. J. Int'l L. & Econ. 32 (2000), 333-349 (343); ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) judgment of 25 September 1997, ICJ Reports 1997.

were to bring a case before the ICJ.[52] The main problem would likely be that the ICJ subscribes to the view that trans-boundary environmental cases are chiefly about sovereignty and territoriality,[53] and it displays 'overt disdain for distributive justice'.[54] While the customary international norm on avoiding significant transboundary harm (the 'no-harm rule') may be flexible enough to encompass at least some of the impacts of one state's greenhouse gas emissions on another state's territory, it is particularly unclear how this due diligence obligation will be applied in the context of a global phenomenon, or whether it can provide adequate reparation for the harms in question.[55] As Antonios Tzanakopoulos aptly argues, the ICJ can be seen as 'a reluctant progressive', a characterisation reflected in two key trends that define its jurisprudence.[56] First, the ICJ frequently resorts to technical considerations of jurisdiction or admissibility to sidestep involvement with 'progressive causes' in contentious disputes, particularly when such cases bear significant political stakes.[57] Second, when the ICJ does engage with substantive issues, it does so with caution and restraint, displaying a preference for consolidating existing legal developments and enabling gradual progress rather than pioneering bold advancements, which is particularly evident in the Court's practice on the protection of the environment.[58] Given the ICJ's position as the principal judicial organ of the United Nations (UN), the internal process of consensual drafting through which it adopts decisions,[59] and its past track record, it seems unlikely that the Court will evolve into 'a global justice and

52 Andrew L. Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in: William C. G. Burns and Hari M. Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press 2009), 334-356.

53 Schuppert (n. 5), 88.

54 Steven Ratner, 'Ethics and International Law: Integrating the Global Justice Project(s)', International Theory 5 (2013), 10-34 (17): as discussed in Schuppert (n. 5), 88-89.

55 ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), judgment of 20 April 2010, ICJ Reports 2010, 14 (para. 101), as discussed in Sandrine Maljean-Dubois, 'The No-Harm Principle as the Foundation of International Climate Law' in: Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021), 15-28.

56 Antonios Tzanakopoulos, 'Chapter 6: The International Court of Justice and "Progressive causes"' in: *Research Handbook on the International Court of Justice* (Edward Elgar 2025), 107, 138.

57 The author defines 'progressive causes' as 'projects related to globally significant societal and ecological challenges which require a break from the status quo to appropriately address, but upon which states hold (sometimes wildly) divergent views'. Tzanakopoulos (n. 56), 107, 138.

58 Tzanakopoulos (n. 56), 138; ICJ, *Certain Activities* (n. 47); ICJ, *Gabčíkovo-Nagymaros* (n. 51); ICJ, *Pulp Mills* (n. 55).

59 For detailed arguments see Tzanakopoulos (n. 56), 138-140.

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environmental sustainability enhancing institution' in the future.[60] In addition, the predominantly inter-state character of procedures before the ICJ presents a serious limitation to its role as a potential forum for resolution of international climate change disputes.[61]

Currently, it is not states, but rather non-state actors – such as individuals and environmental NGOs – that are particularly active in initiating climate change litigation. This is reflected in the ongoing 'turn to rights', where human and constitutional rights are increasingly being mobilised by individuals seeking, in particular, the mitigation of states' greenhouse gas emissions. Different adjudicators have been seized with relevant cases, from domestic courts[62] to United Nations treaty bodies[63] and regional human rights courts.[64]

These bodies have advantages and disadvantages compared to the adjudicators discussed above, especially the ICJ. The example of the ECtHR is, again, a case in point: it has a mandate to protect the human rights featured in the ECHR,[65] and it is through this prism that the Court sees environmental degradation and climate change issues. At the same time, its focus on civil and political rights, combined with the fact that environmental protection lacks the status of a separate right under the ECHR, means that – as argued by Alan Boyle – environmental interests can be outweighed by other interests[66] in the sense that they do not necessarily receive fair consideration in existing proceedings. More generally, human rights bodies may limit their concrete guidance due to their subsidiary role and concerns over backlash; extraterritoriality rules stand in the way of global climate justice claims;[67] and individualistically focused cases may fail to deliver systemic change. Still, given the differences in institutional settings, human rights bodies will approach climate change cases from a different starting point than the ICJ, with its general mandate, or the International Tribunal for the Law of the Sea (ITLOS), with its more specific one. ITLOS has recently provided valuable guidance by recognising anthropogenic greenhouse gas emissions as a form of marine pollution that states must mitigate under their

60 Schuppert (n. 5), 89.

61 Zengerling (n. 10), 310; Hinde (n. 24), 735; Hey (n. 14).

62 For example, Dutch Supreme Court, *Urgenda* (n. 2); The Lahore High Court, *Asghar Leghari v. Pakistan*, Case W. P. no. 25501/2015, 25 January 2018; German Federal Constitutional Court, *Neubauer et al. v. Federal Republic of Germany*, 1 BvR 2656/18, 24 March 2021.

63 CRC, *Sacchi* (n. 2); UN Human Rights Committee, *Daniel Billy* (n. 2).

64 IACtHR, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No. 23, 15 November 2017; ECtHR, *KlimaSeniorinnen* (n. 35).

65 ECHR, CETS no. 005, 4 November 1950, Article 32.

66 Alan Boyle, 'Climate Change, Sustainable Development, and Human Rights' in: Markus Kaltenborn, Markus Krajewski and Heike Kuhn (eds), *Sustainable Development Goals and Human Rights* (Springer 2020), 171-189 (185).

67 ECtHR, Duarte Agostinho and Others v. Portugal and 32 Other Member States, decision of 9 April 2024, no. 39371/20.

law of the sea obligations.[68] However, ITLOS does not have the mandate to comprehensively address climate change issues.[69]

The perspective of human rights bodies depends on the scope of their jurisdiction and standing rules, as well as the substantive obligations of the parties under specific treaties. This shapes their response to climate cases. For example, the ECtHR's recent *KlimaSeniorinnen* judgment was clearly concerned with safeguarding the Court's docket and long-term viability, highlighting the diffuse and far-reaching impact of climate change extending beyond the rights of specific individuals, and the inherent limitations of judicial remedies in addressing such systemic and policy-driven challenges.[70] Against this background, and despite the judgment being a landmark ruling in many ways, it does not seem ideal for human rights bodies to handle large numbers of climate-related cases in addition to their existing workload, especially when resolving these cases takes time. In the realm of climate, we cannot afford to wait years for a judgment.

Overall, while we do not contest the ability or role of human rights bodies to engage with climate cases, we argue that they are not ideal for dealing with climate change. In addition to being insufficiently sensitive to climate change issues, the large number of competing treaty bodies means that different adjudicators' responses could contradict each other, creating legal uncertainty and fragmentation. Furthermore, because of their limited expertise in issues related to climate science and the environment more generally, the existing bodies are not well-equipped to deal with the complexity of climate disputes. The limitations of the existing mechanisms for addressing climate harm highlight the potential benefits of a new court with a specific mandate to handle climate-related claims.

In addition, some authors claim that the existence of NCPs under various environmental treaty regimes calls into question the use of international courts and tribunals.[71] They argue that the NCPs – examples of which include the PAICC and the Aarhus Convention's 'non-confrontational, non-judicial and consultative' option for compliance review[72] – are better equipped to protect the global public's environmental interests.[73] One of the key points here is that, given their position at the intersection between diplomacy and law, the decisions of compliance committees remain non-

68 ITLOS, Advisory Opinion in Case No. 31 of 21 May 2024.

69 See overall e. g. Rozemarijn J. Roland Holst, 'Taking the Current When It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change', RECIEL 32 (2023), 217-225.

70 ECtHR, *KlimaSeniorinnen* (n. 35), para. 479.

71 Justine Bendel, 'Chapter 7: Relationships Between Judicial Dispute Settlement and Non-Compliance Procedures' in: Justin Bendel, *Litigating the Environment* (Edward Elgar 2023), 213-248.

72 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998, 2161 UNTS 447.

73 Boyle and Harrison (n. 15), 275.

binding. States agree to create these largely non-binding, non-contentious NCPs to prioritise other interests if needed.[74] However, the non-compulsory nature of NCPs risks creating a two-tier system of international norms – those that can be judicially enforced and those that cannot.[75]

The fact that an NCP is a mechanism established within a specific multilateral environmental agreement limits its ability to effectively promote the implementation of international environmental law. For example, the ability of the PAICC to achieve the global temperature goal must be understood within the framework of the Paris Agreement, which primarily established legally binding administrative and procedural obligations, leaving the substantive content largely to the discretion of the parties.[76] Combining an enforcement mechanism with a top-down allocation of binding, individual emission reduction obligations would have been a more direct and predictable way of staying below the Paris Agreement's warming targets.[77] Indeed, the rise in climate change litigation and the 'turn to rights' within that litigation are related to the perceived failures of other means (including NCPs) of securing protection against the harmful impacts of climate change.

Looking back at the attempts to establish an international environmental court, we note that criticism of past initiatives has largely focused – in a somewhat technical way – on the proposed institutions' overly broad or vaguely defined jurisdiction *ratione materiae*. In essence, this criticism shows that states would fear the repercussions of creating a powerful international court dealing with environmental matters. These concerns are largely understandable from the perspective of state sovereignty and national best interests, at least for high-emitting states which would not want to see their current and historical conduct challenged before this institution. At the same time, it has become clear that the prioritisation of national resource privileges[78] and state sovereignty remains the most significant unresolved issue in political modernity and the main obstacle to effectively addressing climate change.[79] International law must find the right balance between the ideal of normative considerations of global justice and the reality of self-interest in politics.[80] Given

74 Boyle and Harrison (n. 15), 230.

75 Pauwelyn (n. 16), 152.

76 Pauwelyn (n. 16), 152; Voigt (n. 28), 164.

77 UN Secretary-General, 'Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment – Report of the Secretary-General', UN Doc A/73/419 (30 November 2018), para. 28.

78 Schuppert (n. 5), 89.

79 Sam Adelman 'Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse' in Stephen Humphreys (ed.), *Climate Change and International Human Rights Law* (Cambridge University Press 2010), 159-179 (167).

80 Schuppert (n. 5), 83.

their current practice, existing international institutional and judicial avenues appear unsuitable for achieving this goal and dealing with climate change in a holistic, expert-driven way. In the following sections, we argue that establishing a WCC could provide an important institutional benefit in effectively advancing global justice and addressing climate change.

III. A Way Forward

1. The Feasibility of a WCC

Considering that the political will for the creation of an international environmental court has so far been lacking, the question is whether the path to a WCC is at all feasible. State support will be a deciding factor for the success of any future proposals. However, such support and eventual participation will depend on the specific contours of the proposal and the political context in which it arises.

Achieving the greatest reduction in global greenhouse gas emissions requires solving a highly complex equation that includes the stringency of commitments, levels of participation and compliance by states.[81] All three elements are interconnected, and it is important to consider how changes in one will impact the others.[82] This formula reflects the main conundrum of international environmental governance: the more demanding and stringent the commitments to address climate change become, the harder it is to secure states' participation in the international institutions advancing these commitments. It could be argued that the broad state participation in the Paris Agreement was possible because it does not include rigid, predetermined emissions reductions or a compulsory dispute settlement mechanism. Moreover, the possibility of creating an International Climate Justice Tribunal was particularly criticised in the United States,[83] with some authors arguing that it seems unlikely that developed states would want to establish a climate court to hold themselves accountable. This is especially true given that the foundation of United Nations Framework Convention on Climate Change (UNFCCC) law lies in the principle of common but differentiated responsibilities and respective capabilities, which assigns greater legal obligations to developed

81 Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017), 6.

82 Bodansky, Brunnée and Rajamani (n. 81), 6.

83 Sara Malm, 'UN Planning an "International Tribunal of Climate Justice" Which Would Allow Nations to Take Developed Countries to Court', Daily Mail, 2 November 2015, 10:40 EST, <https://www.dailymail.co.uk/news/article-3300366/UN-planning-international-tribunal-climate-justice-allow-nations-developed-countries-court.html>, last access 15 May 2025, as discussed in Banthia (n. 6), 126.

countries.[84] While the creation of a WCC is a challenging undertaking for political reasons (considerations related to securing political acceptance being beyond the scope of this paper's legal analysis), it is still possible.

The international political environment is dynamic and the support of states for a WCC may yet emerge. For example, the establishment of the International Criminal Court, despite opposition from the United States, is regarded as 'a hard-won revolution in international law-making' and a triumph for NGOs, which played a key role in the negotiations leading to its creation.[85] However, current political dynamics and increasing instances of disregard for international law have arguably reshaped the structure of international law itself. This transformation has prompted renewed scrutiny of its role, raising fundamental questions about whether international law remains an effective instrument for governing international relations and fostering cooperation.[86] At the same time, despite the current challenges confronting international institutions,[87] international courts are seeing an unprecedented volume of cases.[88] More specifically, in the context of climate change and the environment, while some have been sceptical about the role of international adjudication on climate change, perspectives on this are rapidly evolving.[89] Indeed, although the Advisory Proceedings on climate change before the ICJ seemed inconceivable just a couple of years ago, it is now a reality.

Moving forward, climate change is a science-based problem, and thanks to the knowledge provided by the Intergovernmental Panel on Climate Change (IPCC), our understanding of climate change is becoming more robust.[90]

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84 Scott, Keenan and Ku (n. 7), 31.

85 José Enrique Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences', Tex. Int'l L. J. 38 (2003), (405-444), 407.

86 Heike Krieger and Georg Nolte 'The International Rule of Law – Rise or Decline? – Approaching Current Foundational Challenges' in: Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (Oxford Academic 2019), 3-30; Eyal Benvenisti, 'The Resilience of International Law in the Face of Empire', Just Security, 17 February 2025.

87 Kushtrim Istrefi and Luca Pasquet, 'Mind Your Attitude: The Erosion of International Law?', EJIL: Talk!, 3 March 2025.

88 See, for example, Julia Foxen, 'World Court Faces 'Unprecedented Number' of Cases': <https://news.un.org/en/interview/2024/10/1155951>, last access 15 May 2025.

89 Sands (n. 4), 20.

90 IPCC currently has 195 member countries. It prepares comprehensive Assessment Reports about the state of scientific, technical, and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place. The IPCC also produces Special Reports on specific topics agreed by its member governments, as well as Methodology Reports that provide practical guidelines for the preparation of greenhouse gas inventories. Government representatives approve summary of IPCC's reports line-by-line. See <https://www.ipcc.ch/about/preparingreports/>, last access 15 May 2025.

Better appreciation of scientific knowledge on climate change highlights the empirical flaws of the current system of climate governance, which continues to facilitate 'unsustainable resource use and social and global injustice'.[91] Such flaws have led to increasing action, particularly by civil society, individuals most affected by climate change, and small island developing countries, which are especially vulnerable to climate change. If the above trend continues, the international community might decide that the creation of a WCC would prove beneficial for all.

The path to a WCC will be a tightrope walk. On the one hand, if the proposal for a WCC defines its jurisdiction very narrowly, we run the risk of creating a toothless paper tiger. On the other hand, if we give the WCC the broadest possible powers, we risk that states will shun this institution. Given that the project for a WCC must be navigated between these two extremes, as its own Scylla and Charybdis, the following outlines proposals for the Court's composition (III. 2.), for its jurisdiction *ratione materiae*, *personae* and *temporis* (III. 3.), and its competences in the field of remedies and reparation (III. 4.).

2. Composition of a WCC

A first way to improve international mechanisms for climate change adjudication is to strengthen the fields of expertise within these institutions. This would present a significant added value over existing mechanisms. Because international climate law is premised on scientific knowledge, such as emissions reductions pathways and climate models, climate cases bestow an additional responsibility on international judges to make scientific evaluations alongside legal ones. International climate law is based on advancements in the best available climate science. More fundamentally, the prominent place of scientific evidence in climate cases is 'the direct consequence of the low normativity of the international legal rules designed on these questions'.[92] In climate litigation, legal questions require the establishment of scientific fact, at least to the required standard of proof (e. g. beyond a reasonable doubt). At the same time, scientific knowledge entails uncertainties and can be marked by disagreements among scientific experts, although in the context of climate science this is greatly reduced by the existence of the IPCC, as an intergovernmental expert panel that conducts large-scale reviews of scientific studies.

91 Schuppert (n. 5), 84.

92 Jean D'Aspremont and Makane Moïse Mbengue, 'Strategies of Engagement with Scientific Fact-finding in International Adjudication', Journal of International Dispute Settlement 5 (2014), 240-272 (248).

There is an essential and important division of labour in this context. Judges are not tasked with being the ultimate arbiters of scientific truth, just as scientists are not meant to settle legal disputes. Instead, judges evaluate scientific evidence from a legal standpoint, offering well-reasoned explanations that ensure their decisions are perceived as both legitimate and authoritative.[93]

In this regard, our proposed WCC should comprise a balanced mix of experts with backgrounds in international environmental law, general international law, and international human rights law, supported by ongoing cooperation with climate scientists. Additional institutional cooperation with selected IPCC contributors, or its lead authors, would ensure that the expertise in question is representative of the best available climate science. *Ad hoc* specialists in fields such as biodiversity, atmospheric science, and oceanic studies could also be involved when needed, with resources allocated for convening expert hearings at the WCC premises or sending delegations on fact-finding missions where necessary.

The resulting specialised Court would be capable of deciding on climate cases in a more expeditious manner given its ease of access to the necessary scientific and legal expertise. This is crucial given the urgency of the climate crisis and the many new challenges that will continue to emerge. Furthermore, the parties would have confidence that adjudicators are well-equipped to deal with climate cases, which concern science-based issues. This is an important benefit of a WCC, given that 'international actors that are eligible for international dispute settlement mechanisms will submit cases involving scientific aspects before international courts only to the extent that they are confident that their case will be fully and duly appreciated by the judges'.[94]

In evaluating existing institutions by this yardstick, we note that existing interaction with experts is relatively limited, largely involving the assessment of documentary scientific evidence and third-party interventions by non-specialist lawyers and judges, or interaction only with experts put forth by the parties to a dispute. Even where institutional possibilities for deeper engagement exist,[95] they may not be used given time and cost

93 D'Aspremont and Moïse Mbengue (n. 93), 263-269; Alain Papaux, 'Un droit sans émotions. *Iram non novit jus*: esquisse des rapports entre sciences et droit', Revue européenne des sciences sociales XLVII-144 (2009), 105-119 (112-113).

94 D'Aspremont and Moïse Mbengue (n. 93), 269; Caroline E. Foster, 'The Consultation of Independent Experts by International Courts and Tribunals in Health and Environment Cases', FYBIL 20 (2009), 391-421 (404).

95 E. g. the ECtHR's ability to convene expert hearings in Strasbourg and engage in fact-finding missions in Member States (Article 38 ECHR; Rule A1 of the Annex to the Rules of Court (28 March 2024)); see Helen Keller and Pranav Ganesan, 'The Use of Scientific Experts in Environmental Cases Before the European Court of Human Rights', ICLQ 73 (2024), 997-1021.

constraints – or, where they are used, they may trigger criticism about a lack of transparency.[96]

3. Jurisdiction

To limit fragmentation, carefully designing the jurisdiction *ratione materiae, personae* and *temporis* for a WCC will be vital. This contributes to addressing gaps in the enforcement of international climate law, harmonising applicable international regimes, and minimising forum-shopping. Jurisdictional design will be challenging, since the WCC's efficiency would be limited if a sufficient number of powerful states did not ratify the WCC's Statute. To this end, the WCC's jurisdiction should not be perceived as an existential threat to states' self-determination, especially in matters of economic policy and development-related interests. At the same time, climate change is rooted in global inequality and fossil-fuel dependent, growth-oriented economies. A WCC cannot claim legitimacy as an institution if it fails to address these underlying causes. To be both feasible and legitimate, institutional proposals must walk a fine line between doing too much and doing too little.

a) *Ratione Materiae*

A central question that arises here concerns the types of disputes that would fall within the *ratione materiae* jurisdiction of a WCC. One way of delineating the jurisdiction of a specialised international court is by reference to the applicable law.[97] However, such an approach is inappropriate for a WCC intended to harmonise different applicable international regimes. After all, climate change has implications for a broad range of international (environmental) law norms. For example, indicators and elements referred to in states' NDCs under the 2015 Paris Agreement can be assessed through the prism of international (environmental) law in order to determine their 'fair share' of greenhouse gas emissions, drawing on principles such as sustainable development, precaution, polluter pays, sovereignty, special circumstances,

96 Michael A. Becker and Cecily Rose, 'The Return of Not-Quite "Phantom Experts"?: The ICJ Meets with IPCC Scientists', Verfassungsblog, 3 December 2024, <https://verfassungsblog.de/the-icj-meets-with-ipcc-scientists/>, last access 15 May 2025.

97 See e. g. Article 32 of the ECHR; Article 1 of the Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, 2187 UNTS 3.

common but differentiated responsibilities and equality.[98] At the same time, climate change poses a serious and far-reaching threat to people and communities worldwide. It impacts the realisation of a range of human rights and challenges existing human rights law in various ways – including its anthropocentric, individualistic, territorial, civil, and political, and short-term focus.[99] Ultimately, few areas of international law will remain unaffected by the progression of climate change and the increasing inequality, conflict, and other multifaceted harm it brings.[100] It is precisely because of this reality that a segmented, siloed response is inappropriate. Instead, focusing on what we think matters most in the climate context[101] offers a better starting point for any inquiry into the subject-matter jurisdiction of a WCC – more so than trying to identify which treaties or other rules are generally considered relevant to climate change or imagining hypothetical new instruments.

In view of this, a WCC should have the mandate to decide cases involving adverse effects that result, or are likely to result, from climate change. Given the complexity of the phenomenon, its subject-matter jurisdiction should primarily be limited to climate-related cases. This raises the question of whether a WCC would be required to establish a degree of a causal relationship as part of its jurisdiction assessment. Although this would result in a degree of overlap between jurisdictional and substantive issues, the role of causation would remain distinct in relation to these issues. In establishing its jurisdiction, a WCC could rely on the IPCC's findings on general causation to determine factual cause-and-effect relationships, without delving into the question of causation attributable to a specific State. Such State-specific causation would be indispensable in determining responsibility and in apportioning reparation obligations. Moreover, a WCC should be able to look at other environmental issues where relevant, given the existence of different planetary boundaries and the fact that climate change is only one part of a multiple planetary crisis that also includes pollution emergencies and biodiversity loss. If a specific issue concerns the specialised jurisdiction of another international court or tribunal, a WCC should have the possibility to request

98 Lavanya Rajamani et al., 'National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law, Climate Policy 21 (2021), 983-1004.

99 See e. g. Human Rights Committee, General Comment no 36 on the Right to Life, UN Doc CCPR/C/GC/36, 30 October 2018, paras 3 and 62; UN Human Rights Committee, *Teitiota v. New Zealand*, Communication no. 2728/2016, UN Doc CCPR/C/127/D/2728/2016, 24 October 2019, para. 9.4.

100 IPCC, 'Climate Change 2023: Synthesis Report – Summary for Policymakers', (2023), B.2.3.

101 A similar approach to the definition of an international environmental dispute is discussed in Boyle and Harrison (n. 15), 249-250.

an opinion of this body. This trans-judicial dialogue could be an efficient tool for a WCC to coordinate with the other international jurisdictions and take better-informed decisions.

The global nature of climate change underscores the importance of a holistic approach for adjudicators dealing with climate-related damage. One key advantage of a WCC is its ability to ensure coherent interpretation of international standards in climate cases and drive greater systemic integration of international law. State responsibility is contingent upon a violation of international law.[102] In this regard, beyond expanding existing rules, the need to establish clarity and a harmonised approach regarding the obligations of states is underscored by the fact that important aspects of key international environmental norms remain opaque.[103] We note that the legal status and content of the key norms, such as the precautionary principle, sustainable development, common concern, or common but differentiated responsibilities remain contested.[104] Likewise, the ways in which climate change affects and interacts with international human rights obligations is far from clear, despite a number of initial proceedings in this regard before different adjudicators.[105] Relatedly, because of the interdependence of legal responses to climate change and political negotiations, international climate litigation faces 'serious objections relating to the political sensitivity' of climate change issues.[106] Therefore, the role and mandate of a WCC should be carefully considered in view of the indeterminacy of the key legal principles and highly-politicised nature of climate change.[107]

Another important issue that must be addressed here is the ongoing emission of greenhouse gases by non-state actors, particularly transnational corporations and the so-called 'carbon majors', which cumulatively contribute to climate change.[108] While arguments have been made for extending international human rights law standards to corporations, they have no direct 'hard'

102 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement no. 10 (A/56/10), chp. IV. E.1, Article 1(b).

103 For example, Alexander Zahar argues that a state's level of ambition in mitigation is a question of governmental policy. See Alexander Zahar, 'Factual Findings and Applicable Law in Climate Litigation', Presentation delivered at the Workshop on Climate Litigation in a Warming World, Duke Kushan University, China, 18 September 2019, <ssrn.com/abstract=3461239>, last access 15 May 2025.

104 Jutta Brunnée, 'Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection', ICLQ 53 (2004), 351-367 (354).

105 For an overview, see Setzer and Higham (n. 42), alongside the cases discussed in this article.

106 Benoit Mayer, 'International Advisory Proceedings on Climate Change', Mich. J. Int'l L. 44 (2023), 41-115 (78).

107 Bodansky (n. 4), 703.

108 Bruce (n. 26), 146.

obligations under international law.[109] At the same time, international human rights law requires states to regulate the dangerous activities of private actors under their control.[110] There are a number of non-binding instruments (often referred to as 'soft law')[111] which could serve as a starting point for a WCC to identify a customary due diligence standard in this regard. Another matter worth investigating further is whether, in line with the Inter-American Court of Human Rights' recent invitation, there is a *jus cogens* obligation to protect the environment.[112]

One may argue that the creation of the WCC presents an even greater risk of fragmentation within international climate litigation. It is conceivable that many disputes falling under the jurisdiction of a WCC could also be dealt with, in some way, by other international adjudicators. Public international law does not coordinate jurisdiction of courts, and in most cases, the instruments establishing international courts do not provide rules governing their relationship with the jurisdictions of other courts.[113]

Nikos Lavranos argues that international judges and arbitrators could use the principle of comity to manage competing jurisdictions.[114] He suggests

109 See Human Rights Committee, General Comment no 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/c/21/Rev.1/Add.13, 26 May 2004, para. 8; Eric De Brabandere and Maryse Hazelzet, 'Chapter 7: Corporate Responsibility and Human Rights – Navigating Between International, Domestic and Self-Regulation', in: Yannick Radi (ed.) *Research Handbook on Human Rights and International Investment Law* (Edward Elgar 2017), 221-243.

110 See e. g. ECtHR, *Cordella and Others v. Italy,* judgment of 24 January 2019, nos 54414/13 and 54262/15.

111 For example, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights adopted by the UN Human Rights Commission's Sub-Commission on the Promotion and Protection of Human Rights in 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003; the OECD Guidelines for Multinational Enterprises (last updated 2023).

112 IACtHR, *Inhabitants of La Oroya v. Peru*, (Preliminary Exceptions, Merits, Reparations and Costs), judgment of 27 November 2023, Series C no. 511, para. 129.

113 Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals', Cornell Int'l L. J. 50 (2017), 577-610 (587). A distinctive rule within international law is set out by Article 344 of the Treaty on the Functioning of the European Union (TFEU), which prohibits Member States from submitting disputes concerning the interpretation or application of the Treaties to any dispute resolution mechanism other than those established by the Treaties themselves. In doing so, it enshrines the exclusive jurisdiction of the Court of Justice of the European Union (CJEU), underscoring the uniquely centralized nature of judicial authority within the EU legal order. See Art. 344 Treaty on the Functioning of the European Union (Consolidated Version), OJ 2016 C202/47; ECJ, *Commission v. Ireland* (Grand Chamber), judgment of 30 May 2006, C-459/03, para. 123.

114 Nikos Lavranos, 'The OSPAR Convention, the Aarhus Convention and EC Law: Normative and Institutional Fragmentation on the Right to Access to Environmental Information' in: Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in international Law* (Hart Publishing 2011), 143-169 (168).

that if international judges come to the conclusion that another court or tribunal is better placed to adjudicate a dispute, they should relinquish their jurisdiction in favour of this forum.[115] However, comity's weakness lies in the unclear source of power for its application.[116] More importantly, in the absence of a legal duty to defer a dispute to another jurisdiction, when an international court establishes its jurisdiction over a case, it generally does not have the discretion to refrain from deciding an admissible case.

The existence of parallel jurisdictions concerning different aspects of climate-related cases is not necessarily a problem for the WCC. Specifically, the multiplicity of international courts dealing with similar issues will lead to 'a denser body of law, which also includes more sophistication, and a further elucidation of fundamental principles underpinning the order'.[117] In the early 2000s, the UN International Law Commission (ILC)[118] and academic literature[119] focused on norm conflicts arising from the fragmentation of international law, expressing concern that such conflicts could undermine coherence and stability in the international legal system. However, this concern has proven largely exaggerated, and more recent scholarship increasingly views fragmentation as an opportunity.[120] Given this, the existence of different avenues for bringing climate-related cases could be beneficial, especially if there is sufficient dialogue between these various adjudicators to prevent contradictory findings. A system of advisory opinions between the WCC and other adjudicators would be particularly useful in this context.[121] This could take various forms, including one that specifically addresses the climate-related legal and scientific issues of a case.

115 Lavranos (n. 114), 168.

116 Schultz and Ridi (n. 113), 596-597.

117 See Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', I.CON 15 (2017), 671-704 (681).

118 Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalised by Marti Koskenniemi, U. N. Doc. A/CN.4/L.682 (April 13, 2006), with app.: Draft conclusion of the work of the Study Group, U. N. Doc. A/CN.4/L.682/Add.1 (2 May, 2006).

119 See, for example, Joost Pauwelyn, Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law (Cambridge University Press 2003); Martti Koskenniemi and Päivi Leino 'Fragmentation of International Law? Postmodern Anxieties', LJIL 15 (2002), 553-579; Eyal Benvenisti and George W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', Stanford L. Rev. 60 (2007), 595-631.

120 See, for example, Peters (n. 117), 671-704 (681); Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012).

121 We are grateful to Caroline Foster for this suggestion.

b) *Ratione Personae*

Restrictions on standing, participation and access to international courts and tribunals have been commonly referenced as pressing issues relating to international adjudication of environmental disputes.[122] In terms of its *ratione personae* jurisdiction, we propose that the WCC could improve on existing international regimes by lowering access hurdles for individuals, while allowing inter-state claims. This should mean, first and foremost, allowing individual applicants to bundle their claims into one representative application brought by an NGO or environmental movement. Such an approach would enhance existing instruments, which largely require non-state applicants to demonstrate that they have been individually affected in their rights. It also improves upon the recent approach of the ECtHR, which combines acceptance of representative NGO applications with an almost impossible standard for individual applicants to meet.[123]

A high threshold for individual victims protects the dockets of generalist courts and the sensitivities of states, but it is particularly ill-suited to the context of climate change, where risks are diffuse, long-term, and may not be fully manifested at the time of their causation. Individuals are increasingly at risk of heat-related mortality due to the impact of climate change on the frequency and intensity of heat waves. However, these effects may not yet be fully evident, and applicants may struggle to obtain the necessary scientific and legal expertise to bring such claims, or face significant costs in doing so.[124] In this regard, legal aid funding is vital, along with simplified applications procedures, and – where causation is concerned – reliance on statistical evidence and modelling as reliable forms of evidence of harm beyond a reasonable doubt. Various controls should be in place to balance openness to claims with the risks posed by participating NGOs to the system itself. This could include a clear set of criteria for standing, such as an objective standard based on the qualification, experience, and interest of an NGO in a given dispute. Another option could be the requirement for NGOs to acquire prior accreditation to have standing before a WCC.[125]

122 Bruce (n. 26), 148.

123 ECtHR, *KlimaSeniorinnen* (n. 35).

124 Overall, see Helen Keller and Viktoriya Gurash, 'Expanding NGOs' Standing: Climate Justice Through Access to the European Court of Human Rights', Journal of Human Rights and the Environment 14 (2023), 194-218; Violetta Sefkow-Werner, 'Consistent Inconsistencies in the ECtHR's Approach to Victim Status and *Locus Standi*', European Journal of Risk Regulation (2025), 1-10.

125 Similar arguments are discussed at greater length in Keller and Gurash (n. 124).

c) *Ratione Temporis*

In terms of jurisdiction *ratione temporis*, two salient questions arise: the first concerns states' responsibility for their historic emissions, and the second addresses the disproportionate burden of climate change impacts on future generations. Central to our proposal is that a WCC should be entrusted with the competence to hear claims relating to harm inflicted on individuals both now and in the future, including those represented by an Ombudsperson for future generations or accredited environmental NGOs.

The prospect of establishing purely forward-looking new institutions raises complex questions, especially given states' widely disparate historic emissions and the resulting developmental inequalities in light of legacies of colonialism and distributive injustices. This includes regard for the '"slow violence" inflicted by the fossil fuel industry on racialised and poor communities throughout the world'.[126] A purely forward-looking institution or legal obligation would erase much of this reality, which must be seen – as held in the ground-breaking *Held et al. v. Montana* case – in the context of research on the 'greenhouse' effect dating back to the 1850s, and the clear international scientific consensus on the dangers and causes of climate change that has existed since the IPCC began issuing reports in the 1990s.[127]

The second temporal question concerns not the past, but the future. Many climate cases have included claims brought on behalf of future generations, thereby invoking the principle of 'intergenerational equity'.[128] International legal protections for future generations were recently summarised in the 2023 Maastricht Principles on the Human Rights of Future Generations, which draw on international law to 'affirm binding obligations of states and other actors as prescribed under international and human rights law'.[129] These

126 Carmen G. Gonzalez, 'Racial Capitalism, Climate Justice, and Climate Displacement', Oñati Socio-Legal Series, 11 (2021) 108-147, with reference to Rob Nixon, *Violence and the Environmentalism of the Poor* (Harvard University Press 2013) and Caiphas Soyapi and Louis J. Kotzé, 'Environmental Racism, Slow Violence and the Extractive Industry in Post-Apartheid South Africa: Marikana in Context', Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 49 (2016), 393-415.

127 Montana First District Court for Lewis and Clark County, *Held and Others v. Montana* (n. 2), para. 20 and 72 (not yet final).

128 German Federal Constitutional Court, *Neubauer* (n. 62); CRC, *Sacchi* (n. 2); UN Human Rights Committee, *Daniel Billy* (n. 2); for a comprehensive analysis of the legal incarnations of the principle of 'intergenerational equity' see Daniel Bertram, '"For You Will (Still) Be Here Tomorrow": The Many Lives of Intergenerational Equality', Transnational Environmental Law 12 (2023), 121-149.

129 'Maastricht Principles on the Human Rights of Future Generations', 3 February 2023, <https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf>, last access 15 May 2025.

principles set out that the enjoyment of human rights cannot be interpreted as limited to those currently living, but must always include future generations. They resonate with the fact that climate policy has serious impacts on the world's future, not just now or next year, but also 10, 30, 50, and 100+ years from now. Accordingly, climate policy decisions impact the enjoyment of rights by future generations, and contain assumptions as to their needs and interests when making ethical choices.[130] To this end, the legal framework of 'intergenerational equity' is conducive to addressing the long-term implications of the climate crisis. The question that arises here, however, is whether the rights of future generations can already be litigated today.

In this regard, Stephen Gardiner argues that we face a serious intergenerational collective action problem, which he calls 'the tyranny of contemporary', and that existing institutions were not designed with the intergenerational threat in mind.[131] To confront this institutional inadequacy, Gardiner calls for a global constitutional convention focused on future generations, tasked with providing institutional recommendations to protect against the tyranny of the contemporary. This could include the creation of new institutions, modifications to existing ones, or, most likely, a combination of both.[132]

Discussions on protecting future generations have recently been initiated by Stephen Humphreys, who argues that focusing on these rights overlooks the inequalities and rights impacts facing those living today. He contends that the rights of current generations provide a sufficient basis for contesting emissions without turning to the concept of future generations.[133] Responses to Humphreys consider that his argument creates false binaries[134] or deprives indigenous populations and people in the Global South of an important platform for demanding their rights.[135] A WCC could elaborate on the precise content of 'intergenerational equity' and translate it into concrete obligations for governments to take both mitigation and adaptation actions in response to future climate crisis scenarios, while adopting a nuanced approach that avoids existing pitfalls.

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130 Peter Lawrence, 'International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys', EJIL 34 (2023), 669-682.

131 Stephen M. Gardiner, 'On the Scope of Institutions for Future Generations: Defending an Expansive Global Constitutional Convention that Protects Against Squandering Generations', Ethics & International Affairs 36 (2022), 157-178 (159).

132 Gardiner (n. 131), 162.

133 Stephen Humphreys, 'Against Future Generations', EJIL 33 (2023), 1061-1092.

134 Lawrence (n. 130).

135 Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla, 'In Defence of Future Generations: A Reply to Stephen Humphreys', EJIL 34 (2023), 651-668.

Finally, the potential for a WCC to operate based on strict principles of liability for past emissions – for example, applying obligations of result rather than conduct or due diligence – raises an obvious hurdle. This would be a departure from existing regimes, given that obligations to compensate for climate change were explicitly excluded from the Paris Agreement.[136]

4. Remedies and Reparation

The question arises as to what remedies a WCC could offer to 'successful' applicants, what 'success' means here, and how individual and collective forms of redress interact. Despite the wide discretion of international courts and tribunals, they cannot award remedies beyond the scope of the substantive obligations that they are tasked with applying. Remedial awards will accordingly depend on the type of obligation violated.[137] In addition, the parties themselves suggest remedies they wish to see implemented by a court. For example, in climate cases before the ECtHR, applicants have claimed that domestic climate targets and measures are insufficient[138] or inadequate[139] to limit global warming to a safe level, and have asked the Court to order concrete reductions targets and compensation – to no avail.[140] Likewise, in the ICJ's *Costa Rica v. Nicaragua* compensation judgment, the Court was faced with two competing models for calculating the reparations demanded for the environmental harms at stake, requiring it to create its own methodology for conducting the calculation in question.[141]

Some authors argue that, in a climate change case, a pro-climate plaintiff must consider not only the usual elements of facts and law, but also whether winning the case will make any difference to our current predicament.[142] If the goal is to limit greenhouse gas emissions and the corresponding rise in global average temperatures, then it is necessary to reform the international legal regime, requiring more ambitious, binding, yet fair and evolving targets for each state. This involves difficult policy decisions that are arguably beyond the competence of any court. Courts, it is argued, are not the appro-

136 UN Secretary-General (n. 77), para. 28.

137 Justine Bendel, 'Chapter 6: Remedies' in: Justine Bendel, *Litigating the Environment* (Edward Elgar Publishing 2023), 180-212 (189).

138 ECtHR, *KlimaSeniorinnen* (n. 35).

139 ECtHR, *Duarte Agostinho* (n. 67).

140 In *KlimaSeniorinnen*, the Court refused to grant a general measures order under Article 46 ECHR (n. 35).

141 ICJ, *Certain Activities* (n. 47), para. 34.

142 Zahar (n. 103).

priate actors for proposing solutions to problems affecting society as a whole.[143]

While acknowledging the limitations of the role of courts and the legitimacy challenges that arise from them, it is also important to recognise that courts can and often do consider structural or controversial issues of societal importance.[144] We believe that a court with an explicit mandate to evaluate the adequacy of individual states' climate commitments would not only be feasible, but would represent the only practicable way to ensure transparent, equitable, and fair climate action. This includes using scientific methodologies that can and do establish each state's fair share, using fair share ranges that account for different understandings of fairness, and evaluating each state's reductions commitments.[145] In any case, a WCC could play a role by addressing specific questions and by clarifying norms of international (environmental) law and human rights law that are important for legislators and governments.

A significant degree of climate change is unavoidable and indeed has already taken place, with the World Meteorological Organization calculating an 80 % chance that at least one year between 2024 and 2028 will cross the 1.5°C temperature limit.[146] A WCC should be an avenue to remedy climate-related harms, including unavoidable loss and damage through mitigation and adaptation measures. For example, some authors draw parallels to the UN Compensation Commission (UNCC), established in the aftermath of the first Gulf War to remedy environmental damage, to discuss ways to share the burden of compensating for climate harms.[147] Other scholars have also proposed the creation of a Global Climate Reparations Fund to redistribute resources and fund climate reparations.[148] In this regard, the WCC could

143 Guy Dwyer, 'Climate Litigation: A Red Herring Among Climate Mitigation Tools' in: Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021), 128-144.

144 E. g. ECtHR (Grand Chamber), *A, B and C v. Ireland*, judgment of 16 December 2010, no. 25579/05; ECtHR, *D. B. and Others v. Switzerland*, judgment of 22 November 2022, nos 58817/15 and 58252/15.

145 See e. g. Climate Action Tracker, 'CAT Rating Methodology: Fair Share' (2023), <https://climateactiontracker.org/methodology/cat-rating-methodology/fair-share/>, last access 15 May 2025.

146 World Meteorological Organization, 'Global Annual to Decadal Climate Update, 2024-2028' (2024), available at: <https://library.wmo.int/records/item/68910-wmo-global-annual-to-decadal-climate-update>, last access 15 May 2025.

147 Daniel Farber, 'The UNCC as a Model for Climate Compensation' in: Cymie Payne and Peter Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011), 242-257.

148 Audrey Chapman and Karim Ahmed, 'Climate Justice, Humans Rights, and the Case for Reparations', Health and Human Rights 23 (2021), 81-94.

build on and solidify the patchwork of funding mechanisms established under the international climate regime, including the Warsaw International Mechanism for Loss and Damage, which has struggled to make progress due to the lack of clear definitions and legally binding obligations under the Paris Agreement.[149] It could further strengthen the Loss and Damage Fund agreed upon at COP27[150] and operationalised at COP28,[151] which is still severely underfunded.[152]

An important task for a WCC would be to clearly define the harm arising from loss and damage due to climate change. One challenge will be to separate harm linked to anthropogenic climate change from other sources of harm. For example, while extreme weather events will be amplified by climate change, the resulting impacts will not be solely attributable to it, with unrelated vulnerabilities also playing a role.[153] Another question concerns whether loss and damage will include only those impacts with economic consequences, or whether it will also extend to non-economic impacts, including cultural harm to indigenous people. A WCC would also need to determine whether claims for loss and damage should include the loss of state territory due to sea level rises, or even the loss of statehood, and what reparations for these would look like.[154]

To provide a comprehensive, harmonised, equitable, and legitimate response to climate change, a WCC cannot shy away from addressing reparations for loss and damage, including non-economic harms. It must take a holistic approach to the harms at stake, including those with individual, collective, and state-wide impacts. This requires a differentiated, structural and redistributive approach to remedies – one that goes beyond compensating individuals or states for material harm already suffered, and includes structural and future-oriented reparations that take into account all develop-

149 Article 8.3 of the Paris Agreement, and the non-binding 'should' obligation therein (n. 29).

150 Conference of the Parties to the UNFCCC, Decision 2/CP.27, 'Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage', UN Doc. FCCC/CP/2022/10/Add.1, 17 March 2023.

151 Conference of the Parties to the UNFCCC, Decision 1/CP.28, 'Operationalization of the New Funding Arrangements, Including a Fund, for Responding to Loss and Damage Referred to in Paragraphs 2-3 of Decisions 2/CP.27 and 2/CMA.4', UN Doc. FCCC/CP/2023/11/Add.1.

152 David W. South, 'Loss and Damage Fund – Operationalized at COP28 but Funding and Allocation Process Unresolved', Climate and Energy 40 (2024), 29-3.

153 Emmanuel Raju, Emily Boyd and Friederike Otto, 'Stop Blaming the Climate for Disasters', Communications Earth & Environment 3 (2022), 1-2.

154 Meinhard Doelle and Sara L. Seck, 'Loss & Damage from Climate Change: From Concept to Remedy?', Climate Policy 20 (2020), 669-680 (672).

mental and environmental interests and harms at stake. We envision that these reparation amounts, instead of being allocated to a single state, group, or individual, could instead be directed to a climate compensation and financing fund. This fund would ensure fair distribution from high-emitting to low-emitting states based on a 'fair shares' methodology.

IV. Conclusion

At this stage, an answer to the question posed in the title is both overdue and self-evident: we are convinced that a WCC is needed. In this, we follow the approach taken by Stuart Bruce, who has argued that '[i]t is the job of international lawyers to devise creative and meaningful solutions to real-world problems and to make the pieces of international law work as a system'.[155]

From the perspective of avoiding 'free-riders' and ensuring coordinated action by states to meet the Paris Agreement's warming targets, adapt to the effects of climate change, and repair unavoidable loss and damage, binding international legal obligations interpreted by an institution with mandatory jurisdiction offer many advantages. An important benefit that could distinguish the proposed WCC from existing mechanisms is its potential to ensure a coherent interpretation of international standards in climate cases, leading to greater systemic integration of international law, including international environmental law, general public international law, and human rights law. The efficiency and the authority of a WCC would depend on its specific design, and practical and technical legal challenges would need to be overcome. The WCC would need to offer added value over existing mechanisms, but it also cannot not depart too radically from the principles underlying the existing international legal system. As a result, the above must be tempered with a degree of caution against placing overly high expectations in any one institution, including this one.

The history of codifying human rights protections and international legal norms shows that large-scale catastrophes drawing international attention are often required for change to take place.[156] While irreversible climate tipping points have not yet been crossed and the situation can still get much worse, the climate crisis has already arrived. Scientists are observing dangerous

155 Bruce (n. 26), 135.

156 Hilary Charlesworth, 'International Law: A Discipline of Crisis', M. L. R. 65 (2022), 377-392.

changes in the climate now, in the form of a slow-burning crisis. Given the systemic nature of this looming threat, the time has come for the international community to take ambitious and meaningful action. The creation of a WCC would be a step in this direction.

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Resilience of UNCLOS in the Context of the Ocean-Climate Nexus: Reflections on Due Diligence Obligations in the ITLOS Advisory Opinion on Climate Change

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Abstract

Facing various challenges associated with climate change, a question arises as to how one can address these newly emerging issues under the United Nations Convention on the Law of the Sea (UNCLOS). There, the resilience of UNCLOS is at issue. An obligation of due diligence articulated by the International Tribunal for the Law of the Sea (ITLOS) in its advisory opinion on climate change provides an insight into this issue. Thus this article examines the resilience of UNCLOS in the particular context of ocean-climate nexus focusing on an obligation of due diligence. It will argue, inter alia that an obligation of due diligence can perform a dual function to enhance the resilience of UNCLOS: an interstitial function to incorporate new environmental norms into UNCLOS and a systemic function that connects the Paris Agreement to UNCLOS.

Keywords

Resilience – UNCLOS – climate change – ocean-climate nexus – ITLOS – advisory opinion

I. Introduction

The UN Convention on the Law of the Sea (UNCLOS or the Convention) currently faces many challenges that were unforeseen at the time of its adoption in 1982.[1] The ocean-climate nexus is a case in point.[2] Climate change can create multiple legal issues, such as interpretation of rules governing baselines due to sea level rise, regulation of geoengineering and reduction of greenhouse gas emissions (GHG) from shipping.[3] The essential question that arises in this regard is how one can adapt UNCLOS to new circum-

1 The United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 397 was opened for signature 10 December 1982, entered into force 16 November 1994.

2 Generally see Daniel Bodansky, 'The Ocean and Climate Change Law: Exploring the Relationship' in: Richard Barnes and Ronán Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges, Essays in Honour of David Freestone* (Brill/Nijhoff 2021), 316-336.

3 For an overview, see David Freestone and Millicent McCreath, 'Climate Change, the Anthropocene and Ocean Law: Mapping the Issues' in: Jan McDonald, Jeffrey McGee and Richard Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar 2020), 49-80.

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stances facing various challenges associated with climate change without amendments of the Convention.[4] Given that, as Oxman pointedly observed, '[s]tability in the law is not possible without adaptation to new circumstances',[5] the adaptation of UNCLOS into a changing environment due to climate change is of critical importance. There, resilience of UNCLOS matters.

The definition of the concept of resilience varies according to academic disciplines.[6] For the purpose of this article, 'resilience' can be defined as 'a capacity to adapt the existing legal system to a new or changing situation whereby the system continues to function'.[7]

When considering the resilience of UNCLOS, obligations of due diligence are key.[8] Whilst a due diligence obligation may have different meanings depending on the context in which it is used,[9] the International Court of Justice (ICJ), in *Pulp Mills on the River Uruguay*, described that obligation as follows:

> 'It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.'[10]

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4 Amendments to a treaty are an orthodox way to adapt the treaty into new circumstances. However, it would appear that the amendment procedures set out in Articles 312-316 of UNCLOS are hard to use because of their complexity.

5 Bernard H. Oxman, 'The Fortieth Anniversary of the United Nations Convention on the Law of the Sea', International Law Studies 99 (2022), 865-873 (871).

6 For various definitions of the term 'resilience', see Kate Knuth, 'The Term "Resilience" is Everywhere – But What Does It Really Mean?', at <https://ensia.com/articles/what-is-resilience/>, last access 13 May 2025.

7 Yoshifumi Tanaka, 'Resilience of the UN Convention on the Law of the Sea: Reflections on Three Approaches', Portuguese Yearbook of International Law 1 (2024), 57-94 (58). Murphy deconstructs the term 'resilience' into three different concepts: durability, flexibility, and plasticity. Sean D. Murphy, 'Durability, Flexibility and Plasticity in the UN Convention on the Law of the Sea', IJMCL 39 (2024), 225-251 (227).

8 Due diligence is an old concept that dates back to ancient law. For origins of due diligence, see Samantha Besson, *La* due diligence *en droit international* (Brill/Nijhoff 2021), 35. Generally on due diligence, see also Samantha Besson, *Due Diligence in International Law* (Brill/Nijhoff 2023); Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020); Joanna Kulesza, *Due Diligence in International Law* (Brill/Nijhoff 2016); Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press 2022).

9 Penelope Ridings, 'Due Diligence in International Law', United Nations Report of the International Law Commission, Seventy-fifth Session, A/79/10, 2024, 146-162 (151).

10 ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), merits, judgment of 20 April 2010, ICJ Reports 2010, 14 (para. 197).

Furthermore, the International Tribunal for the Law of the Sea (ITLOS), in its advisory opinion on climate change, considered that the obligation of due diligence 'requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective'.[11] In summary, an obligation of due diligence functions as a rule of conduct that obliges States to take necessary measures.[12]

However, the role of due diligence obligations is not limited to rules of conduct. As will be discussed in section II of this article, such obligations can also serve as a medium for incorporating new scientific/technological knowledge and norms into a treaty. In so doing, due diligence obligations can contribute to adapting a treaty to new situations. In this sense, due diligence obligations can perform an 'interstitial' function.

The role of interstitial norms, such as sustainable development, as the engine to develop international law has been stressed by Lowe.[13] According to Lowe, interstitial norms 'have no independent normative charge of their own'.[14] Thus Lowe seemingly considered that interstitial norms exist in a form distinct from primary norms of international law. However, interstitial norms do not always exist as norms distinguished from primary rules of international law. In appropriate circumstances, it appears that a primary rule

11 ITLOS, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, advisory opinion of 21 May 2024, para. 235, available at: <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.5.2024_orig.pdf>, last access 10 July 2025. All documents relating to the advisory opinion, including written statements, are available at: <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>, last access 10 July 2025. For a recent commentary of the ITLOS advisory opinion, see David Freestone, Clive Schofield, Richard Barnes and Payam Akhavan, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case 31' IJMCL 39 (2024), 835-846; Benoit Mayer, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law', AJIL 119 (2025), 153-160.

12 ITLOS, 2024 Advisory Opinion (n. 11), para. 233. See also ITLOS, Responsibilities and Obligations of States with Respect to Activities in the Area, advisory opinion of 1 February 2011, ITLOS Reports 2011, 10 (para. 110).

13 See Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creating Changing?' in: Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2000), 207-226 (212-221).

14 Lowe (n. 13), 216.

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of international law, such as a due diligence obligation, can also perform an interstitial function.

Furthermore, as will be discussed in section III of this article, mutual supportiveness between UNCLOS and the Paris Agreement is crucial to strengthen the resilience of UNCLOS in the particular context of the ocean-climate nexus. There, a due diligence obligation serves as a medium that connects the two treaties. In this sense, it can be considered that a due diligence obligation performs a systemic function linking the Paris Agreement to UNCLOS. At the same time, as will be discussed in section IV, care should be taken in noting that a due diligence obligation contains some limitations with regard to its normative ambiguity.

Against that background, this article addresses the resilience of UNCLOS in the particular context of ocean-climate nexus, focusing particularly on due diligence obligations articulated by the ITLOS advisory opinion on climate change. Specifically, this article addresses the following issues:

(1) What is an interstitial role of due diligence obligations in the enhancement of the resilience of UNCLOS?

(2) What is the systemic function of due diligence obligations in ensuring the mutual supportiveness between UNCLOS and the Paris Agreement?

(3) If due diligence obligations are relevant to enhance the resilience of UNCLOS, are there any problems associated with the obligations?

This article is structured as follows. Following the introduction, section II analyses the interstitial function of obligations of due diligence in enhancing the resilience of UNCLOS. Next, section III considers a systemic function of a due diligence obligation. Section IV examines possible problems associated with due diligence obligations. Finally, a conclusion is presented in section V.

II. Interstitial Function of Due Diligence Obligations

1. Obligations of Due Diligence Under UNCLOS

According to ITLOS, Article 194(1) of UNCLOS 'requires States to act with "due diligence" in taking necessary measures to prevent, reduce and control marine pollution'.[15] Likewise ITLOS considered that Article 194(2) provides an obligation of due diligence.[16] Furthermore, in the view

15 ITLOS, *2024 Advisory Opinion* (n. 11), para. 234.

16 ITLOS, *2024 Advisory Opinion* (n. 11), para. 254 and para. 258. This view is in line with *Pulp Mills on the River Uruguay*. ICJ, *Pulp Mills* (n. 10), para. 101. See also Alan Boyle and Catherine Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment* (4th edn, Oxford University Press 2021), 163; Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' GYIL 35 (1992), 9-51 (38-41).

of ITLOS, the obligation to cooperate under Article 197 'is an obligation of conduct which requires States to act with "due diligence"'.[17] ITLOS also took the same view with regard to Article 192, stating that '[t]he obligation of the State, in this instance, is one of due diligence'.[18] In summary, according to ITLOS, due diligence obligations are at the heart of environmental norms relevant to the prevention of anthropogenic GHG emissions under UNCLOS.[19] In this regard, two observations can be made.

The first observation relates to the nature of a due diligence obligation as an obligation of conduct. It is generally understood that an obligation of due diligence is an obligation of conduct, not result. In the words of the International Law Commission (ILC), '[t]he duty of due diligence involved, […], is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so'.[20] ITLOS, in its advisory opinion of 2024, also stressed the nature of an obligation of due diligence as an obligation of conduct.[21] In reality, it would be difficult to completely prevent environmental harms from anthropogenic GHG emissions. Furthermore, anthropogenic GHG can often derive from various sources located in multiple States. In light of the collective nature, establishing causation concerning environmental harms is far more complicated compared with that of bilateral environmental pollution.[22]

17 ITLOS, *2024 Advisory Opinion* (n. 11), para. 309.

18 ITLOS, *2024 Advisory Opinion* (n. 11), para. 396. This view is in line with the *South China Sea* arbitration (merits). PCA Case No. 2013-19, *The South China Sea Arbitral Award* (The Philippines v. The People's Republic of China), merits, award of 12 July 2016, RIAA 33 (2020), 153 (para. 959).

19 Some States and organs also discussed the obligation of due diligence in the context of the protection of the marine environment. Examples include: Written Statement of African Union, Vol. I, 16 June 2023, para. 333; Written Statement of Belize, 16 June 2023, at 19-20, para. 59; Written Statement of the Commission of Small Island States on Climate Change and International Law, Vol. I, 16 June 2023, 77, para. 278 and 119-120, para. 415. See also presentation by Webb, Verbatim Record, ITLOS/PV.23/C31/3/Rev.1, 39; Written Statement by the European Union, 15 June 2023, 10, para. 17. See also presentation by Bruti Liberati, ITLOS/PV.23/C31/14/Rev.1, 37; Written Statement of Latvia, 16 June 2023, 7, para. 14. See also, presentation of Paparinskis, Verbatim Record, ITLOS/PV.23/C31/9/Rev.1,12; Presentation by Okowa (Mozambique), Verbatim Record, ITLOS/PV.23/C31/11/Rev.1, 13; Written Statement of the Republic of Sierra Leone, 16 June 2023, 24-25, para. 50; Written Statement by the Socialist Republic of Vietnam, 16 June 2023, para. 4.4.

20 ILC, 'Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities', ILCYB (2001), Vol. II, Part Two, 154, Art. 3, para. 7.

21 This point was already highlighted by the ITLOS Seabed Disputes Chamber. ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 111. See also Declaration of Judge Kittichaisaree in: ITLOS, *2024 Advisory Opinion* (n. 11), paras 11-24.

22 For the problem of collective causation in the context of climate change, see Nataša Nedeski and André Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation', EJIL:Talk!, 15 December 2022.

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Accordingly, it may be difficult if not impossible to establish responsibility of a particular State for causing environmental harm from anthropogenic GHG emissions. In light of this, it would be relevant to focus on an obligation of conduct of State when invoking State responsibility for anthropogenic GHG emissions.

The second observation concerns the nature of an obligation of due diligence as an obligation *erga omnes*. ITLOS as a full court, in its advisory opinion on climate change, did not refer to the *erga omnes* nature of that obligation. However, the ITLOS Seabed Disputes Chamber noted:

> 'Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area'.[23]

The reference to '[e]ach State Party' implies that the obligation relating to the preservation of the environment of the high seas and the Area is an obligation *erga omnes partes* which, in light of the obligation under Article 192 to 'protect and preserve the marine environment' applies to the ocean as a whole.[24] The obligation to protect and preserve the marine environment under Article 192 is now generally accepted as reflecting a rule of customary international law.[25] Accordingly, there may be a basis for considering that the due diligence obligation under Article 192 is regarded as an obligation *erga omnes*.[26] This interpretation can affect the *locus standi* of States other than a directly injured State in international adjudication.

Even though it may be too early to draw any general conclusion, jurisprudence of the ICJ seems to hint in the direction that the ICJ would accept the *locus standi* of a not directly injured State in response to a breach of obliga-

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23 ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 180. For an analysis of this paragraph, see Yoshifumi Tanaka, 'Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011', NILR 60 (2013), 205-230 (226-227).

24 Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (Edward Elgar 2018), 138, 327; Rachael L. Johnstone, *Offshore Oil and Gas Development in the Arctic Under International Law: Risk and Responsibility* (Brill/Nijhoff 2015), 223.

25 The UN Secretary-General, in the report of 1989, stated that 'articles 192 and 193 are generally regarded as statements of customary international law on the extent of the environmental responsibility of States towards the oceans'. UNGA, *Protection and Preservation of the Marine Environment: Report of the Secretary-General*, of 18 September 1989, para. 29.

26 James Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press 2017), 24 f.; Yoshifumi Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', NILR 68 (2021), 1-33 (5).

tions *erga omnes (partes)*, if it could establish its jurisdiction.[27] In this regard, the Institut de Droit International declared:

> 'In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.'[28]

Following the Institut, as a matter of theory, all States, including States that are not directly injured, can have *locus standi* to invoke responsibility for a breach of a due diligence obligation to protect the marine environment from anthropogenic GHG emissions before an international court or tribunal, when that court or tribunal can establish its jurisdiction.[29]

2. Interstitial Function of a Due Diligence Obligation in the Enhancement of UNCLOS

a) Incorporation of New Scientific/Technological Knowledge Into UNCLOS

On the basis of the above considerations, we will analyse the functions of a due diligence obligation in enhancing the resilience of UNCLOS. In this regard, the evolutionary nature of the obligation must be stressed.[30] Indeed, ITLOS has repeatedly stressed the evolutionary nature of that obligation. In its advisory opinion of 2011, for example, the Seabed Disputes Chamber of

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27 For example, the ICJ, in its Order of provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between The Gambia and Myanmar, held that 'any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end'. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), provisional measures, order of 23 January 2020, ICJ Reports 2020, 3, para. 41. See also ICJ, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), merits, judgment of 20 July 2012, ICJ Reports 2012, 422; ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), merits, judgment of 31 March 2014, ICJ Reports 2014, 226.

28 Institut de Droit International, 'Resolution: Obligations *Erga Omnes* in International Law' (Krakow Session 2005), Article 3, at <https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf>, last access 10 July 2025.

29 Relatedly, see also Rao and Gautier (n. 24), 327; Tanaka, 'Legal Consequences' (n. 26), 20-24.

30 Besson, *La* due diligence *en droit international* (n. 8), 138.

ITLOS stated that the obligation of due diligence 'may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge'.[31] Referring to the statement, ITLOS as a full court also held that '[t]he standard of due diligence may change over time, given that those factors constantly evolve'.[32] It would seem to follow that the obligation of due diligence is to reflect 'new scientific or technological knowledge'. In light of this, an obligation of due diligence can function as a medium for incorporating new scientific or technological knowledge into UNCLOS. This interstitial function of a due diligence obligation is of particular importance in the protection of the marine environment because, as ITLOS stated, 'measures adopted to prevent pollution of the marine environment may need to change over time to become stricter "in light […] of new scientific or technological knowledge"'.[33]

In this regard, particular attention must be paid to the link between an obligation of due diligence and an obligation to apply best environmental practice (BEP)/best available techniques (BAT). The link between the due diligence obligation and BEP was highlighted by the Seabed Disputes Chamber of ITLOS, stating:

> '[I]n light of the advancement in scientific knowledge, member States of the [International Seabed] Authority have become convinced of the need for sponsoring States to apply "best environmental practices" in general terms so that they may be seen to have become enshrined in the sponsoring States' obligation of due diligence.'[34]

Arguably, the same would apply to the relationship between the obligation of due diligence and BAT.[35]

If a State whose activities have caused serious environmental damage has failed to apply BEP and BAT, it would be difficult to claim that due diligence has been exercised. In this sense, an obligation to apply BEP and BAT and a due diligence obligation are intimately intertwined. Hence, there appears to be some scope to argue that the obligation to apply BEP and BAT is to be incorporated into Part XII of UNCLOS via an obligation of due diligence, even though UNCLOS contains no explicit obligation to apply BEP and

31 ITLOS, *Responsibilities and Obligations of States* (n. 12), 43, para. 117.

32 ITLOS, 2024 *Advisory Opinion* (n. 11), para. 239. See also para. 397.

33 ITLOS, *2024 Advisory Opinion* (n. 11), para. 317. See also ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 117.

34 ITLOS, *Responsibilities and Obligations of States* (n. 12), 42, para. 136.

35 Yoshifumi Tanaka, 'Reflections on Time Elements in the International Law of the Environment', HJIL 73 (2013), 139-175 (163).

BAT. In so doing, UNCLOS can modernise its environmental norms. It appears that the incorporation of BAT and BEP into UNCLOS can contribute to enhancing the resilience of UNCLOS in the protection of the marine environment.

b) Incorporation of New Environmental Norms Into UNCLOS

An obligation of due diligence can also open the way to incorporate new environmental norms that have developed after the adoption of UNCLOS.[36] The precautionary approach or principle is a case in point.[37] UNCLOS contains no explicit provision concerning the obligation to apply the precautionary approach. Even so, many writers have expressed the view that the provisions of the LOSC must be interpreted in accordance with this approach.[38]

The ITLOS advisory opinion on climate change is innovative in the sense that ITLOS clearly declared the obligation to apply the precautionary approach under UNCLOS. In the words of ITLOS, '[t]he obligation of due diligence is also closely linked with the precautionary approach'.[39] Accordingly, ITLOS continued, 'States must apply the precautionary approach in their exercise of due diligence to prevent, reduce and control marine pollution from anthropogenic GHG emissions'.[40] This statement does seem to suggest that the precautionary approach is to be incorporated into the relevant provisions of UNCLOS via an obligation of due diligence. Following

36 This view was shared by Roland Holst, stating that '[d]ue diligence thereby allows for the incorporation of concepts and principles of environmental law, such as the precautionary principle or rules on EIA, that developed after the Convention entered into force'. Rozemarijn J. Roland Holst, *Change in the Law of the Sea: Context, Mechanisms and Practice* (Brill/Nijhoff 2022), 230. Also argued that 'due diligence offers a gateway to enrich the obligations established under the LOSC [UNCLOS] to protect and preserve the marine environment with environmental principles that do not find explicit mentioning in the text of the Convention'. Nele Matz-Lück and Erik van Doorn, 'Due Diligence Obligations and the Protection of the Marine Environment' L'Observateur des Nations Unies 42 (2017), 177-195 (180).

37 While the terminology of 'the precautionary approach' or 'the precautionary principle' is not unified, on this issue, ITLOS, in its advisory opinion on climate change, used the term 'the precautionary approach'. This article follows the usage of the ITLOS advisory opinion.

38 Aline L. Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Brill/Nijhoff 2017), 135-136.

39 ITLOS, *2024 Advisory Opinion* (n. 11), para. 242. Furthermore, the ICJ, in the 2010 *Pulp Mills on the River Uruguay* case, explicitly stated that 'a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute [of the River Uruguay]'. ICJ, *Pulp Mills* (n. 10), para. 164.

40 ITLOS, *2024 Advisory Opinion* (n. 11), para. 242.

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this approach, the question as to whether the precautionary approach is part of customary international law is no longer at issue.[41]

The interstitial function of a due diligence obligation is significant because it can incorporate new environmental norms into UNCLOS, even if the norms have not been crystallised as rules of customary international law yet. Through its interstitial function, due diligence obligations under UNCLOS can strengthen environmental dimensions of the Convention, thereby enhancing the resilience of the Convention to address multiple environmental challenges, including climate change.

Another example may be the ecosystem approach. UNCLOS contains no explicit provision relating to the application of the ecosystem approach because the importance of that approach was unknown at the time of the adoption of the Convention. Even so, ITLOS held:

> 'Under Articles 61 and 119 of the Convention, States Parties have the specific obligations to take measures necessary to conserve the living marine resources threatened by climate change impacts and ocean acidification. […] This obligation requires the application of the precautionary approach and an ecosystem approach.'[42]

The conservation of living resources and marine life falls within the general obligation to protect and preserve the marine environment under Article 192 of UNCLOS.[43] Hence there appears to be good reasons to argue that States are required to apply the ecosystem approach in their exercise of due diligence to protect the marine environment from anthropogenic GHG emissions. If this is the case, the ecosystem approach is to be incorporated into environmental norms under UNCLOS via an obligation of due diligence under Article 192. The incorporation of the ecosystem approach will enable UNCLOS to address new challenges associated with adverse impacts of climate change on conservation of marine living resources, thereby enhancing the resilience of the Convention.

c) Incorporation of a New Source of Marine Pollution Into an Environmental Impact Assessment

An obligation of due diligence can also serve as a medium to expand the scope of the existing environmental norms. The obligation to conduct an

41 In fact, ITLOS, in its advisory opinion on climate change, did not examine the customary law nature of the precautionary approach. According to ITLOS, the precautionary approach is 'implicit in the very notion of pollution of the marine environment, which encompasses potential deleterious effects'. ITLOS, *2024 Advisory Opinion* (n. 11), para. 213.

42 ITLOS, *2024 Advisory Opinion* (n. 11), para. 441(4)(e). See also para. 418.

43 ITLOS, *2024 Advisory Opinion* (n. 11), para. 409.

environmental impact assessment (EIA) is a case in point. An EIA is a procedure to predict environmental risks and likely impacts of a proposed project and to integrate environmental concerns into the decision-making process before authorising or funding the project.[44] As the ICJ rightly stated in the *Pulp Mill* case, an EIA 'must be conducted prior to the implementation of a project'.[45] Thus, an EIA is characterised by its ex-ante nature. In light of the irreversible character of damage to the environment,[46] effective implementation of an EIA *before* authorising planned activities is of critical importance in the protection of the environment and the same would hold true of the protection of the marine environment from anthropogenic GHG emissions. Under UNCLOS, the obligation to conduct an EIA is embodied in Article 206. Furthermore, the obligation to conduct a transboundary EIA is generally regarded as a rule of customary international law.[47]

Of particular note is the link between a due diligence obligation and an obligation to conduct an EIA. Indeed, the two obligations are intimately intertwined in the sense that a due diligence obligation cannot be considered fulfilled if an EIA was not carried out.[48] In fact, the ICJ, in *Pulp Mills on the River Uruguay*, held:

> '[D]ue diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.'[49]

In light of this, it can be considered that an obligation to conduct an EIA provides a legal procedure for effectuating a due diligence obligation in environmental protection.

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44 Boyle and Redgwell (n. 16), 184. For a definition of EIA, see also Convention on Environmental Impact Assessment in a Transboundary Context of 10 September 1997, 1989 UNTS 310, Art. 1, para. vi (Espoo Convention).

45 ICJ, *Pulp Mills* (n. 10), para. 205.

46 ICJ, *Gabcíkovo-Nagymaros Project* (Hungary v. Slovakia), merits, judgment of 25 September 1997, ICJ Reports 1997, 7 (para. 140).

47 ICJ, *Pulp Mills* (n. 10), para. 204; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) *and Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), merits, judgment of 16 December 2015, ICJ Reports 2015, 665 (para. 104). See also ITLOS, *Responsibilities and Obligations of States* (n. 12), para. 145; ITLOS, *2024 Advisory Opinion* (n. 11), para. 355.

48 Yoshifumi Tanaka, 'Obligation to Conduct an Environmental Impact Assessment (EIA) in International Adjudication: Interaction Between Law and Time', Nord. J. Int'l L. 90 (2021), 86-121 (93).

49 ICJ, *Pulp Mills* (n. 10), para. 204. See also ICJ, *Costa Rica* v. *Nicaragua/Nicaragua* v. *Costa Rica* (n. 47), para. 104.

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Relatedly, ITLOS, in its advisory opinion on climate change, opined that 'Article 206 therefore constitutes a "particular application" of the obligation enunciated in Article 194, paragraph 2',[50] which provides an obligation of due diligence to prevent marine pollution from anthropogenic GHG emissions.[51] If this is the case, one can say that States are obliged to conduct an EIA with regard to planned activities that may cause substantial pollution to the marine environment or significant and harmful changes thereto through anthropogenic GHG emissions in their exercise of the due diligence obligation under UNCLOS. It would seem to follow that the scope of Article 206 is to be expanded to cover anthropogenic GHG emissions through a due diligence obligation reflected in Article 194(2) of UNCLOS. This would contribute to enhancing the resilience of UNCLOS in the particular context of the ocean-climate nexus.

The problem is that Article 206 provides no further precision with regard to the content of an EIA. In this regard, the ICJ, in *Pulp Mills on the River Uruguay*, held that; 'it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment'.[52] Furthermore, the ICJ in *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica* held that 'determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case'.[53]

However, it is not suggested that States have complete discretion on this matter. As explained earlier, a due diligence obligation 'entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators'.[54] In light of this, it could be argued that States are obliged to legislate municipal law concerning an EIA and enforce it with a certain level of vigilance in order to fulfil an obligation of due diligence.

50 ITLOS, *2024 Advisory Opinion* (n. 11), para. 356.
51 ITLOS, *2024 Advisory Opinion* (n. 11), para. 258.
52 ICJ, *Pulp Mills* (n. 10), para. 205.
53 ICJ *Costa Rica* v. *Nicaragua/Nicaragua* v. *Costa Rica* (n. 47), para. 104.
54 ICJ, *Pulp Mills* (n. 10), para. 197.

3. Summary

The above discussion can be summarised as follows.

(i) In the view of ITLOS, an obligation of due diligence is at the heart of environmental norms relevant to the prevention of anthropogenic GHG emissions under UNCLOS. Due diligence obligations are embodied in Articles 194(1)(2), 192, and 197 of UNCLOS.

(ii) In light of its evolutionary nature, an obligation of due diligence can flexibly incorporate new scientific/technological knowledge reflected in BEP/BAT into relevant provisions of UNCLOS. The obligation of due diligence can also open the way to incorporate new environmental norms into the Convention that were not explicitly provided for in UNCLOS such as the precautionary approach and an ecosystem approach.

(iii) The obligation to conduct an EIA embodied in Article 206 of UNCLOS constitutes a 'particular application' of a due diligence obligation enunciated in Article 194(2) of the Convention. Under Article 206, State Parties to UNCLOS must conduct an EIA in the prevention of marine pollution from anthropogenic GHG emissions in their exercise of an obligation of due diligence. Accordingly, the scope of the obligation to perform an EIA under Article 206 is to be expanded to cover a new source of marine pollution, that is, anthropogenic GHG emissions, through a due diligence obligation.

(iv) It appears that the interstitial function of due diligence obligations can contribute to strengthening environmental norms of UNCLOS in order to address new challenges associated with climate change, thereby enhancing the resilience of the Convention. As Roland Holst pointedly observed, one can say that due diligence is a key concept that 'enables the evolution of treaty norms in light of subsequent developments, and establishes enforceable accountability, while leaving States flexibility in the implementation of their legal obligations'.[55]

III. Systemic Function of Due Diligence Obligations

The role of a due diligence obligation in enhancing the resilience of UNCLOS is not limited to its interstitial function. A systemic function of due diligence obligations also merits discussion.

55 Roland Holst (n. 36), 229. Relatedly, Proelss has argued that the due diligence-based approach 'constitutes the most promising way to operationalize Part XII UNCLOS'. Alexander Proelss, 'The Contribution of the ITLOS to Strengthening the Regime for the Protection of the Marine Environment' in: Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019), 93-105 (104 f.).

1. Mutual Supportiveness Between UNCLOS and the Paris Agreement via Due Diligence Obligations

When considering this issue, first, it is necessary to examine the relationship between UNCLOS and climate change treaties, including the Paris Agreement.[56] A question that arises in this regard is whether the particular treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, constitutes *lex specialis* in respect of the environmental obligations under UNCLOS.[57] In the view of ITLOS, the answer was 'no'. In the words of the Tribunal:

> 'In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention [UNCLOS] and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention.'[58]

Even though the maxim *lex specialis* is widely accepted, its practical application is not free from difficulties partly because the distinction between 'general' and 'special' rules is not always clear-cut.[59] The relationship between *lex specialis* and other conflict-solution techniques, such as *lex posterior derogate legi priori*, also remains unclear.[60] In any event, it is clear that the scope and aims of climate change treaties, including the Paris Agreement, significantly differ from those of UNCLOS. Accordingly, as ITLOS observed, there appears to be room for the view that the relationship between UNCLOS and the Paris Agreement is not governed by *lex specialis*.

If the relationship between UNCLOS and the Paris Agreement is not governed by *lex specialis*, it is not suggested that there is no normative interaction between the two treaties. Rather, mutual supportiveness between UNCLOS and the Paris Agreement via due diligence obligations merits discussion. For the purpose of this article, mutual supportiveness between treaties refers to 'an interpretative technique that ensures harmonious and systemic interpretation or application of rules of treaties as reinforcing each

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56 For a recent study of this issue, see Bastiaan Ewoud Klerk, 'The ILTOS Advisory Opinion on Climate Change: Revisiting the Relationship Between the United Nations Convention on the Law of the Sea and the Paris Agreement', RECIEL 34 (2025), 181-193.

57 According to the report of the study group of the ILC, *lex specialis* means that 'if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former'. ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006 [Study Group Report], 34-35, para. 56.

58 ITLOS, *2024 Advisory Opinion* (n. 11), para. 224. See also para. 223.

59 ILC, *Study Group Report* (n. 57), para. 58.

60 ILC, *Study Group Report* (n. 57), para. 58.

other'.[61] In this regard, the systemic interpretation pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties comes into play.[62]

The essence of the systemic interpretation can be found in the statement of the International Court of Justice (ICJ) in the *Namibia* advisory opinion, which stated that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[63] An illustrative example is the interpretation of Article 192 by the Annex VII arbitral tribunal in the *South China Sea* arbitral award (Merits).[64] In this case, the Annex VII arbitral tribunal read Article 192 in light of 'the corpus of international law relating to the environment' and 'other applicable international law',[65] in particular, the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES).[66] Accordingly, the Annex VII arbitral tribunal held that the general obligation to 'protect and preserve the marine environment' in Article 192 included a 'due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection'.[67] In line with systemic treaty interpretation, CITES informs the content of the due diligence obligation under Article 192 of UNCLOS. It appears that systemic treaty interpretation enhances normative

61 More generally, Pavoni defined 'mutual supportiveness' as a 'principle according to which international law rules, all being part of one and the same legal system, are to be understood and applied as reinforcing each other with a view to fostering harmonization and complementarity, as opposed to conflictual relationship'. Riccardo Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regime" Debate?' EJIL 21 (2010), 649-679 (650). It appears that the mutual supportiveness between norms is of particular importance in the protection of the environment. Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Elven International Publishing 2005), 320.

62 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331. For a detailed commentary to Article 30, see Alexander Orakhelashvili, '1969 Convention: Article 30' in: Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol. 1 (Oxford University Press 2011), 764-800; Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Brill/Nijhoff 2021), 59-84.

63 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), advisory opinion of 21 June 1971, ICJ Reports 1971, 16 (para. 53).

64 The systemic interpretation in the *South China Sea* arbitration was discussed by: Yoshifumi Tanaka, *The South China Sea Arbitration: Toward an International Legal Order in the Oceans* (Hart Publishing 2019), 135 f.

65 PCA Case No. 2013-19, *The South China Sea Arbitral Award* (n. 18), para. 941 and para. 959.

66 Convention on the International Trade in Endangered Species of Wild Fauna and Flora of 1 July 1975, 993 UNTS 243.

67 PCA Case No. 2013-19, *The South China Sea Arbitral Award* (n. 18), para. 956, para. 959.

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integration; that is, incorporation of a relevant norm set out in a treaty into another treaty, thereby promoting mutual supportiveness of the treaties.

Given that 195 States have become Parties to the Partis Agreement, it may not be unreasonable to consider that the Paris Agreement forms part of 'the corpus of international law relating to the environment' and that the Paris Agreement informs the content of the due diligence obligation set out in Article 192 of UNCLOS. The same would hold true of due diligence obligations embodied in other provisions, such as Articles 194(1)(2) and 197 of UNCLOS.[68]

By applying systemic treaty interpretation, it would appear that the Paris Agreement can inform the content of due diligence obligations embodied in Articles 192, 194(1)(2) and 197 of UNCLOS. There, due diligence obligations can serve as a nexus to link the Paris Agreement to UNCLOS, thereby strengthening the mutual supportiveness of the two treaties.

2. Relationship Between a Breach of the Paris Agreement and an Obligation of Due Diligence Under UNCLOS

An issue that arises in this context is whether due diligence obligations set out as in relevant provisions of UNCLOS, including Article 194(1), would also be breached if a State failed to fulfil the obligations under the Paris Agreement. ITLOS, in its advisory opinion on climate change, did not directly address this question. However, ITLOS stated:

> 'The Tribunal does not consider that the obligation under Article 194, paragraph 1, of the Convention [UNCLOS] would be satisfied simply by complying with the obligations and commitments under the Paris Agreement.'[69]

If compliance with the obligations under the Paris Agreement would be inadequate to satisfy the obligation under Article 194(1) of UNCLOS, it seems logical to argue that a breach of the obligations under the Paris Agreement would breach the obligation under Article 194(1). Even though a further development of the jurisprudence is needed to draw more general conclusions, it may not be unreasonable to consider that in appropriate circumstances, a breach of the Paris Agreement could be a breach of a due

68 Voigt has argued that 'the Paris Agreement needs to be considered as representing generally accepted international rules, when giving effect to Articles 192, 194, 207 and 212'. Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation', RECIEL 32 (2023), 237-249 (245).

69 ITLOS, *2024 Advisory Opinion* (n. 11), para. 223.

diligence obligation under UNCLOS. If this is the case, a State can formulate a dispute concerning a breach of the Paris Agreement as a dispute concerning an alleged breach of the due diligence obligation under UNCLOS and trigger the compulsory procedures of international dispute settlement under the Convention.

This interpretation can pave the way for climate change litigation using the UNCLOS compulsory procedures of international dispute settlement.[70] This interpretation would also highlight the role of the dispute settlement procedures under UNCLOS in combatting climate change, thereby enhancing the resilience of UNCLOS dispute settlement procedures. Furthermore, if, as explained earlier, the obligation to protect and preserve the marine environment can be considered as an obligation *erga omnes*, arguably all States, including States other than a directly injured State can have the *locus standi* in response to a breach of the due diligence obligation to prevent GHG emissions under UNCLOS. This interpretation would also open the way for 'public interest litigation'.[71] At the same time, care should be taken in noting that an excessive use of the compulsory procedures of dispute settlement might entail the risk of causing mutations of UNCLOS tribunals from the law of the sea tribunals into climate change tribunals.

3. Summary

The above discussion can be summarised in three points.

(i) According to ITLOS, the relationship between UNCLOS and the Paris Agreement is not governed by *lex specialis*. It would seem to follow that the due diligence obligation under UNCLOS would not be satisfied by complying with the obligations and commitments under the Paris Agreement only.

(ii) The Paris Agreement can inform the content of due diligence obligations set out in Articles 194(1)(2), 192, and 197 of UNCLOS through the systemic treaty interpretation. It would seem to follow that the Paris Agreement indirectly elaborates the content of due diligence obligations under UNCLOS. In this sense, UNCLOS and the Paris Agreement are mutually

70 In this regard, Boyle has argued that 'the LOSC provides a vehicle for compulsory dispute settlement notably lacking in the UNFCCC regime'. Alan Boyle, 'Litigating Climate Change Under Part XII of the LOSC', IJMCL 34 (2019), 458-481 (481). See also Meinhard Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention', Ocean Dev. Int. Law 37 (2006), 319-337; Mayer (n. 11), 160.

71 The term 'public interest litigation' was used by Christian J. Tams, 'Individual States as Guardians of Community Interests' in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011), 379-405 (383). Tanaka uses the term 'community interest litigation'. Tanaka, *South China Sea Arbitration* (n. 64), 193.

supportive. There, due diligence obligations can serve as a nexus to integrate elements of the Paris Agreement in UNCLOS.

(iii) Even though it is too early to reach any general conclusion, one cannot preclude the possibility that a breach of the Paris Agreement can constitute a breach of due diligence obligations under UNLCOS at the same time. If this is the case, as a matter of theory, it might be possible for a State to refer a dispute concerning an alleged breach of the due diligence obligation under UNCLOS that also constitutes a breach of the Paris Agreement to UNCLOS' compulsory procedures for international dispute settlement.

IV. Challenges Associated With an Obligation of Due Diligence

The considerations in sections II and III seem to reveal that due diligence obligations can contribute to enhancing the resilience of UNCLOS through their interstitial and systemic functions. However, it cannot pass unnoticed that due diligence obligations contain some issues that needs further consideration.

1. Variable Nature of Standard of the Obligation of Due Diligence

An essential question that arises in this context concerns the variable nature of the standard for due diligence. The standard of due diligence can vary according to the primary rules of international law.[72] Relatedly, ITLOS observed that 'the standard of due diligence is variable, depending upon relevant factors, including risks of harm involved in activities'.[73] Hence, it seems difficult if not impossible to identify an objective standard for due diligence in international law.[74] The absence of an objective standard for due diligence can entail the risk of undermining the normative strength of envi-

72 The ILA's Second Report took the view that 'there is no one single standard of diligence that applies to all primary sources'. ILA Study Group on Due Diligence in International Law, Second Report (Tim Stephens (Rapporteur) and Duncan French (Chair)) (the ILA's Second Report), July 2016, 20.

73 ITLOS, *2024 Advisory Opinion* (n. 11), para. 256.

74 In this regard, McDonald argued that '[t]here is no broad rule of due diligence in international law' and that 'the role of due diligence in international law is determined, on a case-by-case basis, by reference to a rule'. Neil McDonald, 'The Role of Due Diligence in International Law', ICLQ 68 (2019), 1041-1054 (1044). See also, Besson, *La* due diligence *en droit international* (n. 8), 91; Matz-Lück and van Doorn (n. 36), 189-191.

ronmental norms under UNCLOS. For example, ITLOS stressed that '[t]he standard of due diligence under Article 194, paragraph 1, of the Convention is stringent, given the high risks of serious and irreversible harm to the marine environment from such [GHG] emissions'.[75] According to ITLOS, '[t]he standard of due diligence under Article 194, paragraph 2, can be even more stringent than that under Article 194, paragraph 1, because of the nature of transboundary pollution'.[76] Without an objective standard for due diligence, however, it seems difficult to specify the 'stringent' level of the due diligence obligation under Article 194(1) and (2).

In this context, ITLOS stressed the importance of science, stating that measures under Article 194(1) of UNCLOS 'should be determined *objectively*, taking into account, *inter alia*, the best available science […]'[77] However, the concept of 'the best available science' is not wholly unambiguous and the interpretation of this concept may vary according to States. Furthermore, 'the best available science' can change over time. Thus, the question of how the consideration of 'the best available science' can be transformed to an objective standard for due diligence may seem to need further consideration.

The absence of an objective standard for due diligence can affect the application of new environmental norms incorporated into UNCLOS via due diligence obligations. For example, as discussed elsewhere, the application of the precautionary approach itself does not automatically specify measures that should be taken.[78] If, as ITLOS stated, a 'State must apply the precautionary approach in their exercise of due diligence',[79] it seems difficult if not impossible to properly assess the implementation of the precautionary approach as part of a due diligence obligation without any objective standard for due diligence. The same would be true of the ecosystem approach. In summary, new environmental norms that are incorporated through a due diligence obligation may be compromised by the obligation itself.

2. Principle of Common but Differentiated Responsibilities and Respective Capabilities

In the particular context of the ocean-climate nexus, the establishment of an objective standard for due diligence will become even more difficult due

75 ITLOS, *2024 Advisory Opinion* (n. 11), para. 243.

76 ITLOS, 2024 *Advisory Opinion* (n. 11), para. 258.

77 Emphasis added. ITLOS, *2024 Advisory Opinion* (n. 11), para. 243.

78 Yoshifumi Tanaka, *The International Law of the Sea* (4th edn, Cambridge University Press 2023), 331.

79 ITLOS, *2024 Advisory Opinion* (n. 11), para. 242.

to the significant differences of States' capabilities and resources. There, the implications of the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) for the due diligence obligation merit discussion.[80]

According to Hey and Paulini, '[t]he concept of common but differentiated responsibilities in international environmental law entails that while pursuing a common goal, […] States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake'.[81] The principle of CBDRRC was enshrined in Principe 7 of the Rio Declaration on Environment and Development.[82] Subsequently, that principle is enshrined in the UN Framework Convention on Climate Change (UNFCCC),[83] the Kyoto Protocol,[84] and the Paris Agreement.[85] Overall, one can say that CBDRRC constitutes a key principle in the UNFCCC and the Paris Agreement.[86]

UNCLOS contains no clear reference to the principle of CBDRRC. Nonetheless, ITLOS considered that the principle is reflected in Article 194 (1) and (2) of UNCLOS.[87] By incorporating the principle of CBDRRC into the due diligence obligations under Article 194(1) and (2), one can better secure the compatibility between climate change treaties and UNCLOS. At the same time, however, the implementation of the obligation of due diligence

80 Further, see Yoshifumi Tanaka, 'Principle of Common but Differentiated Responsibilities and Respective Capabilities in the ITLOS Advisory Opinion on Climate Change: A Critical Assessment', Max Planck UNYB 28 (2024) (forthcoming). It appears that the terminology of the 'concept' or the 'principle' of common but differentiated responsibilities and respective capabilities is not unified. ITLOS, in its advisory opinion of 2024, used the term the 'principle'. This article also uses the term 'the principle'.

81 Ellen Hey and Sophia Paulini, 'Common but Differentiated Responsibility' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2019), para. 1.

82 UN General Assembly, A/CONF.151/26 (Vol. I), 12 August 1992. Principle 7: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.'

83 UN Framework Convention on Climate Change of 21 March 1994, 1771 UNTS 107, Art. 3.

84 Kyoto Protocol of 16 February 2005, 2303 UNTS 162, Art. 10.

85 Paris Agreement of 4 November 2016, 3156 UNTS 79, Art. 2(2). See also Art. 4(4).

86 This principle has changed from 'common but differentiated responsibilities and respective capabilities' (Article 3 of the UNFCCC) to the principle of 'common but differentiated responsibilities and respective capabilities, in light of different national circumstances' (Preamble of the Paris Agreement). Lavanya Rajamani, *Innovation and Experimentation in the International Climate Change Regime* (Brill/Nijhoff 2020), 219.

87 ITLOS, *2024 Advisory Opinion* (n. 11), para. 229 and para. 249. ITLOS, in its advisory opinion on climate change, did not discuss the principle of CBDRRC in relation to Article 192 of UNCLOS. Even so, the same interpretation would apply to the general obligation to protect and preserve the marine environment set out as in Article 192.

is to be relativised in accordance with the principle of CBDRRC. It would seem to follow that the application of environmental norms incorporated into UNCLOS via the due diligence obligation, such as the precautionary and ecosystem approaches, will also be relativised in accordance with the principle of CBDRRC.

A major challenge that arises in this context is that the principle of CBDRRC is an extremely vague concept.[88] For example, 'capabilities' remains a vague and variable concept; it may include scientific, technical, economic, and financial capabilities.[89] Actually, capabilities and available resources significantly differ among States. It would seem to follow that the standard of due diligence will also vary significantly. Furthermore, as 'capability' is a generic term, its content may change over time. In light of the variable nature of 'capabilities' of States, adjudicative bodies may face challenges when deciding an alleged breach of due diligence obligations by a State in accordance with the principle of CBDRRC. The same would hold true of deciding an alleged breach of the precautionary and ecosystem approaches as part of the exercise of due diligence obligations.

3. Summary

The above considerations can be summarised in two points.

(i) As due diligence is a variable concept, it is difficult to identify an objective standard of due diligence in international law. In light of the absence of an objective standard, it seems difficult, if not impossible, to objectively assess whether States have complied with a due diligence obligation or whether States have properly applied the precautionary and ecosystem approach in their exercise of due diligence to prevent, reduce and control marine pollution from anthropogenic GHG emissions. Thus new environmental norms that are incorporated through a due diligence obligation can be weakened by the due diligence obligation itself.

(ii) Even though UNCLOS contains no clear reference to the principle of CBDRRC, ITLOS considered that that principle is reflected in Article 194(1) and (2) of UNCLOS. Accordingly, the application of environmental norms and technologies incorporated into UNCLOS via a due diligence obligation are to be relativised in accordance with the principle of CBDRRC.

88 Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections', Ariz. St. L. J. 49 (2017), 689-712 (696).

89 ITLOS, *2024 Advisory Opinion* (n. 11), para. 225.

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V. Conclusion

This article examined the resilience of UNCLOS focusing particularly on the obligation of due diligence obligations articulated by ITLOS in its advisory opinion on climate change. The above considerations seem to reveal that due diligence obligations can perform a dual function in the enhancement of the resilience of UNCLOS in the particular context of the ocean-climate nexus.

First, due diligence obligations can perform an interstitial function to incorporate new scientific/technological knowledge and environmental norms into treaties. Through its interstitial function, the due diligence obligation can serve as a medium for incorporating new scientific/technological knowledge and environmental norms that were underdeveloped at the time of the adoption of UNCLOS into the Convention. In so doing, a due diligence obligation can serve as an engine for enhancing the resilience of UNCLOS to address new challenges, such as marine pollution from anthropogenic GHG emissions.

Second, due diligence obligations also perform a systemic function that connects the Paris Agreement to UNCLOS. It is argued that the Paris Agreement can inform the content of due diligence obligations embodied in UNCLOS. In this sense, UNCLOS and the Paris Agreement are mutually supportive. The mutual supportiveness of the two instruments is crucial in order to strengthen the resilience of UNCLOS in the prevention of marine pollution from anthropogenic GHG emissions.

Due diligence obligations are not a panacea, however. As discussed earlier, it is difficult, if not impossible, to identify an objective standard for due diligence in light of its variable nature. The level of standard of due diligence may also vary in accordance with the principle of CBDRRC. Thus, caution is required in that the absence of an obligation standard for due diligence can entail the risk of compromising the effective application of environmental norms as part of the exercise of due diligence obligations.

Animal Welfare Conditionality in the World Bank's Legal Framework

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Abstract

The World Bank (International Bank for Reconstruction and Development [IBRD] / International Development Association [IDA]) may have passed a critical juncture in its consideration of animal welfare in the Environmental and Social Framework (ESF). This paper analyses Bank's legal framework and the extent to which animal welfare is considered. Overall, the analysis reveals an

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asymmetry in how the World Bank handles the welfare of wild versus farm animals. While the substantive welfare standards for wild animals are extremely low, a complaint can be brought fairly easily before the World Bank Accountability Mechanism. The opposite is true for farm animals. While the substantive standards for farm animals are comparably high, since an explicit standard exists in the ESF, holding the World Bank accountable for animal suffering is nearly impossible, because in many instances there are no project affected people.

Keywords

World Bank – Animal Welfare –Inspection Panel –Accountability Mechanism – Environmental and Social Framework – Sustainable Development

I. Introduction

The World Bank (IBDR/IDA) plays a pivotal role in shaping economic development policies and funding projects worldwide. Since the Bank's primary objectives are eradicating poverty and fostering sustainable development, the livestock sector plays a substantive role.[1] Currently, the World Bank has about 1.9 billion USD of active investments in livestock.[2] In providing loans to States, the Bank funds mostly small and medium-sized agribusinesses and livestock enterprises,[3] regularly exceeding 100 million USD funding per project.[4] One should not forget that behind the term 'livestock' there lies the fate of hundreds of thousands of individual animals in different projects. Because of the economic relevance of and the many animals affected by projects funded by the World Bank, calls from animal and climate activists to stop funding industrial livestock farming operations are becoming more and more prominent.[5] With the intention to contribute to the

1 FAO, Transforming the Livestock Sector Through the Sustainable Development Goals (2018), <https://www.fao.org/3/CA1201EN/ca1201en.pdf>, last access 31 January 2025.

2 World Bank, Brief Moving Towards Sustainability: The Livestock Sector and the World Bank, 22 February 2022, <https://www.worldbank.org/en/topic/agriculture/brief/moving-towards-sustainability-the-livestock-sector-and-the-world-bank>, last access 31 January 2025.

3 World Bank, Good Practice Note: 'Animal Health and Related Risks', December 2020, <https://thedocs.worldbank.org/en/doc/637081608213776430290022020/original/AnimalHealthGoodPracticeNote.pdf>, last access 11 June 2025, 42.

4 The World Bank, Project List, <https://projects.worldbank.org/en/projects-operations/projects-list?os=0>, last access 31 January 2025.

5 Jon Ungoed-Thomas, 'World Bank's Funding of "Hog Hotel" Factory Farms Under Fire Over Climate Effect', The Guardian, 7 April 2024, <https://www.theguardian.com/business/2024/apr/07/world-banks-funding-of-hog-hotel-factory-farms-under-fire-over-climate-effect>, last access 31 January 2025.

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starting discourse on the protection of animals within the context of international financial institutions,[6] this paper turns to the significance of the welfare of animals in the World Bank's legal framework. By analysing the World Bank's founding treaty[7] and its Environmental and Social Framework,[8] the goal is to assess the level of commitment to and options for the World Bank to protect the welfare of animals as well as to explore the possibility of holding the World Bank accountable for the suffering of animals.[9]

The following analysis is threefold. In order to provide a brief overview of the relationship of animal welfare and the World Bank's legal framework, the first section examines how the welfare of animals fits in the World Bank's legal framework (III.). The third section explores how to hold the World Bank to account for animal suffering (IV).

II. Animal Welfare Conditionality in the World Bank's Legal Framework

The World Bank's founding treaty governs the mandate and competences,[10] whereas the ESF governs the day-to-day operations and forms part of the internal rules of the organisation. The first part of this section focuses on the obligation to consider and protect the welfare of animals of the Bank and the borrowers under the ESF (1.). The second part of this section analyses the World Bank's competence to introduce animal welfare conditionality (2.).

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6 Anne Peters, Animals in International Law, RdC 410 (2020), 95-544 (166-174); Humane Society International: International Financial Institutions, Export Credit Agencies and Farm Animal Welfare, February 2016, <https://www.hsi.org/wp-content/uploads/assets/pdfs/international-finance-institutions.pdf>, last access 31 January 2025.

7 The World Bank Group is a family of five international organisations (IBRD, IDA, IFC, MIGA and ICSID). This paper mainly focuses on the lending activities of the IBRD and IDA, which are commonly referred to as the World Bank. Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), 27 June 2012, <https://thedocs.worldbank.org/en/doc/722361541184234501-0330022018/original/IBRDArticlesOfAgreementEnglish.pdf>, last access 31 January 2025; Articles of Agreement of the International Development Association (IDA), 24 September 1960, <https://thedocs.worldbank.org/en/doc/2a209939e876fdcd0d957036daebff6e-0410011960/original/IDA-Articles-of-Agreement-English.pdf>, last access 31 January 2025.

8 World Bank, Environmental and Social Framework, Washington DC, <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf>, last access 31 January 2025, ('ESF').

9 Other issues, such as the ethical dilemma between the welfare of animals and the survival of humans, or a critique of eurocentrism or the position of individual animals in international law will be left out despite their relevance.

10 See ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion of 8 July 1996, ICJ Reports 1996, 74 (para. 19).

1. Animal Welfare Conditionality in the Environmental and Social Framework

In 2018 the Bank introduced its new Environmental and Social Framework. The ESF has a three-fold structure consisting of a *Vision Statement*, the *Environmental and Social Policy* and ten *Environmental and Social Standards*. The *Vision Statement* is a non-binding commitment regarding environmental and social development and human rights.[11] The *Environmental and Social Policy* (ES-Policy) sets out the Bank's obligations for project financing. The *Environmental and Social Standards* (ESS) define the borrower obligations. The ESF applies to all Investment Project Financing (IPF) operations of the Bank.

The legal quality of the ESF is difficult to determine,[12] since these rules primarily bind the staff of the organisation.[13] Interestingly, however, the objectives of the ESF become binding as they are incorporated in the lending contracts between the Bank and the borrowers by an individual *Environmental and Social Commitment Plan*.[14] In such plan, the Bank and the borrower negotiate specific obligations and measures to be initiated by the borrower to achieve the objectives of the ESF.[15] Thereby, the lending contracts contain all project-relevant obligations for the borrowers to

11 ESF (n. 8), 1, para. 3; Philipp Dann and Michael Riegner, The World Bank's Environmental and Social Safeguards and the Evolution of Global Order, LJIL 32 (2019), 537-559 (551) argue that the Vision Statement could be useful for the interpretation of the ESF.

12 See Giorgio Gaja, Special Rapporteur of the International Law Commission: Third Report on the Responsibilities of International Organisations, UN Doc. A/CN.4/553, 13 May 2005, paras 18-22; see for the ESF's predecessor Daniel D. Bradlow and Andria Naudé-Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?', International Organisations Law Review 10 (2013), 3-80; for the new ESS of the World Bank Giedre Jokubauskaite, 'The Legal Nature of the World Bank Safeguards', VRÜ 51 (2018), 78-102; see also Vanessa Richard, 'Can Multilateral Development Banks Be more Environmentally Effective? Perspectives from the Practice of International Accountability Mechanisms', in: Sandrine Maljean-Dubois (ed.), *The Effectiveness of Environmental Law* (Cambridge University Press 2017), 313-344 (326 f.).

13 See Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', International Organizations Law Review 8 (2011), 397-482; Lorenzo Gasbarri, The Dual Legality of the Rules of International Organizations, International Organizations Law Review 14 (2017), 87-119.

14 ESF (n. 8), 9, paras 46-47; Dann and Riegner (n. 11), 552: argue that '*plans are not just a technical, administrative feature of the ESF, but a crucial legal site where the relative bargaining power of bank and borrower will play out in the future*'.

15 See e. g. World Bank, Burkina Faso Livestock Resilience and Competitiveness Project, P178598, Ministry of Agriculture of Animal Resources and Fisheries, Negotiated ENVIRONMENTAL AND SOCIAL COMMITMENT PLAN (ESCP), April 2023, <https://documents1.worldbank.org/curated/en/099041423132566168/pdf/P17859807310d80d0bc350fac05ce94e9f.pdf>, last access 31 January 2025.

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achieve the objectives of the ESF.[16] As a result, only the specific project-relevant parts of the ESF eventually form part of international law[17] – not the ESF as such.[18] As the Bank believes that the standards it prescribes help to realise the objectives of the Bank and those of the borrowers,[19] one may regard the ESF as quasi 'general terms and conditions': a pre-formulated basis of the Bank setting out the objectives for entering into a lending contract with a borrower.

The next paragraphs analyse the obligations of the Bank (a.) and the borrower (b.) regarding the consideration and the protection of the welfare of animals arising from the ESF.

a) The World Bank's Obligations Regarding the Welfare of Animals

The Bank itself has no obligation to consider the welfare of animals arising out of the ES-Policy. However, the ES-Policy imposes obligations regarding the conduct of the borrower. Among those are obligations regarding disclosure,[20] monitoring,[21] ongoing risk assessment,[22] supporting the borrower in implementation,[23] review of the environmental impact assessment,[24] and

16 ESF (n. 8), 9, paras 46-48; Dann and Riegner (n. 11), 552.

17 See John W. Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks', AJIL 90 (1996), 214-234.

18 However, one could argue that at least parts of the ESF become binding law if seen as a binding declaration of the bank, see on binding effect ICJ, *Nuclear Tests*, judgment of 20 December 1974, ICJ Reports 1974, 253, 267 (para. 43); ICJ, *Nuclear Tests,* judgment of 20 December 1974, ICJ Reports 1974, 457, 472 (para. 46); ICJ, *Military and Paramilitary Activities in and against Nicaragua,* merits, judgment of 27 June 1986, ICJ Reports 1986, 14 (para. 261).

19 World Bank, Environmental and Social Framework (n. 8), ix, para. 4.

20 World Bank, Environmental and Social Framework (n. 8), ES-Policy, 3-11, paras 1-65: Disclosure, para. 20 Project Classification, para. 21 Change of Classification, para. 26 Intent for UCL, para. 26 Summary of UCL Assessment, para. 51 Disclosure of Environmental Risk Documentation.

21 World Bank, Environmental and Social Framework (n. 8), ES-Policy, 3-11, paras 1-65: Monitoring, para. 56 '*The Bank will monitor the environmental and social performance of the project in accordance with the requirements of the legal agreement, including the ESCP […]. The Bank will monitor the projects on an ongoing basis in accordance with OP 10.00*'.

22 World Bank, Environmental and Social Framework (n. 8), ES-Policy, 3-11, paras 1-65, Risk Analysis and Review: para. 21 Review of Risk Classification, para. 25 Review of Borrower System, para. 33 Assessment of Environmental and Social Risks and Impacts, para. 33 Assessment of Reliability of Information and Risks to the ESS, para. 34 Due Diligence Gap Analysis in Relation to the ESS, para. 36 Review of Adequacy of National Environmental and Social Requirements Relevant to Subprojects, para. 40 Review of Adequacy of National Environmental and Social Requirements Relevant to the Project.

23 World Bank, Environmental and Social Framework (n. 8), 3-11, paras 1-65: Provide Assistance, para. 27 Strengthen the Borrowers ES Framework, para. 57 Implementation Support.

24 World Bank, Environmental and Social Framework (n. 8), 3-11, paras 1-65: review the borrower's environmental impact assessment para. 32.

stakeholder involvement.[25] Notably, the wording in the ESF of the Bank's obligations changed compared to the ESF's predecessor. In particular, the verb '*to ensure*' has been replaced by the verb '*to require*'. It remains debated whether this change was a simple harmonisation of language or if it did water down the Bank's obligations.[26]

Obligations of the borrower to consider and protect the welfare of animals can be found in several parts of the ESS.[27] Of particular importance are the borrower's obligations under ESS6: '*Biodiversity Conservation and Sustainable Management of living Resources*'. In the following the obligations regarding the welfare of farm animals (b) and wild animals (c) are discussed.

b) The Protection of the Welfare of Farm Animals

Obligations of borrowers to consider and protect the welfare of farm animals are directly addressed in ESS6. Borrowers must apply *Good International Industry Practice* (GIIP) in livestock operations.[28] However, a definition of GIIP is absent. Nevertheless, a footnote attached to the term GIIP refers to the *Good Practice Note* (GPN) on animal welfare of the World Bank's sister organisation, the International Finance Corporation (IFC).[29]

The Inspection Panel, the Bank's administrative tribunal, paid particular attention to this reference in the *Vietnamese Livestock Case.* In January 2017,

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25 World Bank, Environmental and Social Framework (n. 8), ES-Policy, 3-11, paras 1-65: para. 26.

26 *Chistina Passoni, Ariel Rosenbaum and Eleanor Vermunt,* 'Empowering the Inspection Panel: The Impact of the World Bank's New Environmental and Social Safeguards', N. Y. U. J. Int'l L. & Pol. 49 (2017), 922-958 (929-931, esp. fn. 34); see also Inspection Panel, Comments on the Second Draft of the Proposed ESF, 17 June 2015, <https://consultations.worldbank.org/sites/default/files/documents/Inspection%20Panel%20Comments%20on%202nd%20Draft%20ESF%20-%2017 %20June%202015.pdf>, 4 December 2023, 2.

27 Peters (n. 6), 167, with reference to: ESS3: 'Resource efficiency and pollution prevention and management', ESS4: 'Community health and safety', ESS5: 'Land acquisition, land use restrictions and involuntary resettlement', and ESS6: 'Biodiversity conservation and sustainable management of living resources'.

28 World Bank, Environmental and Social Framework (n. 8), ESS6, 67-72, paras 37, 72.

29 See IFC, Good Practice Note: Improving Animal Welfare in Livestock Operations, Washington DC, 2014, <https://www.ifc.org/wps/wcm/connect/c39e4771-d5ae-441a-9942-dfa4add8b679/IFC+Good+Practice+Note+Animal+Welfare+2014.pdf?MOD=AJPERES&CVID=kGxNx5 m>, 4 December 2023; The strategy behind the reference to the IFC GPN is to avoid depending on WBG external decision makers see European Commission, Directorate General Health and Food Safety: Study on the impact of animal welfare international activities: volume I, main text: final report, Publications Office, 2017, <https://data.europa.eu/doi/10.2875/745687>, last access 31 January 2025, 122.

two Vietnamese animal welfare organisations claimed that a project had failed to consider the welfare of animals in both staff training and consultation with animal welfare organisations.[30] The Panel rejected the case since the ESF was not applicable *ratione tempore*.[31] In the following *obiter dictum* the Panel used the animal welfare definition of the World Organisation for Animal Health (WOAH)[32] Terrestrial Animal Health Code and recognised the importance of animal welfare. It stated that, in case the ESF had been applicable, its reference to the IFC's GPN would have provided an acceptable standard for assessing animal welfare concerns.[33] Thereby the Panel confirmed – *argumentum e contrario* – the binding legal nature of the reference in ESS6. It follows that the IFC's GPN sets out the objectives of the ESF and applies to the borrower and the staff of the Bank. In essence, the IFC's GPN hardens to the binding minimum standard for the welfare of animals.

Due to the wording of the footnote attached to the reference to the term animal welfare, the ESF only binds large scale producers.[34] A definition of large-scale producers, however, is absent in the ESF. As the Bank describes its own livestock investment as mostly small- and medium-sized, it is unclear whether the standards apply to any of the current projects. The *Vietnam Livestock Case* unfortunately does not provide orientation as the project in question did not concern large-scale commercial farming.[35]

The IFC's GPN[36] itself includes a large collection of national and international standards for the welfare of animals. All in all, it mentions about 24 different standards and rulesets. These standards are organised in groups such as transport, aquaculture, pigs, or slaughter. Regularly, the IFC's GPN provides more than one standard for a sector or a production step, making it difficult in practice to specify the applicable obligation. The potpourri of

30 Inspection Panel, Vietnam Livestock Competitiveness and Food Safety Project (P090723) and Vietnam Livestock Competitiveness and Food Safety Project Additional Financing (P151946), Request for Inspection, 12 January 2017, 1-5.

31 Inspection Panel, Vietnam Livestock Case (2017) (n. 30), Request for Inspection, 12 January 2017.

32 Formerly known as OIE.

33 Inspection Panel, Vietnam Livestock Case (2017) (n. 30), Notice of Non-Registration, 27 March 2017, para. 13.

34 World Bank, Environmental and Social Framework (n. 8), ESS6, 72, para. 34: 'The Borrower involved in the industrial production of crops and animal husbandry will follow GIIP to avoid or minimize adverse risks or impacts. The Borrower involved in large-scale commercial farming, including breeding, rearing, housing, transport, and slaughter of animals for meat or other animal products (such as milk, eggs, wool) will employ GIIP[19] in animal husbandry techniques, with due consideration for religious and cultural principles.'

35 Inspection Panel, Vietnam Livestock Case (2017) (n. 30), Notice of Non-Registration, 27 March 2017, para. 13.

36 IFC, Good Practice Note (2014) (n. 29).

rules can be explained by the original function of the GPN. In the context of the IFC, the GPN is not a binding standard but shall only provide guidance and orientation in project structuring or in its pursuit. In the context of investment project financing, however, one must find the best suited standard for each specific situation. To define the applicable standard is an obligation of the Bank, as it introduces the standard to the borrower.

In addition to the IFC's GPN, the World Bank published a Good Practice Note on *Animal Health and Related Risks* in 2020.[37] Since the ESF does not reference it, it is not binding. In comparison to the GPN of the IFC, the Bank's GPN deals exclusively with farm animals. The Bank's GPN focuses on supporting implementation of rules in opposition to setting new standards for animals. It places the responsibility on farmers, breeders, and users.[38] Borrowers should at least strive to implement internationally recognised standards. Both GPNs emphasise the standards of the WOAH.[39] Both GPNs attach particular importance to the welfare of animals when this is likely to generate an economic benefit.[40] However, in the IFC's GPN, individual standards exist that provide for the welfare of animals without a link to economic considerations.[41] For example, the IFC's GPN states for aquacultures: '*The water supply should […] ensure the welfare of the farmed species. The physical environment should be designed, sited, and maintained to promote the health and welfare of the animals.*'[42]

c) The Protection of the Welfare of Wild Animals

As a matter of fact, animal welfare is not solely a matter of farm animals. In the ESF, however, the welfare of wild animals forms part of biodiversity standards. This can be seen in some cases where the Inspection Panel ruled

37 World Bank, Good Practice Note (2020) (n. 3).

38 World Bank, Good Practice Note (2020) (n. 3), 42.

39 IFC, Good Practice Note (2014) (n. 29), 21-23; World Bank, Good Practice Note (2020) (n. 3), 42-44.

40 Peters (n. 6), 170, suspects the strategy of fending off *ultra vires* claims.

41 IFC, Good Practice Note (2014) (n. 29), 14. See also 14: Animals should be handled using low-stress methods, equipment and facilities that allow animals to move calmly; 15: Food and water […] should be provided in such a way that all animals have the opportunity to eat or drink without undue competition; 16: Animals that have access to exercise or live outdoors should have access to shade and shelter; 17: No electric spikes or pricks should be used when catching, loading, unloading or moving pigs.; 18: Prior to slaughter, animals should be restrained using appropriate handling techniques, lighting, space and ventilation; 18: All animals must be handled, restrained, rendered unconscious until dead and slaughtered in as painless a manner as possible by trained and competent personnel.

42 IFC, Good Practice Note (2014) (n. 29), 14.

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on the basis of the predecessor of the ESF. For example, in the *Ecosystem Conservation and Management Project Case* the Panel referred to the fact that the broadening and design of the drainage system of a street through the rain forest of Sri Lanka would have prevented smaller animals from passing the street.[43]

The ESF refers to biodiversity and natural habitats in ESS6.[44] Where risks for biodiversity are identified, borrowers must develop and implement a *Biodiversity Management Plan*.[45] The legal force of such plan is debatable, since it could either be a standalone document or be included in the *Environmental and Social Commitment Plan*.

Further, ESS6 commits borrowers to a zero-net loss of biodiversity.[46] A fourfold mitigation hierarchy of avoiding, minimising, mitigating, and offsetting applies to borrowers. In modified habitats there is no requirement of zero net loss and impacts must only be avoided, minimised, or mitigated 'as appropriate'. ESS6 determines the importance and level of protection of biodiversity and habitats by their vulnerability and irreplaceability. The calculation of their specific value considers *inter alia* the value attributed by affected persons.[47]

However, ensuring the welfare for individual animals is mostly impossible: Firstly, the ESF contains a duty to biodiversity offsets.[48] Biodiversity offsets aim to bring benefits to biodiversity by countering the losses from development.[49] The ESF states that offsets must be designed and implemented to achieve measurable, additional, and long-term conservation outcomes.[50] The long-term orientation of offsets impedes the consideration of the welfare of an animal because short and mid-term suffering of animals are tolerated. Additionally, the welfare of individual animals is covered only to a minor extent since the inclusion of habitat protection allows only the consideration of groups of animals.

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43 Inspection Panel, Case-145, IPN Request RQ 19/15, *Ecosystem Conservation and Management Project Case*, Report No. 146090-LK, Report and Recommendation on a Request for Inspection, 14 February 2020, Management Response, para. 28.

44 World Bank, Environmental and Social Framework (n. 8), ESS6, 67-72, paras 37-72; see also Paul Paquet and Chris Darimont, 'Wildlife Conservation and Animal Welfare: Two Sides of the Same Coin?', Animal Welfare 19 (2010), 177-190 (179).

45 World Bank, Environmental and Social Framework (n. 8), ESS6, 68, para. 9.

46 World Bank, Environmental and Social Framework (n. 8), ESS6, 69, para. 16.

47 World Bank, Environmental and Social Framework (n. 8), ESS6, 68, para. 8.

48 World Bank, Environmental and Social Framework (n. 8), ESS6, 69, para. 15.

49 Jonathan Morley, Graeme Buchanan, Edward T. A. Mitchard and Aidan Keane, Implications of the World Bank's Environmental and Social Framework for Biodiversity, Conservation Letters 14 (2021), <https://doi.org/10.1111/conl.12759>, last access 31 January 2025, 1-6 (2-3).

50 World Bank, Environmental and Social Framework (n. 8), ESS6, 69, para. 16.

In any case, borrowers are bound by the precautionary principle and GIIP in all operations.[51] The ESF references the *Environmental, Health and Safety Guidelines* (EHSG)[52] for GIIP.[53] Thereby EHSGs represent a binding standard for borrowers.[54] The EHSG system is organised in one general guideline and 61 sector-specific guidelines. None of the EHSGs required the inclusion of welfare of wildlife explicitly. Yet ESS3 '*Resource Efficiency and Pollution Prevention and Management*' may indirectly protect wild animals because national law may apply to the project if national law offers a higher level of protection than the EHSGs.[55] However, the borrower only has to use technically and financially feasible methods.[56] The concern for individual wild animals' welfare plays a subordinate role, as long as it does not result in a biodiversity loss.

To conclude, biodiversity as a standard is inadequate to protect the welfare of animals. This is not least due to its anthropocentric orientation of the protection of biodiversity.[57] However, conservation strategies might also benefit the welfare of animals.[58]

d) Interim Conclusion

Overall, the ESF plays a crucial role in addressing animal welfare concerns within the project financing of the World Bank. Animal welfare is inherent to specific parts of the ESF, particularly in ESS6, which addresses biodiversity conservation and the sustainable management of living resources. The lack of a specific definition for GIIP and the potpourri of diverse standards within the IFC's GPN present challenges in defining the precise obligation of the borrower on an abstract level. While the welfare of

51 World Bank, Environmental and Social Framework (n. 8), ESS6, 68, para. 12.

52 IFC, Environmental, Health and Safety Guidelines, 30 April 2007, <https://www.ifc.org/wps/wcm/connect/29f5137d-6e17-4660-b1f9-02bf561935e5/Final%2B-%2BGeneral%2BEHS%2BGuidelines.pdf?MOD=AJPERES&CVID=nPtguVM>, 4 December 2023.

53 World Bank, Environmental and Social Framework (n. 8), x, para. 11.

54 World Bank, Environmental and Social Framework (n. 8), ES-Policy, 6, paras 18-19. However, the EHSGs are available to the extent that borrowers can deviate from them by citing their stage of development or project-specific circumstances.

55 World Bank, Environmental and Social Framework (n. 8), ESS3, 39-43, 40, para. 11.

56 World Bank, Environmental and Social Framework (n. 8), ESS3, 39, para. 4.

57 Guillaume Futhazar, 'Biodiversity, Species Protection and Animal Welfare in International Law', in: Anne Peters (ed.): *Studies in Global Animal Law* (Springer 2020), 95-108 (99); Paquet and Darimont (n. 44), 186.

58 See also Stuard R. Harrop, 'From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission', Journal of International Wildlife Law and Policy 6 (2003), 79-104 (100-104); Futhazar (n. 57), 105.

farm animals is addressed through the IFC's GPN, the welfare of wildlife is indirectly covered by biodiversity and habitat protection. Nonetheless, protecting individual welfare of animals proves challenging due to the focus of biodiversity on groups and the long-term nature of conservation efforts. Despite these deficiencies, the ESF introduces borrowers to an animal welfare conditionality while occasionally emphasising the specific moral significance of animal welfare.

2. The World Bank's Mandate to Introduce Animal Welfare Conditionality

In light of the above-mentioned standards and their respective shortcomings, one might ask whether the Bank has already done everything within its power to protect the welfare of animals – whether it has fully exercised its mandate and the power derived from it. The wording of the Bank's founding treaty does not contain an explicit competence to introduce animal welfare conditionality. Moreover, it demands a strict economic orientation.[59] Consequently, in order to consider the introduction of animal welfare conditionality as a competence arising from the founding treaty, the welfare of animals must be linked to economic advantage.[60] Essentially, as long as animal welfare contributes to animal productivity,[61] the Bank may introduce it in its lending policies.

The Bank has limited competences. Occasionally, however, the Bank has pushed these limits, while remaining conscious to avoid allegations of illegitimate overreach.[62] In the World Bank's legal framework, three legal aspects

59 Arts I, III Section 5, IV Section 10 Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), 27 June 2012, <https://thedocs.worldbank.org/en/doc/722361541184234501-0330022018/original/IBRDArticlesOfAgreementEnglish.pdf>, last access 31 January 2025.

60 See for such benefits Marian Stamp Dawkins, 'Animal Welfare and Efficient Farming: Is Conflict Inevitable?', Animal Production Science 57 (2017), 201-208; Szilvia Vetter, László Vasa and László Ózsvári, 'Econmic Aspects of Animal Welfare', Acta Polytechnica Hungarica 11 (2017), 119-134 (127-131).

61 Linda Keeling et. al., 'Animal Welfare and the United Nations Sustainable Development Goals', Frontiers in Veterinary Science 6 (2019), Article 336, <https://doi: 10.3389/fvets.2019.00336>, last access 31 January 2025, 1-12 (3).

62 Ibrahim Shihata, 'Democracy and Development', ICLQ 46 (1997), 635-643 (639 f.); Gunther Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change Towards Sustainable Development', AJIL 92 (1998), 642-665 (639 f., 648); Anne Peters, 'Constitutional Theories of International Organisations: Beyond the West', Chinese Journal of International Law 20 (2021), 649-698 (658); Dimitri Van Den Meerssche, 'The Evolving Mandate of the World Bank, How Constitutional Hermeneutics Shaped the Concept and Practice of Rule of Law Reform', The Law and Development Review 10 (2017), 89-118 (92-95).

govern the limits of interpretating its mandate. Firstly, the mandate for sustainable development may serve as a means to introduce animal welfare conditionality (a). Secondly, the Bank must not engage in any political activity (b). Thirdly, the practice of other international financial institutions can be considered (c).

a) The Mandate for Sustainable Development as a Means to Introduce Animal Welfare Conditionality

In recent years, the World Bank has increasingly become a promoter of sustainable development.[63] However, the welfare of animals is often overlooked in discussions and decision-making processes of sustainable development. The structural deficit of sustainable development regarding the welfare of animals roots in the underlying principle of integration which finds its origins in international environmental law and demands an integrative balancing of environmental, social, and economic interests.[64] These three interests form the three pillars of sustainable development.[65] A clear allocation of a concern to one pillar of sustainable development[66] is a necessary precondition for such integration and balancing.

63 See Makane Moise Mbengue and Stéphanie Moerloose, 'Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development', The Law and Development Review 10 (2017), 389-424; David Freestone, 'The World Bank and Sustainable Development', in: David Freestone (ed.), *The World Bank and Sustainable Development – Legal Essays* (Martinus Nijhoff 2013), 7-41 (9-17); Handl (n. 62), 3 f.; see also Copenhagen Declaration on Social Development in Report of the U. N. World Summit for Social Development, U. N. Doc. A/Conf.166/9, 14 March 1995, para. 26, Commitment 2 paras g & h.

64 UNGA Res 19/2 of 28 June 1997, A/RES/19/2, Annex, paras 23-24; Rüdiger Wolfrum, 'Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law', RdC 416 (2021), 161 f.; Philippe Sands and Jaqueline Peel, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018), 217 f.; Nico Schrijver, 'The Evolution of Sustainable Development in International Law: Inception Meaning and Status', RdC 329 (2007), 217-412 (372 f.).

65 UNGA Res 57/253 of 21 February 2003, A/RES/57/253: 'Reaffirming the need to ensure a balance between economic development, social development and environmental protection as interdependent and mutually reinforcing pillars of sustainable development.'

66 *See United Nations,* Report of the World Summit on Sustainable Development, UN Doc. A/CONF-199/20, 4 September 2002, 6, para. 5; Schrijver (n. 64), 372 f.; Virginie Barral, 'The Principle of Sustainable Development', in: Ludwig Krämer and Emanuela Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018), 103-114 (106-107).

The concept of animal welfare eludes a definite classification of either a purely economic, social or an environmental concern.[67] The welfare of animals is never considered *per se*. It follows, that the welfare of animals only becomes relevant if it causes negative externalities to other pillars, revealing a fragmented picture.

The environmental pillar itself refers only to the protection of habitats, ecosystems, or endangered species.[68] Animal suffering becomes a negative externality when causing environmental damage.[69]

Prominently, the suffering of animals becomes a negative externality for the social pillar when it develops into a health hazard for humans, as seen in the Covid-19 pandemic.[70] In this regard, the One Health approach highlights the interdependencies between human and animal health within the broader ecological framework.[71] It underscores the crucial need for a holistic, interdisciplinary collaboration to effectively tackle complex health challenges. By promoting a shift towards a more inclusive and compassionate worldview, the One Health approach promises a less anthropocentric starting point,[72] without, however, being eco-centric.[73] Despite such broadening perspective, animal welfare cannot be deduced from One Health itself, because its primary focus lies in the interconnectedness of health across species, the consideration of animals does not automatically imply the imperative not to harm an animal. Nonetheless, One Health presents a more tangible approach

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67 See Elien Verniers, 'Bringing Animal Welfare Under the Umbrella of Sustainable Development: A Legal Analysis', RECIEL 30 (2021), 349-362 (351).

68 Kate Rawles, 'Sustainable Development and Animal Welfare: The Neglected Dimension', in: Jacky Turner and Joyce D'Silvia (eds), *Animals, Ethics, and Trade: The Challenge of Animal Sentience* (Earthscan 2006), 208-216 (209 f.); Futhazar (n. 57), 101-104; Kristen Stilt, 'Rights of Nature, Rights of Animals', Harv. L. Rev. F. 134 (2021), 276-285 (276-278).

69 Vetter, Vasa and Ózsvári (n. 60), 123.

70 Cleo Verkuijl et al., 'Mainstreaming Animal Welfare in Sustainable Sevelopment – A Policy Agenda', Background Paper May 2022, Stockholm+50 Background Paper Series 2022, <https://www.sei.org/wp-content/uploads/2022/05/animal-welfare-stockholm50backgroundpaper.pdf>, last access 31 January 2025, 5.

71 See for One Health approach FAO, <https://www.fao.org/one-health/en>, last access 31 January 2025; see also World Bank, Brief: Safeguarding Animal, Human and Ecosystem Health: One Health at the World Bank, 3 June 2021, <https://www.worldbank.org/en/topic/agriculture/brief/safeguarding-animal-human-and-ecosystem-health-one-health-at-the-world-bank>, last access 31 January 2025.

72 Lauren E. Van Patter, Julia Linares-Roake and Andrea V. Breen, 'What Does One Health Want?: Feminist, Posthuman and Anti-Colonial Possibilities', One Health Outlook 5 (2023); Simon Coghlan, Benjamin John Coghlan, Anthony Capon and Peter Singer, 'A Bolder One Health: Expanding the Moral Circle to Optimize Health for All', One Health Outlook 3 (2021).

73 Anne Peters, 'One Health – One Welfare – One Rights', Verfassungsblog, 1 April 2024, doi: 10.59704/0e96426ad7c67295.

to position and categorise animal welfare within the three pillars of sustainable development.

Both the welfare and the suffering of animals can negatively impact the economic pillar. While the welfare of animals can be made a borrower obligation when it increases productivity, it becomes a negative externality for the economic pillar whenever it impedes progress or production capacity. The Bank would not be able to demand welfare standards which could not be implemented economically. Rather, the Bank would – theoretically – be allowed to demand tighter spaces for animals to increase the overall production.

The Sustainable Development Goals are not helping to integrate animal welfare into sustainable development since the welfare of animals is not covered by the Sustainable Development Goals themselves but becomes relevant in multiple places simultaneously,[74] which led to the identification of animal welfare as a missing element of the 2030 Agenda.[75]

In conclusion, sustainable development can be made a vehicle for animal welfare, as it captures animal suffering. Nevertheless, sustainable development focuses on the impacts of animal suffering on humans and the environment, rather than the suffering of animals themselves. While the welfare of animals is often included by considerations of sustainable development, it is not considered solely for the benefit of animals, but rather for the benefit of humans and the environment. Hence, the anthropocentric orientation of sustainable development prevents a holistic introduction of animal welfare conditionality.

Still, the World Bank has an implicit mandate to demand animal welfare within the limits of sustainable development. This includes considerations of animal welfare within environmental, social, and economic interests. However, the exercise of its mandate remains rather cautious and applies only to farm animals. Even in this area, the Bank's approach is relatively restrained. Moreover, the principle of sustainable development does not, in itself, preclude the introduction of stricter standards.

74 Ingrid J. Vissen-Hamakers, The 18th Sustainable Development Goal, Earth System Governance 3 (2020), 1-5; Keeling et al. (n. 61); Gabriela Olmos Antillón et al., 'Animal Welfare and the United Nations Sustainable Development Goals – Broadening Students Perspectives', Sustainability 13 (2021), doi: 10.3390/su130633-28.

75 Independent Group of Scientists appointed by the Secretary-General, Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development, (United Nations, New York 2019), <https://sdgs.un.org/gsdr/gsdr2019>, last access 31 January 2025, 117.

b) Animal Welfare Conditionality and the Prohibition of Political Activity

The introduction of strict animal welfare conditionality to a borrowing state may quickly face the accusation of imposing western values or politics on developing countries. As the Bank's founding treaty prohibits to take political considerations into account,[76] it ensures the Bank's political neutrality.[77] Conceptually, the term political is defined as an antithesis.[78]

Political may be what is not economical. Accordingly, animal welfare lending policies are not political in case of a direct economic benefit.

Conversely, *political* may be what is not international. Such interpretation is in line with the historical purpose of the prohibition to open the Bank to non-capitalist countries.[79] To evaluate what is international, one may draw an analogy to the prohibition of intervention which protects the *domaine réservé* as the *political sphere* of a state.[80] What constitutes a *political* activity would then depend on the general development of international law.[81] The topic of animal welfare internationalised in recent years,[82] yet no global treaty exists. Further, domestic legislation is too diverse to extract a general principle of animal welfare.[83] As of today, the welfare of animals has not (yet)

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76 Arts I, III Section 5, IV Section 10 Articles of Agreement (IBRD) (n. 59); Art. V Section 6 Articles of Agreement (IDA) (n. 7).

77 Maria Rosaria Mauro, 'The Protection of Non-Economic Values and the Evolution of International Economic Organizations' in: Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill Nijhoff 2015), 244-274 (251 f.).

78 Carl Schmitt, *The Concept of the Political – Expanded Edition*, translated by George Schwab (The University of Chicago Press 2007), 20 ff.; see polarity legal and political ICJ, *Conditions of Admission of a State to Membership in the United Nations*, Individual Opinion M. Alvarez, ICJ Reports 1957, 69.

79 Stephanie Killinger, Das unpolitische Mandat der Weltbank (Carl Heymanns 2003), 91-96.

80 Handl (n. 62), 648.

81 PCIJ, *Tunis-Morocco Nationality Decrees,* judgment no. 4 of 7 February 1923, Series B, 24; PCIJ, *The Case of the S.S. 'Lotus',* judgment no. 10 of 7 September 1927, Series A, 19; Robert Jennings and Arthur Watts, *Oppenheim's International Law*, Vol. I (9th edn, Longman 1992), 457; see also Samuel A. Bleicher, 'UN v. IBRD: A Dilemma of Functionalism', IO 24 (1970), 31-47 (41 f.).

82 Ian Robertson and Paula Sparks, 'Animal Law – Historical, Contemporary, and International Developments' in: Andrew Knight, Clive Phillips and Paula Sparks (eds), *The Routledge Handbook of Animal Welfare* (Routledge 2023), 366-378; Steven White, 'Into the Void: International Law and the Protection of Animal Welfare', Global Policy 4 (2013), 391-398.

83 Peters (n. 6), 142 f.; see also Katie Sykes, '"Nations Like Unto Yourselves": An Inquiry Into the Status of a General Principle of International Law on Animal Welfare', Can. Yb. Int'l L. 49 (2011), 3-49 (10-17); Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd edn, Cambridge University Press 2010), 672-699.

comprehensively been emancipated from the *domaine réservé* of States. Hence, the Bank has no general implicit mandate for animal welfare beyond the framework of sustainable development.

A new approach to interpret the prohibition on political activity involves using the Bank's own practices.[84] This method of interpretation is especially suited to the organisation as organs of the Bank itself have the mandate to interpret its own mandate.[85] The relevant practice is set out in the Use of Borrower's Environmental and Social Framework (UBESF).[86] The practice allows domestic frameworks to be used as a binding standard between the Bank and the borrower instead of standards of the Bank if the domestic standards are higher compared to the ESF.[87] The determination of what is considered political activity is therefore based on the individual assessment of each borrowing state.

The last approach marks a general shift from an assessment that everything beyond international minimum standards would be considered a political activity to an individual determination in the relation to each borrower. This is in line with the purpose of UBESF to protect national sovereignty – ensured by the borrower's consent.[88] While the UBESF theoretically weakens the Bank's role as a standard setter, it also opens the door for highly diverse approaches to protection. However, the use of the framework is limited, as most domestic frameworks stay behind the ESF standards in practice.[89]

84 See ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, advisory opinion of 9 July 2004, ICJ Reports 2004, 136 (para. 28); ICJ, Nuclear Weapons (n. 10), para. 27; ICJ, Whaling in the Antarctic (Australia v. Japan), judgment of 31 March 2014, ICJ Reports 2014, 226 (para. 83); ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice with Commentaries', UN Doc. A/73/10, 93; Kirsten Schmalenbach, 'Acts of International Organizations as Extraneous Material for Treaty Interpretation', NILR 69 (2022), 271-293 (278-280) linking practice of organs of international organisations to Article 31(3) VCLT. See also Peter Quayle, 'Treaties of a Particular Type: The ICJ's Interpretative Approach to the Constituent Instruments of International Organizations', LJIL 29 (2016), 853-877 (867 f.).

85 Article IX Articles of Agreement; see also Ervin Hexner, 'Interpretation by Public International Organisations of Their Basic Instruments', AJIL 53 (1995), 341-370 (350).

86 Formerly called: Use of Country System, see Stéphanie de Moerloose, 'Sustainable Development and the Use of Borrowing State Frameworks in the New World Bank Safeguards', VRÜ 51 (2018), 53-77 (58).

87 World Bank, Environmental and Social Framework (n. 8), ESS1, 17-18 (paras 19-22).

88 Moerloose (n. 86), 53-77; see also Inspection Panel, *Investigation Report South Africa: Eskom Investment Support Project*, 21 November 2011, para. 111, <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/65-Investigation%20Report%20%28English%29.pdf>, last access 31 January 2025 citing World Bank, Expanding the use of country systems in Bank-supported operations: issues and proposals, <http://documents.worldbank.org/curated/en/856881468780905107/Expanding-the-use-of-country-systems-in-Bank-supported-operations-issues-and-proposals>, last access 31 January 2025.

89 Moerloose (n. 86), 58.

Animal welfare conditionality is never political, if the lending policies prescribe international minimum standards for animal welfare. However, the Bank and the borrower may bilaterally agree on a standard higher than the minimum.

In conclusion, the Bank's stated purpose and prohibition on taking political considerations into account suggest that it may consider animal welfare in its decision-making as long as there might be a direct economic benefit. The Bank's use of UBESF, however, also allows for a borrower specific determination of what is considered political activity.

c) The Practice of International Financial Institutions Regarding Animal Welfare Conditionality

There is a growing trend among international financial institutions to consider animal welfare in their policies and practices. Some institutions, such as the European Bank for Reconstruction and Development (EBRD),[90] the Inter-American Development Bank (IDB),[91] the World Bank (IBRD/IDA), and the IFC have adopted specific rules or guidelines related to animal welfare. Others specifically finance projects related to animal welfare such as the Asian Development Bank (ADB)[92] or the Asian Infrastructure Investment Bank (AIIB).[93] In 2021, the IDB dropped a USD 43 m loan for Marfrig Global Foods' Brazilian beef operations due to public pressure regarding the project's impact on deforestation, land grabbing, and human rights.[94] Among

90 Peters (n. 6), 169; EBRD, Environmental and Social Policy 2019, <https://www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html>, last access 31 January 2025, 38 (para. 24).

91 IADB, Environmental and Social Policy Framework, 31 October 2021, <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-110529158-160>, last access 31 January 2025, GL-131.

92 ADB, Project in India: Zenex Improved Animal Health and Welfare Project, Project No: 55240-001, Approved: 30 September 2022, <https://www.adb.org/projects/55240-001/main>, last access 31 January 2025.

93 Joint Project of the AIIB and the ADB, Cambodia: Cross-Border Livestock Health and Value-Chain Infrastructure Improvement Project, Project No: P000707, <https://www.aiib.org/en/projects/details/2022/proposed/Cambodia-Cross-border-Livestock-Health-and-Value-chain-Infrastructure-Improvement-Project.html>, last access 31 January 2025.

94 IDB, Marfrig Global Foods, Project No: 13032-02, Status: Inactive, <https://www.idbinvest.org/en/projects/marfrig-global-foods-0>, last access 31 January 2025; Ana Mano and Jake Spring, 'IDB and Marfrig End Talks on $200 mln Sustainability Loan', Reuters, 24 February 2022, <https://www.reuters.com/business/sustainable-business/idb-marfrig-end-talks-200-million-sustainability-loan-2022-02-23/>, last access 31 January 2025; Friends of the Earth, 'IDB Invest Drops Controversial Loan to Brazilian Beef Giant Marfrig Global Foods', 23 February 2022, <https://foe.org/news/idb-drops-loan-marfrig/>, last access 31 January 2025.

the nearly 200 organisations that sent an open letter of protest to the Board of Directors were many animal welfare organisations.[95]

In summary, the practices among international financial institutions regarding animal welfare vary widely, which means that suggesting a precise rule or legal conclusion may be difficult. Yet this practice indicates that these institutions generally view animal welfare as falling within their mandate and being part of sustainable development.

All in all, the Bank stayed within the limits of its mandate in its introduction of animal welfare conditionality. Nevertheless, it remained cautious in doing so.

III. The World Bank's Accountability for the Suffering of Animals

Last but not least, we must raise the question of accountability. In 2020, the World Bank introduced its new Accountability Mechanism to ensure compliance with the ESF.[96] Under the umbrella of the Accountability Mechanism two distinct institutions exist. The first body is the Inspection Panel which was originally established in 1993 as an administrative tribunal.[97] The second body is the Dispute Resolution Service, a new and independent mechanism to provide individuals and borrowers with a voluntary dispute resolution mechanism. In the past, Non-Governmental Organisations (NGOs) already asserted animal interests in front of the Inspection Panel.[98]

95 Open Letter to the IDB-Board of Directors, 19 October 2021, <https://foe.org/wp-content/uploads/2022/02/IDB-Letter-Signatories-Formatted_281.docx.pdf>, last access 31 January 2025.

96 World Bank, The World Bank Accountability Mechanism, Resolution No. IBRD 2020-0005, Resolution No. IDA 2020-0004, 8 September 2020.

97 Inspection Panel, Resolution No. IBRD 93-10, Resolution No. IDA 93-6: 'The World Bank Inspection Panel', 22 September 1993: as amended on 8 September 2020: Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003 ('Inspection Panel Resolution').

98 Inspection Panel, *Ecosystem Conservation* (n. 43), para. 28; Inspection Panel, Vietnam Livestock Case (2017) (n. 30), Request for Inspection, 12 January 2017, 5; Inspection Panel, Case-7, *Argentina, Paraguay: Yacyretá Hydroelectric Project,* 1996, Panel Request for Inspection, INSP/ R 96-2, 26 December 1996, 15, paras 52-54; see for representation before the Inspection Panel Stefanie Ricarda Roos, 'The World Bank Inspection Panel in Its Seventh Year: An Analysis of Its Process, Mandate, and Desirability With Special Reference to the China (Tibet) Case', Max Planck UNYB 5 (2001), 473-521 (487-494).

1. The Inspection Panel's Competence to Review a Borrower's Breach of Obligation

A complaint must relate to a breach of obligation by the Bank that caused the borrower to fail its own obligation.[99] However, it is controversial if the Panel has the competence to review breaches of obligations by the borrower. Complaints relating to borrower obligations are inadmissible,[100] originating in the prohibition to interfere in internal affairs.[101] However, the competence to review the borrower's breach of obligation is a necessary condition to assess if the Bank's breach has caused the borrower to breach its obligation.[102] Due to the *Environmental and Social Commitment Plan*, the obligations of the borrower are no longer in his *domaine réservé*.[103] Hence, a review of the borrower's conduct would not constitute an unjust interference. In practice, the Panel claims such competence, albeit stressing that the Bank alone and not the borrower is subject of the investigation.[104] Even more problematic are cases involving a violation of UBESF. In this case the Panel would have to review the borrower's domestic law to assess a breach by the borrower. However, as the Bank's obligation is reduced to the test if the standards of the domestic laws are 'materially consistent' with the ESF,[105] and the domestic standard will become part of the *Environmental and Social Commitment Plan*. In practice, the Inspection Panel assumes to have the competence to review this standard.[106]

2. The Affectedness of Animals

The complainants must demonstrate that their rights or interests are at least likely to have been directly affected by the Bank.[107] The wording of the

99 Inspection Panel Resolution (n. 97), para. 13.

100 Inspection Panel Resolution (n. 97), para. 15 (a).

101 Eisuke Suzuki, 'The International Legal Responsibility of IFIs', in: David Bradlow and Daniel Hunter (eds), *International Financial Institutions and International Law* (Kluwer 2010), 63-102 (85).

102 Suzuki (n. 101).

103 Suzuki (n. 101), 85 with reference to PCIJ, *Nationality Decrees* (n. 81), 24.

104 Andira Naudé-Fourie, World Bank Accountability – in Theory and in Practice (Eleven International Publishing 2016), 124-129.

105 World Bank, Environmental and Social Framework (n. 8), ES-Policy, 6, para. 32.

106 Chairperson of the Inspection Panel, Senior Vice President, and General Counsel, Joint Statement on the Use of Country Systems, R2004-0077, 0077/3, June 2004, 62; see for analysis of the standard of review Moerloose (n. 86), 72.

107 Inspection Panel Resolution (n. 97), para. 13; see also '*project affected parties*' in ESF (n. 8), 11, para. 61.

Internet Protocol (IP)-Resolution suggests that only humans may be affected as communities of persons are mentioned as an example of an association.[108] Accordingly, the welfare of animals can only be addressed in connection with rights or interests of humans. In the following a distinction is made between human interests that can be used as vehicles that are suitable to further the welfare of wild animals (a) and those that are suitable to protect the welfare of farm animals (b).

a) When Farm Animals Are Affected

The consequences of a neglect of the welfare of animals for humans is particularly clear when we turn to food safety[109] or zoonoses.[110] Albeit, factual and legal problems make it difficult to prove a direct affectedness of humans.

On the factual side, livestock facilities are specifically designed to prevent any material adverse effect on humans. For example, in factory farms desolate conditions prevail. Despite a gruelling impact on the mental well-being and health of the animals, a quality control prevents that the suffering of animals leads to harm on humans. Therefore, the likelihood of a material adverse effect is *prima facie* decreased, as the suffering does not cross the walls of the facility.

On the legal side, an increased susceptibility to parasites and a shortened lifespan due to a violation of the applicable standards suggest an adverse impairment on animals. However, if the suffering does not cross the walls of the facility, the only affected human is the operator of the facility. The operator may not even perceive the condition of his animals as negative at all. A shortened lifespan and a quota of sick animals may very well be part of an offset calculation in the business plan, the design of the facility would prevent any adverse effect form materialising. Yet, if nothing leaks out, no one would be affected, and a complaint would not be admissible, despite the Banks primary non-compliance.

108 Inspection Panel Resolution (n. 97), para. 13.

109 Laura Boyle, O'Driscoll, Kieran, 'Animal Welfare: an Essential Component of Food Safety and Quality', in: Jeffrey Hoorfar, Kieran Jordan, Francis Butler and Raffaello Prugger (eds), *Food Chain Integrity* (Woodhead Publishing 2011), 169-186 (170-177).

110 Myrna A. Safitri and Firman Firman, 'Animal Welfare and Covid 19 in Indonesia: A Neglected Legal Issue', Hasanuddin Law Review 7 (2021), 1-11 (7-9).

b) Disturbance of Wildlife

Regarding wildlife, the Panel takes a broad interpretation of the concept of affectedness.[111] This was firstly demonstrated in the *Yacyretá Hydroelectric Project Case*, which involved the financing of a hydroelectric power plant with a dam. The flooding took away a whole swathe of land. In its eligibility decision the Panel assumed that not only local groups and people have an interest in the preservation of biodiversity.[112] Consequently, a complaint could also be made by an NGO. This approach was again confirmed in the *Ecosystem Conservation and Management Project Case* of 2020.[113] This mirrors the classification of biodiversity as a community interest.[114] In this context, the Panel also took note of the protection of endangered species.[115] Even if 'affectedness' is given on the grounds of the loss of biodiversity, this requires a severe degree of impairment of wildlife. Under such circumstances, the interest of biodiversity and species conservation serves to bring the welfare of animals before the Panel.

3. The Asymmetric Protection of the Welfare of Farm Animals and Wildlife

In summary, the hurdles to bring an animal welfare complaint before the Panel are high, and the criterion of 'affectedness' is crucial. The welfare standards for wild animals are extremely low, because biodiversity is the only standard to protect the welfare of wildlife. Still, a complaint can be brought fairly easily before the Panel, because biodiversity is a community interest. The opposite is true for farm animals: The standards for farm animals are comparably high, since an explicit standard exists in the ESF. However, holding the Bank accountable for animal suffering is nearly impossible. The

111 Inspection Panel, *Yacyretá Hydroelectric Project* (1996) (n. 98), paras 67-68; Inspection Panel, *Ecosystem Conservation and Management Project Case* (2020) (n. 43), para. 58.

112 Inspection Panel, *Yacyretá Hydroelectric Project,* (1996) (n. 98), 19, paras 67-68.

113 Inspection Panel, *Ecosystem Conservation and Management Project Case* (2020) (n. 43), para. 28.

114 See e. g. ICJ, *Fisheries Jurisdiction* (United Kingdom v. Iceland), merits, judgment of 25 July 1974, ICJ Reports 1974, 31 (para. 72); WTO, Appellate Body, *United States – Import of Certain Shrimp and Shrimp Products,* report of 12 October 1998, WT/DS58/AB/R, paras 130-131; Wolfrum (n. 64), 60 f. refers to 'common concern' in the preamble of the Convention on Biological Diversity; see also Bruno Simma, 'From Bilateralism to Community Interest in International Law', RdC 250 (1994), 233 f.

115 Inspection Panel, *Ecosystem Conservation and Management Project Case* (2020) (n. 43), Report and Recommendation On A Request for Inspection, 14 February 2020, 8 (para. 39).

reason is that in many instances there are no people 'affected' by a project, since the suffering of the animals does not cross the walls of the farm.

IV. Conclusion

In conclusion, the World Bank's mandate allows the introduction of animal welfare conditionalities to the extent that either economic benefit is expected, or animal suffering negatively impacts the environment, or social progress. Institutionally, these requirements result in a legal situation where the welfare of *wildlife* is relatively easy to address procedurally in the Accountability Mechanism, while in substance the actual protection will often be weak or non-existent. In contrast, the welfare of *farm animals* is more difficult to address in the Accountability Mechanism as a matter of admissibility, but (if the complaint is admissible), it will enjoy a higher level of protection in substance. The resulting different treatment of wild and farm animals may be explained with the anthropocentric orientation of sustainable development and with the World Bank's ethically consequentialist animal welfare approach.

Overall, the Bank should aim for a more integrative and balancing approach to sustainable development to ensure that the welfare of all animals receives due consideration. It should move beyond the consideration of animal suffering as a negative externality when pursuing economic, environmental or social goals, or merely seeing the welfare of animals as a means to achieve economic or environmental objectives.

In essence, the ESF underlines the ethical importance of the welfare of animals. Its approach to animal welfare mostly mirrors the World Bank's mandate, showing readiness to incorporate animal welfare within the mandate's economic, environmental, and social focus. The ESF's approach seems to support a broad interpretation of the Bank's mandate on animal welfare. This is especially apparent regarding farm animals.

The World Bank may have passed a critical juncture in its consideration of animal welfare. This involves addressing the welfare of farm animals. While the ESF's receptivity to animal welfare offers promise, the Bank stayed behind its mandate.

The Rise, Relative Fall and Globalisation of Transnational Law Journals (1964-2024)

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Abstract

This article represents the first attempt to retrace and map the historical and contemporary evolution of transnational law journals, thereby unveiling a blind spot in the history of scientific periodicals in international law. Section I provides a contextualised overview of the emergence of the first generation of transnational law journals, a subset of student-edited international law journals published in the United States between 1964 and 1984. Section II situates the relative decline of transnational law journals in the United States (US) and the early stages of their globalisation within the broader context of the significant transformations experienced by international law journals worldwide between 1984 and 2004. Section III examines the decisive contemporary globalisation of transnational law journals in light

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of key drivers that have reshaped the landscape of international legal publishing during this period, including increased specialisation, the widespread adoption of blind peer review, legal hybridisation, and inter-disciplinarisation. The conclusion summarises the article's main findings and outlines the promising prospects for transnational law journals in light of historical patterns, particularly amid growing doubts about the problem-solving capacity of traditional state-centred international law.

Keywords

transnational law – international law journals – international legal scholarship – history of international law – comparative international law

'Truth is ever to be found in simplicity'
Isaac Newton (1643-1727)

I. Introduction

A recent shift toward studying the 'national' dimensions of international legal history[1] – or, in other words, a new 'turn to the national' in the history of international law –[2] is decisively contributing to the exploration of under-researched historical topics, including the histories of international law journals published within specific countries over time and in historical context.[3] The systematic and detailed study of these neglected histories is not only a contribution to the global history of legal education and its globalisation[4] but also to the history of international law in particular countries and, more

1 See e. g. Giulio Bartolini (ed.), *A History of International Law in Italy* (Oxford University Press 2020); Vincent Genin, Le laboratoire belge du droit international: une communauté épistémique et internationale de juristes (1869-1914) (Académie Royale de Belgique 2018).

2 See further Ignacio de la Rasilla, 'Towards Comparative International Legal History?', J. History Int'l L. 27 (2025)

3 For instance, the commemoration in 2023 of the 75th anniversary of Revista Española de Derecho International (REDI, est. 1948) gave the occasion to the publication of six articles on different facets of the historical evolution of REDI starting with Oriol Casanovas, 'Setenta y cinco años de Derecho Internacional Público en la Revista Española de Derecho Internacional', REDI 75 (2023), 17-40.

4 See e. g. Bryant Garth and Gregory Shaffer (eds), *The Globalization of Legal Education. A Critical Perspective* (Oxford University Press 2022).

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broadly, a contribution to the intellectual and scientific history of those specific countries and the history of international law in different languages. The neglected study of international legal journals (ILJs) also contributes to better knowledge of both different regional histories and, by extension, of the global history of the discipline and the pivotal role they have always played in sustaining its epistemological development. Moreover, the detailed study of ILJs enables them to be adequately preserved and greater diffusion of the rich knowledge they contain among new generations of international lawyers and historians.

As David J. Bederman remarked, ILJs are 'superb vehicles for exploring the vagaries of scholarly taste over time'[5] and, also, one may add, in different places. Indeed, ILJs provide a novel scholarly terrain for both applying the lenses of 'comparative international law'[6] and, also, for a methodologically revamped empirical analysis of contemporary trends in international legal scholarship, starting with 'what' ILJs 'publish and how their content compares to the content of other law journals'.[7] This is particularly relevant at a time when traditional Western-centric core-periphery dynamics are giving way to a new 'substantive pluralism'[8] in international law and its scholarship. Yet, research on the rich historical, intellectual and legal-scientific patrimony contained in ILJs since, the first two of them, *Revue de droit international et de la législation comparée* and *Revue internationale de la Croix-Rouge*[9] were founded in Belgium and Switzerland respectively in 1869, has only recently begun to take its first baby steps.[10]

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5 David J. Bederman, 'Appraising a Century of Scholarship in the American Journal of International Law', AJIL 100 (2006), 20-63 (20).

6 Pierre-Hugues Verdier, 'Comparative International Law and the Rise of Regional Journals', Yale J. Int'l L. 49 (2024), 154-179.

7 Bianca Anderson and Kathleen Claussen, 'International Law Publishing Trends: What Journals Print?', Geo. J. Int'l L. 55 (2024), 11-35. See also Oona Hathaway and John Bowers, 'International Law Scholarship: An Empirical Study', Yale J. Int'l L. 49 (2024),102-124 (102).

8 William W. Burke-White, 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism', Harv. Int'l. L. J. 56 (2015), 1-79.

9 Originally published as 'Le Bulletin International des Societes de Secours aux Militaires Blesses' in 1869.

10 Ignacio de la Rasilla, 'A Short History of International Law Journals, 1869-2018', EJIL 29 (2018), 137-168. See also Otto Spijkers, Wouter G. Werner and Ramses A. Wessel (eds), *Netherlands Yearbook of International Law, Yearbooks in International Law: History, Function and Future* (Springer 2019). See earlier, with a focus on AJIL, Bederman (n. 5). More recently, see also several of the contributions included in the symposium jointly-published in Georgetown Journal of International Law, Yale Journal of International Law and Virginia Journal of International Law under the auspices of the Consortium for the Study and Analysis of International Law Scholarship (SAILS); see: <https://coursesites.georgetown.domains/sails/about/what-is-sails/>, last access 3 July 2025 and <https://www.vjil.org/sails>, last access 3 July 2025.

This article seeks to contribute to the ongoing scholarly developments in the severely neglected research sub-field of the history of international law journals[11] by offering the first systematic attempt to map the historical evolution of transnational law journals and to analyse their contemporary features. It does so by situating the development of transnational law journals (TLJs) within the broader framework of the remarkable expansion and transformation of international law journals, of which TLJs represent a special genus,[12] since the founding of the first such journal, the Columbia Journal of

11 See further, Inge van Hulle and Carl Landauer (eds) *The Journals of International Law* (Brill-Nijhoff, forthcoming 2026).

12 For the purposes of this article, the term 'international law journals' comprises academic/scientific periodicals, which, first, include the term 'international law' (in any language) or their broad equivalents (e. g. *ius gentium;* transnational law) in their titles, whether solely (e. g. 'La revue générale de droit international public') or in combination with other denominations (e. g. comparative law; politics; foreign affairs; international relations; business; European law; commerce; diplomacy; policy; use of force; human rights etc.). Second, the term 'international law journals' includes public, private and transnational academic journals, and both 'generalist' and 'specialised' ones within each of these categories (e. g. 'Transnational Environmental Law'). Included in the category of 'specialised' international law journals are those which, despite not including the term 'international law' in their titles, do include in their title a reference to a specialised area of international law, both when their title does it explicitly (e. g. 'Journal of International Criminal Justice'; 'International Organizations Law Review'; 'Max Planck Yearbook of United Nations Law'; 'Foreign Investment Law Journal' etc.), and implicitly (e. g. 'International Review of the Red Cross'; 'Human Rights Law Quarterly'; 'International Community Law Review' etc.) or to international legal practice (e. g. 'Journal of International Dispute Settlement'; 'Journal of the Law and Practice of International Courts and Tribunals' etc.). Also included in the category of 'specialised' international law journals are those academic journals, which despite not meeting the aforementioned criteria in their titles, are broadly identified as such by international law scholars specialising in the research areas that fall under their scope (e.g 'International Journal of Marine and Coastal Law' etc.). Moreover, the application of the aforementioned criteria explicitly excludes from the denomination 'international law journal' for the purposes of this article all comparative law journals; international relations journals; foreign affairs journals; international diplomacy journals; international business law journals etc., when reference to them in their titles is not combined with the term 'international law' even if/when these journals may occasionally publish or (even actively welcome) academic/scientific articles on international law subjects. Similarly excluded are both 'generalist' (e. g. 'Harvard Law Review') and 'specialised' (e. g. 'Law and History Review') 'law journals' as well as are 'interdisciplinary' journals (e. g. 'International Journal of Transnational Justice' etc.) even if/when any of these three types of journals may occasionally publish or (even actively welcome) academic/scientific articles on international law subjects. Admittedly, the application of these criteria may leave some journals in a 'grey zone' and, certain degree, of reasoned discretion should, therefore, be applied to make well-informed choices in each case regarding their exclusion or inclusion in the category of ILJs including, for instance, with reference to the criterion of whether the journal in question its eminently 'international legal' in its scope and coverage of academic materials. However, for a more encompassing approach, based on a far more inclusive set of criteria as a basis of a 'database' of 'international and comparative law journals', see Kathleen Claussen, 'The World of International and Comparative Law Journals', Geo. J. Int'l L. 55 (2024), 61-79.

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Transnational Law (Columbia JTL), in New York in 1964. Focusing on TLJs in order to unveil a blind spot in the study of the historical evolution and contemporary analysis of ILJs is further justified because the central role TLJs have played over the last sixty years in fostering transnational legal education and in promoting the diffusion of ideas and legal practice related to 'all law which regulates actions or events that transcend national frontiers',[13] as the coiner of the term, Philip C. Jessup, defined it in 1956.

TLJs have borne witness to the great transformations the world has undergone since the Columbia JTL, which built on one of the very first student-edited international law journals published in the United States in the early 1960s, took its current name in 1964. The focus of the article is on the history of the emergence and subsequent globalization of TLJs – an area that remains significantly under-researched and largely shrouded in mystery. While its engagement with the broader field of transnational law[14] is mediated through this perspective, it is important to note that TLJs themselves have served as both a key vector for and a reflection of the field's expansion and diversification into, inter alia, new transnational legal research areas and specialisations (such as e. g. transnational criminal law and transnational environmental law). Moreover, the publication of approximately twenty TLJs over the past six decades – including eleven new ones in Canada, Western Europe, and Asia in the last twenty years alone – not only evidences the field's own geographical and linguistic expansion but also reflects the deep interpenetration of domestic, regional, and international public and private legal spheres in an increasingly interdependent contemporary world. This is so because TLJs complement the attention given to public and private international law with that due, as G. Shaffer and C. Coye note, to 'other rules which do not wholly fit into such standard categories' in their 'governing [of] transnational activities'.[15]

After this introductory section, this article is divided in three sections, each of which corresponds to a twenty-year-long period in the history of TLJs as a blind spot in the nascent global history of international law periodicals. Reasons why this topic may be of interest to an international legal audience include – but are not limited to – the fact that TLJs, like all ILJs, function as scientific and intellectual meeting points for legal scholars and practitioners from diverse legal systems, regions, and traditions –

13 Philip C. Jessup, *Transnational Law* (Yale University Press 1956), 2.

14 For a holistic engagement with the field see e. g. Peer Zumbansen (ed.), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021).

15 Gregory Shaffer and Carlos Coye, 'From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders', in: Peer Zumbansen (ed.), *The Many Lives of Transnational Law* (Cambridge University Press 2020), 126-152.

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including non-Western ones. As such, they serve as engines of global legal dialogue and education, as well as fundamental vectors in the knowledge-production processes of international law.[16] Section I provides a contextualised overview of the rise of the first batch of transnational law journals as a special species of the first generation of student-edited international law journals published in the US between 1964 and 1984 under the direct intellectual influence of Philip C. Jessup, but, also – as we shall see – of Wolfgang G. Friedmann. Section II sets the relative fall of transnational law journals in the US and the very early stage of their globalisation in the broader context of the large transformations and expanding number of international law journals experienced in the period 1984-2004. Section III analyses the resolute globalisation of transnational law journals, which are currently, in fact, more widespread globally than in their North-American birthplace. This analysis is carried out in the light of the key drivers that have reshaped the landscape of ILJs in the period 2004-2024 including specialisation, the generalisation of blind peer review practices, legal-hybridisation and inter-disciplinarisation. The conclusion recaps the article's main findings and highlights the promising prospects for the future geographical expansion of TLJs – at a time when, much like the period in which Judge Jessup coined the term transnational law during the early Cold War, faith in the problem-solving capacity of state-centred international law is once again being questioned in an increasingly conflict-prone geopolitical landscape.

II. The Origins and Early Rise of Transnational Law Journals in the United States (1964-1984)

The origins of transnational law journals form an integral part of the early history of student-edited international law journals. Although student-run international law journals are no longer an exclusively US phenomenon,[17] their beginnings can be traced to a number of elite US universities in the late 1950s and early 1960s. Their initial development – largely supported by the American Society of International Law (ASIL) –[18] followed two main trajectories. These, in turn, provided the background or matrix for the emer-

16 See e. g. de la Rasilla (n. 10).

17 See e. g. Utrecht Journal of International and European Law (prev. Merkourios, est. 1981) or Goettingen Journal of International Law (est. 2007).

18 Harlan G. Cohen, 'A Short History of the Early History of American Student-Edited International Law Journals', Va. J. Int'l L. 64 (2024), 357-372 (367-368).

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gence of the first student-edited transnational law journals in the United States in the mid-1960s and early to mid-1970s, as illustrated in Map 1.[19]

In the first track were a series of journals that embraced the term 'international law' in their titles, starting with the Harvard International Law Club Bulletin (est. 1959). This was soon followed by a series of others published in Virginia (1960), Columbia (1961), Texas (1964),[20] Stanford (1965), and Cornell, New York and Western Case Reserve (1968) universities.[21] The birth of this early batch of student-edited university international law journals was an offspring of the gradual consolidation of international law as an academic discipline in US' law schools, which benefited from a larger intake of international students, including from newly independent states during the, by then, unfolding massive historical decolonisation process. Although these early student-run ILJs were originally intended as fora to provide publication outlets for the law student's best seminar assignments,[22] their development was also emboldened by the influence of 'émigré' international law scholars[23] and by the gradual escalation of the Vietnam war and its impact on politics in US' university campuses. Furthermore, these early journals owe volumes, as H. G. Cohen notes, to 'symbiotic developments between student international law societies, the expansion of The Philip C. Jessup International Law Moot Court Competition [est. in 1960] and the American Society of International Law over that period'.[24] The boost given to student-run international law periodicals in the 1960s, which continued in the 1970s when 'around twenty more student-edited international law journals joined their ranks',[25] lies at the origin of the regular publication of dozens of other student-run ILJs in US universities, with an exponential rise since the 2000s.

19 A previous version of this map can be found in the inaugural editorial of the Chinese Journal of Transnational Law, see Ignacio de la Rasilla, 'Who is Afraid of Transnational Law Journals? An Editorial', Chinese Journal of Transnational Law 1 (2024), 3-7.

20 Journal of the Texas International Law Society (1964).

21 For a brief contemporary account of their launching see, Eleanor Finch, Note, 'Academy of American and International Law', AJIL 59 (1965), 375. Eleanor Finch, Note, 'Student International Law Journals', AJIL 60 (1966), 86-87; Eleanor Finch, Note, 'Student International Law Journals', AJIL 63 (1969), 304-306.

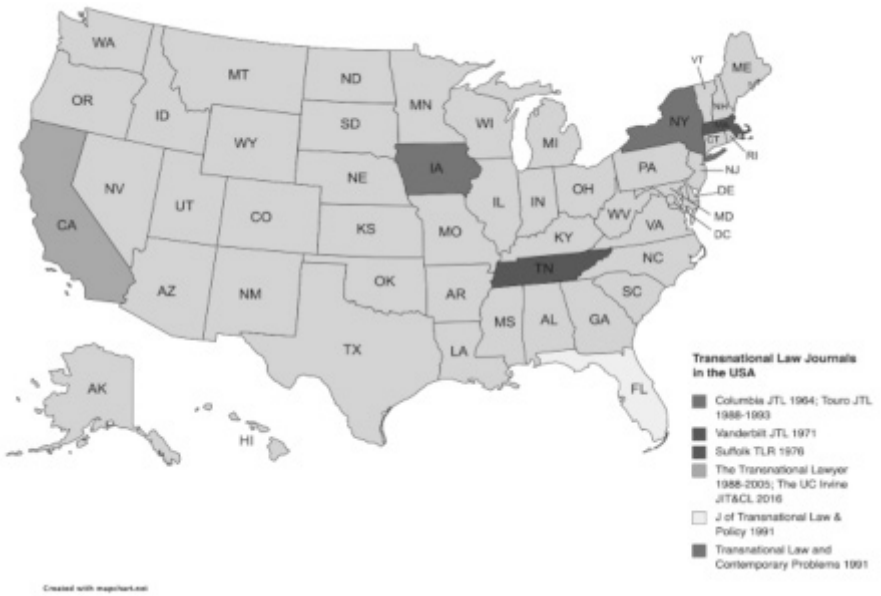
22 Cohen (n. 18), 364.

23 On this phenomenon, see Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted. German-Speaking Emigré Lawyers in Twentieth Century Britain* (Oxford University Press 2004).

24 Cohen (n. 18), 364.

25 Cohen (n. 18), 365.

Map 1. Transnational Law Journals in the USA (1964-2024)



The second track of early US' student-run journals adopted, by contrast, the hybrid form of 'international and comparative law' journals, although this evolved to include other complementary denominations in their titles over time. While 'international and comparative law journals' (I&CLJs) were new to the US scientific publishing landscape at the time, they were, in fact, but the delayed progeny of the first periodicals that emerged in the wake of the gradual consolidation of the scientific discipline of international law in Western European countries in the last third of the nineteenth century. However, by the early 1900s, in Europe, three key factors had largely led to a fall of I&CLJs in Western Europe. These were, according to an earlier work, first, the 'consolidation of comparative law as a distinct branch of legal studies', second, the maturing 'professional and scientific independence of the discipline of international law itself' and, third, the 'emerging instrumentalist nationalisation of the study of international law and of national practice'.[26] It was only around four decades later that the founding of the International and Comparative Law Quarterly (ICLQ)[27] in London in 1952

26 De la Rasilla (n. 10).

27 By fusing together, the 'Journal of Comparative Legislation and International Law' (est. 1918) and the 'International Law Quarterly' (I).

would give a new impetus to the original 'comparative-international duality of scholarly purpose'[28] of the first international law periodicals. Its appeal largely expanded across different US' universities[29] and commonwealth countries from the late 1960s and early 1970s.

The first of these was the Georgia Journal of International and Comparative Law (Georgia JICL, est. 1970),[30] a student initiative supported – as its first faculty advisor – by Dean Rusk, who had become a professor of international law at the University of Georgia after serving as US Secretary of State from 1961 to 1969.[31] The Georgia JICL emerged largely from the same constellation of factors that shaped earlier journals within the more traditional 'international law' track. There is no evidence that its founders saw themselves as inheriting or continuing any specific tradition of 'international and comparative law' journals – tracing from their origins in Western Europe, through their revival in London, and eventual diffusion primarily to the United States and select Commonwealth countries. This is the case even though earlier journals bearing this title existed, including one in South Korea[32] and another in South Africa,[33] which at the time was not a member of the Commonwealth due to its apartheid policies. Nor is there any evidence that the founders were even particularly aware that Georgia JICL was the first student-edited law journal in the United States to explicitly bear this name.[34] Nevertheless, in his Foreword to the journal's inaugural issue, Hardy C. Dillard – the US judge serving on the International Court of Justice from 1970 to 1979 – subtly pointed to a broader conceptual lineage. He evoked the influence of the notion of transnational law, a term coined by his immediate predecessor on the ICJ bench, Judge Philip Jessup, in emphasising that new journal offered 'still another channel for the systematic diffusion of knowledge, understanding and insight dealing with the vast field of international law – a field which, in its modern form, is by no means limited to law between national states but embraces all forms of transactions crossing national frontiers'.[35]

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28 See n. 27.

29 LindsayCowen, 'Foreword', Ga. J. Int'l & Comp. L. 1 (1970), iii.

30 All issues of the journal, are available open access at <https://digitalcommons.law.uga.edu/gjicl/vol2/iss1/>, last access 3 July 2025.

31 Dorsey R. Carson Jr. and Amelia M. Bever, 'Remembering Dean Rusk', Ga. J. Int'l & Compar. L. 25 (1996), 707-728. Also Dean Rusk, 'The 25th U. N. General Assembly and the Use of Force', Ga. J. Int'l & Compar. L. 2 (1972), 19-35.

32 Korean Journal of International and Comparative Law, Vol. 1, 1956.

33 Comparative and International Law Journal of Southern Africa, Vol. 1, No. 1, March 1968.

34 No reference is made to it in the editors' prologue or in the anniversary issues, see for the journal's silver anniversary G. Porter Elliott, 'Foreword', Ga. J. Int'l & Compar. L. 25 (1996), i.

35 Hardy C. Dillard, 'Foreword', Ga. J. Int'l & Compar. L. 1 (1970), v-vii.

It is against this historical backdrop that the Columbia JTL, which was founded at Columbia University in 1964,[36] became the first of three TLJs launched during the early period of student-edited journals in the US. The Columbia JTL was also the first international law journal – albeit not the last one – to take its name under the influence of a school of international legal thought in the US.[37] The concept of transnational law had been seminally introduced by Philip C. Jessup (1897-1986) in his series of Storr Lectures at Yale Law School in 1956.[38] At a time when the early Cold War had shattered confidence in the problem-solving capacity of international law and Jessup himself had been a target of McCarthyism for 'having communist sympathies',[39] Jessup's proposal of transnational law was saluted by Eric Stein as 'an assault on the barriers of classifications and distinctions traditionally separating legal disciplines' which 'hamper progress toward solutions of problems of "transnational" character'.[40] Less than ten years later, Jessup, by then a judge at the International Court of Justice (1961-1970), to which he had been nominated by the US State Department in the early days of John F. Kennedy's administration, would introductorily inaugurate the first issue of the Columbia JTL.[41]

The fact that central figure in the rebranding of the *International Law Bulletin* at Columbia to the Columbia JTL in 1964[42] was the Jewish émigré international law scholar Wolfgang G. Friedmann (1907-1972) also marks an interesting moment of intersection in the intellectual legacies of two of the most influential Western international law scholars of the Cold War period. While Philip Jessup introduced the concept of transnational law – highlighting the multiple operational roles of legal norms and principles beyond inter-state relations – Friedmann, who had 'served as Faculty Advisor to the

36 It built on the 'International Law Bulletin', which had, in 1963, changed its title from the previous 'Bulletin of the Columbia Society of International Law' (est. 1961). Harold Swayze, 'Preface', Colum. J. Transnat'l L. 1 (1961-1963), vii-viii.

37 The other most representative example is 'Yale Studies in World Public Order' (1974-1980), which become the 'Yale Journal of World Public Order' (1980-1983) and, finally, the 'Yale Journal of International Law' since 1983. W. Michael Reisman, 'The Vision and Mission of the Yale Journal of International Law', Yale J. Int'l L. 25 (2000), 263-270.

38 Jessup (n. 13).

39 Senator Joe McCarthy – Audio Excerpts, 1950-1954, Philip C. Jessup, 1951, Marquette University, Milwaukee, Wisconsin available at <https://cdm16280.contentdm.oclc.org/digital/collection/p128701coll0/id/6/>, last access 4 July 2025.

40 Eric Stein, 'Jessup: Transnational Law', Mich. L. Rev. 56 (1958), 1039-1045.

41 Philip C. Jessup, 'The Concept of Transnational Law: An Introduction', Colum. J. Transnat'l L. 3 (1963), 1-3.

42 This could, also, at least in part be interpreted as a homage to – albeit, perhaps, also an effort to capitalise on the reputation of – Judge Jessup, by his doctoral alma mater and long-term employer, Columbia University.

Journal since its inception' in 1961 and provided it with 'continued financial and intellectual support' over the following decade,[43] played a decisive role in institutionalising it. By making the Columbia JTL the first platform from which a more fluidly framed research field of transnational law could evolve, Friedmann – who coincidentally also published his influential *The Changing Structure of International Law* in 1964 – was advancing his own vision of the transformation of international law from the international law of coexistence to the international law of cooperation.[44] According to Friedmann, international law was evolving beyond the confines of a traditional, state-centred system into a functionally differentiated global legal order. This emerging order, incorporating new non-state actors – including, but not limited to, international organizations and multinational corporations – and a plurality of new international legal regimes, such as international economic law, human rights law, and environmental law, was already acquiring a life of its own beyond the traditional boundaries of state sovereignty.[45] A heart-felt tribute to Friedmann, who contributed several articles to the journal in its first decade,[46] was published in the Columbia JTL in 1971,[47] just a few months before Friedmann was robbed and stabbed to death on the streets of Manhattan in 1972.[48]

In 1971, the Vanderbilt International (est. 1967) was renamed the Vanderbilt Journal of Transnational Law (Vanderbilt JTL) 'to mark its transition from duplicated to printed format'[49] and its first issue was, like in the case of the Columbia JTL, inaugurated by an article of Philip C. Jessup.[50] Contrary to the Columbia JTL, which had capitalised on the substantial resources of a 'ten-year grant of the Ford Foundation for the development of international legal studies at Columbia' to build its reputation in the field

43 Swayze (n. 36), viii.

44 Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press and Stevens & Sons 1964).

45 Friedmann (n. 44.)

46 Wolfgang G. Friedmann *et al.*, 'Act of State: Sabbatino in the Courts and in Congress', Colum. J. Transnat'l L. 3 (1964), 99-115 (103); Wolfgang G. Friedmann, 'Legal and Political Aspects of the Berlin Crisis', Colum. J. Transnat'l L. 1 (1961-1963), 1-7 (3); Wolfgang G. Friedmann, 'The Position of Underdeveloped Countries and the Universality of International Law', Colum. J. Transnat'l L. 1 (1961-1963), 78-86.

47 Wolfgang G. Friedmann, 'The Reality of International Law – A Reappraisal', Colum. J. Transnat'l L 10 (1971), 46-60.

48 William J. McGill *et al.*, 'Memorial Service for Professor Wolfgang G. Friedmann, September 25, 1972', Colum. L. Rev. 72 (1972), 1136-1146.

49 Harold G. Maier, 'Foreword: Some Implications of the Term "Transnational"', Vand. J. Transnat'l L. 25 (1992), 147-149.

50 Philip C. Jessup, 'The Development of a United States Approach Toward the International Court of Justice', Vanderbilt L. Rev. 5 (1971), 1-46.

since 1955,[51] this rebranding should be more directly seen in the context of 'increased student enrolment at the Law School and a growing awareness of global activities and problems'[52] which, in turn, had prompted the development of Vanderbilt's international law program since the mid-1960s.[53] This veiled reference to a more politicised environment on US campuses in the late 1960s and 1970s, including as a result of the protracted Vietnam war, was mirrored in Vanderbilt JTL's first issues and that of its predecessor since 1967.[54] Amidst broad decolonisation processes and the Cold War, the far greater awareness of international affairs across US law schools in the 1960s and 1970s furthermore resonates well with the retrospective emphasis put by the founder and long-term Faculty Advisor of the Vanderbilt JTL (and, also, of its predecessor) Harold G. Maier, on the fact that the journal 'selected Jessup's characterization to emphasize global interdependence rather than the political competition suggested by the older, and more familiar terms'.[55] The effort to mark an epistemological departure by 'thinking of the world in a transnational rather than an international context', or similarly, 'the recognition that human affairs could not properly be confined by the artificial territorial boundaries of nation-states',[56] both academically and in professional legal practical terms, thus, inspired the adoption of 'transnational law' in the mastheads of the first two TLJs. Last, but not least, following on the footsteps of Columbia JTL and the Vanderbilt JTL – and aligning with a broader academic movement recognising transnational law as a distinct field shaped by the influential factors identified by Jessup and Friedmann – the Suffolk Transnational Law Review (Suffolk TLR) became in 1976 the first journal to be born with the term 'transnational law' in its original title.

A review of the origins of the first three US student-edited TLJs reveals a concerted effort to institutionalise Jessup's theoretical framework, particularly in the first two, at a time when Jessup was also serving as a US judge on

51 'International Legal Studies at Columbia Law School 1955-1965', Colum. J. Transnat'l L. 4 (1966), 319-327 (319).

52 Charles G. Burr, Editor-in-Chief, 'Editor's Foreword', Vand. J. Transnat'l L. 5 (1972), vii-viii, available at <https://scholarship.law.vanderbilt.edu/vjtl/>, last access 4 July 2025.

53 Harold G. Maier, 'Founder of the Vanderbilt Journal of Transnational Law, Passes Away at 77', Blog of the Vanderbilt Journal of Transnational Law, 27 August 2014, available at <https://www.transnat.org/post/harold-g-maier-founder-of-the-vanderbilt-journal-of-transnational-law-passes-away-at-77>, last access 4 July 2025; Maier also established the Vanderbilt Law School's Transnational Studies Program.

54 Cohen (n. 18). See e. g. W. G. C., 'The Law School Looks at Vietnam', Vand. L. Rev. 1 (1967), 5-9; Peter B. Lund, The Vietnam War: Tax Costs and True Costs, Vand. L. Rev. 1 (1967), 10-17.

55 Maier (n. 49),14

56 Maier (n. 49).

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the bench of the International Court of Justice (ICJ). In these early days, the term transnational law clearly possessed both a descriptive quality – capturing a series of unfolding transformations in the international legal order – and an ideological, progressive-liberal connotation that enabled its advocates to think beyond the traditional Westphalian model of international law. However, while these singular features describe the inception of the earliest US-based TLJs as products of the transformative 1960s, they speak only to the story of their foundation – not to the subsequent evolution and persistence of the transnational law label within the US and, later, across Canada, Western Europe, and Asia. Indeed, rather than a single linear trajectory, there are multiple, competing narratives that emerge from different periods.[57] As we will see in Sections III and IV, the use of the transnational law label in periodical publications has evolved in diverse ways. In some cases, it now designates specialised legal fields – such as transnational environmental law – where the term serves as an apt descriptor of the nature of legal practice, rather than as an ideologically charged scholarly concept.[58] In other instances, the label's appeal lies more in its function as a marketing tool – to distinguish a new journal from others in the same jurisdiction or, in the case of journals not published in English, to signal a linguistic or cultural distinction – rather than as an indicator of a direct intellectual lineage directly traceable to Jessup and the first TLJs.[59]

More specifically, an empirical review of the contents of the first three TLJs since their inception to 2024[60] shows that they all began as generalist ILJs – and have largely remained so over subsequent decades – with a

57 Author's note: The author is grateful to one of the anonymous reviewers of the article for explicitly drawing its attention to this question. This paragraph builds and is largely inspired by his/her comments and/or questions.

58 See n. 57.

59 For instance, the only translational law journal in Spanish – Cuadernos de Derecho Transnacional – defined itself since its inception in 2009 as 'una Revista científica semestral de Derecho Internacional Privado' ('a Biannual scientific review of Private International Law'). For more details on Cuadernos de Derecho Transnacional, see further Section IV of this article and <https://e-revistas.uc3 m.es/index.php/CDT/index last>, access 12 May 2025.

60 The methodology employed is based on an analysis of the article titles – excluding book reviews – published in all issues of the three journals from their inception through 2024. A group of international law doctoral students at Wuhan University were provided with indicative guidelines – including a set of examples illustrating the types of articles falling within each category – to carry out the empirical quantitative analysis. While the results are sufficiently indicative, further refinement through the use of big-data computational, AI-powered tools may yield more granular insights in the future. For an example of the application of an empirical quantitative methodology in international law a related methodological explanations see e. g. Ignacio de la Rasilla, 'Latin America and the Caribbean in the International Court of Justice – An Empirical Quantitative Analysis (2000-2024)', Journal of International Dispute Settlement 16 (2025), idae024, https://doi.org/10.1093/jnlids/idae024.

particular penchant for publishing works on law subjects falling within the purview of public international law. Having noted this, as Figure 1 below shows, variations exist among the three first student-edited TLJs, with the Columbia JTL having, for instance, a stronger focus on 'domestic law' issues with international legal implications and the Vanderbilt JTJ a greater inclination towards economic and private international law topics as a whole over the years. By contrast, contributors to Suffolk TLR have shown a greater thematic interest in 'comparative law' topics.[61] However, and perhaps surprisingly, considering the overall number of academic works (not including book reviews, estimated at circa 2950 in total) published in them since their foundation, the three oldest TLJs have published very few articles featuring the term 'transnational' in their titles. This corroborates the impression that, in the case of the first generation of TLJs, the term transnational has traditionally been – and largely remains – editorially employed as an all-encompassing academic category. As such, it serves to attract contributions spanning public and private international law, comparative law, and domestic legal issues with international dimensions – including what would today be classified as foreign relations law – as well as scholarship addressing the intersections among these fields.

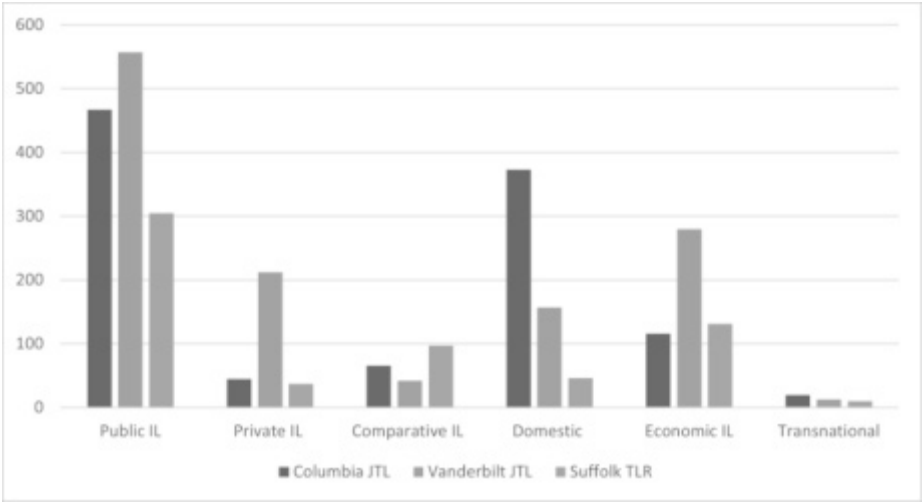

Figure 1: Transnational LJs 1964-1984

61 Which becomes, in fact, more numerically accentuated, in the light of this journal's shorter temporal span.

III. The Relative Decline of Transnational Law Journals in the United States and Early Stages of Their Globalisation (1984-2004)

By the mid-1980s, several of the earlier trends in the historical development of ILJs had largely consolidated. The days of the long nineteenth century when all international law periodicals were published in a few Western European countries and Russia[62] were long gone. However, the expansion of international law journals outside Europe, which had begun in Japan with the publication of *Kokusaihö Gaikö Zasshi* in 1902, was still far from evenly distributed in geographical terms around the globe by the mid-1980s. For instance, the number of university-student-run international law journals (in their different varieties) from the US alone was larger than all those published in all the African, Oceanic, Eastern-European, and Asian countries combined. They were also far more numerous than those that were published in Latin America despite the region having been the first to come to the globalisation of ILJs in the 1910s and 1920s.[63]

This state of affairs can be illustrated by the fact that the first specialised international law journal in mainland China, 中国国际法年刊 (Chinese Yearbook of International Law), was only founded after the Cultural Revolution, in 1982 during the early stages of the opening-up and reform period.[64] The 中国国际法年刊 joined a few similarly 'nationally' branded ILJs that already existed in Korea (1956), Japan (1958), India (1959), the Philippines (1962), and Taiwan (1964).[65] However, the fast development of the number of ILJs in the next four decades, which were published either in Mandarin or in English is apparent in the existence of no less than twenty-five of them,[66] in China (including Hong Kong, Macau and Taiwan), among which, as we shall later see, two TLJs were founded in the 2010s and early 2020 s respectively.[67]

62 De la Rasilla (n. 10).

63 De la Rasilla (n. 10), 149-150.

64 See further Yayezi Hao and Mohan Chen, 'The Chinese Yearbook of International Law: Looking Back to Look Forward (1982-2022)' in: Inge van Hulle and Carl Landauer (eds), *The Journals of International Law* (Brill-Nijhoff, forthcoming 2025). Sompong Sucharitkul, 'Rebirth of Chinese Legal Scholarship, With Regard to International Law', LJIL 3 (1990), 3-17.

65 The Annals of the Chinese Society of International Law / Chinese Yearbook of International Law and Affairs / Chinese (Taiwan) Yearbook of International Law and Affairs (1964).

66 This figure results from the application of the relatively restrictive criteria for the identification of 'international law journals' for the purposes of this article indicated at (n. 12). However, the application of far more inclusive criteria of identification, as those enunciated by Kathleen Claussen, would considerably increase this figure, see further Claussen (n. 12).

67 Peking University Transnational Law Review (2013-2018) and the Chinese Journal of Transnational Law (est. 2023).

The end of the Cold War, the dissolution of the Soviet Union and the rapid spread of globalisation processes around the world in the 1990s, and in their wake the proliferation of international organisations, international courts and tribunals and the mushrooming of specialised international legal regimes, would become catalysts for a multiplication of different varieties of ILJs in all regions in the 1990s and early 2000s. The national identifier in the titles of ILJs, which had begun to spread in the 1950s and 1960s[68] and had become more widely used with the growth of national 'yearbooks' of international law in English language from the 1970s onwards,[69] remained a first pick among new independent countries and others that did not already possess a 'nationally-labelled' international law academic ILJ or IL yearbook, including in Eastern Europe in the 1990s.

Moreover, inspired by processes of regional economic, and incipiently, political integration, new 'continental' or regional varieties of ILJs also emerged in Europe, namely the European Journal of International Law (EJIL) (est. 1990),[70] which aimed to, *inter alia*, 'transcend national silos in European international legal scholarship'.[71] And also, in particular, in Africa,[72] where 'regional' ILJs became substitutes for 'national' international law journals. The 1984-2004 period also witnessed specific university-labelled journals beginning to be published beyond the US such as the Leiden Journal of International Law (Leiden JIL) (1988), which echoed the 'belief that the need for scholarly writing in international law is becoming a major focus of legal education in the Netherlands (and Western Europe in general)'.[73] Meanwhile, in the US the number of student-edited international law journals continued to rise steadily. H. Cohen attributes this expansion to a 'combination' of rising demand for 'publication slots' among academics prompted by 'growing faculties and rising tenure standards' on the one hand with the 'credentials and career opportunities journal editorship could offer' students on the other.[74]

A particularly remarkable feature of this 20-year period is that from the mid-1980s a new and increasingly numerous breed of specialised international law began to emerge across an increasingly diversified and fragmented international legal landscape, including in the fields of international

68 De la Rasilla (n. 10).

69 De la Rasilla (n. 10).

70 The Editors, Editorial, EJIL (1990), 1-3.

71 On the foundational purposes of EJIL, see Verdier (n. 6), 7-8.

72 'Editorial Comment', AJICL 1 (1989), xix-xxii. On its foundational purposes of see Verdier, (n. 6), 8-9.

73 Editorial, LJIL 1 (1988), 1-2. Eric De Brabandere and Ingo Venzke, 'The Leiden Journal of International Law at 30', LJIL 30 (2017), 1-4 (1).

74 Cohen (n. 18), 370.

investment law[75] and international economic law[76] but also extending to international human rights law,[77] international criminal law,[78] international environmental law[79] and even to general and more transversal fields like international adjudication[80] and the history of international law.[81] These built on a small number of specialised antecedents which first emerged in the fields of human rights and the law of the sea in the late 1960s and 1970s.[82] From then, specialised ILJs largely nurtured the emergence of new 'transnational' epistemological communities in specific research areas. These early stages of specialisation of international law journals were fostered by the gradual generalisation of digital access to hitherto only printed ILJs and the proliferation of the first 'electronic' (as they used to be called) ILJs in the mid-late 1990s and early 2000s. Similarly characteristic of this stage in the historical evolution of international law journals in the twentieth century was the gradual introduction of the practice of double-blind peer reviewing by ILJs, itself an offspring of the introduction of new technologies in editorial management of ILJs in the mid-late 1990s and early 2000s.

In Western Europe, this would gradually transform what was until then a landscape marked by the generalised practice of invited contributions to publish in ILJs among a selected-group of established members of the 'invisible college', and by extension their student networks in elite universities with, at most, editorial non-anonymised peer reviewing of unsolicited submissions. Moreover, the gradual consolidation of 'regional' IJLs, the spread of specialised ones and the inclusion of external (albeit not necessarily blind) peer reviews of both solicited and unsolicited submissions contributed to levelling the playing field by providing emerging scholars with more opportunities regardless of their affiliation and pedigree[83] by the mid-2000s. While, by contrast to the generalisation of blind peer-review in Western European ILJs, US student-edited ILJs, do not

75 ICSID Review – Foreign Investment Law Journal (est. 1986).

76 Journal of International Economic Law (est. 1998).

77 International Journal on Minority and Group Rights (est. 1993); The International Journal of Human Rights (est. 1997); Human Rights Law Review (est. 2001).

78 International Criminal Law Review (est. 2001); Journal of International Criminal Justice (est. 2003).

79 Yearbook of International Environmental Law (est. 1990); Review of European, Comparative & International Environmental Law (est. 1992).

80 The Law & Practice of International Courts and Tribunals (est. 2002).

81 Journal of the History of International Law (est. 1999).

82 See e. g. *Human Rights Quarterly* (est. 1979). See further, de la Rasilla (n. 10).

83 However, the traditional state-of-affairs would remain the general practice among many 'national' ILJs published in local languages across Europe and other regions until the mid-late 2010s and does still linger at present in many places.

generally use blind peer review,[84] 'local' factors, like the introduction of multi-journal-submission electronic platforms in the early 2000s also performed a certain democratising role (of sorts) by increasing accessibility and standardising submission processes, thus enabling access by more authors to JILs in a revamped 'publish or perish' system of international legal scholarship.While still occasionally the object of critical questioning among Western European international law academics,[85] the generalisation of blind peer reviewing in international legal scholarship has contributed – if not to fully eradicating – to reducing the weight of certain forms of embedded structural privilege (based on race, national origin, awarding universities, elite networks, mother-tongue, gender, sexual orientation and/or social class) thus minimising potential biases in international law publishing in academic journals. While these factors are, nonetheless, still with us in different guises, they have faded in the background compared with their greater prevalence in previous times in determining the sociological composition of the 'invisible college' of international lawyers. This transformation has been paralleled by a growing interest in being able to better understand not only *what* ILJs publish[86] but also increasingly by *whom* and from *where* they do so.[87]

This is, broadly speaking, the context which saw the establishment of four new TLJs in the late 1980s and early 1990s in the US and the first of them in

84 Reasons for this state of affairs include the pedagogical function played by student-managed journals, as well as the professional prestige associated with certain editorial positions – particularly in prestigious law reviews. Additional contributing factors include the comparatively expedited decision-making processes of student-edited journals, in contrast to the time-consuming nature of double-blind peer review, which often delays publication in systems that rely exclusively on that model. The resulting faster dissemination of scholarship is particularly valuable in a legal academic environment characterised by considerable professional mobility. Tradition and institutional inertia also play a role in maintaining this model. For different perspectives on the integration of blind-peer review in US law journals see: Barry Friedman, 'Fixing Law Reviews', Duke Law Journal 67 (2018), 1297-1030 (1349); Michael Conklin, 'Letterhead Bias and Blind Review. An Analysis of Prevalence and Mitigation Efforts', U. Ill. L. Rev. Online (2022), 1-9.

85 See e. g. Isabel Lischewski, Editorial #28: Driving with the Re(ar)view Mirror, Völkerrechtsblog, 4. May 2023, doi: 10.17176/20230504-204344-0. For a previous analysis noting that peer-reviewers are structurally conditioned to show a 'bias towards existing paradigms and against novel, transformative or revolutionary ways of thinking', see James Britt Holbrook, 'Peer Review', in: Robert Froedman (ed.), *The Oxford Handbook of Interdisciplinarity* (Oxford University Press 2010), 321-333. I offered an engagement with these ideas in Ignacio de la Rasilla, 'Interdisciplinary and Critical Knowledge Production Processes in International (Human Rights) Law', L'Observateur des Nations Unies 46 (2019) 5-28.

86 Anderson and Claussen (n. 7).

87 SarahNouwen and Joseph Weiler, 'Vital Statistics: Behind the Numbers', EJIL Talk!, 22 April 2024, available at <https://www.ejiltalk.org/vital-statistics-behind-the-numbers/>, last access 4 July 2025.

Western Europe ('Transnational Dispute Management' or TDM) which was established – at the very end of this 20-year-period – in 2004. Common to the birth of the newer US-based TLJs is that they were all adaptative responses to the internationalisation of the law curriculum in US law schools and to the emerging consensus that 'law, as it affects relations between nations and between people in different nations, has become an essential part of a lawyer's intellectual wardrobe'.[88] However, remarkably, the two new US-based TLJs that were established in the late 1980s (including the Transnational Lawyer (est. 1988) which had the specific ambition to perform 'a special practice-oriented role among international journals')[89] dropped the transnational label from their mastheads in the course of the subsequent two decades.[90] Moreover, the remaining three new TJLs either complemented the 'transnational law' label with other 'generalist' denominations[91] or, as in the case of the 'Transnational Lawyer' and also the TDM clearly mirrored the influence of the early trend towards specialisation common in the landscape of Western ILJs catering in this case for the transnational legal practitioner.[92] Being all US-based except for one, these TLJs were not impacted by the gradual introduction of the practice of double blind peer reviewing in the same measure as Western-European faculty-edited ILJs.

While the intellectual bloodlines to Jessup were clear in the first generation of TLJs during the most turbulent decade of the Cold War, this intellectual liaison becomes more diffuse in the second generation of TLJs. In these newer journals, the use of 'transnational law' in their mastheads seems less an effort to carry Jessup's intellectual mantle – formed in a period of early institutional expansion and diversification of the international legal order – and more a reflection of the post-Cold War moment of optimism. This optimism centred on the possibilities for transnational legal practice and global institutional cooperation, a zeitgeist encapsulated in George H.W. Bush's 'New World Order' speech of September 11, 1990.[93] This background is reflected in the emphasis placed on policy-oriented and problem-solving

88 Howard A. Glickstein, 'Introduction', Touro Journal of Transnational Law 1 (1988-1990), v-vi (v). See also 'Preface', Transnational Law 1 (1988), xiii-xviii.

89 'Preface', Transnational Law 1 (1988), xiii-xviii.

90 The Transnational Lawyer (1988-2005) renamed 'The Pacific McGeorge Global Business & Development Law Journal' (2005-2014); Touro Journal of Transnational Law (1988-1993) renamed 'Touro International Law Review'.

91 Journal of Transnational Law and Policy (1991), available at <https://law.fsu.edu/co-curriculars/jtlp/previous-issues>, last access 4 July 2025; Transnational Law and Contemporary Problems (1991).

92 Transnational Dispute Settlement (2004).

93 George H.W. Bush and Brent Scowcroft, *A World Transformed* (Knopf Doubleday Publishing Group 1998).

dimensions associated with transnational law in the titles of some of these newer US journals.[94] The second generation of TLJs also bears witness to a geographical expansion – illustrated in Map 1 above – from the East Coast origins of the term to the Midwest (Iowa), Southwest (California), and Southeast (Florida). This spread signals a certain popularisation of the term, moving from its Ivy League roots toward a more practice-oriented and less theory-intensive academic environment. This, furthermore, coincided with the emergence of 'international/transnational business transactions' focusing on international commercial law and corporate law as a focus in US law school curricula in the 1990s and early 2000s,[95] echoing the rising globalisation of commerce and the legal profession.

A general review of the contents of the four US-based TLJs that appeared between 1988 and 1991 shows that, like their predecessors, they have for the most part remained generalist in orientation.[96] In this respect, they continue the tradition of the first generation of TLJs, serving as platforms for the publication of works on public and private international law, comparative law, and domestic legal issues with international dimensions – including what would today fall under the rubric of foreign relations law. While a comparison with other ILJs that do not feature the 'transnational law' label in their titles lies beyond the necessarily limited scope of this study, it is worth emphasising that the distinctiveness of TLJs lies in their all-encompassing scope. In contrast, ILJs have – over, in particular, the past two decades, as discussed in Section IV – become increasingly specialised in particular research areas and subfields of international law. This trend has resulted in an expertise-based exclusionary bias against scholarship that does not align with those specialised domains. Once again, as figure 2 below shows, studies fitting the five general categories feature alongside just a few labelled 'transnational law' in the titles of the contributions that have appeared by contrast, very sparsely. Having noted this, some particular features of this second generation of TLJs are worth highlighting, including the fact that the data sample (estimated at 1000 academic outputs) is far smaller because two of these US-based TLJs were relatively short-lived.

94 See (n. 90).

95 See e. g. Larry Cata Backer, 'Internationalizing the American Law School Curriculum (in Light of the Carnegie Foundation's Report)' in: Jan Klabbers and Mortimer Sellers (eds), *The Internationalization of Law and Legal Education* (Springer 2009), 49-112.

96 On the methodology employed see (n. 60).

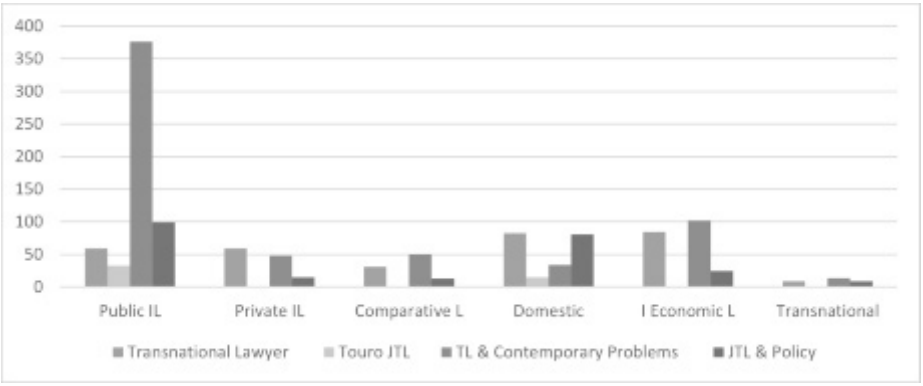

Figure 2 US-based TLJs – from 1988-1991 to 2024.

IV. The Globalisation of Transnational Law Journals (2005-2024)

Two distinct phases may be distinguished in the evolution of TLJs. The first phase spans, as we have seen, from the early rise of the transnational label among student-edited international law journals published in the US in the mid-1960s to the relative fall of the label among US-based student-edited law journals in the early 1990s with two of them subsequently dropping the term 'transnational' from their mastheads. The second phase extends, as we shall now see, from the early 2000s to the mid-2020s when eleven new transnational law journals were launched for the first time beyond the US in the Netherlands, Spain, Canada, the United Kingdom, China, Indonesia, and Italy while only one new US-based academic journal ventured to take up the 'transnational' label again in its title in 2016. Among the new batch of non-US journals – which, moreover, are all faculty-edited TLJs – are some that have challenged the hegemony of English as the universal language of science in the transnational legal field for the first time. Against this background, it would be academically misleading to confine the investigation of the historical evolution and contemporary features of TJLs to those published solely in the United States. Non-US-based TLJs matter not only in historical and epistemological terms, but also constitute an essential component of any serious inquiry into the history of TLJs – a completely overlooked area in the broader historiography of international law journals.

The publishing landscape in the 2020s in the field of international law has become transformed almost beyond recognition compared to that of six

decades ago when the Columbia JTL was established, and completely so since the beginning of the 20th century when, as Oona A. Hathaway and John D. Bowers note, 'the rate of publication' was 'just over 100 articles per year in 1900', compared to 'nearly 6,000 in 2020'.[97] Quantitatively speaking, international law journals have risen to be the most numerous of all academic periodicals in all legal disciplines[98] while the generalisation, since the early-mid 2010s, of 'quality and prestige' journal rankings based on 'metrics' and 'impact factors' and their influence on hiring and promotion decisions in academic careers and research-funding allocations[99] has also been a game-changer in international law journal publishing as a whole. The 'metrics fever' in ILJs is often decried.[100] However, the competitive nature of metrics-ridden journal rankings may be argued to have contributed to fostering minimum-common-quality standards across the board for international law journals in both the Global North and in the developing world and emerging economies.[101] Regarding the latter, besides their use as an 'objective' benchmark[102] (of sorts) for appointments and promotions in increasingly professionalised epistemological communities[103] in all scientific fields,[104] two main factors

97 Hathaway and Bowers (n. 7). For some qualifications on the methodology and database employed by the authors, see, nonetheless, e. g. Marko Milanovic, 'Horrible Metrics, Part Deux', EJIL Talk!, 9 May 2024, available at https://www.ejiltalk.org/horrible-metrics-part-deux/; and Artur Simonyan, 'Where is Martti Koskenniemi?: A Rejoinder', Völkerrechtsblog, 25 May 2024, available at <https://voelkerrechtsblog.org/where-is-martti-koskenniemi/>, last access 4 July 2025.

98 Albeit adopting a very inclusive methodology, has identified the existence of *circa* six-hundred ILJs over time of which a bit over 20 % of them have been discontinued, see Claussen (n. 12).

99 See e. g. Craig G. Anderson, Ronald W. McQuaid and Alex M. Wood, 'The Effect of Journal Metrics on Academic Resume Assessment', Studies in Higher Education 47 (2022), 2310-2322.

100 See e. g. Janja Hojnik, 'What Shall I Compare Thee To? Legal Journals, Impact, Citation and Peer Rankings', Legal Studies 41 (2021), 1-24.

101 Another positive side of 'ranking journals' occurs when/if, as a meritocratic criterion, the fact of publishing in them is combined with other distinguishing marks of a complementary diversified and innovative academic production as well as community-service that do evidence an all-round-approach to scholarly life instead than one solely focused on reaping the professional rewards by moulding one's scientific production to the targeting of 'high-ranking' ILJs.

102 'Objective', at least, when compared to past systems ranging from the paternalistic/protégé traditional model of appointment to those including different levels of 'corruption' and different types of bias in decision-making processes regarding appointment to university positions in many parts of the world.

103 See, highlighting the relationship between the metrics fever and the professionalisation of international law teaching across Latin-American, see Jorge Contesse, 'International Law Scholarship in Latin-America', Va. J. Int'l L. 64 (2024), 1-32.

104 Chris Brooks, Lisa Schopohl and James T. Walker, 'Comparing Perceptions of the Impact of Journal Rankings Between Fields', Critical Perspectives on Accounting 90 (2023), 1-49.

 DOI 10.17104/0044-2348-2025-3-803

may account for the attachment to 'journal rankings' among universities in the Global South.

The first is related to the fact that the frequency of publications in top scientific journals has an impact on both the national and global prestige and ranking of universities themselves in a time of fierce competition in national, regional, and global markets for students, talents, public and private sources of funding, scientific patents, and commercial trademarks. This competition has great economic implications for developing, emerging, and developed economies alike.[105] The second reason behind the embracing of the 'metrics fever' in the 'Global South' is their potential role in the ongoing reversing of traditional centre-periphery dynamics in all scientific fields, including international law. This has much to do with the subtle geo-political and geo-economic strategic value of international law scholarship itself.

This role of ILJs – including TLJs – is increasingly relevant when an ongoing shift from a Western-centric international order to a far more multipolar one has increased the value of ILJs as platforms from which initiatives – including international legal ones – are launched and soft-power in the field is exercised.[106] While the reservoir of ILJs was originally the West,this subtle strategic role is currently also being increasingly performed by the founding of regional and/or national ILJs in non-Western countries. What H. Verdier has termed an 'outbound or outcast' role aimed at 'broaden[ing] the reach and influence' of the 'regional [or national] perspective on international law'[107] of certain journals underlies the current rise in the establishment of newer ILJs in emerging economies as they 'strive to carve out a space in global international law discourse for a traditionally underrepresented regional [or national] perspective'.[108]

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105 The rise of universities in the Global South, namely across certain parts of Asia, threatens with gradually depriving Western universities (across the Anglosphere: The US, the UK and Australia) of an enormous source of yearly income from international students from the Global South on which their universities have grown largely dependent to finance themselves. In 2023, the 'US State Department 'granted 289,526 visas to Chinese students' alone. Aline Barros, 'Chinese Still Largest Group of Foreign Students in US', 21 December 2023, available at <https://www.voanews.com/a/chinese-still-largest-group-of-foreign-students-in-us/7407560.html>, last access 4 July 2025.

106 David Hughes and Yahli Shereshevsky, 'State-Academic Lawmaking', Harv. Int'l. L.J. 64 (2023), 253-309 (253).

107 Verdier (n. 6), 2.

108 Verdier (n. 6), 12. Other than this 'outbound' role, regional journals may also serve an 'inbound' or 'dialogic' role, and an 'inward-looking' or 'localized' role. See further, for a detailed empirically based application of these three roles to a selected number of regional [or national] ILJs, Verdier, (n. 6), 12-25. Some of the newer TLJs, in particular those located in China, do also conform, as will see later, to this 'non-mutually exclusive' tripartite categorisation of roles.

Map 2. The Global Expansion of Transnational Law Journals (2005-2024)

The last 20 years have also witnessed a deepening of the proliferation of specialised ILJs that has accompanied, and further strengthened, the expansion and diversification experienced by the field of international law since the turn of the century.[109] This tendency is particularly acute in journals published in today's scientific *lingua franca* in Western Europe and to a lesser extent in the US, where an earlier generation of 'generalist' international law periodicals sit side by side with a newer generation of specialised or even sub-specialised ones. The deepening of the specialising trend is apparent in all fields of international law, where new specialised and sub-specialised journals have been added to those founded between the 1980s and the early 2000s, ranging from international human rights law[110] to international environmental law and various sub-specialities including climate law.[111] Moreover, it also comprises, *inter alia*, newer specialised journals in several other international legal specialisations including some cross-sub-specialised ones such as international dispute settlement,[112] the

109 De la Rasilla (n. 10), 164.

110 International Human Rights Law Review (est. 2012). Human Rights & International Legal Discourse (est. 2007).

111 Climate Law (est. 2010).

112 Journal of International Dispute Settlement (est. 2010).

law of international organisations[113] and more specific ones such as the use of force[114] and international disaster law.[115]

Geographically speaking, the specialising undercurrent, which is now a central feature of the latest batch of publications in the English language in the North-Western hemisphere, has also been gradually expanding, albeit in a more limited manner, to other regions and languages. However, in the broader and, to a certain extent, still unmapped province of international law journals published in languages other than English and/or in non-Western regions, the 'generalist' framework still remains the rule, albeit often in tandem with a 'national' label or in combination with a regional or 'continental' (e. g. Africa, Asia),[116] sub-continental (Latin-America)[117] or even sub-regional (e. g. South-Asia)[118] identifier in the title of international law reviews. Like any good rule, this one also has exceptions and some of the newer continental and regional ILJs are marketed as specialised ones.[119]

Alongside the significant process of specialisation of ILJs, which is understood as an outcome of the endogenous evolution of a scientific discipline or research field, legal hybridisation and inter-disciplinarisation are also characteristics (albeit less so in comparison) of the transformation experienced by international law publishing in academic journals in recent decades. In this context, legal hybridisation may be understood as an amalgamation of international law with another legal area in the title of a journal (traditionally comparative law but also, in particular in the 2000s, European law or even Islamic law or, with far longer historical pedigree, foreign public law as in the case of Zeitschrift für ausländisches öffentliches Recht und Völkerrecht).[120] By contrast, inter-disciplinarisation may refer to either the blending of two cognate research areas or disciplines (more traditionally international relations, politics, international affairs, business, diplomacy or alternatively to identification of the journal's scope with a research area that, by its very nature, encompasses and invites contributions from several disciplines

113 International Organizations Law Review (est. 2004).

114 Journal on the Use of Force and International Law.

115 Yearbook of International Disaster Law (est. 2019).

116 Asian Journal of International Law (est. 2011).

117 Revista Latinoamericana de Derecho Internacional (est. 2013). On it and the 'Sociedad Latinonamericana de Derecho Internacional', see further Contesse (n. 103), 383-386.

118 South Asian Journal of International Law (est. 2020).

119 See e. g. Asian Journal of International Humanitarian Law and Human Rights (2018); African Journal of International Criminal Justice (2014); The African Journal of International Economic Law (2020).

120 Robert Stendel, '(Re-)Discoveries in a 'Lost' Text: Looking Back at the ZaöRV's First Editorial', Völkerrechtsblog, 4 June 2024, doi: 10.17176/20240605-004947-0.

including international law[121] (e. g. world trade, global responsibility to protect, global governance, transitional justice etc.). This has taken place in an international context informed by globalising legal tendencies that has also left its 'global' mark or its 'constitutional' one or even both (e. g. *Global Constitutionalism*), on the name of a number of academic journals that regularly publish research on international legal topics.

However, as previously noted regarding the move towards specialisation in ILJs, legal hybridisation and inter-disciplinarisation are, once again, features that have so far mostly affected academic serials published in the Western world, and in particular in the English language. According to Claussen's database of what she categorises *in toto* as 'international and comparative law journals' ILJs featuring these characteristics amount to three quarters of the total.[122] By contrast, in other regions and/or languages, some exceptions notwithstanding,[123] 'generalist' international law journals remain once again the general rule.

Against this background, from 2004 to the present transnational law journals have experienced a resolute global revival. Indeed, as Map II above shows, since the mid-2000 several transnational law journals have been published in the United Kingdom, Spain, Canada, China, Indonesia, and Italy. Meanwhile, in the US, where only six transnational law journals continue to exist, a new transnational law journal was launched in 2016,[124] the first since 1991. Despite the number of TLJs published outside the US now being greater than that of those existing in their birthplace, only two of them, *Cuadernos de Derecho transnacional* (2009) founded in Madrid and the most recent *Journal de droit transnational* (2022) in Italy,[125] do not use English as their main vehicle of academic expression.[126]

Like their earlier US counterparts, the existing TLJs remain closely associated with universities and/or research centres, although only a few of the newer ones flag this affiliation in their titles.[127] Moreover, compared to

121 It is debatable whether interdisciplinary journals that do not contain the term 'international law' in their titles should be included in the category of 'international law journals'. For journals which may fall in a 'grey zone' resort to other criteria may be complementarily warranted. See further criteria in (n. 12).

122 For a more restrictive definition of ILJ, see Claussen (n. 12).

123 Chinese Journal of Global Governance (est. 2015-2020).

124 UC Irvine Journal of International, Transnational Law and Comparative Law (2016).

125 The JDT is founded by the Autonomous Region of Sardinia.

126 Although they also publish submissions in other languages, including English.

127 Peking University Transnational Law Review (2013-2018), available at <https://stl.pku.edu.cn/Academics/Centers_and_Journals/Peking_University_Transnational.htm>, last access 4 July 2025 and UC Irvine Journal of International, Transnational Law and Comparative Law (2016).

the two previous generations of TLJs, this new batch of journals has for the most part followed a pattern of specialisation which is consonant with the general evolution of international law periodicals in recent decades.[128] In the case of TLJs, this pattern of specialisation has mirrored the expansion of the transnational legal domain into the spheres of transnational environmental law,[129] transnational criminal law,[130] transnational commercial law,[131] transnational business law and even transnational Islamic law and practice.[132] However, as is also the case in the broader realm of ILJs, generalist TLJs have not disappeared even though some of the newer TLJs have either adopted a more theoretical orientation[133] or have begun, as ILJs started doing a long time ago beginning with the American Journal of International Law (AJIL) (est. 1907), to similarly adopt a 'national' identifier in their title.[134]

The greatest percentage of the newer TLJs are 'on-line only' journals, a fact that is in accordance with K. Claussen's finding that approximately a third of those she categorises *in toto* in her global database as 'international and comparative law journals' are 'on-line only'.[135] The largest proportion of TLJs are, similarly, self-published; a feature that cannot be disassociated from their origin in US law schools, where in-house university publishing remains the general practice. Meanwhile, the presence of TLJs among the otherwise fairly limited number of international law journals (around 20 %) currently included in the list of law journals in the 'Social Sciences Citation Index' (SSCI), one of the indexes most often used as a yardstick to evaluate academic performance, is limited to just two TLJs, although one of them tops the list of ILJs with the highest-impact factor.[136] Nevertheless, seven newer TLJs have been established in the 2020s (all of them outside the US), which is an all-time-record figure for TLJs in such a short period.

A general review of the contents of the ten new TLJs that have appeared since 2009 shows that although some newer journals maintain a 'pragmatic perspective' in their inclusivist conceptualisation of transnational law as a 'space' for the coexistence and interaction of several legal orders, there is a more defined private international law orientation in some of the newer

128 De la Rasilla (n. 10).
129 Transnational Environmental Law (2012).
130 Transnational Criminal Law Review (2022).
131 Transnational Commercial Law Review (2020).
132 Manchester Journal of Transnational Islamic Law and Practice (2020).
133 Transnational Legal Theory (2010).
134 Chinese Journal of Transnational Law (Chinese JTL) (2023).
135 Claussen (n. 12), 8.
136 Transnational Environmental Law (2012). Other widely used law journal rankings include e. g. Google Scholar and the Washington and Lee Law Journal Rankings.

generalist ones.[137] This is in contrast with the broad umbrella under which public, private, comparative and some specifically labelled 'transnational' topics have been traditionally published in US-based TLJs. However, this is consonant with the fact that in Western-European civil law countries, where there is a clear-cut divide between public and private international law in the legal curriculum,[138] 'transnational law' has been traditionally identified as pertaining to the scientific sphere of private international law.[139] A similar association of transnational law with private international law is common in China, where the public-private international law divide becomes tripartite with the addition of 'international economic law' as a separate unit of specialisation in law faculties. This contrasts with TLJs published in common law countries like the United Kingdom (UK) and dual legal systems like the US, where law departments' internal organisation is more flexible and less specialised.[140]

Asia-based generalist TLJs combine a general although not exclusive private international law orientation, in the case of the Chinese TLJs, with 'an outbound or outcast' role which consists, as we saw before, in fostering a regional or national standpoint on international law issues.[141] Moreover, when transposing the 'perspective of comparative international law' to these new TLJs it is apparent that Chinese TLJs, like their regional International Law Journal (ILJ) counterparts in Verdier's analysis,[142] perform an 'inbound or dialogue' role, in particular by bringing 'outside authors into conversation

137 'Editorial-Presentation du journal', Journal du Droit International 1 (2023), 2-3 (2).

138 Up to the point that their respective professors possess venia docendi to impart only one of them such, for instance, in Spain, where professors of public international law and professors of private international law often belong to different public law and private law sub-departments within law schools and follow clearly distinct career paths.

139 This is apparent in the case of 'Cuadernos de Derecho transnational' (2009) which presents itself as a 'scientific private international law biannual journal' which publishes research on 'private international law, uniform law, European social law and comparative private international law', available at <https://e-revistas.uc3 m.es/index.php/CDT>, last access 4 July 2025.

140 In the US the most commonly titled 'law professor' may be required to teach across the whole legal curriculum (e. g. from contract law to international business transactions). In both the US and the UK the very few scholars holding 'international law professorships' could be expected to teach public, private and economic international law. Moreover, at least in the UK, holding a lecturing position will generally not be an impediment to be requested to teach by the dean of the law school other 'public law' subjects such as constitutional, administrative and EU law.

141 See Jeffrey S. Lehman, 'Foreword', Peking University Transnational Law Review 1 (2013), 2-5 (4), stressing the journal's commitment 'to critical exploration of issues that bear directly on China's participation in the transnational legal community and as a venue when 'legal questions of central importance to the future relationship between China and the rest of the world can be analysed and debated'.

142 Verdier (n. 6), 12.

or debate with regional authors, especially on topics of regional interest' rather than striving 'to expose [their] regional audience to outside perspectives'.[143] These two roles or functions are often combined with a third one consisting of an 'inward or localised' role by 'providing a forum for regional authors to publish on issues of regional interest'.[144] Meanwhile, the only TLJ published in the US for more than three decades is far more encompassing, or ecumenical, in being the first TLJ that makes the inclusive traditional practice of US-based law journals explicit by encompassing in its title international law (public and private), comparative law and transnational law.[145]

By contrast, the newer generation of specialised TLJs is more thematically oriented and universal in scope. This is apparent in those covering the more established fields, such as 'transnational environmental law' understood by its founding editors as one that offers 'a powerful new mode of understanding and engaging with environmental law' in its embodiment of 'an approach to legal studies and practice' that is 'inspired by some sensibilities and assumptions' as it, *inter alia*, tackles non-'state law and private governance' regarding a subject matter 'that simply [does] not recognise national boundaries'.[146] A similar approach of broadening by pushing to their limits (and beyond) the research-area contours of other 'transnationally' re-conceptualised legal fields, ranging from criminal law[147] to commercial law, and in doing so escaping thematic and methodological constraints in addressing specialist audiences, is shared by other newer specialised TLJs. Finally, between the generalists and specialised TLJs stands out the only TLJ with a defined theoretical orientation, even though one originally conceived as 'pluralistically minded' in its encompassing 'high-quality theoretical scholarship that addresses transnational dimensions of law and legal dimensions of transnational fields and activity'.[148]

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143 See Verdier (n. 6), 2.

144 See Verdier (n. 6), 2.De la Rasilla (n. 19), 3-8, noting that the Chinese JTL intends to also 'providing a forum to enable analysis and better understanding of matters and perspectives related to China, Asia and developing nations on international and transnational legal issues and their influence in shaping correlated global legal developments and scholarly debates'.

145 Irvine Journal of International, Transnational Law and Comparative Law.

146 Veerle Heyvaert and Thijs Etty, 'Editorial, Introducing Transnational Environmental Law', Transnational Environmental Law 1 (2012), 1-11 (3-5).

147 See e. g. Neil Boister et al., 'Editor's Note', Transnational Criminal Law Review 1 (2022), i-ii, noting that its establishment is 'based on the simple premise that, while there were both journals dedicated to international criminal law stricto sensu and those which might publish material concerning crime and international law, it would be useful to have a law journal dedicated to the emerging and increasingly important discipline of transnational criminal law'.

148 Craig Scott, 'Introducing Transnational Legal Theory', Transnational Legal Theory 1 (2010), 1-4 (1).

If, as seen earlier, the first generation of TLJs was an offspring of Jessup's ideologically progressive influence in the US at a time of early expansion and diversification of international law in the 1960s, in the second generation of TLJs, the intellectual pedigree retraceable to Jessup were already pretty diffuse against the background provided by the geopolitical conditions of the by-then emerging new post-cold war order. This noted, all US based TLJs have remained all-encompassing in their coverage of the research space identified by Jessup. In contrast, the third – and predominantly non-US-based – generation of TLJs tends to use 'transnational law' primarily as a descriptor of specialised fields (e. g., transnational environmental law, transnational criminal law, transnational commercial law, transnational business law, or transnational Islamic law and practice). Even among the few remaining generalist journals, the term often serves to signal research areas that, within their respective regional jurisdictions, largely fall within the domain of private international law. The main exceptions to these twin tendencies are two North American TLJs. One is a Canada-based journal that is the most theoretically oriented among them, maintaining a strong dialogue with foundational legal theories.[149] The other is the only US-based TLJ established during this period, which – coinciding with Gregory Shaffer's tenure at the University of California, Irvine – adopted a transnational orientation under the influence of his work on 'transnational legal orders'.[150] Overall, the trajectory of TLJs illustrates a complex interplay between foundational legal theories, historical global transformations shaping the evolution of international law, and the increasing specialisation of international legal discourse.

V. Conclusions – New Homes Away from Home?

The history of transnational law journals is an intrinsic part of the global history of international law journals and of the global diffusion of a way to look at different legal regimes and regulatory spaces which stand 'in an ambivalent relationship to the state and its proprietary claims over legitimate law making'.[151] Their evolution and geographical expansion, which this article has surveyed, had long remained a blind-spot in the historical evolution of international law journals.[152] The re-integration of knowledge on TLJs to the broader family of ILJs is part of a larger effort to enrich research on the

149 Transnational Legal Theory.

150 See e. g. Gregory Shaffer (ed.), *Transnational Legal Ordering and State Change* (Cambridge University Press 2013) and Terence C. Halliday and Gregory Shaffer (eds) *Transnational Legal Orders* (Cambridge University Press 2015).

151 Peer Zumbansen, 'Editorial', Transnational Legal Theory 10 (2019), 1-5 (1).

152 See Van Hulle and Landauer (n. 11).

historical evolution and contemporary features of ILJs as the 'unlikely repositories of intellectual history of a discipline'[153] at a time when its future evolution is plagued with challenges and uncertainties. These include – but are not limited to – those posed by the transition to an open-access[154] model, blind peer reviewing in an overcrowded ILJ scenario and the manifold risks surrounding the rise of generative artificial intelligence (AI) for international legal scholarship more generally.[155]

More research on ILJs not published in English, and in particular on those published in Mandarin and Spanish,[156] the two languages with the largest number of native speakers in the world, will cast further light and help us to better historize, map, classify and analyse the main features of international law journals. These are central in any effort to analyse past and contemporary trends in international legal scholarship on a global scale. As Claussen notes, there are still 'remarkably few data as to what topics, methodologies, and perspectives of international law scholarship journals and publishers print, by whom, in what languages, through what media, and subject to what parameters'.[157] Scholarly analyses including ones focused on *what* ILJs publish, *who* publishes in them and from *where* they do so, even *where* the specific readers of some ILJs are located,[158] or *what* are the works and *who* are the authors who are more widely cited[159] cast a much needed light on the transformations of international law publishing over time and the study of its impact on policymaking over time. Its potential as a platform to provide meaningful comparisons 'through the lenses of comparative international law'[160] among countries and regions with regard to international law and its study is apparent in an increasingly post-Western-centric, multipolar and transnationally interdependent world system.

The evolution of TLJs over the last twenty-years in particular has been replicating historical dynamics common to, and clearly observable, during the early globalisation of ILJs.[161] Similar to ILJs in Western Europe, TLJs

153 Bederman (n. 5), 20.

154 Raffaella Kunz, 'Opening the Access to International Legal Scholarship – an Introduction', HJIL 84 (2024), 219-230.

155 See e. g. Matthew Grimes et al., 'From Scarcity to Abundance: Scholars and Scholarship in an Age of Generative Artificial Intelligence', Academy of Management Journal 66 (2023), 1617-1624 (1617).

156 Contesse (n. 103).

157 Kathleen Claussen, 'SAILS Foreword', Va. J. Int'l L. 64 (2024), 349-356 (350-351).

158 AJIL and AJIL Unbound, available at <https://x.com/AJIL_andUnbound/status/1788579314201501773>, last access 4 July 2025.

159 See, polemically, Hathaway and Bowers (n. 7 and n. 97).

160 See Verdier (n. 6).

161 See De la Rasilla (n. 10), in particular maps at 142, 145 and 157.

first emerged (albeit almost a hundred years later) in what at the time was the incontestable greatest economic, political, and military centre of world power. As ILJs did in a similar time lapse of forty years, TLJs also began to spread geographically, although in this case in a reverse manner from the US to Western Europe. Since then, and over the subsequent twenty years TLJs (as ILJs did, mostly in Latin America in the 1910s and 1920s) have extended further reaching Canada and Asia, while similarly beginning to adopt a 'national' denomination in their titles during the 2010s and early 2020s. Moreover, TJLs have also been mirroring developments common to the evolution of ILJs over the last sixty years. These include further specialisation and even legal-hybridisation and inter-disciplinarisation, and a direct impact of new technologies on their management and features, the relative generalisation of blind peer review methods, increasing online-only access and incorporation in indexes and rankings.

Philip C. Jessup's coinage of the term 'transnational law' in the mid-1950s was intended to provide an alternative to the disrepute to which international law had fallen as a problem-solving framework during the early Cold War. While, as we have seen, Jessup's early understanding of transnational law has largely fallen in the rear-mirror of the creation of new TLJs, the tectonic transformations the international legal order has experienced over the last eighty years, what commentators argue is an emerging Cold War 2.0. is fostering a similar lack of trust in state-based international law to face global crises and challenges in an interdependent world.[162] This provides a fertile terrain for a revamped field of transnational law, of which the establishment of new TLJs may be a symptom.[163]

Moreover, the historical parallels between the general evolution of ILJs and TLJs also offer good prospects for the future of TLJs. The rising trend of seven new TJLs in barely four years has only made more apparent the great potential for TLJs to continue reaching out to other languages beyond the modern *lingua franca* and to continue expanding geographically like the first ILJs did themselves from Western Europe to all other regions throughout the 20th century. In particular, there is not yet a single TLJ in Africa, Central and South America, Central and Eastern Europe or across most parts of the Asia

162 See 'Is There Really a Cold War 2.0? Inside the Debate on How to Think about the US-China Rivalry', Foreign Policy, 11 June 2023, <https://foreignpolicy.com/2023/06/11/new-cold-war-2-us-china-russia-geopolitics/>, last access 15 May 2025.

163 This also agrees with the relatively little proportion of TLJs in the larger boom of ILJs during the 1984-2004 period (and even abandonment of the label in some cases) which may be accounted to the fact that TLJs did not need to compensate for the problem-solving lack of capacity of international law during a time of new hope on international law and institutional-creation processes.

Pacific region, which alone comprises about 60 % of the world's population. This is as much an empirical fact as it is a window of opportunity for a future generation of TLJs to steer new courses in their continual exploration across new regions of a transnational law field which is now more than ever finding new homes away from home.

Of Queens and Kings: Hereditary Heads of State under the Prism of International Law and Human Rights

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Abstract

The origin of public international law is strongly intertwined with monarchs and royal houses. From a traditional continental perspective, the concept of 'sovereign States' and of 'sovereignty' is traced back to the acquired autonomy and independence gained by kings over other sources of power. Despite this original connection, current international law studies seem to devote little attention to the relationship between monarchies and international law. The present work seeks to fill this gap and will analyse the possible conceptual clashes between the existence of monarchies and fundamental principles of international law, such as the prohibition of discrimination. The right to non-discrimination will be addressed both in light of the

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'external' relations of royal houses, viz 'commoners', and 'internal' relations of the house, contextualising rules on the succession to the throne in the general framework of human rights protection. Furthermore, a juxtaposition of monarchies and the holding of a lifetime position with the principles of immunity will highlight the limits under which royals may enjoy such privileges under international law.

Keywords

Monarchies – International Law – Conditions for Legal Personality in International Law – Immunities – Human Rights

I. The 'Sovereign' in 'Sovereign-ty': Setting the Framework of Human Rights and Royal Households

The foundations of the Westphalian model admittedly rest[1] on the independence (European) kings and kingdoms gained from other powers[2] and it is therefore not surprising that monarchs, at least back then, were inseparable from the concept of sovereignty which today still represents the very essence of statehood in international law. It would be beyond the scope of the present work to investigate the origin[3] and the legal meaning of 'sover-

1 The common idea which traces back the emergence of a new international legal order to the birth of independent States with the Treaties of Westphalia in 1648 has been challenged by scholars who have included in traditional studies over European continental States that of colonial States, thus widening the scope of the contribution of other areas of the world in the evolution of international law. See Lauren Benton, 'From International Law to Imperial Constitutions: The Problem of Quasi Sovereignty, 1870-1900', Law and History Review 26 (2008), 595-619.

2 See Special Arbitration Agreement, 23 January 1925, *Netherlands v. USA, Island of Palmas Case*, 4 April 1928, *Reports of International Arbitral Awards*, 2006, 829, at 838, writing that '*Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.*' For a critical reading of the 1648 Peace of Westphalia, see Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', The International History Review 21 (1999), 569-591; Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', IO 55 (2001), 251-287.

3 On the much recent origin of the 'idea' of sovereignty, see Jean D'Aspremont, 'Statehood and Recognition in International Law: A Post-Colonial Invention' in: Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2018* (Oxford University Press 2019), 139-154.

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eignty',[4] which for our purposes here can generally be understood as '*a synonym for independence*'[5] of a legal system.

International law is not the same as it was when States were at their 'beginnings' and when monarchs such as Louis XIV identified themselves as being the State by saying '*l'État, c'est moi*'. The relationships between monarchies and international law already stem from the etymology of (State) Sovereignty and, as will be seen, often translated into monarchs being above the law.[6] Their contribution to the development of international law is undisputed: jurisdictional immunities may be a case in point.[7] Yet, international law is not the same as it was, and monarchies may be at odds with principles and rights generally considered to be fundamental nowadays.

In this sense, the present work intends to raise the question of whether and to what extent modern international law affects monarchies (and *vice-versa*). More specifically, para. II will address the privileged legal status of royals against the backdrop of the principles of non-discrimination and equal dignity of people in part by looking at discrimination (mainly against women) that can be found in rules on the succession to the throne. A human rights law reading of these rules supports the view that greater compliance with equality principles[8] is still needed and should be better pursued in the future. Para. III explores the relationships between personal immunities and hereditary Heads of State, arguing that, in particular when combined with extended domestic privileges, a *sine die* personal immunity, could be at odds with general understandings of the law of immunities. Para. IV addresses 'the other side of the coin': i. e. possible interferences with royal's human rights just because of their specific status, suggesting that the traditional human-

4 On the difficulties in giving a clear content to the term, see for all Stephane Beaulac, *The Power of Language in the Making of International Law* (Brill 2004), 1 ff.

5 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2019), 124.

6 See William Blackstone, *Commentaries on the Law of England, Book I, Rights of Persons*, with introductions by Wiflrid Prist and David Lemming (Oxford University Press 2016), 157.

7 See Josh Hughes, '*Rex Non Potest Peccare*: The Unsettled State of Sovereign Immunity and Constitutional Torts', Drake L. Rev. 69 (2021), 949-980, addressing the question of the compatibility of State immunity deriving from English doctrine under the perspective of the US Constitution.

8 From an historical perspective, commenting on the treaties between the United States of America and Hawaii for its annexation, see Henry E. Chambers, *Constitutional History of Hawaii* (The John Hopkins Press 1896), 30 writing that '*At first the efforts of the Hawaiian Commissioners to the United States gave promise of success. Subsequent developments, however, demonstrated the futility of the mission. The friends of Hawaiian royalty were greatly elated in consequence of this failure. It was hard for them to realize that the times no longer tolerated a monarchy of the grotesque or opera-bouffe order in as civilized a society as Hawaii had become, and that the re-establishment of such a monarchy could only be brought about by bloodshed and infractions upon the laws of humanity*.'

rights law tests seem not to be respected in all circumstances, possibly leading to a breach of human rights.

The present investigation is conducted without focusing exclusively on one specific monarchy but is based on a comparison of different approaches followed in various royal households (albeit many references are to the British Royal Family due to the greater accessibility of its rules, provisions, and customs). It should however be noted that the present work does not address the question of whether international law prohibits monarchies *tout court*. Not only is current State practice an obvious evidence to the contrary, but such a proposition also clashes with the (more traditional) idea that international law does not require any additional element on the government other than being 'effective' on some territory.[9]

A need for the current investigation is grounded on the one hand on the consideration that monarchies are a common object of study in the field of constitutional law,[10] and sociology of law,[11] but not necessarily in public international law. Because international law and the traditional requirements for legal personality do not focus on whether a sovereign State has a parliamentary or monarchical structure, the topic tends to occupy little space in writings (correctly so when the perspective is that of 'Statehood'). The change of perspective adopted here, i. e. investigating possible limits on monarchies imposed by public international law, wishes thus to add to current legal debates. On the other hand, this study seems necessary in light of quantitative and qualitative considerations. Quantitatively, noble houses invested of some pub-

9 On the role of 'democracy' in relation to Statehood, see in the scholarship James Crawford, *The Creation of States in International Law* (Oxford University Press 2007), 150 ff.; Sergio Maria Carbone, 'Caratteristiche e tendenze evolutive della Comunità internazionale', in: Stefania Bariatti et al., *Istituzioni di diritto internazionale* (Giappichelli 2021), 1-44 (12 ff.).

10 In particular where the Crown in constitutional monarchies takes part in the legislative process; see most recently on the British legal system Paul F. Scott, 'The Crown, Consent, and Devolution', The Edinburgh Law Review 28 (2024), 61-85, and in general Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford University Press 1995). Also, for a constitutional law analysis of the *Principauté de Monaco*, see Pasquale Costanzo, *La Costituzione del Principato di Monaco* (Giappichelli 2006). However, noting how the sharing of powers with monarchs in democratic orders has received little attention, see Carsten Anckar, 'Constitutional Monarchies and Semi-Constitutional Monarchies: A Global Historical Study, 1800-2017', Contemporary Politics 27 (2020), 23-40; Robert Hazell and Bob Morris, 'Foreword', in: Robert Hazell, Bob Morris (eds), *The Role of Monarchy in Modern Democracy: European Monarchies Compared* (Hart Publishing 2020), at p. v; Rosalind Dixon, 'Gender and Constitutional Monarchy in Comparative Perspective', Royal Studies Journal 7 (2020), 1-9.

11 Most recently, advocating for an abolition of monarchies due to their immoral presuppositions, see Christos Kyriacou, 'The Moral Argument Against Monarchy (Absolute or Constitutional)', Res Publica 30 (2024), 171-182. For a reconstruction of different readings on the divisive nature of nobility and monarchies, see Leland B. Yeager, 'A Libertarian Case for Monarchy', Procesos de Mercado: Revista Europea de Economía Política XI (2014), 237-251 (244 f.).

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lic functions are more common than one may imagine. As a simple non-exhaustive example, one could only think of the United Kingdom, Luxembourg, Andorra, Spain, The Netherlands, Belgium, Denmark, Norway, Sweden, Liechtenstein, Monaco, The Vatican City, Malaysia, Japan, Saudi Arabia, The United Arab Emirates, and more. Furthermore, monarchs may have a role in States other than their own, as in the notorious case of King Charles III, King of the United Kingdom and, as such, Head of State of each of the Commonwealth States, i. e. Antigua and Barbuda, Australia, The Bahamas, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands, and Tuvalu. From a qualitative perspective, whilst international law might not prohibit monarchies as such, monarchs can assume (or inherit) public roles such as that of Heads of State that are surely relevant for international law. In this sense, monarchs may become major (and lifelong) players in the international arena, and their relationships with the relevant law must be assessed.

II. Privileged Royal Status, Equality and Non-Discrimination

'*All human beings are born free and equal in dignity and rights.*'[12] This is the well-known text of Art. 1 of the 1948 Universal Declaration of Human Rights.[13] It is of course difficult to give content to the principle of equality and dignity which, as noted by scholars, has a certain degree of relativity both in space and in time.[14]

Even more so, according to Art. 7 of the Declaration, '*All are equal before the law […]*'. If these two rules constitute the starting point of the legal analysis, a number of questions arise with regard to constitutional monarchies.

1. Dieu et mon droit

From a historical perspective, some rulers were considered as having a spiritual role and in their functions where thus accorded supremacy given that they were called to act as defenders of religious values; in other words,

12 On equality, dignity, and human rights law, see in the scholarship Pasquale De Sena, 'Dignità umana in senso oggettivo e diritto internazionale', Diritti umani e diritto internazionale 11 (2017), 573-586; Yoram Dinstein, 'Discrimination and International Human Rights', Isr. Y. B. Hum. Rts. 15 (1985), 11-27; Oscar Schachter, 'Human Dignity as a Normative Concept', AJIL 77 (1983), 848-854; John Tasioulas, 'Human Dignity and the Foundations of Human Rights', in: Christopher McCrudden (ed.), *Understanding Human Dignity* (Oxford University Press 2013), 291-312.

13 UNGA Res A/RES/217(III) of 10 December 1948.

14 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', EJIL 19 (2008), 655-724.

monarchs were subject to God only.[15] To this day, the Papacy[16] may still be considered to fall within this group of 'monarchies' that conceptualise the ruler as having primacy over people, and being subject to God only, despite the fact that the 'ascension' to the role is not hereditary, but elective. The Kingdom of Saudi Arabia also adheres to the view that the ruler is called to protect and implement religious values.[17]

In constitutional monarchies, the role of king or queen varies in terms of their autonomy and power: whereas the Japanese Emperor mostly retains ceremonial functions and '*shall not have powers related to government*',[18] in other systems the head of the royal house may have a greater role in the formal promulgation of laws by way of granting a royal assent.[19] One does not even necessarily have to think of far-away places to find royals usually associated with power and great wealth. In the heart of Europe, in 2003, a public referendum in Liechtenstein strengthened the powers of the Princely House despite evident concerns[20] by the Council of Europe's Venice Com-

15 A prime example of this approach can be seen in the Danish Royal Law of 1665, whose section 2 read that the king '*shall from this day forth be revered and considered the most perfect and supreme person on the Earth by all his subjects, standing above all human laws and having no judge above his person, neither in spiritual nor temporal matters, except God alone*' (see David McIlroy, *The End of Law. How Law's Claim Relate to Law's Aim* (Edward Elgar 2019), 118, and for a translated text of the document, Ernst Ekman, 'The Danish Royal Law of 1665', J. Mod. Hist. 29 (1957), 102-107 (105 ff.).

16 See Dogmatic Constitution on the Church, *Lumen gentium*, Solemnly promulgated by his Holiness Pope Paul VI on 21 November 1964, Chapter I, The mystery of the church, available online, at para. 22, where it can be read that '*The pope's power of primacy over all, both pastors and faithful, remains whole and intact. In virtue of his office, that is as Vicar of Christ and pastor of the whole Church, the Roman Pontiff has full, supreme and universal power over the Church. And he is always free to exercise this power. The order of bishops, which succeeds to the college of apostles and gives this apostolic body continued existence, is also the subject of supreme and full power over the universal Church, provided we understand this body together with its head the Roman Pontiff and never without this head.*'

17 See in the Kingdom of Saudi Arabia, The Basic Law of Governance, Royal Decree No. A/90, Dated 27th Sha'ban 1412 H (1 March 1992), available online at <https://www.wipo.int/wipolex/en/legislation/details/7973>, last access 1 July 2025, Arts 7, 8, 55 ('*The King shall rule the nation according to the Sharia. He shall also supervise the implementation of the Sharia, the general policy of the State, and the defense and protection of the country.*'), and 56 ('*The King is the Prime Minister. Members of the Council of Ministers shall assist him in the performance of his mission according to the provisions of this Law and other laws.*').

18 The Constitution of Japan, Promulgated on 3 November 1946, available online at <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html>, last access 1 July 2025, Art. 4.

19 See in the UK, Royal Assent Act 1967, 1967 Ch. 23.

20 See Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, adopted by the Venice Commission at its 53rd plenary session (Venice, 13-14 December 2002), available online at <https://www.venice.coe.int/webforms/documents/CDL-AD(2002)032-e.aspx>, last access 1 July 2025, reading in its conclusions that '[…]

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mission.[21] This choice was confirmed later in 2012 when a referendum to limit the Prince's powers did not pass.[22]

The exercise of State powers, however extended they may be, based on the person's affiliation to a royal household evidently raises a number of questions related to the principle of non-discrimination.

In the first place, and on a more generalised level, the *ratio* for elevating some members of society may itself be at odds with the general principle of non-discrimination enshrined in Art. 1 of the United Nations (UN) Declaration on Human Rights.[23] To the extent a royal household assumes their role based on God's grace, a first clash with one of the most basic human rights can already be spotted. Although it may nowadays be uncommon for monarchs to argue their divine right to the throne, traces of such an approach can still be seen in the coat of arms of the British Royal House, where the traditional motto *Dieu et mon droit* is still carved in. Though, not all royal households claim or have claimed God's grace to justify their position. A number of northern-European monarchies trace back their right to ancestors who assumedly unified the nation.

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the present proposal from the Princely House would present a decisive shift with respect to the present Constitution. It would not only prevent the further development of constitutional practice in Liechtenstein towards a fully-fledged constitutional monarchy as in other European countries, but even constitute a serious step backward. Its basic logic is not based on a monarch representing the state or nation and thereby being removed from political affiliations or controversies but on a monarch exercising personal discretionary power. This applies in particular to the powers exercised by the Prince Regnant in the legislative and executive field without any democratic control or judicial review. Such a step backwards could lead to an isolation of Liechtenstein within the European community of states and make its membership of the Council of Europe problematic. Even if there is no generally accepted standard of democracy, not even in Europe, both the Council of Europe and the European Union do not allow the "acquis européen" to be diminished.' On the perplexities of the coexistence of instruments for direct democracy and the strong powers still granted to the Prince, see Pascal Mahon, 'La Costituzione del Liechtenstein da un punto di vista svizzero: una relazione difficile tra democrazia diretta e monarchia?', DPCE Online 52 (2022), 869-892; Michele Di Bari, 'Liechtenstein e diritti umani: il punto di vista degli *international monitoring bodies*', DPCE Online 52 (2022), 955-968.

21 The 'Venice Commission' is how the European Commission for Democracy through Law is generally known. This is an advisory body of the Council of Europe that was established in 1990, right after the fall of the Berlin wall, and is composed by experts on democracy. Whilst it has no legislative power *stricto sensu*, it provides legal advice to its State parties through its opinions, which abide to standards of democracy and human rights protection generally recognised between European States. On the Venice Commission, see Wolfgang Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact', EJIL 25 (2014), 579-597; Bogdan Iancu, '*Quod licet Jovi non licet bovi*?: The Venice Commission as Norm Entrepreneur', Hague Journal on the Rule of Law 11 (2019), 189-221.

22 See the entry voice *Liechtenstein*, in: Tom Lansford (ed.), *Political Handbook of the World 2016-2017*, Vol. I (SAGE 2017), 895-899 (897).

23 Universal Declaration of Human Rights (1948), Proclaimed by the General Assembly, resolution 217 A (III) of 10 December 1948, A/RES/3/217 A.

In the second place, the circumstance that some people are born into privilege not only has effects in terms of generalised discrimination as the majority of society is not considered to be 'worthy' of ascending to the throne; on an inter-personal level, reserving a State public function to a dynasty may translate into direct discrimination inasmuch as people are simply prevented from assuming that role.[24] Paradoxically, even the Pope, who may be considered as an absolute ruler for having legislative, judicial, and governmental powers, acquires more democratic traits than other royal families, as he is elected by its own community and, provided interested people satisfy the specific requirements, anyone within that community could eventually be chosen to 'ascend to the throne'.

In human rights law terms, this paves the way for the complex question of whether international law and equality rights may tolerate this form of discrimination. The right to access a specific public office is not necessarily included amongst those absolute rights that are never subject to limitations.[25] If this is true, the traditional standards for limiting individual rights should apply: that the limitation is provided for by a rule of law, is necessary to pursue a legitimate State interest and is proportionate.[26] It seems that, the greater the role and power of the monarch, the more difficult it would be for the State to 'defend' its choice to reserve the relevant office to a pre-determined set of persons just because of their birth circumstances.[27] In this sense, there is little surprise that some European monarchies have in time evolved towards predominantly ceremonial roles. This appears to be a normative consequence of democratic and equality principles.[28] Still, where monarchs retain some degree of power, a justification for limiting access to

24 See Wim Roobol, 'Twilight of the European Monarchy', Eu Const. L. Rev. 7 (2011), 272-286 (286), writing that '[…] *the unremitting emphasis on mending the much debated democratic deficit of the Union will sooner or later raise questions about how to fit hereditary heads of states into a constitutional system in which equality of all the citizens – every citizen should in principle be entitled to be head of state – is a core principle.*'

25 On 'absolute' human rights, see for all Michael K. Addo and Nicholas Grief, 'Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?', EJIL 9 (1998), 510-524; Martin Borowski, 'Absolute Rights and Proportionality', GYIL 56 (2013), 385-424; Natasa Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights', HRLR 12 (2012), 723-758.

26 *Ex multis*, Mohamed E. Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments', International Journal of Human Rights 7 (2003), 63-92.

27 Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, adopted by the Venice Commission at its 53rd plenary session (Venice, 13-14 December 2002), (n. 20).

28 See Jan-Herman Reestman, 'The State of the European Union's Monarchies. An Introduction to the Series', Eu Const. L. Rev. 7 (2011), 267-271 (268).

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public office should be given. There appears to be an evident margin of appreciation for States on the matter, and State practice confirms that, in principle, monarchies are acceptable in terms of limitation to equality rights as long as the monarchical (and hereditary) structure is perceived as being fundamental to ensuring the continuity and neutrality of an 'overseeing office' unentangled by the political constraints of a given moment.[29] This idea, it must be noted, is not exclusive to constitutional monarchies; even legal systems adopting a different model may accept that some offices do have an unlimited term of office so as to ensure the political independence of the respective person.[30]

2. Succession to the Throne and Male Privilege

Equality and non-discrimination principles may also become relevant in other aspects of the monarchical system, namely in terms of possible male preference to the succession to the throne (i. e., to the public office). For quite some time, most monarchies have adopted succession criteria inspired by Salic Law,[31] whereby only male children of the ruler could inherit. Female children were excluded from the succession, up to the point that collateral male relatives of the former king were favoured over the direct female descendants. This is still the case in Japan, for example: according to Art. 1 of The Imperial House Law, '*The Imperial Throne shall be succeeded to by a male offspring in the male line belonging to the Imperial Lineage*.'[32] In other circumstances, even where the monarch is elected, this may be a completely male-driven process, as is the case of the election of the Pope.[33]

29 See Yeager (n. 11), 242 ff. and Douwe Jan Elzinga, 'Monarchy, Political Leadership, and Democracy: On the Importance of Neutral Institutions', in: John Kane, Haig Patapan and Paul 't Hart (eds), *Dispersed Democratic Leadership. Origins, Dynamics, & Implications* (Oxford University Press 2009), 105-117.

30 On the United States of America and the appointment of Justices at the Supreme Court without a final term to ensure their independence from any power, see Vicki C. Jackson, 'Packages of Judicial Independence: The Selection and Tenure of Article III Judges', Geo. L. J. 95 (2007), 965-1040.

31 For a reconstruction of different approaches in various monarchies, see Christine Corcos, 'From Agnatic Succession to Absolute Primogeniture: The Shift to Equal Rights of Succession to Thrones and Titles in the Modern European Constitutional Monarchy', Michigan State Law Review 21 (2012), 1587-1670, and, in historical perspective, Ann Lyon, 'The Place of Women in European Royal Succession in the Middle Ages', Liverpool L. Rev. 27 (2006), 361-393.

32 The Imperial House Law, in Official Gazette English Edition No. 237, 16 January 1947.

33 See in the scholarship, Ejikemeuwa Ndubisi, 'Gender Inequality and Roman Catholic Priesthood: A Philosophical Examination', International Organization of Scientific Research (IOSR) Journal of Humanities and Social Science 21 (2016), 29-33.

In other cases, younger male heirs are preferred over older female heirs of the same lineage. A female heir, whilst not being excluded *a priori* from the succession line, can effectively inherit the throne only if she has no brothers who would be preferred. Both Spain[34] and Monaco[35] still privilege male heirs over female.

However, it appears that most of the monarchies in Europe have evolved in such a way so as to ensure equal rights in succession matters between female and male heirs, this being for example the case of The Netherlands,[36] the United Kingdom,[37] Sweden,[38] Norway,[39] and Luxembourg.[40] Nonetheless, such an evolution towards equality is not to be taken for granted. Not only does Spain still privilege men over women, the Principality of Liechtenstein still adheres to a pure Salic law and does not allow women to inherit the throne,[41] i. e. the public office of Head of State.

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34 According to Art. 57(1) of the Spanish Constitution: '[…] *Succession to the throne shall follow the regular order of primogeniture and representation, the first line always having preference over subsequent lines; within the same line, the closer grade over the more remote; within the same grade, the male over the female, and in the same sex, the elder over the younger.*'

35 According to Art. 10(1) of the Constitution of the Principality of Monaco: '*La succession au Trône, ouverte par suite de décès ou d'abdication, s'opère dans la descendance directe et légitime du Prince régnant, par ordre de primogéniture avec priorité masculine au même degré de parenté.*'

36 See in the Dutch Constitution, Art. 25 which, on matters of succession makes no distinction at all between female or male heirs ('[…] *the Throne shall pass by hereditary succession to the King's legitimate descendants in order of seniority* […]'). In the scholarship, on the traditional presence of Queens in the Dutch monarchy, see Corcos (n. 31), 1626 f.

37 See Perth Agreement of 28 October 2011, concluded at the bi-annual Commonwealth Heads of Government Meeting, in Report by the House of Commons Political and Constitutional Reform Committee, 11th report (2010-2012): Rules of Royal Succession (HC 1615), Annex I (writing that '*All countries wish to see change in two areas. First, they wish to end the system of male preference primogeniture under which a younger son can displace an elder daughter in the line of succession. Second, they wish to remove the legal provision that anyone who marries a Roman Catholic shall be ineligible to succeed to the Crown. There are no other restrictions in the rules about the religion of the spouse of a person in the line of succession and the Prime Ministers felt that this unique barrier could no longer be justified.*'), and Succession to the Crown Act 2013, Ch. 20, S. 1 ('*In determining the succession to the Crown, the gender of a person born after 28 October 2011 does not give that person, or that person's descendants, precedence over any other person (whenever born).*').

38 See Successionsordning (1810:0926) / SFS 1979:935, Art. 1.

39 The Constitution of the Kingdom of Norway, LOV-1814-05-17, whose Art. 6 (amended in 1990) now reads that '*For those born before the year 1990 it shall nevertheless be the case that a male shall take precedence over a female.*'

40 Grand Ducal decree of 16 September 2010 introducing equality between males and females with respect to the succession to the throne, in: Journal officiel du Grand-Duché de Luxembourg, B – No. 55, 2011, 720 (23 June 2011).

41 Hausgesetz des Fürstlichen Hauses Liechtenstein vom 26. Oktober 1993, in: Liechtensteinisches Landesgesetzblatt, Jahrgang 1993, Nr. 100 (Art. 12: '*1) Für die Thronfolge gilt gemäss diesem Hausgesetz der Grundsatz der Primogenitur. Danach ist stets der Erstgeborene der ältesten Linie zur Thronfolge berufen. Das Alter einer Linie wird nach ihrer Abstammung*

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Possible discrimination between men and women in the succession to the throne have also influenced international law; the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[42] still coexists with a number of reservations whose aim is to ensure the non-interference of the treaty with succession rules.[43] Even the UN Human Rights Committee expressed doubts on similar rules to succession, arguing – in the context of Liechtenstein's own report – that

> '*While noting the numerous measures taken by the State party to address the problem of inequality between men and women, the Committee notes the persistence of a passive attitude in society towards the role of women in many areas, especially in public affairs. The Committee is also concerned about the compatibility with the Covenant of laws governing the succession to the throne.*'[44]

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vom Fürsten Johann I. von Liechtenstein (1760 bis 1836) beurteilt. Der Rang der männlichen Mitglieder des Fürstlichen Hauses richtet sich nach dem Rang ihres Thronfolgerechtes. Die sich daraus ergebende Rangordnung ist bei der Matrikenführung festzuhalten (Art. 4 Abs. 2). 2) Die weiblichen Mitglieder des Fürstlichen Hauses haben anstelle eines Ranges ein Vortrittsrecht. Dieses richtet sich bei den weiblichen Mitgliedern kraft Geburt (Art. 1 Abs. 2) nach ihrem Geburtsdatum innerhalb der in Abs. 1 näher bezeichneten Linien. Bei den weiblichen Mitgliedern kraft Eheschliessung (Art. 1 Abs. 3) bestimmt sich das Vortrittsrecht nach dem Rang des Ehegatten im Rahmen der Thronfolgeordnung.').

42 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13.

43 All reservations, in force in summer 2025, can be accessed online on the UN webpage at <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en>, last access 1 July 2025. Amongst the reservations relevant for the matter at hand are those of Lesotho ('*The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship.*'); Monaco ('*The ratification of the Convention by the Principality of Monaco shall have no effect on the constitutional provisions governing the succession to the throne.*'); Morocco ('*The Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that: – They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco* […].'); United Kingdom ('*In the light of the definition contained in Article 1, the United Kingdom's ratification is subject to the understanding that none of its obligations under the Convention shall be treated as extending to the succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious denominations or orders or any act done for the purpose of ensuring the combat effectiveness of the Armed Forces of the Crown*'), and Liechtenstein ('*In the light of the definition given in article 1 of the Convention, the Principality of Liechtenstein reserves the right to apply, with respect to all the obligations of the Convention, article 3 of the Liechtenstein Constitution*').

44 Report of the Human Rights Committee, Volume I, Seventy-ninth session (20 October-7 November 2003); Eightieth session (15 March-2 April 2004); Eighty-first session (5-30 July 2004); A/59/40 (Vol. I), 62, also writing '*While noting Liechtenstein's interpretive declaration concerning article 3 of the Covenant, the State party may wish to consider the compatibility of the State party's exclusion of women from succession to the throne with articles 25 and 26 of the Covenant.*'

Art. 28(2) CEDAW does allow reservations, if these are not incompatible with the purpose and object of the treaty. It could be questioned whether rules that discriminate against women in terms of acquiring a public role just because of their sex meet the requirements generally followed in international law when it comes to reservations to treaties in general,[45] and to human rights law treaties in particular.[46] The UN Human Rights Committee evidently adopts the view that similar rules are – at the very best – at odds with human rights law, and State practice also shows that the justification requirement can hardly be met, hence a general shift in European monarchies towards equality. However, it should also be noted that there appear to be no objections raised by States against the reservations to CEDAW. Likewise, the European Court of Human Rights did not take the opportunity to rule on possible discriminations caused by the male inheritance of nobility titles in Spain on some occasions. At times, the Court argued that nobility titles do not fall within the scope of application of the Convention and that they are not 'possessions' in terms of the treaty.[47]

Assuming that a stronger or weaker male preference in the succession to the throne mainly finds its justification in anachronistic traditions and can hardly be justified unless no real or valid reason is given, Liechtenstein's[48] position is of particular interest. Rules concerning the succession to the throne (and to the office of Head of State), which exclude women, are not

45 See ICJ, *Reservations to the Convention on Genocide*, advisory opinion, 28 May 1951, ICJ Reports 1951, 15. See also ILC, *Guide to Practice on Reservations to Treaties 2011*, ILCYB 2011, Vol. II, Part Two, 26 ff.

46 Specifically, see A/CN.4/477, Second Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, ILCYB 1996, Vol. II (1), 37 ff., and A/52/10, Report of the International Law Commission on the Work of Its Forty-Ninth Session, 12 May-18 July 1997, in ILCYB 1997, Vol. II (2), 1, in part at 46 ff. See for all, Alain Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur', EJIL 24 (2013), 1061-1097.

47 ECtHR, *De la Ciera y Osorio de Mosoco and Others v. Spain* (dec.) – appl. nos. 45726/99, 41127/98, 41503/98 et al., decision of 28 October 1999. The Spanish Parliament has partly settled the matter adopting a law in 2006 which ensures equal rights in the succession to nobility titles (Ley 33/2006, de 30 de octubre, sobre igualdad del hombre y la mujer en el orden de sucesión de los títulos nobiliarios, BOE núm. 260, 31 October 2006, 37742), but it is not necessarily clear whether the law also applies to the succession to the throne, as Art. 57 of Constitution still contains a male preference. In the scholarship, see Corcos (n. 31), 1641; Ruth Rubio Marín, 'Engendering the Spanish Monarchy: Modernizing or Abolishing?', Royal Studies Journal 7 (2020), 80-93 (85).

48 1921 Liechtenstein Constitution, available online at <https://www.constituteproject.org/constitution/Liechtenstein_2011>, last acces 1 July 2025, Art. 3 ('*The succession to the throne, hereditary in the Princely House of Liechtenstein, the coming-of-age of the Prince Regnant and of the Heir Apparent, as well as any guardianship which may be required, are to be determined by the Princely House in the form of a dynasty law.*')

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adopted by the State's legislative body, as usually happens in many constitutional parliamentary monarchies. Rather, succession rules are adopted internally by the Princely house itself. This 'reallocation' of regulatory competences should bear no relevance: royal households are branches of the 'State'[49] and, as such, are still bound by the same human rights law standards. In Liechtenstein, the Prince Regnant (along with the 'people') is the source of the power of the State.[50] In these terms, it could hardly be argued that a royal household, whose head is also the Head of the State, is not part of the State and – for this reason – is not bound to respect human rights when regulating matters that are 'internal to the family'. The parallel development of the rules in Luxembourg, where gender equality has been attained despite rules adopted internally by the Princely house, seems to confirm that human rights law would impose the same result in Liechtenstein.

III. Privileged Royal Status and International Law: A Permanent Immunity *ratione personae*

Another possible clash between 'royal status' and international law may occur in the field of immunities which follows the maxim, well known to international law lawyers, *rex non potest peccare*. However, before turning to the interrelationships between general principles in the field of immunities and the position of the sovereign assuming the role of Head of State, a preliminary specification should be made on the scope of the present investigation. 'Royals' *lato sensu* and the 'Sovereign Head of State', for the purposes of immunities, should be treated as two different categories. Senior members of a royal household may to some extent take part in public affairs at the international level, yet their public involvement does

49 Cris Shore, 'The Crown as Metonym for the State?: The Human Face of Leviathan', in: Cris Shore and David V. Williams (eds), *The Shapeshifting Crown: Locating the State in Postcolonial New Zealand, Australia, Canada and the UK* (Cambridge University Press 2019), 53-74; Geoffrey Marshall, *Constitutional Theory* (Clarendon Press 1971), 13 ff. See also Cheryl Saunders, 'The Concept of the Crown', Melbourne University Law Review 38 (2015), 873-896.

50 Liechtenstein 1921 (rev. 2011) Constitution, Art. 2 ('*The Principality is a constitutional, hereditary monarchy on a democratic and parliamentary basis (Art. 79 and 80); the power of the State is inherent in and issues from the Prince Regnant and the People and shall be exercised by both in accordance with the provisions of the present Constitution.*'). On the 'double-sovereignty', see Elisa Bertolini, 'La Costituzione del Liechtenstein nel diritto comparato', DPCE Online 52 (2022), 893-922 (904); Rolando Tarchi, 'La Costituzione del Liechtenstein nel suo centenario. Riflessioni di sintesi nella prospettiva comparata', DPCE Online 52 (2022), 1031-1070 (1041).

not necessarily mean that they are automatically granted the same privilege international law recognises for the Head of State. If they are agents of their home State, some of their actions may indeed be 'covered' by (functional) immunities.

According to the *rex non potest peccare* doctrine and the *par in parem non habet imperium* principle, the very concept of (internal and external) immunity has been developed.[51] Assuming international law as a focal lens, two questions arise. In the first place, if the monarch assumes one of those roles which demand the recognition of (external) immunity *ratione personae* under international law,[52] such as becoming (a life-long) Head of State, one may wonder whether this is at odds with some principles generally accepted in the field of immunities. Heads of State, amongst few others, enjoy immunity from foreign jurisdiction for both public and private acts in civil and criminal matters.[53] This treatment evidently translates into interferences with the (human) rights of others, since they will not be able to start proceedings before the court that would eventually enjoy jurisdiction under the relevant rules of international procedure. It seems that a general understanding of international law is that personal immunity, i. e. the immunity from jurisdiction some high-ranking officials enjoy abroad for purely private conducts, is temporarily limited.[54] Once they leave their office, foreign courts will again have the opportunity to hear cases and, eventually, deliver a civil or criminal

51 *Ex multis*, Sandra Ekpo, 'Jurisdictional Immunities of the State (Germany v. Italy): The Debate over State Immunity and Jus Cogens Norms', Queen Mary Law Journal 8 (2017), 151-164 (152 f.).

52 On which in the scholarship, see *ex multis* Mario Miele, *L'immunità giurisdizionale degli organi stranieri* (Giuffré 1961); Riccardo Luzzatto, *Stati stranieri e giurisdizione nazionale* (Giuffré 1972); Attila Tanzi, *L'immunità dalla giurisdizione degli agenti diplomatici* (CEDAM 1991); Pasquale De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffré 1996); Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008); Natalino Ronzitti and Gabriella Venturini (eds), *Le immunità giurisdizionali degli Stati e degli altri enti internazionali* (CEDAM 2008).

53 Albeit no specific treaty has been concluded on the immunities of Heads of State as such, according to the International Court of Justice, the 1961 Vienna Convention on Diplomatic Relations (500 UNTS 95) and its rules on immunity for diplomats, constitutes a 'useful guidance' see ICJ, *Arrest Warrant of 1 April 2000* (Democratic Republic of the Congo v. Belgium), judgment of 14 February 2002, ICJ Reports 2002, 3 (para. 52); *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), judgment of 4 June 2008, ICJ Reports 2008, 177 (para. 170).

54 In the case law, see ICJ, *Arrest Warrant* (n. 53), para. 60 ('[…] *Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility* […]'). On the temporal requirement, and the distinction between immunity *ratione materiae* and *personae*, see for all Attila Tanzi, *A Concise Introduction to International Law* (Eleven/Giappichelli 2022), 267 f.

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judgment.[55] Only functional immunity, i. e. the immunity for official acts, may be invoked by (any) State agent at any time before foreign courts as the conduct is attributable to their sovereign State.[56]

The most fundamental question concerning personal immunity thus becomes whether, under international law, a person may hold office in such a way that the 'temporal' requirement is *de facto* annulled. Surely enough, a broad question as this is relevant in cases beyond those of royals, such as those of life-long dictators and similar.[57] It appears that an answer can only be given in light of the second requirement international law imposes on personal immunities. According to the International Court of Justice, immunities under international law only bar jurisdiction of foreign courts, whilst leaving open the possibility of suing the Head of State in their State of origin according to national rules.[58] However, starting proceedings against a king in their home country may not be easy, as they may enjoy a special protection from domestic proceedings (i. e., an 'internal immunity' from jurisdiction). For example, according to § 13 of the Danish Constitution, '*The King shall not be answerable for his actions; his person shall be sacrosanct*.' This provision has been interpreted in the sense of granting civil and criminal immunity within the State.[59]

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55 ICJ, Arrest Warrant (n. 53), para. 61 ('[…] *after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity*').

56 Document A/68/10, Report of the International Law Commission on the work of its sixty-fifth session (6 May-7 June and 8 July-9 August 2013), ILCYB 2013, Vol. II, Part Two (1), 47 f. In the most recent case-law, see *Corinna zu Sayn-Wittgenstein-Sayn Claimant v. His Majesty Juan Carlos Alfonso Victor María de Borbón y Borbón*, [2022] EWCA Civ 1595, para. 16 ('*State immunity (ratione personae) attaches for acts performed by a head of state while in office. But even after a head of state (or other agent of the state) leaves office, they continue to enjoy immunity ratione materiae for acts performed by them as head of state (or agent of the state) while in office, under sections 1(1) and 14(1) or section 14(2) SIA*').

57 Also drawing a parallelism between monarchies and dictatorship as per the rules on succession, see Jason Brownlee, 'Hereditary Succession in Modern Autocracies', World Politics 59 (2007), 595-628.

58 ICJ, Arrest Warrant (n. 53), para. 61 ('[…] *such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law* […]').

59 See Thomas Bull, 'Institutions and Division of Powers' in: Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Bloomsbury 2018), 43-66 (46); Jens Faerkel, 'Some Aspects of the Constitution of Denmark', Irish Jurist 17 (1982), 1-31 (8, and there fn. 15), and European Commission of Human Rights (Second Chamber), *Hoffunktionærforeningen I Danmark v. Denmark*, 13 January 1992, appl. no. 18881/91, available online at < https://hudoc.echr.coe.int/eng?i=001-1260>, last access 1 July 2025.

From an international law standpoint, it would seem that a combination of both privileges, one barring jurisdiction of foreign courts for private conducts, the other barring jurisdiction of national courts, would lead to an excessive interference with the right to access a court of law, possibly to the point that the privileges at hand could clash with human rights.[60] What is more, they could clash with those principles reconstructed by the International Court of Justice in the specific field of immunities, provided that a complete and absolute procedural bar in all legal systems would not be that different from granting substantive impunity – which is barred under international law.[61] Eventually, one may even argue that foreign courts, should they face a combination of international and domestic prerogatives leading to an absolute and *sine die* procedural immunity, could be allowed to deny jurisdictional immunities *ratione personae* under international law due such a situation's inconsistency with international law itself and due to the necessity to ensure some access to justice. Of course, this is without prejudice to the possibility of still applying functional immunities for official acts of the agent, if the act may be qualified as such rather than being 'private' in nature.[62] If this conclusion is correct, then one may frown upon some State practice, where national legislators considered enacting rules to ensure full judicial protection of previous (no longer in office) monarchs for their private acts.[63] Even the possibility of

60 Limitations to the right to access a court of law have been carefully scrutinised and admitted only in rather exceptional cases, see ECtHR, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, 11 June 2013, appl. no. 65542/12; on which see Beatrice I. Bonafè, 'L'esistenza di rimedi alternativi ai fini del riconoscimento dell'immunità delle organizzazioni internazionali: la sentenza della Corte suprema olandese nel caso delle Madri di Srebrenica', RDI 95 (2012), 826-829; Maria Irene Papa, 'Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'Associazione Madri di Srebrenica', Diritti umani e diritto internazionale 8 (2014), 27-62; Valentina Spiga, 'Effective Limitations and Illusory Rights: A Comment on the Mothers of Srebrenica Decision of the European Court of Human Rights', The Italian Yearbook of International Law 23 (2014), 269-286; and Kirsten Schmalenbach, 'Preserving the Gordian Knot: UN Legal Accountability in the Aftermath of Srebrenica', NILR 62 (2015), 313-328.

61 ICJ, *Arrest Warrant* (n. 53), para. 60.

62 See *Corinna zu Sayn-Wittgenstein-Sayn* (n. 56).

63 This is the case in the Spanish system; after the abdication of King Juan Carlos I and the possibility of him being subject to a number of legal proceedings different in nature, the Government considered, at first, a constitutional amendment to extend the full inviolability of the King to former kings as well. This constitutional change has not been pursued, see Laura Frosina, 'Una monarchia rinnovata per la Spagna del XXI secolo. L'abdicazione del Re Juan Carlos I, la proclamazione di Felipe VI ed il c.d. Aformiento reale', Nomos 2 (2014), 1-18 (13 f.) and has led the Government to 'settle' for a high-level protection for the royal house, despite a possible lack of performance of public functions, ensuring that only the Tribunal Supremo has jurisdiction (see Ley Orgánica 4/2014, de 11 de julio, complementaria de la Ley de racionalización del sector público y otras medidas de reforma administrativa por la que se

starting proceedings against governmental departments, considered as the extensions of the King's *political body*, although they provide procedures unavailable against a monarch exercising the same functions, does not solve the issue of a possible (domestic) immunity from jurisdiction for private acts of the king or the queen.[64] In other words, the greater the opportunities to seek

modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE núm. 169, 12 July 2014, 54647). Cases against former King Juan Carlos I have also been brought before foreign courts, which had thus to assess questions related to immunity and private international law. Most recently, see *Sayn-Wittgenstein-Sayn v. HM Juan Carlos Alfonso Victor Maria De Borbon y Borbon*, [2023] EWHC 2478 (KB), 6 October 2023, on which see Ugljesa Grusic, 'Former King of Spain, His Ex-Lover, and Brussels I bis in English Courts', EAPIL Blog, 16 October 2023.

64 As recently noted by the Ministry of Justice of the United Kingdom, '*The Queen as head of state has sovereign immunity from both civil and criminal proceedings. That is a long established customary rule of law not statutory provisions. Such sovereign immunity is common to other jurisdictions. Judges are appointed by the Sovereign and dispense justice in the name of the Sovereign. As a result, all orders of the court, civil and criminal are on behalf of the Crown. Criminal cases are prosecuted by the Crown Prosecution Service, in the name of the Sovereign against a defendant. In civil cases the court dispenses justice on the authority of the Sovereign. It is also worth noting that the Crown Proceeding Act 1947 allows for civil actions to be brought against the Crown in certain circumstances but this in general terms means Her Majesty's Government rather than the Sovereign*', see Freedom of Information Act (FOIA) Request – 190519007, 3 June 2019, available online at <https://www.whatdotheyknow.com/request/577449/response/1375834/attach/5/FOI%20190519007.pdf?cookie_passthrough=1>, last access July 2025. Allowing some proceedings against the Crown (but not against the person of the King) evidently raises the challenge of properly and correctly defining the Crown itself; an uneasy task which leads to different argumentations and conclusions. Amongst the most debated theories, two are of particular interest and relevance. According to a first conceptualisation, the so called 'two-bodies doctrine', the person of the King is the sum of their natural and of their political bodies, whereby this last one consists of their political and governmental powers. Under a second conceptualisation, that of the 'corporation sole' doctrine, the Crown is seen as a continuous and uninterrupted office held by different persons over time. Scholars have long rationalised diverse approaches to offer a definition of what the Crown is; still, what the Crown really is, remains a question with no single answer (see in this sense David Torrance, The Crown and the Constitution (House of Commons Library 2023), 8). Even the Crown Proceedings Act 1947 to some extent takes for granted what 'the Crown' is; no specific definition is offered, and only Section 17, dedicated to the parties to the proceedings, adopts a quite extensive notion of 'Crown', which includes authorised Government Departments – conceptualised as an extension of the political body of the King. On the conceptualisation of the King, the Crown, and their governmental functions, see Ernst H. Kantorowics, The King's Two Bodies: A Study in Medieval Political Theology (7th edn, Princeton University Press 1997), 7 ff.; Marie-France Fortin, 'The King's Two Bodies and the Crown a Corporation Sole: Historical Dualities in English Legal Thinking', History of European Ideas 47 (2021), 1-19; Maurice Sunkin and Sebastian Payne (eds), The Nature of the Crown. A Legal and Political Analysis (Oxford University Press 1999); Jason Grant Allen, 'The Office of the Crown', C. L. J. 77 (2018), 298-320. However, this does not ensure that domestic prerogatives of the monarch ensuring immunity from national jurisdiction may be superseded; in this regard, some have argued that the 'monarch is immune from prosecution, even for parking offences', Catherine Barnard, 'Monarchy and the Courts', in: Changing Europe, the Constitution Unit, UCL, The British Monarchy (online report 2023), 39-41 (39).

justice in the State of origin, the stronger international law immunities can be justified and preserved.

IV. Unprivileged Royal Status and International Law: The Need to Ensure Respect of Royals' Human Rights

Not only may the *status* of royals 'elevate' some people over others granting them special legal treatment which could sometimes be at odds with the ordinary assumptions of international law, but it can eventually ground cases where royals, because of their *status*, can suffer an interference with their own rights. One such instance has already been touched upon and can only be mentioned here again for the sake of completeness. As seen, some legal systems such as Spain, Monaco, and Liechtenstein still discriminate against women in rules concerning the succession to the throne. This legal treatment can hardly be reconciled with human rights law as there is no apparent justification for the different treatment, which cannot be defended by arguing that the matter is 'private' and internal to the relevant dynasty.

Further arguable limitations to the human rights of royal family members may be reconstructed and assessed under the ordinary approaches followed when interferences with fundamental rights are at stake.

1. Head of State and Head of State's Confession

Taking the British monarchy as a well-known example, the King or the Queen, by law, must be Protestant to assume their role.[65] This comes with little surprise since the Head of State is also the Head of the Anglican Church. As usual, any limitation on human rights would have to 'pass' the traditional test, meaning that the limitation at hand must be foreseen by law, necessary, and proportionate. Evidently, in the case of a Head of State who must also assume the role of the Head of the Church, the necessity and proportionality of the limitation of the individual's human right are likely to play a significant role in justifying the interference with the religious freedom. Additionally, it could be argued the essence of the right to religious freedom is not at stake; the sovereign, or the heir, is always left with the choice to leave the relevant office.

65 Act of Settlement (1700).

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In this specific case, if the strong relationship between the two roles – that of Head of State and Head of the Anglican Church – may to some extent be seen as a sufficient justification to require that the monarch must follow one specific religion, conditions and limitations on freedom of religion on other members of the royal family may be more difficult to justify. Possibly, these tensions with human rights explain why a peculiar condition on the rules of succession to the throne has recently been changed. A marriage between an heir to the throne and a Catholic person was a reason to be excluded from the line of succession.[66] This, which may also be scrutinized under different focal lenses (as an interference with the right to marry or to a private life), was repealed in 2013 with the Succession to the throne act, according to which, now, '*A person is not disqualified from succeeding to the Crown or from possessing it as a result of marrying a person of the Roman Catholic faith*.'[67]

2. Pre-Emptive Consent to Enter a Marriage

Human rights limitations extend only to a certain number of members of the royal house. Again, under British law, the first six persons in line to inherit the throne must obtain royal consent to marry. Should the royal consent not be requested or given, '*the person and the person's descendants from the marriage are disqualified from succeeding to the Crown*'.[68] Similar provisions are not uncommon,[69] and may be found with some degree of differences on who is called to give the consent to the marriage. In The Netherlands, for example, the heirs to the throne need a parliamentary authorisation to marry, under penalty of being excluded from the line of succession.[70]

The admissibility test for human rights limitations remains unchanged; necessity and proportionality would evidently play a significant role in justifying the limitation at hand. However, some concerns remain. In the first place, it could be argued that a 'State' may have a stronger legitimate interest

66 Act of Settlement (1700).

67 Succession to the Crown Act 2013, Ch. 20, S. 2.

68 Succession to the Crown Act 2013, Ch. 20, S. 3.

69 See Hausgesetz des Fürstlichen Hauses Liechtenstein vom 26. Oktober 1993 (n. 41), Art. 7.

70 See Dutch Constitution, Art. 28 ('*The King shall be deemed to have abdicated if he contracts a marriage without having obtained consent by Act of Parliament. Anyone in line of succession to the Throne who contracts such a marriage shall be excluded from the hereditary succession, together with any children born of the marriage and their issue* […]').

in exercising control over the heir apparent that, by law, is destined to become the Head of the State when compared to other persons in the line of succession. The more unlikely a person is to become the sovereign, the less acceptable any limitation on the freedom to marry would become. In the second place, it is not necessarily clear what these interests are, or what the limits of the scrutiny are. While it appears reasonable to deny permission to marry someone that has notoriously committed international crimes and seeks a royal marriage to gain protection, as the State would have an interest in not becoming an agent for impunity, one may wonder whether considerations such as the infertility of the prospective spouse that may threaten the line of succession can also justify withholding permission.

Evidently, it is not possible to develop a fit-for-all rule. As a matter of general principle, State practice shows that there is a State interest in pre-emptive control over marriages of sovereigns and heirs to the throne. Such an interest, however, should not extend beyond what is strictly necessary for the performance of public duties of the sovereign, and pre-emptive consent should not become an indirect tool for a character judgment on the person entering the marriage with the sovereign or the heir. If these general criteria are respected, conditioning the right to marry can comply with human rights standards. And, again, it could always be argued that the core right to enter a marriage is not prejudiced, as the heir is left with the choice between the throne and love.

3. LGBTQ and Succession to the Throne

The latest point, that of pre-emptive authorisation to marry and the limit of such scrutiny, raises a subsequent matter of particular relevance in respect to the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) community. The history of sovereigns appears to be characterised by hetero-normative models, and it may be wondered if and to what extent LGBTQ heirs could ascend to the throne, lawfully marry, and generate heirs themselves. Again, no fit-for-all-solution can be developed, yet some general considerations can be offered.

The question of sexual orientation appears to have been explicitly addressed in some ways at least by the Dutch, Swedish, and British legal systems. As for the first two, communications by the governments[71] suggest that consent to marry will not be withheld to the heir or the sovereign only

71 See the online article by Hugo Greenhalgh, 'After King Charles, Could Britain Have an Openly LGBTQ+ Monarch?', www.openlynews.com, 5 May 2023.

because of the same-sex nature of the relationship. This, of course, also suggests that sexual orientation is per se no condition or limit to ascend to the throne. As for the British legal system, Parliamentary debates during the adoption of the new rules on succession in 2013 highlighted the gender neutrality of the draft, allowing for a same-sex marriage of the sovereign or the heir.[72] However, the same debates have pointed to 'consequential' problems in terms of succession that may be common to some royal houses. In a number of cases, heirs succeed to the throne because of their (biological) descendancy to a former sovereign – for example Princess Sophia of Hannover in the case of the British royal family.[73] The question – which is evidently of relevance for both traditional and same-sex royal marriages – thus becomes whether heirs that have no blood connection at all with the 'body of' the ancestor might be excluded for such a reason from the succession. In the United Kingdom, a proposal to amend the 2013 Draft Succession Act to limit succession claims only in favour of heirs born out of a wedding between a 'man' and a 'woman'[74] did not find its way into the final text of the statute, suggesting at least the will not to take an official position on heirs stemming from same-sex marriages.

Adopting a human rights law lens, the trends for a gender-neutral reading of the provisions on the succession to the throne (or on authorisation to enter a marriage) surely appear in line with human rights law. At the same time, including their offspring in the line of succession raises much more complex issues. To the extent a legal system relies on a principle of 'biological dynasty' to justify the existence of monarchy, medieval expressions such as 'heir to the body of […]' are destined to raise many questions in the future. What has to be noted, however, is that there does not appear to be an inherent right to be included in the line of succession. Even children of a traditional couple are

72 Succession to the Crown Bill, Report, Volume 744: debated on Wednesday 13 March 2013, available online at <https://hansard.parliament.uk/lords/2013-03-13/debates/13031351000661/SuccessionToTheCrownBill>, last acces 1 July 2025, column 268 ('[…] *it will clearly be lawful for a monarch or an existing heir of the body to enter into a same-sex marriage when that Act becomes law. After all, one hesitates to imagine the circumstances in which either Clause 3 (3) of this Bill were used to frustrate an intended same-sex marriage – a novel interference with rights, as others have pointed out – thereby denying that person succession to the Throne, or indeed where there was no intervention and the marriage was accepted in some of the realms and not others.*').

73 Act of Settlement (1700).

74 Succession to the Crown Bill, Report, Volume 744: debated on Wednesday 13 March 2013, available online at <https://hansard.parliament.uk/lords/2013-03-13/debates/13031351000661/SuccessionToTheCrownBill>, last access 1 July 2025, column 267 ('*1: After Clause 1, insert the following new Clause – "Royal marriages: heirs of the body (1) A marriage is a Royal Marriage for the purposes of establishing the claim of any person to succeed to the Crown as heir to the body if that Marriage is a marriage between a man and a woman* […]"').

excluded from the succession line if they are born out of wedlock.[75] A circumstance that per se may raise questions in broader terms. But if even biological 'heirs to the body' of Sophia of Hannover may be excluded from the line of succession, it seems logic that the same applies for those who have no direct bloodline at all. On the contrary, it is more questionable whether one may exclude the heir of a same-sex royal marriage born with a medically assisted procreation technique from the succession because this person does indeed share the same DNA with the successor of Sophia of Hannover.

Other royal families are apparently less specific in their succession rules and may allow for greater flexibility: Art. 24 of the Dutch Constitution, for example, provides that the throne may be claimed by '*descendants of King William I, Prince of Orange-Nassau*'. Even Art. 10(1) of the Constitution of the Principality of Monaco may be read as introducing some elements of flexibility, as it provides that '[l]*a succession au Trône* […] *s'opère dans la descendance directe et légitime du Prince regnant* […]'. Expressions such as 'descendants' could be interpreted so as to include adopted children, since they do not clearly rely on a biological connection (even though this was most certainly taken for granted at the time said provisions were drafted). Rules relying on 'direct descendancy' may be interpreted to include within their scope surrogacy agreements if there is a genetic link between the sovereign and the child. In such a circumstance, the second – additional – condition of being a 'legitimate' child, i. e. not being born in wedlock, would probably constitute a more significant obstacle.

As mentioned, it does not seem possible to develop any specific solution at this stage. What appears clear, however, is that an LGBTQ-integrated reading of succession rules in light of human rights law still has to be further developed while taking into account all the specificities of the different legal systems.

4. (Theoretical) Limitations on the Right to Vote

Senior members of a given royal family may willingly refrain from voting or from expressing their political views, especially in those legal systems where the monarchy has a predominantly ceremonial role and does not directly take part in the political life of the country. Again, the United Kingdom appears to be an apt case study since, at least under the reign of Queen Elisabeth II, political neutrality was strictly adhered to. There is effectively no rule of law that prohibits senior members of the British Royal Family

75 Legitimacy Act 1926; Legitimacy Act 1959.

from standing for general elections or to vote. Rather, this is a result of a custom.[76] This, taken alone, removes the matter from the legal field and places it in that of protocol and politics. However, one may wonder if a legal limitation on such a right[77] could be acceptable in human rights law terms. Having particular regard to the necessity and proportionality of a possible limitation to vote, if it is true that the monarchical structure is perceived as being *fundamental* to ensuring the continuity and neutrality of an 'overseeing office' unentangled by the political constraints of a given moment,[78] some limitations on the participation of the sovereign's political life may not necessarily be unjustified.

5. Sanctions for Former Royal Houses

A *past* royal *status* in some cases has led to interferences with human rights. In Italy, former Italian kings and queens, as well as their male heirs, were prohibited entry to or residence in Italy by the post-World War II constitution.[79] All former members of the royal household were excluded from voting in Italy, and from holding any public office in the country.

Limitations on the rights of members of the former royal family even made it to the European Court of Human Rights that preliminarily ruled for the admissibility of the case.[80] The Court did not decide the case on the merits though[81] as, after postponing some of the hearings, Italy changed its Constitution and ceased to apply *pro futuro* limits concerning entry into the country or access to political life.[82] Still, the constitutional amendment did

76 Torrance (n. 64), 30.

77 On the strict requirements over possible limitations to the right to vote in the case law, see ECtHR, *Case of Hirst v. The United Kingdom (no. 2)*, appl. no. 74025/01, judgment of 6 October 2005, ECLI:CE:ECHR:2005:1006JUD007402501, paras 56 ff.; ECtHR, *Case of Aziz v. Cyprus*, appl. no. 69949/01, judgment of 22 June 2004, ECLI:CE:ECHR:2004:0622-JUD006994901, para. 25 ff.; ECtHR, *Case of Vito Sante Santoro v. Italy*, appl. no. 36681/97, judgment of 1 July 2004, ECLI:CE:ECHR:2004:0701JUD003668197, paras 47 ff.

78 See Yeager (n. 11), 242 ff. and Elzinga (n. 29), 105-117.

79 Costituzione delle Repubblica italiana, Art. XIII of the final provisions ('*I membri e i discendenti di Casa Savoia non sono elettori e non possono ricoprire uffici pubblici né cariche elettive. Agli ex re di Casa Savoia, alle loro consorti e ai loro discendenti maschi sono vietati l'ingresso e il soggiorno nel territorio nazionale*').

80 Corte Europea dei Diritti dell'Uomo, *Vittorio Emanuele di Savoia c. Italia*, judgment of 13 September 2001, case no. 53360/1999, available online at <http://dirittiuomo.it/caso-vittorio-emanuele-di-savoia>, last access 1 July 2025.

81 Cour européenne des droits de l'Homme, *Affaire Victor-Emmanuel De Savoie c. Italie*, Requête no 53360/99, Arrêt 24 avril 2003, ECLI:CE:ECHR:2003:0424JUD005)336099.

82 Legge costituzionale 23 ottobre 2002, n. 1, Art. 1(1).

not repeal rules on expropriation of royal property. This is quite remarkable given that the expropriations of royal properties had already been litigated before the European Court of Human Rights, which, in a case involving Greece, ruled in favour of the members of the royal house.[83] Expropriation of royal properties has evidently been a matter of concern for States. Historically, some have deposited specific reservations to human rights treaties so as to ensure the non-applicability of some rights to the national rules on royal expropriation.[84]

V. Conclusions: Royals and International Law – A Long Road Ahead

Contrary to what one might think at first sight, the relationships between monarchies and international law are numerous and particularly interesting from a methodological perspective. Connections and cross-influence range from immunities to human rights law and anti-discrimination law. As we have seen, public international law rules on Statehood may themselves be blind as to whether a national legal system privileges monarchies or other forms of government. Nonetheless, in specific fields of international law, monarchies may not be as irrelevant for two reasons: (1) either because royalty *status* proves to be a systemic aporia which requires careful argumentation to be legally defensible, as the case of discrimination against 'commoners' demonstrates, or (2) because royalty *status* no longer proves to be fully impermeable to legal principles that are now required by legal systems – as is the case of principles of equality in the succession order.

Yet monarchies also raise other legal issues under international law that should be addressed in the future. In particular, it deserves further scholarly

83 See ECtHR, *Case of the Former King of Greece and Others v. Greece*, appl. no. 25701/94, 23 November 2000, ECLI:CE:ECHR:2000:1123JUD002570194, and judgment (just satisfaction) of 28 November 2002, ECLI:CE:ECHR:2002:1128JUD002570194.

84 Reservations and Declarations for Treaty No. 046 – Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (ETS No. 046), Austria, Reservation made at the time of signature, on 16 September 1963, and renewed at the time of deposit of the instrument of ratification, on 18 September 1969 (according to which '*Protocol No. 4 is signed with the reservation that Article 3 shall not apply to the provisions of the Law of 3 April 1919, StGBl. No. 209 concerning the banishment of the House of Habsbourg-Lorraine and the confiscation of their property, as set out in the Act of 30 October 1919, StGBl. No. 501, in the Constitutional Law of 30 July 1925, BGBl. No. 292, in the Federal Constitutional Law of 26 January 1928, BGBl. No. 30, and taking account of the Federal Constitutional Law of 4 July 1963, BGBl. No. 172.*').

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elaboration whether a *sine die* personal immunity paired with a full national immunity complies with the basic premises of immunity as recognised by the International Court of Justice. Conversely, human rights already have exerted their influence on monarchies, showing that rules to succession should not be drafted with discriminatory effects or intent. It seems that the human rights dimension may, in the long term, mould monarchies and change them. From a continental European perspective, one may wonder if and to what extent the European Union could play a role in the – indirect – shaping of monarchies. Whereas there is little doubt that the Union has no say on the existence of monarchies as such in Member States and that these may very well fall within the concept of 'national identity' the Union has to respect,[85] the pervasive power and force of the Union's founding principles and fundamental liberties[86] may at least contribute to the evolution of 'democratic monarchies'.[87]

85 See Consolidated version of the Treaty on European Union, in OJC 326, 26 October 2012, 13, Art. 4(2), reading that '*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*'

86 On the effects of a national legislation prohibiting nobility titles with negative consequences on the free movement of persons, and its possible admissibility under EU law, provided that proper and relevant justification is given by the Member State, see ECJ, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, judgment of 22 December 2010, case no. C-208/09, ECLI:EU:C:2010:806, and ECJ, *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe*, judgment of 2 June 2016, ECLI:EU:C:2016:401. In the scholarship, see *ex multis* Giulia Rossolillo, 'Changement volontaire du nom, titres nobiliaires et ordre public: l'arrêt Bogendorff von Wolffersdorff', European Papers 1 (2016), 1205-1213.

87 See *ex multis* Hans Ulrich Jessurun d'Oliveira, 'The EU and Its Monarchies: Influences and Frictions', Eu Const. L. Rev 8 (2012), 63-81.

Economic and Social Rights in Central and Eastern Europe – Insights from the Perspective of the UN Human Rights System

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Abstract

This article delves into the protection of economic and social rights in Central and Eastern Europe from the United Nations (UN) human rights protection system perspective. We analyse the extent to which the broad inclusion of economic and social rights in domestic constitutions translates into Central and Eastern European states' ways of approaching the international protection of economic and social rights. In particular, we examine

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whether the recognition of the justiciability of economic and social rights in these countries' domestic constitutions are borne out by their acceptance of human rights treaties that protect economic and social rights, especially those that enable individuals to bring communications at the international level. Based on the concluding observations of the UN Committee on Economic, Social and Cultural Rights, we also study Central and Eastern European countries' approach to the domestic implementation of the International Covenant on Economic, Social and Cultural Rights. We argue that there is a discrepancy between the extensive constitutional protection of economic and social rights by Central and Eastern European countries on the one hand, and their reluctant acceptance of the international law counterparts of these constitutional rights on the other.

Keywords

Central and Eastern Europe – Economic and Social Rights – Committee on Economic Social and Cultural Rights – Justiciability

I. Introduction

After the fall of communism, Central and Eastern Europe (CEE)[1] served as a kind of laboratory for the protection of economic and social rights.[2] Legal scholarship enthusiastically discussed constitutionalisation and implementation of these rights in the region.[3] Once their constitutions were adopted, interest in economic and social rights in the region visibly decreased and tended to be fragmented. In recent years researchers have focused on specific jurisdic-

1 Due to the differences in defining the scope of countries described by the term 'Central and Eastern European', for the sake of clarity it is useful to list the countries that we covered in our research. These are: Albania, Bosnia and Herzegovina, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, Ukraine. The information in this article is up to date as of 21 July 2025.

2 This term was rightly used by: Wojciech Sadurski, *Constitutional Socio-Economic Rights: Lessons from Central Europe*, The Foundation for Law, Justice and Society in affiliation with The Centre for Socio-Legal Studies, University of Oxford, 2009.

3 See Adam Ploszka, 'Constitutional Debates and Courts in Central and Eastern Europe' in: Malcolm Langford and Katharine G. Young, (eds) The Oxford Handbook of Economic and Social Rights (Oxford University Press, forthcoming).

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tions (especially Hungary[4]) or selected rights. At the same time, discussions are gaining momentum[5] in the area of economic and social rights, and their enforcement, also in relation to the crises that have happened in recent years.[6]

This article aims to contribute to this debate by providing insights into Central and Eastern Europe from international law, specifically, from the UN human rights protection system perspective. Our research question here is as follows: to what extent is the constitutionalisation of economic and social rights (defined as subjective rights) after the fall of communism reflected in Central and Eastern European states' approach to the UN economic and social rights protection system? We will reconstruct this approach by examining two of its dimensions. First, the acceptance of UN treaties and optional complaints procedures which serve to protect economic and social rights through the UN. Secondly, the implementation of the ICESCR at the domestic level based on the concluding observations issued by the UN Committee on Economic, Social, and Cultural Rights.

The focus on the UN system is particularly relevant in our research, as this system has introduced mechanisms for the individual quasi-judicial enforcement of economic and social rights, similar to the mechanisms of judicial enforcement that were introduced in the constitutional orders of Central and Eastern European countries. For this reason, we do not analyse in detail the European economic and social rights protection system centred around the (Revised) European Social Charter. For despite the comprehensive and detailed case-law developed by the European Committee of Social Rights[7], the Charter only provides a mechanism for collective complaints. Instead, we focus on the UN system which is particularly relevant since in the early days

4 Renata Uitz and András Sajó, 'A Case for Enforceable Constitutional Rights? Welfare Rights in Hungarian Constitutional Jurisprudence' in: Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006), 97-128; Malcolm Langford, 'Hungary: Social Rights or Market Redivivus', in: Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008), 250-266; Csilla Kollonay Lehoczky and Balazs Majtenyi, 'Social Rights, Social Policy, and Labor Law in the Hungarian Populist-Nationalist System,' Comparative Labor Law & Policy Journal 42 (2021), 13-42

5 See for example: Aoife Nolan (ed.), *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press 2014); Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2017); Jackie Dugard et al. (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020); Christina Binder, Jane A. Hofbauer, Flávia Piovesan and Amaya Úbeda de Torres (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar 2020).

6 In particular, the global financial crisis started in 2008, which resulted in adopting a series of austerity measures. Later, there were the health crises associated with the COVID-19 pandemic and then (to some extent, its aftermath) the cost-of-living crisis.

7 See more David Harris and John Darcy, *The European Social Charter: The Protection of Economic and Social Rights in Europe* (Brill 2021).

of CEE's transition from communism to democracy, participation in the UN international human rights protection system and its implementation machinery (especially through the International Covenant on Economic, Social and Cultural Rights [ICESCR] reporting system) was regarded as a positive change in the states' approach to international human rights protection.[8] The question arises, however, whether this change in attitude amongst the CEE states was profound or rather superficial.

In the scholarly debate on social and economic rights protection, much attention is rightly attributed to the domestic application[9] and enforcement of international human rights law in addition to supervision from international human rights treaty bodies.[10] Various concepts and methods of reasoning developed in international law,[11] such as the concept of minimum core obligation,[12] were also applied domestically. However, the relationship between domestic and international economic and social rights protection is not a one-way street. Some concepts developed in domestic jurisdictions have also influenced the shape of international law. Perhaps the best example of this is the category of reasonableness,[13] which was applied by the South African Constitutional Court[14] and which ultimately found application in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.[15]

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8 Zdzisław Kędzia, 'The Implementation of Social and Economic Rights in Central and Eastern Countries' in: Franz Matscher (ed.), *The Implementation of Economic and Social Rights: National, International, and Comparative Aspects* (Engel 1991), 237-266 (240).

9 See Matthew C. R. Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights', NILR 40 (1993), 367-404; Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in: Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights, a Textbook* (2nd edn, Brill/Nijhoff 2001), 55-84.; David Landau, 'The Reality of Social Rights Enforcement', Harv. Int'l L. J. 53 (2012), 189-248; Malcolm Langford (ed.), *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge University Press 2008).

10 See especially: Philip Alston, 'The Committee on Economic, Social and Cultural Rights' in: Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press 2020), 439-476.

11 See for example: Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014).

12 Katharine G. Young 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', Yale J. Int'l L. 33 (2008), 113-175.

13 See more: Albie Sachs, 'Enforcement of Social and Economic Rights,' Am. U. Int'l L. Rev. 22 (2007), 673-708.

14 See more: Sandra Liebenberg, 'The South African Model of Socio-Economic Constitutionalism: Features and Fault Lines' in: Steffen Hindelang, Stefan Korte and Nils Schaks, YSEC Yearbook of Socio-Economic Constitutions 2024 (Springer 2025), 37-65.

15 Bruce Porter, 'Reasonableness and Article 8(4)' in: Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016), 173-202.

With this piece, we hope to contribute to this debate by identifying the impact (or lack thereof) of the constitutionalisation of economic and social rights on the domestic application of international law. We focus particularly on the International Covenant of Economic Social and Cultural Rights, as well as on the ratification policy[16] of states in the field of international protection of economic and social rights. Drawing on the rich literature on the interplay between domestic and international human rights protection systems,[17] our cautious hypothesis is that the constitutional determination of economic and social rights in CEE states, as subjective and justiciable rights, should translate into greater openness towards the international protection of economic and social rights amongst those states. Yet in this paper, we find that the constitutionalisation of economic and social rights in CEE, which is widely accompanied by the acceptance of judicial enforcement of economic and social rights, is not generally reflected in Central and Eastern European states' approach to the UN's international protection of economic and social rights. We argue that this is evident in particular from the low number of ratifications in CEE of the optional complaints procedures that enable individuals to challenge economic and social rights violations at the international level as well as in the very limited application of the ICESCR in domestic legal orders.

The article is structured as follows. Following this introduction, in part II, we draw on existing literature to briefly sketch the constitutional regulation of economic and social rights in Central and Eastern Europe. Our aim there is to establish a point of reference for further analysis of the Central and Eastern European countries' approach toward the international protection of economic and social rights and also to explain why we have chosen to focus on Central and Eastern Europe. Then, in part III, we will review the acceptance status of international human rights instruments and place these acceptance decisions on a timeline. We aim to determine whether there is a correlation between Central and Eastern European countries' adoption of constitutions and their decisions to accept certain human rights instruments. Finally, in parts IV and V, we present the results of our analysis of the concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR) in the context of reports submitted by countries in the region related to the implementation

16 On the relationship between constitutional law and ratification policy see Thomas Buergenthal, 'Modern Constitutions and Human Rights Treaties', Colum. J. Transnat'l L. 36 (1998), 211-223.

17 In this regard see Thomas Buergenthal, 'The Evolving International Human Rights System' AJIL 100 (2006), 783-807; Beth A. Simmons, *Mobilizing for Human Rights International Law in Domestic Politics* (Cambridge University Press 2012) 148-154; Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press 2013).

of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Our focus on the ICESCR and the CESCR concluding observations is additionally justified by the fact that within the UN system, the Covenant is a key international human rights treaty on economic and social rights[18] ratified by all countries in the region. Therefore, all the countries that we are considering here have been evaluated by the CESCR, which makes it possible to draw some conclusions about the state of the protection of economic and social rights in the region. In our analysis, on the one hand we will focus on countries' domestic applications of ICESCR. On the other hand, with a view to identifying common trends and patterns, we also focus on three social rights that are both covered by the ICESCR and which are also common to all constitutional orders of the countries in question. These are the right to social security, the right to healthcare, and the right to education.

II. Economic and Social Rights in Central and Eastern European Constitutionalism

One key characteristic of Central and Eastern European constitutionalism, which also to some extent distinguishes it from Western European constitutionalism, is that all constitutions adopted in this region contain a wide range of economic and social rights.[19] The adoption of these rights was essentially the legacy of communism. The societies of countries that bore the hardships of economic transition and were simultaneously accustomed to certain benefits in the communist period expected their needs to be addressed by the new democratic constitutions.[20]

However, the catalogues of economic and social rights which are protected in the CEE constitutions differ between countries, and some are more elaborate

18 See more: Zdzisław (Dzidek) Kędzia, 'Social Rights Protection Under the ICESCR and Its Optional Protocol – the Role of the Committee on Economic, Social and Cultural Rights' in: Christina Binder, Jane A. Hofbauer, Flávia Piovesan and Amaya Úbeda de Torres, *Research Handbook on International Law and Social Rights* (Edward Elgar 2020), 90-110.

19 For more on global trends in the constitutionalisation of social rights, see Ran Hirschl, Evan Rosevear and Courtney Jung, 'Justiciable and Aspirational Economic and Social Rights in National Constitutions' in: Katharine G. Young (ed.), *The Future of Economic and Social Rights* (Cambridge University Press 2019), 37-65.

20 Wojciech Sadurski, *Rights Before Courts A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014), 253. See also: András Sajó, 'Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court', in: Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Routledge 2006), 83-105; Wiktor Osiatyński, 'Rights in New Constitutions of East Central Europe' Colum. Hum. Rts. L. Rev. 26 (1994), 111-166. Gábor Halmai, 'Separation of Power – Social Rights – Judicial Review. The Polish and Hungarian Cases' in: Mirosław Wyrzykowski (ed.), *Constitution-Making Process* (Institute of Public Affairs 1998), 83-96.

than others. Until now, no one has been able to provide a convincing explanation for this diversity amongst the catalogues of rights.[21] Sadurski has suggested that there are a number of factors that did *not* influence the shape of these catalogues, including: the stage of economic development; the strength of post-communist political forces; the speed with which a constitution was created; and, finally, the prospect of further EU integration.[22] What all bills of rights adopted in the region do have in common is the presence of three social rights: the right to social security, the right to healthcare, and the right to education.[23]

During the constitution-making process, however, the real problem was not the catalogue of economic and social rights but rather how these economic and social rights should or should not differ from civil and political rights in terms of enforcement mechanism.[24] Sadurski identified three models for the enforcement of economic and social rights in these constitutions.[25]

Constitutions in the first group do not draw any meaningful distinctions between economic and social rights and all other rights, making them directly enforceable (as subjective rights). This model occurred on the largest scale, and numerous countries in the region adopted it.[26] In the second model, economic and social rights (as aspirational rights) were clearly separated from civil and political rights, and this separation was applied through an introduction to the constitution of a general clause limiting the possible enforcement of economic and social rights.[27] The Czech Republic's Charter of Fundamental Rights and Freedoms adopted in 1991[28] is an example here. Article 41 (cited from the official English translation) provides that: 'The rights listed in

21 A detailed analysis of the catalogues of rights adopted by the constitutions of Central and Eastern Europe has been carried out by Sadurski, *Rights Before Courts* (n. 20), 253-287. See also: Kędzia, 'Implementation of Social and Economic Rights' (n. 8), 237-266.

22 Wojciech Sadurski, 'Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights', Law & Contemp. Probs. 65 (2002), 223-250 (234).

23 Sadurski, *Rights Before Courts* (n. 20), 261.

24 Osiatyński (n. 20), 141.

25 Sadurski, 'Postcommunist Charters' (n. 22), 234-235.

26 Belarus, Bulgaria, Croatia, Estonia, Latvia, Lithuania, Macedonia, Romania, Ukraine, Montenegro, and Serbia.

27 This model can be found in the Czech Republic and Slovakia, and in Hungary (in the latter case, a qualitative change (the transition from model one to model two was brought about by the adoption of a new constitution, called Fundamental Law in 2011.)

28 The Charter of Fundamental Rights and Freedoms was adopted in Czechoslovakia on 9 January 1991 by the required super-majority of the Federal Assembly members, before the formal (so called velvet) dissolution of the federation. Both countries have decided to incorporate the Charter into their legal order. The Slovak Republic incorporated a slightly changed Charter directly into its constitution of September 1992 while the Czech Republic stated in its constitution of December 1992 that the Charter constitutes a part of the constitutional order of the republic (see Article 112.1. of the Constitution). The Charter is available in English at: <https://www.psp.cz/en/docs/laws/listina.html>, last access 18 February 2025.

Article 26, Article 27, par.4, Articles 28 to 31, Article 32, pars.1 and 3, and Articles 33 and 35 of the Charter may be claimed only within the scope of the laws implementing these provisions.' The provision that rights can 'only' be claimed within the statutory regulation governing those specific rights points to a significant limitation of the justiciability of the economic and social rights indicated in this provision.[29] Finally, the third model combines the first and second ones. The Polish 1997 Constitution[30] serves as an example of this model.[31] This constitution contains both social and economic rights that can be directly enforced but also a clause limiting the citizen's ability to enforce some of them. Article 81 of the Polish Constitution, for example, provides that: 'the rights specified in Article 65, paras 4 and 5, Article 66, Article 69, Article 71 and Articles 74-76, may be asserted subject to limitations specified by statute.'[32]

III. Acceptance of the International Treaties in the Field of Economic and Social Rights by Central and Eastern European Countries

Through our close examination of the ratification status of human rights treaties, we hope to uncover some interesting insights into the protection of economic and social rights within CEE states, and into their approach to the justiciability of economic and social rights. Of course, simply knowing whether a state has signed, ratified, or acceded to certain international instruments does not provide a comprehensive picture of the enjoyment of these rights in the region. But it may serve as an indicator of the attitudes of the domestic authorities towards the enforcement of economic and social rights since the ratification of human rights treaties is usually associated with better human rights practices.[33] Therefore, for the purposes of this study, we have reviewed the nine following UN human rights treaties:

29 On the reasons for adopting this solution, see Lloyd Cutler and Herman Schwartz. 'Constitutional Reform in Czechoslovakia: E Duobus Unum?' U. Chi. L. Rev. 58 (1991), 511-553. See more on the Czech Republic constitution-making in: Jon Elster, 'Transition, Constitution-Making and Separation in Czechoslovakia', European Journal of Sociology/Archives Européennes de Sociologie 36 (1995), 105-134.

30 The Constitution of the Republic of Poland of 2nd April 1997, published in Journal of Laws No. 78, item 483.

31 Also in: Albania, Moldova, and Slovenia.

32 See more on Poland constitution-making: Wiktor Osiatyński, 'A Brief History of the Constitution,' East European Constitutional Review 6 (1997), 66-76.

33 As Oona A. Hathaway argues in: 'Do Human Rights Treaties Make a Difference', Yale L. J. 111 (2002), 1935-2042. See more: Christof H. Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' HRQ 23 (2001), 483-535.

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- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the Optional Protocol to the ICESCR
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)
- the Convention on the Rights of the Child (CRC)
- the (Third) Optional Protocol to the Convention on the Rights of the Child on a communications procedure
- the Convention on the Rights of Persons with Disabilities (CRPD)
- the Optional Protocol to the CRPD

Each of these treaties aims to enhance the protection of economic and social rights, albeit to a greater (like the ICESCR) or lesser (like the CRC) extent. Nonetheless, the above selection comes with a caveat: our selection of treaties focuses on those we perceived to have a greater significance for the protection of economic and social rights in two ways. First, due to their provisions that directly protect economic and social rights (substantially and procedurally); secondly, based on the extensive practice of supervisory bodies doing work based on these treaties in the area of economic and social rights.

Therefore, one can assume that if a state accepts one of the abovementioned treaties, the individuals in that state may enjoy their rights to a greater extent (at least *de iure*).[34] In order to assess CEE states' involvement in the internationalisation[35] of these rights we therefore compiled all the available data on the acceptance (this could refer to ratification, accession, or succession) of the abovementioned international treaties. The covenants which declare certain rights and impose new obligations on the state parties are presented in Table 1.[36] States which also accepted optional complaints procedures that might strengthen the procedural guarantees of economic and social rights protection were presented in a separate table (Table 2). The differentiation between these two types of human rights treaties was justi-

34 The problem of the actual (*de facto*) enjoyment of these rights will be discussed in the next sections.

35 Under the concept of 'internationalisation', we understand different forms of recognising and enforcing human rights through international institutions. On this issue see Lloyd N. Cutler, 'The Internationalization of Human Rights', U. Ill. L. Rev. 3 (1990), 575-591.

36 Regarding indications used here and in the following tables: X indicates that a treaty was accepted, and lack of X indicates that it was not.

fied by the fact that these procedural mechanisms are supposed to permit individuals to initiate international proceedings if states fail to observe their obligations.[37]

Table 1. Acceptance of UN International Treaties (Protecting Economic and Social Rights) in CEE states

CEE states	ICESCR	CEDAW	CMW	CRC	CRPD
Albania	x	x	x	x	x
Bosnia and Herzegovina	x	x	x	x	x
Belarus	x	x		x	x
Bulgaria	x	x		x	x
Croatia	x	x		x	x
Czechia	x	x		x	x
Estonia	x	x		x	x
Hungary	x	x		x	x
Latvia	x	x		x	x
Lithuania	x	x		x	x
Montenegro	x	x		x	x
North Macedonia (FYROM)	x	x		x	x
Poland	x	x		x	x
Romania	x	x		x	x
Serbia	x	x		x	x
Slovakia	x	x		x	x
Slovenia	x	x		x	x
Ukraine	x	x		x	x

37 On this issue see Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi, 'Introduction' in: Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016), 1-15. See also: Zdzisław Kędzia, 'The Committee on Economic, Social and Cultural Rights – The Power of Subjective Rights?', Journal of Human Rights Practice 14 (2022), 50-74.

It is not necessarily true that the CEE states are reluctant to sign and ratify international instruments, but they are certainly selective in this regard. The ICESCR, CEDAW, CRC and CRPD are the only international instruments that were universally ratified in Central and Eastern Europe. On the other hand, not a single CEE state accepted the individual communication procedure under the CMW, and the CMW itself was only ratified by two states (Albania, and Bosnia and Herzegovina).[38] Indeed, even the Optional Protocol to the ICESCR has been accepted by no more than five states so far (Albania, Bosnia and Herzegovina, Montenegro, Serbia, and Slovakia)[39] while some CEE states have also refrained from accepting the Optional Protocol to the CEDAW, CRC, and CRPD.[40]

Table 2. Acceptance of UN Individual Complaints Procedures in CEE States (Economic and Social Rights)

CEE states	ICESCR (OP)	CEDAW (OP)	CMW (ICP)	CRC (OP)	CRPD (OP)
Albania	x	x		x	
Bosnia and Herzegovina	x	x		x	x
Belarus		x			
Bulgaria		x			
Croatia		x		x	x
Czechia		x		x	x
Estonia		x		x	x
Hungary		x			x
Latvia					x
Lithuania		x		x	x
Montenegro	x	x		x	x
North Macedonia (FYROM)		x			x

38 Serbia and Montenegro signed the CMW, but abstained from ratifying it.

39 North Macedonia, Slovenia and Ukraine signed the Optional Protocol to the ICESCR, but abstained from ratifying it.

40 North Macedonia, Poland, Romania and Serbia signed the Optional Protocol to the CRC, but abstained from ratifying it. Bulgaira and Romania signed the Optional Protocol to the CRPD, but abstained from ratifying it.

Poland		x			
Romania		x			
Serbia	x	x			x
Slovakia	x	x		x	x
Slovenia		x		x	x
Ukraine		x		x	x

In the context of ratification policies it is worth adding that CEE states made hardly any relevant reservations or declarations to the treaties. However, we must mention some important examples of reservations that affect the protection of economic and social rights. For instance, upon ratification of the CRPD, Poland made a reservation that the provisions of the treaty could not be 'interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto, unless that right is guaranteed by the national law'.[41] Lithuania also declared that the legal concept of 'sexual and reproductive health' under the CRPD 'does not include support, encouragement or promotion of pregnancy termination, sterilisation and medical procedures of persons with disabilities, able to cause discrimination on the grounds of genetic features'.[42] Such reservations and declarations can have very real implications for the right to healthcare in terms of access to abortion as we will discuss below. Moreover, the right of persons with disabilities to work on an equal basis with others could also be affected by reservations, such as that made by Slovakia stating that 'the implementation of the prohibition of discrimination on the basis of disability in setting conditions of recruitment, hiring and employment shall not apply in the case of recruitment for service as a member of the armed forces, armed security forces, armed corps, the National Security Office, the Slovak Information Service and the Fire and Rescue Corps'.[43] Nonetheless, CEE states have generally abstained from making reservations or declarations that could significantly undermine the protection of economic and social rights.

Based on our quantitative analysis, we have also identified three crucial periods in the process of internationalisation of economic and social rights in the region. This timeline was established on the basis of the number of

41 See <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-15&chapter=4&clang=_en>, last access 18 February 2025.

42 See <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-15&chapter=4&clang=_en>, last access 18 February 2025.

43 See <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-15&chapter=4&clang=_en>, last access 18 February 2025.

ratifications and/or accessions to the abovementioned instruments within each span of time (Chart 1). Ratifications by states that no longer exist, and by the predecessors of some Central and Eastern European countries (Czechoslovakia, the Soviet Union, and Yugoslavia) were also included in this study. The first period occurred in the 1970s when the Eastern Bloc countries ratified the ICESCR as well as other human rights treaties. To a great extent, ratifications during this period were driven by the process of improving relations between East and West, which ultimately resulted in the adoption of the so-called Helsinki Agreement of 1975.[44] The second stage occurred in the 1990s. In this period there was a noticeable spike in the number of ratifications/accessions to the conventions. This trend may be explained on the one hand by the emergence of new CEE states who accepted the UN international human rights treaties in that sphere, as well as by numerous states' efforts to move towards a market-oriented economy and to abandon their Communist heritage on the other.[45] As mentioned above – with the decisions to be bound by the various international treaties – legal scholars at the time hoped that the level of respect for human rights within countries in the region would improve.[46] The third stage roughly encompasses the time from 2000 to 2025. In this period, the CRPD and a series of optional protocols (to the ICESCR, CRPD, CRC) were accepted and opened for signature. All of the CEE states ratified the CRPD, and some of the states also accepted the optional protocols for the ICESCR, CRPD, CRC, and CEDAW.

Nonetheless, all the states in this study seem in general to be reluctant to extend their obligations under international treaties on economic and social rights. It is especially alarming that states fail to provide individuals with the respective individual complaints procedures at the international level. One cannot overlook here a striking contradiction related to the fact that CEE states whose constitutions recognise the justiciability of economic and social rights at the same time in principle reject the primary mechanism for addressing violations of these rights in the international forum of the Optional Protocol to the ICESCR. It is worth underlining that, without such guarantees, individuals might face considerable difficulties when enforcing the rights guaranteed to them in international treaties. If the rights enshrined in the

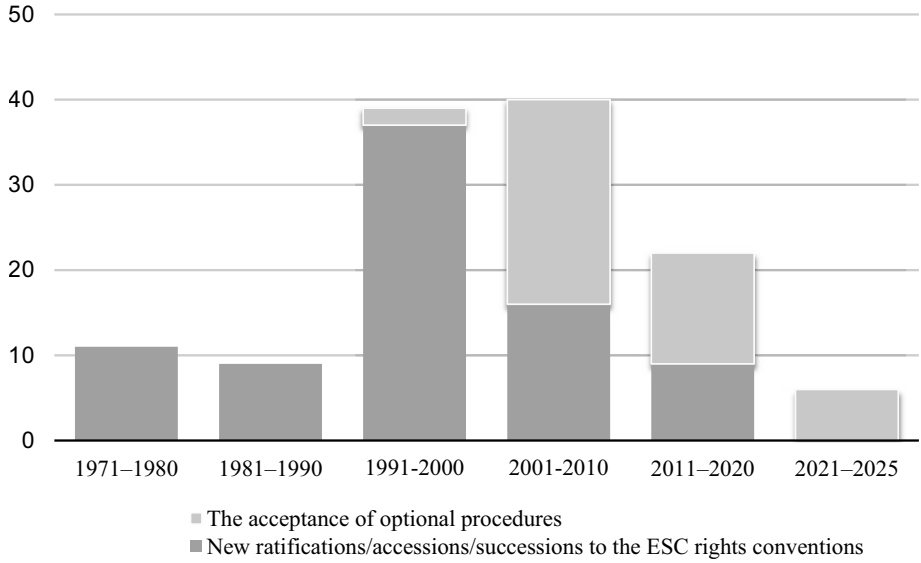
44 See more: Arthur Henry Robertson, 'Helsinki Agreement and Human Rights', Notre Dame L. Rev. 53 (1977), 34-48.

45 On this issue see for example: Krzysztof Drzewicki, 'Implementation of Social and Economic Rights in Central and Eastern Europe Transforming from Planned Economy to Market Economy', Nord. J. Int'l L. 64 (1995), 373-384; Jakub J. Szczerbowski and Paulina Piotrowska, 'Measures to Dismantle the Heritage of Communism in Central and Eastern Europe. Human Rights' Context', Cuadernos constitucionales de la Cátedra Fadrique Furió Ceriol 62/63 (2008), 233-248.

46 See Kędzia, 'Implementation of Social and Economic Rights' (n. 8).

covenants are not effectively realised by the domestic authorities and/or enforced before the national courts, opportunities for individuals to protect their rights remain significantly limited.

Chart 1. The timeline of new international instruments in ESC rights



Interestingly, the CEE countries' approach to preventing individuals from challenging violations of economic and social rights internationally can also be seen in the regional European human rights protection system. The regional mechanism – the collective complaint procedure based on 1995 Protocol to the European Social Charter/Revised European Social Charter – generally remains inaccessible to citizens. This is partly because the only entities entitled to file complaints are specific types of organisations (including trades union or employers' unions),[47] but, more importantly, because only four CEE states have accepted the procedure (Bulgaria, Croatia, Czechia, and Slovenia).[48] Therefore, in many cases the only legal procedure that CEE individuals can use to challenge violations of economic and social rights is an individual application to the European Court on Human Rights

47 On this mechanism see more: Robin R. Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', EJIL 15 (2004), 417-456.

48 Signatures and ratifications of the 1961 Charter, its Protocols and the European Social Charter (revised) as of 1 January 2025, available at <https://www.coe.int/en/web/european-social-charter/signatures-ratifications>, last access 18 February 2025.

(ECtHR).[49] However, this legal tool remains questionable and insufficient for economic and social rights litigation.[50] In spite of several significant judgments of the ECtHR, the Court does not generally engage in the protection of these rights to a wider extent.[51]

It could be argued that the reluctance of CEE countries regarding international enforcement mechanisms corresponds to a similar trend among the states commonly referred to as 'Western European liberal democracies'. However, this argument is not entirely accurate, as we can see from the example of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This protocol has been accepted by countries such as Belgium, France, Finland, Germany, Italy, Luxembourg, Portugal, and Spain. However, despite certain deficiencies in terms of access to international procedures in 'Western Europe', the approach adopted by CEE states still emerges as distinctive for two reasons. First, the low level of engagement with these instruments clearly contrasts with the fact that the Central and Eastern European constitutions could be generally associated with 'social constitutionalism' rather than 'liberal' and 'neoliberal' varieties.[52] This discrepancy is quite striking. Second, in many Western European states, at least one of these international procedures will still be available. It is worth noting that, for example, Belgium, France, and Italy ratified both the 1995 protocol to the European Social Charter and the Optional Protocol to the ICESCR. Concurrently, no CEE state agreed on both the CESCR and the ESC procedures.

The existence of domestic mechanisms to protect economic and social rights could be leveraged as a justification for the CEE states' low level of engagement in the international procedures. However, this argument is not fully convincing for at least three reasons. First, there are numerous shortcomings in the realisation of these rights, as will be described in the later sections, and this clearly shows that the international obligations are, in many cases, implemented ineffectively or even not at all. Secondly, it is

49 Ellie Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', Erasmus Law Review 4 (2009), 397-425.

50 Colin Warbrick, 'Economic and Social Interests and the European Convention on Human Rights', in: Mashood Baderin and Robert McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (Oxford University Press 2007), 241-256.

51 Liam Thornton, 'The European Convention on Human Rights: A Socio-Economic Rights Charter?', in: Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014), 227-256.

52 On differentiating types of constitutionalism see Whitney K. Taylor, *The Social Constitution. Embedding Social Rights Through Legal Mobilization* (Cambridge University Press 2023), 4-7.

desirable for the content of economic and social rights to be interpreted in a consistent manner among parties to the ICESCR. Meanwhile, the lack of participation in international enforcement mechanisms may perpetuate differences in the level of protection guaranteed by respective countries. Notably, some domestic authorities may interpret certain rights, such as the right to health, in a more restrictive way than their foreign counterparts. Such a phenomenon would be incompatible with the universal nature of human rights. Therefore, the involvement in the international human rights protection system can be viewed as a 'further stage in the historical development of the idea of constitutionalism' (global constitutionalism), whereby international actors also impose limits on the exercise of the state's power.[53] Thirdly, and finally, although parallel systems of economic and social rights protection may entail a risk of generating inconsistent and contradictory outcomes, and causing tension between domestic and international legal commitments, previous experience in civil and political rights protection suggests that parallel systems are ultimately beneficial for the individual whose rights are violated. The best example of this is the aforementioned system of the European Convention on Human Rights, to which all European countries are party (with the exception of Russia and Belarus), and which functions alongside the national systems of protection of rights and freedoms which reinforce it, which of course sometimes causes controversy and tension.[54]

To sum up, what CEE states have in common is the general acceptance of most of the UN treaties that protect economic and social rights at the international level and the states' simultaneous failure to accept the procedural treaties that allow individuals to question violation of rights at the international level. While it must be acknowledged that poor engagement with the international enforcement of economic and social rights is an ongoing issue in numerous countries globally, this is a prevailing trend among the CEE states in particular.

53 See Stephen Gardbaum, 'Human Rights as International Constitutional Rights', EJIL 19 (2008), 749-768 (766-767).

54 See Adam Ploszka 'It Never Rains but It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', Hague Journal on the Rule of Law 15 (2023), 51-74.

IV. Implementation of the ICESCR by Central and Eastern European Countries – in Light of the Concluding Observations of the Committee on Economic and Social Rights

As mentioned earlier, merely looking at the number of ratifications does not give a complete picture of how Central and Eastern European countries approach the international protection of economic and social rights. To better understand this, it is worth to draw on the conclusions of the Committee on Economic and Social Rights. Based on a thorough comparison of 49 concluding observations of the Committee on Economic, Social and Cultural Rights, several observations can be made with regard to the Central and Eastern European countries. It is important to note that our analysis covered concluding observations adopted in respect to CEE countries[55] after the fall of communism. Thus, the period covered by concluding observations extends, in theory, over 30 years, although one should bear in mind that the first concluding observations (after the fall of communism in these countries) were not adopted until the mid-1990s. It is also worth noting that practice in reporting on the domestic implementation of the ICESCR varied widely between different countries during this period. On average, therefore, our analysis included three concluding observations for each country. However, some countries saw more (as in the case of Ukraine, where it was five) or less (as in the case of Hungary, where only one concluding observation was accepted during that period).

The concluding observations provided by the Committee encompass synthetic summaries of the problems encountered in specific jurisdictions. Each document includes descriptive elements (what was noted by the Committee) as well as recommendations (what should be done to improve the enjoyment of conventional rights). These observations are issued – as a matter of principle – on a regular basis. However, this does not apply to all CEE states given the fact that – as mentioned above – some states failed to submit periodic reports within the dates specified by the Committee. This situation in itself is concerning since the implementation of the obligations laid down in the Covenant might not be subject to evaluations for as long as twenty years.[56] It must be also acknowledged that concluding observations are drafted in a very specific way, which stems from the fact that they are

55 At the moment, concluding observations have not yet been adopted for Kosovo.

56 See long periods of time with no period reports provided by Belarus (1996-2013), Bulgaria (1999-2012), Croatia (2001-2025), Hungary (since 2008) and Romania (1994-2014).

primarily based on state reports as well as submissions from Non-Governmental Organisations (NGOs) and UN specialised agencies.[57] While they are obviously not formulated in a strictly academic way, they provide – as reputable expert resources – valuable insights into the implementation of the Covenant at domestic level.

According to the CESCR's concluding observations, the provisions of the ICECSR are generally either not invoked at all before courts in CEE states or are invoked in a limited number of cases (Table 3).[58] This practice remains incompatible with the nature of the obligations reflected in the Covenant because its provisions should be justiciable by the domestic judicial bodies.[59] Regretfully, only some of the state parties were able to provide information on the relevant national case-law. The information provided raise additional doubts concerning the scope of the domestic application of the ICESCR. To give an example, Romania asserted that the Covenant had been invoked in over 1,700 cases from 2011 to 2024. Along with basic quantitative data, no detailed qualitative information was presented.[60] A further problem might arise from the fact that the Covenant is applied by the higher instance courts, but not lower courts and administrative instances, as was highlighted in the concluding observations regarding Czechia.[61] A limited number of cases in which the Covenant was invoked, such as in the Slovenian judiciary, can also be considered as threats to the protection of economic and social rights.[62]

One could argue that referring to the Covenant would ultimately be redundant in view of the fact that the domestic constitutions contain detailed catalogues of economic and social rights. However, the CESCR has not observed the presence of such well-established practices in terms of invoking constitutional economic and social rights. Even if this were the case, it does

57 Malcolm Langford and Jeff A. King, 'Committee on Economic, Social and Cultural Rights. Past, Present and Future' in: Malcolm Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge University Press 2009), 477-516 (479).

58 The CESCR's concluding observations are publicly available at: <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5>, last access 18 February 2025.

59 The Committee on Economic, Social and Cultural Rights General Comment No. 9 on the domestic application of the Covenant, 3 December 1998, E/C.121998/24, para. 10.

60 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Romania, 20 March 2024, E/C.12/ROU/CO/6, para. 4.

61 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of the Czech Republic, 23 June 2014, E/C.12/CZE/CO/2, para. 5; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of the Czech Republic, 28 March 2022, E/C.12/CZE/CO/3, para. 4.

62 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Slovenia, 15 December 2014, E/C.12/SVN/CO/2, para. 5.

not exclude the additional references to the provisions of the ICESCR. Those references may serve as a legal basis for inclusion of the case-law of the Committee on Economic, Social and Cultural Rights in the jurisprudence of domestic courts, including constitutional courts. Nevertheless, even if the domestic courts referred extensively to the constitutional provisions, the question would remain as to whether or not these rights are universally interpreted in line with the international standards.

Table 3. Cases of Direct Applicability of the Covenant Before the Courts

Provisions invoked in numerous cases	**Provisions invoked only by higher instance courts**	**Provisions interpreted as not giving rise to subjective claim rights**	**Provisions occasionally or rarely invoked by the courts**	**No data provided by the state**
Romania (as of 2024)	Czechia	Estonia	Belarus (as of 2022)	Albania
	Latvia	Hungary	Bulgaria	Bosnia and Herzegovina
		Poland (until 2016)	Croatia (as of 2001)	Belarus (until 2013)
			Lithuania (as of 2023)	Lithuania (until 2014)
			North Macedonia	Montenegro
			Slovakia (as of 2019)	Poland (as of 2024)
			Slovenia	Romania (until 2014)
				Serbia
				Slovakia (until 2012)
				Ukraine
				Croatia (as of 2025)

The question arises as to the driving factors behind the nearly universal absence of the Covenant within CEE domestic case-law. In its concluding observations, the Committee suggests that the main difficulty in enforcing the provisions of the Covenant comes from a lack of sufficient training for members of the judiciary, lawyers, and public officials along with insufficient awareness of economic and social rights among rights holders (as well as other state and non-state actors responsible for the implementation of the Covenant).[63]

Yet it appears that this state of affairs results from more systemic concerns in the domestic human rights protection systems. We argue that these failures can be attributed to three wrong assumptions. First, the state party may view the Covenant as programmatic and aspirational, but not justiciable.[64] Secondly, there is a common misconception that the violations of economic and social rights should not be treated by the authorities as seriously as any infringements in the sphere of civil and political rights.[65] Thirdly, the legal obligations undertaken by the state parties are frequently implemented as if they were merely obligations of conduct, not obligations of result. The CESCR's concluding observations show that in many cases the states adopt appropriate legislative frameworks, which are then not effectively implemented in practice.[66]

In this context it is worth reminding ourselves that article 2(1) imposes an obligation to 'take steps with a view to achieving progressively the full realisation of the rights by all appropriate means'.[67] Hence states are supposed to 'move as expeditiously and effectively as possible towards that goal'

63 E. g.: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Lithuania, 30 March 2023, E/C.12/LTU/CO/3, paras 4-5; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Poland, 26 October 2016, E/C.12/POL/CO/6, paras 5-6; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Serbia, 6 April 2022, E/C.12/SRB/CO/3, paras 4-5; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Slovakia 2019, 14 November 2019, E/C.12/SVK/CO/3, paras 4-5.

64 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Fifth Periodic Report of Poland, 2 December 2009, E/C.12/POL/CO/5, para. 8.

65 Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights', HRQ 20 (1998), 81-124 (82).

66 See The Committee on Economic, Social and Cultural Rights Concluding Observations on the Initial Report of Montenegro, 15 December 2014, E/C.12/MNE/CO/1, para. 16; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Combined Second to Fourth Periodic Reports of the former Yugoslav Republic of Macedonia, 15 July 2016, E/C.12/MKD/CO/2-4, para. 39; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Latvia, 30 March 2021, E/C.12/LVA/CO/2, para. 16.

67 The International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

and use 'the maximum available resources'.[68] One can nevertheless observe that the states in the region have serious problems with meeting this requirement, although attempts are made to respect, protect, and fulfil economic and social rights. The in-depth analysis of the concluding observations enabled us to discern two patterns related to CEE states' approach to the dialogue with the CESCR regarding the domestic implementation of economic and social rights guaranteed by the ICESCR. There is a small group of countries where domestic authorities persistently refrain from implementing the recommendations formulated by the Committee. This is especially evident from our analysis of the concluding observations from Bosnia and Herzegovina (adopted in 2006, 2013 and 2021), Belarus (1996, 2013 and 2022), and Bulgaria (1999, 2012 and 2019). This approach compromises the protection of the rights guaranteed by the ICESCR.

However, this is not a typical approach. The majority of CEE states are characteristically taking numerous actions in several areas, for example by amending existing laws and launching multi-annual programmes, but these were nonetheless regarded by the ICESCR as insufficient. Despite these critical observations, the states are not substantially changing their approach. This can be seen in the following concluding observations on Albania (2013, 2024), Estonia (2002, 2011, 2019), Hungary (2008), Latvia (2008 and 2021), Lithuania (2004, 2014 and 2023), Montenegro (2014), North Macedonia (2008 and 2016), Poland (1998, 2002, 2009, 2016, 2024), Romania (2014, 2024), and Serbia (2014, 2022).

Interestingly, a significant number of countries initially took the first approach. However, over the years, the approach of some CEE countries has changed. These countries have begun to engage in dialogue with the CESCR and address challenges in implementing economic and social rights. One can observe this change in the concluding observation adopted in reference to Croatia (2001 and 2025), Czechia (2014 and 2022), Romania (2014 and 2024), Serbia (2014 and 2022), Slovenia (2014), and Ukraine (2014 and 2020), especially when compared with earlier ones.

V. Selected Deficits in the Implementation of Selected Social Rights by Central and Eastern European Countries

As mentioned in the first part of this article, there are three social rights that are common to CEE constitutionalism – the right to social security,

68 The Committee on Economic, Social and Cultural Rights General Comment No. 3 on the Nature of States Parties' Obligations, 14 December 1990, para. 9.

the right to healthcare, and the right to education.[69] Regardless of their constitutional anchoring, the CESCR notes a number of systemic problems that arise in their realisation. In the present section, we concentrate on the deficits noted in more than one country, particularly in several CEE jurisdictions.

According to the CESCR's general comment no. 19, entitlement to social security is vital for safeguarding the principle of human dignity, and therefore access and maintenance of benefits must not be based on any discriminatory criteria.[70] On the basis of constitutional provisions alone, one might possibly conclude that the CEE states will be particularly 'generous' in that regard. However, the reality appears to be quite different in many cases. The problems may arise at different stages, starting with the failure to take effective measures to ensure that employers pay social security contributions on time, although fortunately, this is not a widespread issue in the region.[71] In reality, beneficiaries are generally covered by different forms of financial support, but the amounts of benefits, pensions, and allowances are often still insufficient for an adequate standard of living.[72] There are also two tendencies that clearly aggravate this problem – the cuts in public fundings that have an adverse impact on the socio-economic status of recipients,[73] and application

69 Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edn, Springer 2014), 261-264.

70 The Committee on Economic, Social and Cultural Rights General Comment No. 19, The Right to Social Security, 4 February 2008, E/C.12/GC/19, paras 1-2.

71 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Initial Periodic Report of Bosnia and Herzegovina, 24 January 2006, E/C.12/BIH/CO/1, para. 15; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Bosnia and Herzegovina, 16 December 2013, E/C.12/BIH/CO/2, para. 18; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina, 11 November 2021, E/C.12/BIH/CO/3, para. 34; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Lithuania, 30 March 2023, E/C.12/LTU/CO/3, para. 45.

72 See for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Estonia, 16 December 2011, E/C.12/EST/CO/2, para. 18; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Lithuania, 24 June 2014, E/C.12/L TU/CO/2, para. 10; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Estonia, 27 March 2019, E/C.12/EST/CO/3, paras 28-31; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Latvia, 30 March 2021, E/C.12/LVA/CO/2, paras 28-29.

73 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of the Czech Republic, 23 June 2014, E/C.12/CZE/CO/2, para. 14; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Combined Third to Fifth Periodic Reports of Romania, 9 December 2014, E/C.12/ROU/CO/3-5, para. 15.

of stricter eligibility criteria affecting the marginalised groups and disadvantaged groups, which put them in an even more vulnerable position.[74]

The deficiencies in access to healthcare are also particularly troublesome. Clearly, this does not mean that CEE countries generally abstain from allocating public funds for such objectives. Serious doubts do arise however if one scrutinises the way in which healthcare services are distributed. There are reoccurring disparities in the availability of such services between regions.[75] The deep-lying general causes of these disparities are frequently systemic, boiling down to factors such as the lack of sufficient well-qualified medical professionals combined with the excessively low budget allocations.[76]

Significantly, the Committee is 'responsive' not only to the risks to the protection of physical health, but also mental health, which is especially evident as far as the most recent concluding observations are concerned.[77] Shortcomings in the latter are widespread in the region, and consequently strengthening domestic mental health-care systems has become one of the

74 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Slovenia, 15 December 2014, E/C.12/SVN/CO/2, para. 18; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Combined Second to Fourth Periodic Reports of the former Yugoslav Republic of Macedonia, 15 July 2016, E/C.12/MKD/CO/2-4, paras 37-38; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Poland, 26 October 2016, E/C.12/POL/CO/6, paras 27-28; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Serbia, 6 April 2022, E/C.12/SRB/CO/3, para. 50.

75 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Poland, 26 October 2016, E/C.12/POL/CO/6, paras 43-44; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Bulgaria, 29 March 2019, E/C.12/BGR/CO/6, paras 40-41; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Fourth Periodic Report of Albania, 17 October 2024, E/C.12/ALB/CO/4, paras 44-45.

76 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Poland, 26 October 2016, E/C.12/POL/CO/6, paras 43-44; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Lithuania, 30 March 2023, E/C.12/LTU/CO/3, paras 52-53.

77 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Bulgaria 29 March 2019, E/C.12/BGR/CO/6, paras 42-43; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Estonia, 27 March 2019, E/C.12/EST/CO/3, paras 42-43; The Committee on Economic, Social and Cultural Rights Concluding Observations on Latvia, 30 March 2021, E/C.12/LVA/CO/2, paras 44-45; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Lithuania, 30 March 2023, E/C.12/LTU/CO/3, paras 56-57; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Romania, 20 March 2024, E/C.12/ROU/CO/6, paras 44-45.

most important challenges for the CEE states, especially considering the high suicide rates among different age groups, including adolescents.[78]

In some cases, there are also still considerable concerns in terms of reproductive health.[79] The emerging trends fall into two categories. In a few countries, abortion has become a prevalent method of birth control, a trend which is often attributed to a lack of sexual health education.[80] On the other hand, women seeking to terminate pregnancy in other jurisdictions have faced difficulties in gaining access both to safe abortions and also to contraceptives.[81] Apart from the apparent infringement of the International Covenant on Economic, Social and Cultural Rights, the latter trend, which has grown over the last years,[82] appears to be clearly incom-

78 According to the data provided by Eurostat, in 2021 the suicide rate among adolescents aged from 15 to 19 years in 8 CEE countries was higher than the average suicide rate in the European Union. See <https://ec.europa.eu/eurostat/databrowser/view/tps00202__custom_11207793/default/bar?lang=en>, last access 18 February 2025.

79 The right to sexual and reproductive health is considered by the CESCR an integral part of the right to health. On this issue see The Committee on Economic, Social and Cultural Rights General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, para. 1.

80 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Estonia, 16 December 2011, E/C.12/EST/CO/2, para. 24; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Lithuania, E/C.12/L TU/CO/2, 24 June 2014, para. 22; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Initial Report of Montenegro, 15 December 2014, E/C.12/MNE/CO/1, para. 24.

81 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Combined Second to Fourth Periodic Reports of the former Yugoslav Republic of Macedonia, 15 July 2016, E/C.12/MKD/CO/2-4, paras 49-50; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report, 26 October 2016, Poland 2016, E/C.12/POL/CO/6, paras 46-47; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Slovakia 2019, 14 November 2019, E/C.12/SVK/CO/3, paras 41-42; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Latvia, 30 March 2021, E/C.12/LVA/CO/2, paras 42-43; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Romania, 20 March 2024, E/C.12/ROU/CO/6, paras 42-43; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Seventh Periodic Report of Poland, 24 October 2024, E/C.12/POL/CO/7, paras 44-45. The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Croatia, 10 March 2025, E/C.12/HRV/CO/2, paras 46-47.

82 On this issue see for example: Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill). "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20', Eu Const. L. Rev. 17 (2021), 130-153; Andrea Cioffi, Camilia Cecannecchia, Fernanda Cioffi, Giorgio Bolino and Raffaella Rinaldi, 'Abortion in Europe: Recent Legislative Changes and Risk of Inequality', International Journal of Risk & Safety in Medicine 33 (2022), 281-286.

patible with the Human Rights Committee's (HRC) stance on the right to life. Using the words of the HRC, one could say that the obstacles that some CEE women or girls face when seeking to terminate a pregnancy might 'jeopardize their lives, subject them to physical or mental pain or suffering', and moreover 'discriminate against them or arbitrarily interfere with their privacy'.[83]

CEE states have also faced significant difficulties in the full realisation of the third 'core' right of Central and Eastern-European Constitutionalism – the right to education. There are several problematic areas that are apparent in more than one country. In the most extreme cases, the states fail to adopt effective measures aimed to eliminate high dropout rates in primary and secondary education. The statistical gravity of this issue varies depending on specific social groups, but, undoubtedly, the risk of not completing education is exacerbated in marginalised and vulnerable communities, in particular among Roma children.[84] Predominantly in the most recent concluding observations, the Committee emphasises the importance of inclusive and accessible education for children with disabilities, migrant children, and children from national/ethnic minorities. This is an issue due to the existing legal and administrative barriers to school enrolment as well as harmful practices such as the continuation of segregated structures in educational institutions.[85]

Nevertheless, the shortcomings in the realisation of the right to education does not amount solely to the aspect of 'accessibility'. The ongoing challenge remains the quality of education, which is related, *inter alia*, to the pressing need to extend the school curricula to cover the age-appropriate sex and

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83 The Human Rights Committee General Comment No. 36 on the Right to Life, 3 September 2019, CCPR/C/GC/36, para. 8.

84 See for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Hungary, 16 January 2008, E/C.12/HUN/CO/3, para. 27; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Slovakia, 8 June 2012, E/C.12/SVK/CO/2, para. 26; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Bulgaria, 29 March 2019, E/C.12/BGR/CO/6, paras 48-49

85 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Bulgaria, 29 March 2019, E/C.12/BGR/CO/6, paras 48-49; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina, 11 November 2021, E/C.12/BIH/CO/3, paras 50-51; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Czechia, 28 March 2022, E/C.12/CZE/CO/3, paras 46-49; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Fourth Periodic Report of Albania, 17 October 2024, E/C.12/ALB/CO/4, paras 48-49, The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Croatia, 10 March 2025, E/C.12/HRV/CO/2, para. 50.

reproductive health education.[86] This issue is certainly inextricably linked to the question of whether a sufficient level of budget is being allocated to education.[87] Although this results only indirectly from the concluding observations, the Committee generally recognises education as a tool for strengthening the protection of economic and social rights in CEE countries. It follows that schools should also aim to combat the perpetuation of gender stereotypes[88] and raise awareness about human rights protection.[89]

VI. Conclusions

To conclude, the Central and Eastern European states' approach to economic and social rights can be characterised by a discrepancy between the way in which economic and social rights were constitutionalised and the states' approach to protecting these rights at the international level. Despite the fact that economic and social rights are defined in CEE national legal systems as subjective rights, which translates into their justiciability before national courts, the same countries do not, in principle, allow individuals to challenge violations of economic and social rights internationally. These countries also struggle with effective implementation of the International Covenant on Economic and Social Rights as can be seen in the concluding observations of the UN Committee on Economic, Social and Cultural Rights regarding states' reports. It is impossible to provide a single answer to explain this paradox, as the reasons behind it are clearly multi-layered.

86 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Fifth Periodic Report of Poland, 2 December 2009, E/C.12/POL/CO/5, para. 31; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Lithuania, 24 June 2014, E/C.12/L TU/CO/2, para. 22.

87 See for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Sixth Periodic Report of Romania, 20 March 2024, E/C.12/ROU/CO/6, para. 46; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Seventh Periodic Report of Poland, 24 October 2024, E/C.12/POL/CO/7, para. 48.

88 See for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Initial Report of Montenegro, 15 December 2014, E/C.12/MNE/CO/1, para. 11; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Combined Second to Fourth Periodic Reports of the former Yugoslav Republic of Macedonia, 15 July 2016, E/C.12/MKD/CO/2-4, paras 25-26; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Slovakia 2019, 14 November 2019, E/C.12/SVK/CO/3, paras 18-19.

89 See for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina, 11 November 2021, E/C.12/BIH/CO/3, para. 5; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Czechia, 28 March 2022, E/C.12/CZE/CO/3, para. 5.

Among these, however, in our opinion, particular importance should be accorded to the differential approach to civil and political rights versus economic and social rights and mechanisms for their protection. After the collapse of communist regimes starting at the end of the 1980s, attention in this part of Europe was focused on safeguarding civil and political rights which had been neglected and massively infringed throughout the Communist era, rather than on economic and social rights.[90] Our analysis confirms this argument. Despite the constitutional embedding of economic and social rights, some Central and Eastern European countries still question the quality of the rights enshrined in the ICESCR as genuinely subjective (and thus justiciable) rights, either doing so openly – like Estonia and Hungary – or by not presenting any information on the matter in their reports. This is even more visible in the ratification policy that CEE countries have pursued in the context of optional protocols that enable individuals to bring communications on economic and social rights violations at the international level. Our analysis shows that these legal avenues are virtually inaccessible to victims of economic and social rights violations from the CEE region. At the same time, however, the region's countries allow violations of civil and political rights and freedoms to be challenged internationally.[91] This issue, in our view, should be a key point in the dialogue conducted by the CESCR and other UN Committees with each of the Central and Eastern European countries.

Among other factors impeding the implementation of the Covenant by the CEE states the CESCR also highlighted the economic hardship arising during the transition to a market economy.[92] Finally, several crises, including the effects of the global financial crisis in the late 2000s[93] and more recent

90 Beata Faracik, Jernej Letnar Černíč and Olena Uvarova, 'Business and Human Rights in Central and Eastern Europe: Trends, Challenges and Prospects', Business and Human Rights Journal 9 (2024), 1-14 (4, 7-8); Antal Visegrády 'Transition to Democracy in Central and Eastern Europe: Experiences of a Model Country – Hungary', William & Mary Bill of Rights Journal 1 (1992), 245-265 (261).

91 See detailed analysis: Mihaela Şerban, 'Stemming the Tide of Illiberalism? Legal Mobilization and Adversarial Legalism in Central and Eastern Europe', Communist and Post-Communist Studies 51 (2018), 177-188.

92 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Romania, 30 May 1994, E/C.12/1994/4, para. 4; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Bulgaria, 8 December 1999, E/C.12/1/Add.37, para. 3; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Initial Periodic Report of the Czech Republic, 5 June 2002, E/C.12/1/Add.76, para. 7.

93 See for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of the Czech Republic, 23 June 2014, E/C.12/CZE/CO/2, para. 14.

ones like the COVID-19 pandemic[94] as well as the ongoing war in Ukraine[95] constituted an obstacle in progressively achieving the full realisation of the rights recognised in the Covenant, as the CESCR rightly pointed out. As a side note, these numerous crises have contributed to the extension of the scope of the obligations imposed on the state parties, some of which can be extra-territorial, for example, in terms of 'exercising its leverage in regional and international organisations' to 'advocate for universal, equitable and affordable access to COVID-19 vaccines and drugs'.[96]

It is undeniable that numerous deficits in the implementation of economic and social rights can also be observed in other regions of the world. The present study however, has revealed that there are multiple similarities between the countries covered by the research, which allowed us to identify the specific challenges faced by CEE states and the right-holders seeking the effective enforcement of their rights.

94 The Committee on Economic, Social and Cultural Rights Concluding Observations on the Second Periodic Report of Latvia, 30 March 2021, E/C.12/LVA/CO/2, paras 40-41; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Serbia, 6 April 2022, E/C.12/SRB/CO/3, paras 20-21; The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Lithuania, 30 March 2023, E/C.12/LTU/CO/3, paras 23-25.

95 See for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Seventh Periodic Report of Ukraine 2 April 2020, E/C.12/UKR/CO/7, paras 35-36.

96 On this issue see for example: The Committee on Economic, Social and Cultural Rights Concluding Observations on the Third Periodic Report of Lithuania, 30 March 2023, E/C.12/LTU/CO/3, paras 24-25.

Die (unvollendete) Reform des Europäischen Stabilitätsmechanismus (ESM)

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Abstract

Bereits zu Beginn der Wirtschaftskrise in Europa wurde der Ruf nach einem Mechanismus laut, der zur Währungsstabilität beiträgt und damit ein wirksames Instrument zur Bekämpfung der Staatsschuldenkrise darstellt. Zu diesem Zweck einigten sich die Euro-Staaten auf die Schaffung eines permanenten Rettungsschirms, den Europäischen Stabilitätsmechanismus (ESM).[1] Der „Ret-

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1 Der ESM-Vertrag wurde am 2. Februar 2012 von den 17 Euro-Staaten unterzeichnet (die ursprüngliche Fassung wurde eigentlich bereits im Juli 2011 unterzeichnet, doch es wurden noch Änderungen vorgenommen); vgl. ER, 'Treaty Establishing the European Stability Mechanism', Factsheet vom 2. Februar 2012. Darauf folgte der Ratifikationsprozess in den Euro-Staaten und schließlich trat der ESM-Vertrag am 27. September 2012 in Kraft; vgl. Art. 48 ESM-Vertrag. Mit der konstituierenden Sitzung des ESM Gouverneursrats am 8. Oktober 2012 hat der ESM seine Arbeit aufgenommen.

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tungsschirm“[2] zielte in erster Linie darauf ab, einen Zusammenbruch der Europäischen Wirtschafts- und Währungsunion zu verhindern und den Euro als gemeinsame Währung der Europäischen Union (EU) „mit allen Mitteln“[3] zu bewahren. Nach einem Jahrzehnt seines Bestehens steht der ESM an einem wichtigen Wendepunkt, da die seit Jahren vorbereitete Reform, die wesentliche Weiterentwicklungen vorsieht, auf ihre Ratifizierung wartet.[4] Der vorliegende Beitrag soll die zukünftige Reichweite dieser (noch unvollendeten) Reform des ESM analysieren. Zu diesem Zweck wird in einem ersten Schritt ein grundsätzlicher Überblick über den aktuellen Status quo des ESM gegeben, bevor auf die Kernpunkte der aktuellen ESM-Reform näher eingegangen wird.

Keywords

Europäischer Stabilitätsmechanismus – ESM-Reform – Konditionalität – gemeinsame Letztsicherung – einheitlicher Abwicklungsfonds – Umschuldungsklauseln

Summary: The (Uncompleted) Reform of the European Stability Mechanism (ESM)

Right at the beginning of the economic crisis in Europe, there were calls for a mechanism that would contribute to monetary stability and thus represent an effective instrument to address the sovereign debt crisis. For this purpose, the euro countries agreed to establish a permanent rescue mechanism, the European Stability Mechanism (ESM). The main objective of the “rescue umbrella” was to prevent the collapse of the European Economic and Monetary Union and to preserve the euro as the common currency of the EU “by all means”. A decade after its inception, the ESM stands at a critical

2 Der Euro-Rettungsschirm besteht neben dem ESM auch aus dem Europäischen Finanzstabilisierungsmechanismus (EFSM) und der Europäischen Finanzstabilisierungsfazilität (EFSF).

3 I. d. S. äußerte sich der ehemalige Präsident der Europäischen Zentralbank Mario Draghi in einer Rede am 26. Juli 2012 in London ‘Within our mandate, the ECB is ready to do whatever it takes to preserve the euro.’ <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>, zuletzt besucht 28. Oktober 2024.

4 Siehe ER, Arbeitsprogramm der Euro-Gruppe für das zweite Halbjahr 2024, 15. Juli 2024 ‘The Ratification of the Agreement Amending the ESM Treaty Is a Priority.’ <https://www.consilium.europa.eu/media/bcqnoz2v/eurogroup-work-programme-until-march-2025.pdf>, zuletzt besucht 28. Oktober 2024.

juncture, with a long-prepared reform – introducing significant advancements – awaiting ratification. This article seeks to analyse the future scope of this (still incomplete) ESM reform. To this end, it first provides an overview of the current status quo of the ESM before delving into the key aspects of the proposed reform.

Keywords

European Stability Mechanism – ESM reform – strict conditionality – Single Resolution Fund (SRF) – common backstop – Collections Action Clauses

I. Der ESM – Status Quo

Der ESM wurde durch völkerrechtlichen Vertrag der Mitgliedstaaten des Euro-Raumes als rechtlich selbständige internationale Organisation außerhalb der Rechtsordnung der EU errichtet. Nichtsdestotrotz ist der ESM in vielerlei Hinsicht eng mit der EU verbunden. Dies spiegelt sich bereits im vorrangigen Ziel des ESM wider: Die Stabilität des Euro-Währungsgebiets insgesamt zu wahren.[5]

Der Zweck des ESM besteht in der Bereitstellung von Stabilitätshilfen an ESM-Mitglieder, wenn dies „zur Wahrung der Finanzstabilität des Euro-Währungsgebiets insgesamt und seiner Mitgliedstaaten unabdingbar ist".[6] Zur Führung seiner Geschäfte verfügt der ESM über einen Gouverneursrat, ein Direktorium und einen Geschäftsführenden Direktor.[7] Das Direktorium fasst die Beschlüsse, die ihm nach Maßgabe des ESM-Vertrags obliegen oder die ihm vom Gouverneursrat übertragen werden, mit qualifizierter Mehrheit, sofern der ESM-Vertrag nichts anderes vorsieht.[8] Der Geschäftsführende Direktor ist der gesetzliche Vertreter des ESM und führt nach den Weisungen des Direktoriums die laufenden Geschäfte des ESM.[9]

Für seine Tätigkeit wurde der ESM von den Mitgliedern mit einem genehmigten Stammkapital in Höhe von rund 708,5 Mrd EUR ausgestattet. Davon

5 ErwGr. 2, 6; Art. 3 Abs. 1, Art. 12 Abs. 1 ESM-Vertrag. Siehe auch Art. 136 Abs. 3 AEUV.

6 Art. 3 ESM-Vertrag.

7 Art. 4 Abs. 1 ESM-Vertrag.

8 Art. 6 Abs. 5, 6 ESM-Vertrag.

9 Art. 7 Abs. 5 ESM-Vertrag.

stellen rund 81 Mrd EUR eingezahltes Kapital dar, während sich der Gesamtnennwert der abrufbaren Anteile auf rund 627,5 Mrd EUR beläuft.[10] Dieses Kapital ermöglicht dem ESM, durch Anleiheoperationen auf den internationalen Finanzmärkten finanzielle Mittel aufzunehmen, welche in der Folge als Hilfsprogramm an „notleidende" Mitglieder ausgezahlt werden können. Demnach tritt der ESM selbst als Darlehensgeber gegenüber dem Empfängerland auf; nicht jedoch die Euro-Staaten. Die verfügbaren Instrumente zur Gewährung von Finanzhilfen sind in den Art. 14 bis 18 ESM-Vertrag aufgezählt.

Das Verfahren zur Gewährung von Stabilitätshilfe findet sich in Art. 13 ESM-Vertrag und ist für die verschiedenen Formen der Stabilitätshilfen – bis auf geringfügige Ergänzungen (Art. 14-18 ESM-Vertrag) – grundsätzlich einheitlich geregelt. Ausgangspunkt des Verfahrens ist das Ersuchen eines ESM-Mitglieds um Gewährung finanzieller Unterstützung. Nach Eingang des Ersuchens beauftragt der Vorsitzende des Gouverneursrats die Kommission, im Benehmen mit der Europäischen Zentralbank (EZB), mit der Erstellung von Analysen, welche insbesondere das Bestehen einer Gefahr für die Finanzstabilität des Euro-Währungsgebiets insgesamt oder seiner Mitgliedstaaten (lit. a); die Tragfähigkeit der öffentlichen Verschuldung (lit. b) sowie den Finanzierungsbedarf des betreffenden ESM-Mitglieds (lit. c) bewerten. Auf Grundlage dieser Ergebnisse und des Antrags des ESM-Mitglieds entscheidet der Gouverneursrat im gegenseitigen Einvernehmen, ob dem betreffenden ESM-Mitglied grundsätzlich Stabilitätshilfe gewährt wird.[11] Für den Fall, dass dieser Beschluss positiv ausfällt, beauftragt der Gouverneursrat daraufhin die Kommission zusammen mit der EZB (und nach Möglichkeit zusammen mit dem Internationaler Währungsfonds (IWF)), mit dem betreffenden ESM-Mitglied ein *Memorandum of Understanding* (MoU) auszuhandeln.[12] Im MoU werden die strengen, dem Finanzhilfeinstrument angemessenen Auflagen festgehalten, an welche die Gewährung der Stabilitätshilfe gebunden ist.[13] Bei diesen strengen Auflagen handelt es sich grundsätzlich um Maßnahmen der Haushaltssanierung, welche in der Folge vom Empfängerstaat der Stabilitätshilfe in seiner nationalen Rechtsordnung durch Reformen umgesetzt werden müssen. Dadurch soll ge-

10 Art. 8 ESM-Vertrag.

11 Art. 5 Abs. 5 lit. f; Art. 13 Abs. 2 ESM-Vertrag.

12 Art. 13 Abs. 3 ESM-Vertrag.

13 Art. 12 Abs. 1 S. 1 ESM-Vertrag. Dazu ausführlich Ulrich Forsthoff und Natalie Lauer, 'Policy Conditionality Attached to ESM Financial Assistance' in: Fabian Amtenbrink und Christoph Herrmann (Hrsg.), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), Rn. 30.41; siehe auch zur Rechtsnatur des MoU Jörn Axel Kämmerer, 'Das Memorandum of Understanding (MoU): Vom Eingang einer exotischen Rechtsfigur in das Europarecht' in: Theodor Baums, Hermann Remsperger, Michael Sachs und Volker W. Wieland (Hrsg.), *Zentralbanken, Währungsunion und stabiles Finanzsystem: FS für Helmut Siekmann* (Duncker & Humblot 2019), 69-85.

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währleistet werden, dass das Empfängerland eine solide Haushaltspolitik verfolgt, was dem ESM, als Kreditgeber, in gewisser Weise als „Kredit-Sicherheit" dient.[14] Das MoU wird, vorbehaltlich der Genehmigung durch den Gouverneursrat, von der Kommission im Namen des ESM unterzeichnet.[15] Ebenso muss die Vereinbarung über eine Finanzhilfefazilität (Financial Assistance Facility Agreement – FFA), welche vom Geschäftsführenden Direktor ausgearbeitet wird, vom Gouverneursrat angenommen werden.[16] Dabei handelt es sich um eine weitere Vereinbarung, die das Rechtsverhältnis zwischen ESM und Empfängerstaat regelt.[17] Gemäß Art. 13 Abs. 7 ESM-Vertrag ist die Kommission damit betraut – in Verbindung mit der EZB und, wo immer möglich, zusammen mit dem IWF – die Einhaltung der im MoU festgelegten Programmauflagen zu überwachen.

II. Die Reform des ESM

1. Hintergrund, Stand und Ziel des Reformvorhabens

Das Reformvorhaben des ESM fügt sich in eine jahrelange Diskussion hinsichtlich der Zukunft der Wirtschafts- und Währungsunion, ihrer Stärkung oder einer möglichen Vollendung ein. Basierend auf der Forderung des „Fünf-Präsidenten-Berichts" von 2015[18] legte die Kommission im Dezember 2017 im „Nikolaus Paket" weitere Schritte zur Vollendung der Wirtschafts- und Währungsunion bis 2025 vor.[19] Ein Teil dieses Pakets sah die Errichtung eines Europäischen Währungsfonds (EWF) im Rechtsrahmen der EU vor, der auf der Struktur des bislang intergouvernemental ausgestalteten ESM

14 Vgl. dazu EuGH, *Pringle*, Urteil v. 27. November 2012, Rs. C-370/12, ECLI:EU:C:2012:756, Rn. 137, 143; Ulrich Forsthoff, '§ 13 Der Europäische Stabilitätsmechanismus – Institutionelles und modus operandi' in: Ulrich Hufeld und Christoph Ohler (Hrsg.), *Europäische Wirtschafts- und Währungsunion* (Nomos 2022), Rn. 53.

15 Art. 13 Abs. 4 ESM-Vertrag.

16 Art. 13 Abs. 3, 5 ESM-Vertrag.

17 Im FFA werden die finanztechnischen Geschäftsbedingungen der Finanzhilfe geregelt, z. B. Laufzeit, Auszahlungsmodalitäten, Finanzierungsinstrument etc.; vgl. auch Ulrich Forsthoff und Jasper Aerts, 'Financial Assistance to Euro Area Members (EFSF and ESM)' in: Fabian Amtenbrink und Christoph Herrmann (Hrsg.), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), Rn. 33.10 f.; 33.88 ff.

18 Der Bericht der fünf Präsidenten: Die Wirtschafts- und Währungsunion Europas vollenden <https://commission.europa.eu/system/files/2016-03/5-presidents-report_de_0.pdf>, zuletzt besucht 28. Oktober 2024.

19 Siehe Mitteilung der Kommission an das Europäische Parlament, den Rat, die Europäische Zentralbank: Weitere Schritte zur Vollendung der Wirtschafts- und Währungsunion: Ein Fahrplan, COM (2017) 821 final, 12.

beruhen sollte.[20] Die Reformideen aus dem „Nikolauspaket" wurden jedoch bisher nicht weiterverfolgt und werden voraussichtlich auch in naher Zukunft grundsätzlich nicht mehr aufgegriffen.[21]

Ausgangspunkt der aktuellen Reform des ESM war die Erklärung der Staats- und Regierungschefs des Euro-Währungsgebiets vom 29. Juni 2018, nach welcher der ESM als intergouvernementale Institution beibehalten und auf diese Weise weiterentwickelt werden sollte.[22] Die Euro-Gruppe einigte sich im Zuge ihrer Sitzung im inklusiven Format am 13. Juni 2019 auf einen überarbeiteten ESM-Vertragsentwurf, der Themen wie die gemeinsame Letztsicherung für die Bankenabwicklung, die vorsorglichen Instrumente sowie institutionelle Aspekte und die Zusammenarbeit zwischen dem ESM und der Kommission im Rahmen von Programmen und außerhalb von Programmen umfasst.[23] Der darauffolgende Euro-Gipfel am 21. Juni 2019 würdigte die Fortschritte der Euro-Gruppe bei der Stärkung der Wirtschafts- und Währungsunion, und forderte diese auf, weiter an allen Elementen dieses umfassenden Pakets zu arbeiten.[24] Am 4. Dezember 2019 erstellte die Euro-Gruppe im inklusiven Format für den Euro-Gipfel am 13. Dezember einen Bericht,[25] welcher sich u. a. auf das Gesetzgebungspaket zur Reform des ESM konzentrierte, das auf den im Juni 2019 vereinbarten überarbeiteten Bestimmungen des ESM-Vertrags beruht. Der folgende Euro-Gipfel brachte jedoch keine wesentlichen Fortschritte hinsichtlich des ESM Reformpaketes.[26] Am 30. November 2020 konnten sich die Mitglieder endgültig auf die Reform des ESM einigen und so den Ratifizierungsprozess einleiten.[27] Das Abkommen zur

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20 Siehe Vorschlag für eine Verordnung des Rates über die Einrichtung des Europäischen Währungsfonds, COM (2017) 827 final; Anhang des Vorschlags, Satzung des Europäischen Währungsfonds, COM (2017) 827 final ANNEX.

21 Die Kommission hat den entsprechenden Vorschlag für eine solche VO (COM (2017) 827 final) aus ihrem Arbeitsprogramm 2021 genommen. Siehe auch Matthias Ruffert, 'Are we SURE?: Ein Vorschlag der Kommission – und was man als Europarechtler dazu sagen kann', Verfassungsblog, 5. April 2020, doi: 10.17176/20200405-131117-0, demzufolge das Nikolauspaket 'nie den Hauch einer Realisierungschance hatte'.

22 ER, Erklärung des Euro-Gipfels vom 29. Juni 2018, EURO 502/18.

23 ER, Euro-Gruppe, 13. Juni 2019, <https://www.consilium.europa.eu/de/meetings/eurogroup/2019/06/13/>, zuletzt besucht 28. Oktober 2024.

24 ER, Erklärung des Euro-Gipfels vom 21. Juni 2019, EURO 502/19.

25 ER, Euro-Gruppe, 4. Dezember 2019, <https://www.consilium.europa.eu/de/meetings/eurogroup/2019/12/04/>, zuletzt besucht 28. Oktober 2024.

26 ER, Erklärung des Euro-Gipfels vom 13. Dezember 2019, EURO 505/19, 'Wir beauftragen die Euro-Gruppe, vorbehaltlich der nationalen Verfahren die Arbeit am ESM-Reformpaket fortzusetzen und weiter an allen Elementen zur weiteren Stärkung der Bankenunion zu arbeiten.'

27 ER, Euro-Gruppe, 30. November 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/11/30/statement-of-the-eurogroup-in-inclusive-format-on-the-esm-reform-and-the-early-introduction-of-the-backstop-to-the-single-resolution-fund/>, zuletzt besucht 28. Oktober 2024. Siehe auch 'Starker Euro, Starke Banken – Wozu dient die ESM-Reform?', Zeit

Änderung des ESM-Vertrags und das zwischenstaatliche Übereinkommen über den einheitlichen Abwicklungsfonds (Single Resolution Fund – SRF) wurden schlussendlich am 27. Januar 2021[28] von den ESM-Mitgliedern unterzeichnet.[29] Damit der reformierte Vertrag in Kraft treten kann, muss das Ratifizierungsverfahren in allen 20 ESM-Mitgliedstaaten im Einklang mit ihren nationalen verfassungsrechtlichen Vorschriften abgeschlossen werden. Nachdem in Deutschland das BVerfG im Oktober 2022 den Weg für das Ratifizierungsverfahren frei machte,[30] fehlt aktuell (Stand Oktober 2024) nur noch Italien als letztes ESM-Mitglied.[31] Wann Italien seine Blockadehaltung gegenüber der Vertragsänderung aufgibt, bleibt unklar[32] – das Parlament stimmte Ende 2023 gegen eine Ratifikation des Reformvertrags.[33]

Trotz der anhaltenden Blockade Italiens lohnt es sich, die Reform genauer zu betrachten, da sie bedeutende strukturelle Änderungen mit sich bringt, die sowohl die Stabilität der Eurozone als auch die Bankenunion beeinflussen. Zudem machen die politischen Verzögerungen deutlich, wie sensibel die Debatte um den ESM weiterhin ist und warum eine fundierte Auseinandersetzung mit den Inhalten und Zielen der Reform besonders wichtig bleibt.

Online, 30. November 2020, <https://www.zeit.de/news/2020-11/30/klappt-es-diesmal-hoffnung-auf-abschluss-der-esm-reform>, zuletzt besucht 28. Oktober 2024.

28 Estland konnte die Vereinbarungen aufgrund eines Regierungswechsels erst am 8. Februar 2021 unterzeichnen.

29 Siehe ESM, ESM Members Sign Revised Treaty, Entrusting the Institution with New Tasks, 27. Januar 2021 <https://www.esm.europa.eu/press-releases/esm-members-sign-revised-treaty-entrusting-institution-new-tasks>, zuletzt besucht 28. Oktober 2024.

30 In Deutschland wurde die Prüfung des Gesetzes zur Änderung des ESM-Vertrags durch den Bundespräsidenten vorläufig ausgesetzt, weil von FDP-Bundestagsabgeordneten eine Verfassungsbeschwerde erhoben wurde. Diese wurde jedoch vom BVerfG als unzulässig angesehen, BVerfG, Urteil v. 13. Oktober 2022, 2 BvR 1111/21.

31 ER, Euro-Gruppe, 7. Dezember 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/12/07/remarks-by-paschal-donohoe-following-the-eurogroup-meeting-of-7-december-2023/>, zuletzt besucht 28. Oktober 2024.

32 Der ESM ist in Italien mit einem politischen Stigma behaftet, welches für eine Untergrabung der nationalen Souveränität steht und mit der Einführung unerwünschter Sparmaßnahmen gleichgesetzt wird, vgl. 'Why is the ESM so Controversial Only in Italy? A Conversation with Klaus Regling', <https://iep.unibocconi.eu/publications/why-esm-so-controversial-only-italy-conversation-klaus-regling-0>, zuletzt besucht 28. Oktober 2024. Zudem wird dieser auch als 'cause of a formidable increase in poverty and all the indicators of social unease' angesehen, siehe zur Aufarbeitung insb. Giampaolo Galli, 'The Reform of the ESM and Why It Is so Controversial in Italy', Capital Markets Law Journal 15 (2020), 262-276 (265).

33 'Was hinter Italiens Nein zum Stabilitätsfonds für Europa steckt', Handelsblatt, 22. Dezember 2023, <https://www.handelsblatt.com/politik/international/europaeische-union-was-hinter-italiens-nein-zum-stabilitaetsfonds-fuer-europa-steckt/100004209.html>, zuletzt besucht 28. Oktober 2024; 'EU-Staaten einigen sich auf neue Schuldenregeln', Zeit Online, 20. Dezember 2023, <https://www.zeit.de/wirtschaft/2023-12/eu-staaten-einigen-sich-auf-neue-schuldenregeln>, zuletzt besucht 28. Oktober 2024.

Die beschlossene ESM-Reform enthält im Wesentlichen vier Kernelemente: Erstens führt die Reform zu einer institutionellen Stärkung der Rolle des ESM selbst, insbesondere bei der Ausgestaltung, Verhandlung und Überwachung künftiger Finanzhilfeprogramme. Zweitens soll das Instrument der vorsorglichen Finanzhilfe attraktiver ausgestaltet werden, indem hierbei vom Erfordernis eines MoU abgesehen wird. Drittens sieht die Reform die Einführung von Umschuldungsklauseln mit einstufiger Aggregation (*single-limb*) in den Anleihen der Euro-Staaten vor. Und als gänzlich neue Aufgabe soll der ESM – viertens – dem einheitlichen Abwicklungsausschuss (Single Resolution Board – SRB) die gemeinsame Letztsicherung für den einheitlichen Abwicklungsfonds bereitstellen, die sog „*common backstop* Funktion". Grundsätzlich spiegeln sich diese Punkte auch in der Zweckerweiterung des Art. 3 im reformierten ESM-Vertrag[34] wider.

2. Auswirkungen auf die Rolle der beteiligten Akteure

a) Rollenverteilung zwischen ESM-Organen und EU-Organen

Die Reform des ESM-Vertrags wird zu gewissen Änderungen bei den beteiligten Mitgliedern, Unionsorganen und anderen Institutionen führen. Veränderungen für beteiligte Akteure ergeben sich vor allem mit Blick auf das Verfahren zur Gewährung von Stabilitätshilfen. Festzuhalten ist hier, dass das Verfahren für die Gewährung von Stabilitätshilfen im Grunde nicht ver-

34 'Art. 3 Abs. 1 Zweck des ESM ist es, Finanzmittel zu mobilisieren und ESM-Mitgliedern, die schwerwiegende Finanzierungsprobleme haben oder denen solche Probleme drohen, unter strikten, dem gewählten Finanzhilfeinstrument angemessenen Auflagen eine Stabilitätshilfe bereitzustellen, wenn dies zur Wahrung der Finanzstabilität des Euro-Währungsgebiets insgesamt und seiner Mitgliedstaaten unabdingbar ist. Sofern es für die interne Vorbereitung sowie die angemessene und rechtzeitige Erfüllung der Aufgaben, die dem ESM durch diesen Vertrag übertragen wurden, relevant ist, kann der ESM die makroökonomische und finanzielle Lage seiner Mitglieder, einschließlich der Tragfähigkeit ihrer öffentlichen Schulden, verfolgen und bewerten und relevante Informationen und Daten analysieren. Hierfür arbeitet der Geschäftsführende Direktor mit der Europäischen Kommission und der EZB zusammen, um die uneingeschränkte Übereinstimmung mit dem im AEUV vorgesehenen Rahmen für die Koordinierung der Wirtschaftspolitik sicherzustellen.
Abs. 2 Der ESM kann dem SRB für den SRF die Letztsicherungsfazilität zur Verfügung stellen, um die Anwendung der Abwicklungsinstrumente und die Ausübung der Abwicklungsbefugnisse des SRB, wie sie im Recht der Europäischen Union verankert sind, zu unterstützen.
Abs. 3 Zu diesen Zwecken ist der ESM berechtigt, Mittel aufzunehmen, indem er Finanzinstrumente begibt oder mit ESM-Mitgliedern, Finanzinstituten oder sonstigen Dritten finanzielle oder sonstige Vereinbarungen oder Übereinkünfte schließt.'

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ändert wird,[35] sondern „lediglich" die Rollenverteilung und Aufgaben der beteiligten Organe bzw. Institutionen.

Dabei kommt es bereits in der Antragsphase von Stabilitätshilfen zu einer Änderung, denn nach der ESM-Reform überträgt der Vorsitzende des Gouverneursrats gem. Art. 13 Abs. 1 S. 1 reformierter ESM-Vertrag sowohl der Kommission als *auch* dem Geschäftsführenden Direktor die Aufgabe der Erstellung einer Bewertungsgrundlage für die Entscheidung des Gouverneursrats gem. Art. 13 Abs. 2. Die Reform würde hierbei eine bereits bestehende Arbeitsteilung zwischen Kommission und ESM nun auch vertraglich vorschreiben.[36] Weiters wird eingeführt, dass auch das Kriterium der Rückzahlungsfähigkeit in die Bewertung miteinfließt.[37] Dabei achtet die Kommission auf die Übereinstimmung mit dem Recht der EU,[38] wohingegen der ESM seine Bewertung und Analyse aus der Perspektive eines Kreditgebers durchführen wird.[39] Zudem kommt neu hinzu, dass der Gouverneursrat in der Folge auf Grundlage eines auf diesen Bewertungen beruhenden Vorschlages des Geschäftsführenden Direktors entscheidet, ob dem betreffenden ESM-Mitglied grundsätzlich Stabilitätshilfe gewährt werden soll.[40] Die durchgeführten Bewertungen gem. Art. 13 Abs. 1 S. 1 reformierter ESM-Vertrag und der auf diesen Bewertungen beruhende Vorschlag des Geschäftsführenden Direktors entfalten jedoch keine Bindungswirkung hinsichtlich der Entscheidung des Gouverneursrats.[41] Die endgültige Beschlussentscheidung liegt daher nach wie vor beim Gouverneursrat.

Fasst der Gouverneursrat einen solchen Grundsatzbeschluss gem. Art. 13 Abs. 2, ist im („alten") ESM-Vertrag vorgesehen, dass der Gouverneursrat die Kommission ersucht, zusammen mit der EZB und nach Möglichkeit mit dem IWF, das MoU mit dem Empfängerstaat auszuhandeln und die wirt-

35 Siehe oben I.

36 Nach dem 'MoU on the working relations between the Commission and the European Stability Mechanism' (Stand April 2018), arbeiten die Kommission und der ESM bei der Vorbereitung dieser Bewertungen zusammen, siehe <https://www.esm.europa.eu/system/files/document/20180427_esm_ec_mou.pdf>, zuletzt besucht 28. Oktober 2024.

37 Art. 13 Abs. 1 lit. b reformierter ESM-Vertrag sieht ausdrücklich vor, dass die Bewertung der Schuldentragfähigkeit und der Rückzahlungsfähigkeit auf transparente und vorhersehbare Weise durchgeführt wird und einen ausreichenden Bewertungsspielraum offen lässt. Siehe dazu auch ErwGr. 11 b reformierter ESM-Vertrag.

38 EuGH, *Ledra*, Urteil v. 20. September 2016, verb. Rs. C-8/15 P bis C-10/15 P, ECLI:EU:C:2016:701, Rn. 58, 67.

39 ErwGr. 5 b reformierter ESM-Vertrag, siehe auch 'Joint Position on Future Cooperation Between the European Commission and the ESM', 19. November 2018.

40 Art. 13 Abs. 2 reformierter ESM-Vertrag.

41 EuGH, *Ledra* (Fn. 38), Rn. 51 f.; EuGH, *Pringle* (Fn. 14), Rn. 161. So auch Art. 13 Abs. 2 ESM-Vertrag '*kann* der Gouverneursrat beschließen'.

schaftspolitischen Auflagen zu überwachen.[42] Die Reform sieht hierbei eine veränderte Rollenverteilung vor: Vorgesehen ist nämlich, dass der Gouverneursrat dem Geschäftsführenden Direktor *und* der Kommission im Benehmen mit der EZB die Aufgabe überträgt, ein MoU mit dem betreffenden Mitgliedstaat auszuhandeln.[43] Die aktivere Rolle des ESM bei der Formulierung der an die Stabilitätshilfe gebundenen Auflagen ist durchaus nachvollziehbar, tritt doch der ESM gegenüber dem Empfängerstaat der Stabilitätshilfe als Gläubiger und Darlehensgeber auf. Vor allem konnte der ESM durch die jahrelange Zusammenarbeit mit der Europäischen Kommission (EK), EZB und dem IWF das notwendige Wissen hierfür erwerben, um solche internationalen Finanzstabilitätshilfen zu verwalten.[44]

Durch die vorgesehenen Änderungen würde sich auch eine Neuerung im Zusammenhang mit der Unterzeichnung des MoU ergeben. Der aktuelle ESM-Vertrag sieht vor, dass die Kommission das MoU „im Namen" des ESM unterzeichnet und somit in dessen Auftrag und Namen tätig wird.[45] Die Kommission wird durch diese Unterzeichnung jedoch nicht verpflichtet und das MoU ist dieser auch nicht zurechenbar,[46] es handelt sich um eine „Vereinbarung" zwischen ESM und Empfängerstaat.[47] Nach Inkrafttreten des reformierten ESM-Vertrags würde das MoU von der Kommission *und* dem Geschäftsführenden Direktor „im Namen" des ESM unterzeichnet werden,[48] wodurch die aufgewertete Rolle des ESM in der Gestaltung und Verhandlung des MoU auch im Unterzeichnungsakt deutlich wird. Weiters würde durch die Reform auch die Rechtsprechung des Gerichtshofs der Europäischen Union (EuGH)[49] berücksichtigt und klargestellt, dass der Kommission (und EZB) keine Entscheidungsbefugnisse übertragen worden sind und sie durch die Erfüllung von Aufgaben i. Z. m. dem ESM nicht selbst verpflichtet wird, sondern nur der ESM.[50] Die Tätigkeiten und Aufgaben der Kommission (und EZB) im Rahmen des ESM haben rein unterstützenden Charakter.[51]

42 Art. 13 Abs. 3 und 7 ESM-Vertrag. Die Zusammenarbeit dieser drei Institutionen (EK, EZB und IWF) als zentrale Akteure – neben dem Empfängerstaat – im Zusammenhang mit dem MoU wurde auch als 'Troika' bezeichnet.

43 Art. 13 Abs. 3 reformierter ESM-Vertrag.

44 Vgl. Jasper Aerts und Pedro Bizzaro, 'The Reform of the European Stability Mechanism', Capital Markets Law Journal 15 (2020), 159-174 (166).

45 Art. 13 Abs. 4 ESM-Vertrag.

46 EuGH, *Ledra* (Fn. 38), Rn. 51; EuGH, *Pringle* (Fn. 14), Rn. 161.

47 Vgl. Forsthoff und Lauer (Fn. 13), Rn. 30.79.

48 Art. 13 Abs. 4 reformierter ESM-Vertrag.

49 EuGH, *Ledra* (Fn. 38), Rn. 51 ff.; EuGH, *Mallis*, Urteil v. 20. September 2016, verb. Rs. C-105/15 P bis C-109/15 P, ECLI:EU:C:2016:702, Rn. 53.

50 ErwGr. 10 reformierter ESM-Vertrag.

51 So auch Rainer Palmstorfer, *Die WWU, ihre Krise und Reform* (Verlag Österreich 2021), 316.

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Zudem ist eine Erweiterung der Rolle des ESM im Bereich der Überwachung und Einhaltung der mit der Stabilitätshilfe verbundenen Auflagen vorgesehen; diese Tätigkeit würde eine gemeinsame Aufgabe der Kommission (im Benehmen mit der EZB) und des Geschäftsführenden Direktors darstellen.[52] Dadurch berücksichtigt die Reform, dass der ESM eine solche Überwachungstätigkeit de facto bereits ausübt.[53] Weiters soll nach Art. 13 Abs. 8 reformierter ESM-Vertrag die gemeinsame Position zur künftigen Zusammenarbeit des ESM und der Kommission in einer Kooperationsvereinbarung festgehalten werden, die zeitgleich mit den Änderungen des ESM-Vertrags in Kraft treten wird.[54]

b) Bewertung

Die Reform des ESM erweitert dessen Aufgabenbereich und wirft insbesondere die Frage auf, wie diese neue Rolle im Verhältnis zu den Befugnissen der EU im Bereich der Wirtschaftspolitik einzuordnen ist. Nach dem Prinzip der begrenzten Einzelermächtigung liegt die Zuständigkeit für die Wirtschaftspolitik bei den Mitgliedstaaten, während der EU lediglich eine Koordinierungskompetenz zukommt.[55] Es sind demnach die Mitgliedstaaten, welche grundsätzlich autonom *ihre* Wirtschaftspolitik festlegen.[56] Auf unionsrechtlicher Ebene erfolgt die Vorgabe von Zielen und Grundzügen im Bereich dieses Politikfeldes und folglich die Koordinierung und Überwachung dieses vorgegebenen Regelungsrahmens der Wirtschaftspolitik.

Vor diesem Hintergrund stellt sich die Frage, inwiefern der reformierte ESM in diesen Kompetenzbereich eingreift. Nach der Rs *Pringle* stellt der ESM eine Maßnahme der Wirtschaftspolitik dar.[57] Die Reform sieht hierbei eine gewisse Zweckerweiterung des ESM in Art. 3 Abs. 1 reformierter ESM-Vertrag vor. Danach soll der ESM die makroökonomische und finanzielle Lage seiner Mitglieder, einschließlich der Tragfähigkeit ihrer öffentlichen Schulden, verfolgen und bewerten und relevante Informationen und Daten

52 Art. 13 Abs. 7 reformierter ESM-Vertrag.

53 Im Rahmen des dritten Hilfsprogrammes für Griechenland, siehe Compliance Report: The Third Economic Adjustment Programme for Greece – First Review, June 2016, <https://economy-finance.ec.europa.eu/system/files/2017-11/compliance_report_-_first_review_of_the_esm_programme.pdf>, zuletzt besucht 28. Oktober 2024.

54 Siehe auch ErwGr. 5 b reformierter ESM-Vertrag.

55 Art. 2 Abs. 3 AEUV; Art. 5 AEUV; Art. 119 bis Art. 121 AEUV und Art. 126 AEUV.

56 Art. 121 Abs. 1 AEUV; zur Begrifflichkeit der Wirtschaftspolitik i. S. d. Art. 119 AEUV siehe Helmut Siekmann, 'Art 119 AEUV' in: Helmut Siekmann (Hrsg.), EU Kommentar zur EU-Währungsunion (Mohr Siebeck 2013) Rn. 75.

57 EuGH, *Pringle* (Fn. 14), Rn. 60.

analysieren. Dabei übernimmt er jedoch keine allgemeine wirtschaftspolitische Koordinierungs- und Überwachungsfunktion für die Mitgliedstaaten.[58] Denn der ESM dient *nicht* der Koordinierung der Wirtschaftspolitik zwischen seinen Mitgliedern.[59] Vielmehr ist der Zweck dieser Tätigkeiten ein interner, wenn dies für die Vorbereitung bzw. Erfüllung der vertraglich zugewiesenen Aufgaben – der Gewährung der Stabilitätshilfe – des ESM relevant ist.[60] So liefert die Bewertung der Schuldentragfähigkeit, der Risiken für die finanzielle Stabilität und des Finanzierungsbedarfs des Empfängermitgliedstaats die Entscheidungsgrundlage für die Gewährleistung der ESM-Finanzhilfe. Zudem agiert der ESM bei diesen Aufgaben nicht allein, sondern immer gemeinsam mit den Unionsorganen (EK und EZB).[61] Auch die neue Rolle des Geschäftsführenden Direktors bei der Aushandlung der strengen Auflagen im makroökonomischen Anpassungsprogramm steht in keinem Konflikt zur Zuständigkeit der Union im Bereich der Wirtschaftspolitik. Zum einen stellt diese keine Maßnahme der wirtschaftspolitischen Koordinierung dar, sondern bezweckt die Vereinbarkeit der ESM-Hilfe mit Art. 125 Vertrag über die Arbeitsweise der Europäischen Union (AEUV).[62] Zum anderen wird durch die Beteiligung der Kommission im Rahmen des MoU sichergestellt, dass diese Auflagen mit den Koordinierungsmaßnahmen der EU (dem Unionsrecht im weiteren Sinne) vereinbar sind.[63] Aus diesem Grund kann auch nicht von einem *competence-creep* des ESM in Bezug auf die Kommission gesprochen werden.[64]

Es ist nicht zu übersehen, dass der ESM-Vertrag zahlreiche Bestimmungen enthält, die ein Tätigwerden von Unionsorganen vorsehen. Wichtig dabei ist, dass all diese Aufgaben rein unterstützender Natur sind, denn die tatsächliche Entscheidungsbefugnis liegt nach wie vor beim ESM (Gouverneursrat).[65] Durch diese unterstützende Tätigkeit der EU-Organe wird auch nur der ESM selbst verpflichtet, nicht die EU. In der Judikatur des EuGH wurde auch klargestellt, dass wenn die Unionsorgane im Rahmen des ESM nicht im

58 EuGH, *Pringle* (Fn. 14), Rn. 68 f., 121.

59 EuGH, *Pringle* (Fn. 14), Rn. 110; ErwGr. 15 a reformierter ESM-Vertrag.

60 Siehe auch Art. 3 Abs. 1 reformierter ESM-Vertrag; Andrea Westerhof Löfflerová, 'Reform of the European Stability Mechanism Signed: A Landmark Achievement Fully Respectful of EU Constitutional and Institutional Limits', EU LAW Live, Weekend Edition, 6. März 2021, 13-22 (16 f.).

61 Siehe dazu 'Joint Position on Future Cooperation Between the European Commission and the ESM', 19. November 2018.

62 EuGH, *Pringle* (Fn. 14), Rn. 111.

63 EuGH, *Pringle* (Fn. 14), Rn. 69, 113.

64 So auch Westerhof Löfflerová (Fn. 60), 17.

65 EuGH, *Ledra* (Fn. 38), Rn 53 und EuGH, *Mallis* (Fn. 49), Rn. 53, beide mit Verweis auf EuGH, *Pringle* (Fn. 14), Rn 161.

Namen der EU tätig werden, diese trotzdem verpflichtet sind, sicherzustellen, dass ihre Tätigkeit inhaltlich im Einklang mit Unionsrecht – einschließlich der Charta der Grundrechte der Europäischen Union (GRC) – steht.[66] Demnach müssen die Unionsorgane selbst in dieser unterstützenden Tätigkeit, in der sie „außerhalb des unionsrechtlichen Rahmens handeln",[67] den Rechtsrahmen der EU beachten. Mit der Reform des ESM-Vertrags wird in Art. 12 Abs. 4 eine allgemeine Kohärenzklausel eingefügt, die klarstellt, dass es Aufgabe der Kommission ist, dafür zu sorgen, dass alle Finanzhilfeoperationen des ESM im Einklang mit dem Unionsrecht – insbesondere mit den Maßnahmen zur wirtschaftspolitischen Koordinierung – stehen. Dementsprechend wird die bedeutende Rolle der Kommission als „Hüterin der Verträge"[68] betont, welche durch ihre Einbeziehung in die Handlungen des ESM auch mittelbar auf diesen durchschlägt.

3. Vorsorgliche Finanzhilfe

a) Zugangskriterien, Konditionalität und Überwachung

Aktuell kann der ESM einem ESM-Mitglied gem. Art. 14 Abs. 1 eine vorsorgliche Finanzhilfe in Form einer vorsorglichen bedingten Kreditlinie (Precautionary Conditioned Credit Line – PCCL) oder in Form einer Kreditlinie mit erweiterten Bedingungen (Enhanced Conditions Credit Line – ECCL) gewähren. Ziel und Zweck der vorsorglichen Finanzhilfe ist es, einen wirtschaftlich soliden Mitgliedstaat zu unterstützen und einer Krisensituation vorzubeugen, indem die Möglichkeit eingeräumt wird, eine ESM-Hilfe in Anspruch zu nehmen, bevor Mitgliedstaaten den Zugang zu Finanzmitteln auf den Märkten vollständig verlieren.[69] Die Bereitstellung der vorsorglichen Kreditlinie erfolgt in Form eines Darlehens oder eines Primärmarktankaufs.[70] Als Verfügbarkeitszeitraum ist bei beiden Formen vorgesehen, dass diese für ein Jahr bereitgestellt werden und eine zweimalige Verlängerung für je sechs Monate möglich sei.[71] Die mit der vorsorg-

66 EuGH, *Ledra* (Fn. 38), Rn. 67.

67 EuGH, *Ledra* (Fn. 38), Rn 67.

68 Art. 17 Abs. 1 AEUV; vgl. auch EuGH, *Ledra* (Fn. 38), Rn. 57; EuGH, *Chrysostomides*, Urteil v. 16. Dezember 2020, Rs. C-597/18 P, C-598/18 P, C-603/18 P und C-604/18 P, ECLI:EU:C:2020:1028, Rn. 96.

69 Art. 1 ESM Guideline on Precautionary Financial Assistance, 9. Oktober 2012, <https://www.esm.europa.eu/system/files?file=document/esm_guideline_on_precautionary_financial_assistance.pdf>, zuletzt besucht 28. Oktober 2024.

70 Art. 2, Art. 4 ESM Guideline on Precautionary Financial Assistance, 9. Oktober 2012.

71 Art. 2 Abs. 1 ESM Guideline on Precautionary Financial Assistance, 9. Oktober 2012.

lichen Finanzhilfe verbundenen Konditionalitätsbedingungen werden in einem MoU festgehalten.[72]

In Bezug auf die vorsorgliche Finanzhilfe im Rahmen des ESM sieht die Reform vor, das Instrument der vorsorglichen Finanzhilfe zu optimieren und transparenter zu gestalten, gleichwohl soll dabei auch der „letzte Mittel" Charakter der Stabilitätshilfen nach wie vor sichergestellt werden.[73] Vor diesem Hintergrund kommt es zu einer punktuellen Änderung des Art. 14,[74] einer Überarbeitung der Leitlinien[75] des Instruments und einem neuen Anhang III zum ESM-Vertrag. Die Reform ist dabei vor allem auf das PCCL-Instrument fokussiert. Art. 14 Abs. 1 des reformierten ESM-Vertrags sieht vor,[76] dass das Instrument der Unterstützung von ESM-Mitgliedern mit gesunden wirtschaftlichen Eckdaten dient, welche von einem negativen Schock beeinträchtigt werden, der sich ihrer Kontrolle entzieht. Der Adressatenkreis der vorsorglichen Finanzhilfe beschränkt sich demnach auf wirtschaftlich solide Mitgliedstaaten, welche sich unverschuldet in einer Schocksituation befinden. Wodurch zusätzlich der „vorsorgliche" und präventive Charakter dieser Finanzhilfe zum Ausdruck kommt. Insofern würde die Gewährung einer vorsorglichen Finanzhilfe auch eine positive Signalwirkung entfalten, als dass sich der Empfängerstaat nach wie vor in einer wirtschaftlich gesunden Situation befindet.[77]

Vor diesem Hintergrund werden die geänderten *ex-ante* Zugangskriterien unmittelbar auf Vertragsebene in einem neuen Anhang III normiert. Für die Bereitstellung einer PCCL muss das ESM-Mitglied zukünftig sowohl die quantitativen Referenzwerte als auch die qualitativen Zugangskriterien erfüllen.[78] Demnach darf das ESM-Mitglied nicht Gegenstand eines Verfahrens bei einem übermäßigen Defizit sein und muss in den zwei Jahren vor dem Ersuchen um vorsorgliche Finanzhilfe drei Referenzwerte erfüllen.[79] Hin-

72 Art. 14 Abs. 2 ESM-Vertrag.

73 Vgl. auch BT-Drs. 19/667, 6.

74 Weiters auch Art. 5 Abs. 6 lit. f; Art. 13 Abs. 3 und 4.

75 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019, <https://www.esm.europa.eu/sites/default/files/migration_files/20191206_-_draft_precautionary_guideline_-_publication_version.pdf>, zuletzt besucht 28. Oktober 2024.

76 Findet sich zusätzlich auch in Art. 1 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

77 Teils wird auch von einem 'Gütesiegel durch den ESM' gesprochen, vgl. BT-Drs. 19/15973, 6; BT-Drs. 19/6772, 5.

78 Anhang III Zugangskriterien für die Gewährung einer vorsorglichen bedingten Kreditlinie ('PCCL'); siehe auch Art. 2 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

79 Z. 2 lit. a Anhang III reformierter ESM-Vertrag bzw. Art. 2 Abs. 2 lit. a i) bis iii) Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019: 'i) ein gesamtstaatliches Defizit von höchstens 3 % des BIP; ii) ein gesamtstaatlicher struktureller Haushaltssaldo in

sichtlich der qualitativen Zugangskriterien wird vorausgesetzt, dass das ESM-Mitglied keine übermäßigen wirtschaftlichen Ungleichgewichte aufweist, über Zugang zu den internationalen Kapitalmärkten verfügt und eine tragfähige außenwirtschaftliche Position vorweisen kann. Darüber hinaus dürfen keine gravierenden Schwächen im Finanzsektor bestehen.[80] Die Erfüllung der Zugangskriterien sind von der Kommission und dem ESM gemeinsam zu prüfen.[81] Kann der antragstellende Mitgliedstaat nicht alle Zugangskriterien für eine PCCL erfüllen, besteht jedoch die Möglichkeit – bei sonstigen Vorliegen der allgemeinen Zugangsvoraussetzungen für eine vorsorgliche Finanzhilfe – des Zugangs zu einer ECCL.[82]

Weiters würde bei einer PCCL das grundsätzliche Erfordernis des Abschlusses eines MoU für die Konditionalität der Finanzhilfe entfallen.[83] Der neue Art. 3 Abs. 1 weist insofern bereits im Rahmen der Zwecke des ESM darauf hin,[84] dass die strengen Auflagen dem „gewählten Finanzhilfeinstrument" angemessen zu sein haben;[85] diese müssen jedoch nicht zwingend in einem MoU festgeschrieben werden.[86] Die Konditionalität der PCCL-Finanzhilfe würde sich demnach in Form der „kontinuierlichen Erfüllung zuvor festgelegter Anspruchsvoraussetzungen"[87] realisieren, zu welcher sich der Empfängerstaat in seinem Ersuchen verpflichtet („Absichtserklärung" oder Letter of Intent).

Auch das Verfahren zur Überwachung der Einhaltung der an die Finanzhilfe geknüpften Bedingungen und Überprüfung des Zugangs zur vorsorglichen Kreditlinie wird durch die Reform geändert und konkretisiert. An-

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Höhe oder oberhalb des länderspezifischen Mindestreferenzwerts; iii) ein Schuldenstands-Referenzwert, der eine gesamtstaatliche Schuldenquote von unter 60 % des BIP oder eine Verringerung des Abstands zur 60 %- Marke in den vorangehenden zwei Jahren um durchschnittlich ein Zwanzigstel jährlich beinhalte'.

80 Siehe dazu Z. 2 lit. b bis e Anhang III reformierter ESM-Vertrag bzw. Art. 2 Abs. 2 lit. b bis e Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

81 Art. 3 Abs. 3 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

82 Z. 3 Anhang III reformierter ESM-Vertrag.

83 Art. 14 Abs. 2 reformierter ESM-Vertrag; Art. 3 Abs. 1 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

84 So auch Art. 12 Abs. 1 ESM-Vertrag, so darf unter 'strengen, dem gewählten Finanzhilfeinstrument angemessenen Auflagen Stabilitätshilfe' gewährt werden.

85 Siehe auch Art. 12 Abs. 1 ESM-Vertrag, 'Diese Auflagen können von einem makroökonomischen Anpassungsprogramm bis zur kontinuierlichen Erfüllung zuvor festgelegter Anspruchsvoraussetzungen reichen.'

86 Vgl. EuGH, *Pringle* (Fn. 14), Rn. 136 f.; Art. 136 Abs. 3 AEUV spricht von 'strengen Auflagen'. Siehe auch Hannes Rathke, '§ 14 Der Europäische Stabilitätsmechanismus – Stabilitätshilfeverfahren' in: Ulrich Hufeld und Christoph Ohler (Hrsg.), *Europäische Wirtschafts- und Währungsunion* (Nomos 2022), Rn. 108.

87 Art. 14 Abs. 2 reformierter ESM-Vertrag; Art. 12 Abs. 1 ESM-Vertrag. Zu den Kriterien siehe Art. 2 Abs. 2 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

knüpfungspunkt der Überwachung ist ein Bericht gem. Art. 13 Abs. 7,[88] welcher die kontinuierliche Einhaltung der Zugangskriterien (PCCL) bzw. die Einhaltung der im MoU festgelegten Auflagen (ECCL) zusammenfasst. Wenn der Bericht zu dem Schluss kommt, dass das betreffende ESM-Mitglied die Zugangskriterien bzw. die strengen Auflagen weiterhin erfüllt, wird die Kreditlinie grundsätzlich beibehalten; das Direktorium kann jedoch einvernehmlich davon abweichen.[89] Sollte der Bericht hingegen zum Schluss kommen, dass die Zugangskriterien bzw. die strengen Auflagen vom betreffenden ESM-Mitglied nicht mehr erfüllt werden, wird die Kreditlinie eingestellt; wiederum kann das Direktorium jedoch einvernehmlich entscheiden, die Kreditlinie trotzdem aufrechtzuerhalten.[90]

b) Bewertung

Besonders hervorzuheben ist die Verankerung der Zugangskriterien zu einer vorsorglichen Finanzhilfe unmittelbar auf Vertragsebene des ESM (Anhang III). Bislang finden sich diese Kriterien „nur" in Leitlinien wieder.[91] Die Aufnahme in den Vertragstext führt zu einer Veränderung der (politischen) Einflussmöglichkeiten bei der Anpassung dieser Voraussetzungen. Eine Änderung der Zugangskriterien im Anhang III erfordert, im Gegensatz zur Änderung der Leitlinien,[92] einen Beschluss des ESM Gouverneursrats,[93] wodurch eine stärkere Rückkopplung zu den ESM-Mitgliedern erfolgt.

Zweitens ist bei der Erfüllung der Zugangskriterien zu beachten, dass die Inanspruchnahme des PCCL Instruments die kumulative Erfüllung der quantitativen Referenzwerte und der qualitativen Zugangskriterien voraussetzt.[94] Obwohl durch die Reform keine umfassende Gesamtbetrachtung der Zugangsvoraussetzungen mehr vorgesehen ist,[95] bleibt dennoch ein gewisser Ermessensspielraum bestehen. Dies liegt daran, dass die Erfüllung der Vo-

88 Sowohl der Geschäftsführende Direktor als auch die Kommission im Benehmen mit der EZB werden damit betraut; vgl. Art. 5 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

89 Art. 14 Abs. 6 reformierter ESM-Vertrag.

90 Art. 14 Abs. 7 reformierter ESM-Vertrag.

91 ESM Guideline on Precautionary Financial Assistance, 9. Oktober 2012.

92 Art. 14 Abs. 4 ESM-Vertrag.

93 Art. 5 Abs. 6 lit. f reformierter ESM-Vertrag.

94 Anhang III Zugangskriterien für die Gewährung einer vorsorglichen bedingten Kreditlinie ('PCCL'); siehe auch Art. 2 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

95 Art. 2 Z. 2 'A Global Assessment', ESM Guideline on Precautionary Financial Assistance, 9. Oktober 2012.

raussetzungen auch im reformierten Vertrag lediglich als „Regel“[96] definiert ist, von der es wohl implizit Ausnahmen geben könnte. Der verbleibende Beurteilungsspielraum konzentriert sich dabei vor allem auf die qualitativen Kriterien, da die quantitativen Vorgaben und Werte durch die Reform konkreter definiert wurden.[97] Eine (transparente) Präzisierung der Zugangskriterien für die Inanspruchnahme einer PCCL ergibt sich insbesondere aus folgenden Klarstellungen: Das betreffende ESM-Mitglied darf sich nicht in einem Verfahren wegen eines übermäßigen Defizits befinden und muss die quantitativen Verschuldungsregelungen einhalten. Zudem dürfen hinsichtlich der qualitativen Kriterien keine übermäßigen Ungleichgewichte festgestellt worden sein und es dürfen keine schwerwiegenden Schwachstellen im Finanzsektor existieren, die die Finanzstabilität des ESM-Mitglieds gefährden.

Auf der Ebene der Konditionalität führt die Reform zu einer ausdrücklichen Unterscheidung zwischen einer PCCL und einer ECCL. Im Gegensatz zu einer ECCL ist bei der Inanspruchnahme einer PCCL der Abschluss eines MoU nicht mehr erforderlich. Stattdessen wird bei einer PCCL ein Letter of Intent vorgelegt, in dem sich der betreffende Empfängerstaat zur Einhaltung der *ex-ante* Zugangskriterien verpflichtet und die dafür zentralen (politischen) Vorhaben angibt. Damit wird der Vertragstext an die bereits bestehende Differenzierung zwischen ECCL und PCCL in der Ausgestaltung der Konditionalität angepasst. Denn auch im Rahmen des („alten“) ESM-Vertrags beschränkte sich der Inhalt des MoU bei einer PCCL auf die dauernde Einhaltung der *ex-ante* Zugangskriterien, ohne umfassendes Anpassungsprogramm.[98] Die Verankerung der Konditionalität einer vorsorglichen bedingten Kreditlinie (PCCL) in einem Letter of Intent entspricht zudem den Anforderungen der Judikatur des EuGH, die verlangt, dass die Gewährung einer ESM-Finanzhilfe strengen, dem gewählten Finanzhilfeinstrument angemessenen, Auflagen unterliegen muss.[99] Der Letter of Intent kann daher als funktionales Äquivalent zum MoU – nur mit anderer Bezeichnung – betrachtet werden. Die Abkehr von einem MoU ist vor dem Hintergrund zu sehen, dass diese Form der Sicherstellung der Konditionalität häufig als „Verlust staatlicher Souveränität“ wahrgenommen wird und dadurch für viele ESM-Mitglieder eine „abschreckende“ Wirkung entfaltet.[100]

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96 Z. 2 ‘In der Regel’ Anhang III reformierter ESM-Vertrag bzw. Art. 2 Abs. 2 Draft Guideline on Precautionary Financial Assistance, 6. Dezember 2019.

97 Vgl. auch BT-Drs. 19/15973, 7. Rathke (Fn. 86), Rn. 106.

98 Art. 12 Abs. 1 ESM-Vertrag; Art. 2 Z. 3 ESM Guideline on Precautionary Financial Assistance, 9. Oktober 2012; vgl. auch Rathke (Fn. 86), Rn. 94.

99 EuGH, *Pringle* (Fn. 14), Rn. 136 ff., 142.

100 I. d. S. auch Aerts und Bizzaro (Fn. 44), 166; Rathke (Fn. 86), Rn. 108.

Im Ergebnis führt die Reform zu einer strengeren und präziseren Formulierung der Zugangsvoraussetzungen.[101] Gleichzeitig entfällt jedoch bei einer PCCL die Verpflichtung zur Unterzeichnung eines MoU, was als „Anreiz" dient und das Instrument insgesamt attraktiver macht.[102] Denn im Gegensatz zum MoU ist der Letter of Intent nicht negativ vorbelastet und kann vielmehr als „Gütesiegel" für wirtschaftlich solide Mitgliedstaaten verstanden werden. Hingegen wäre bei der Gewährung einer ECCL weiterhin der Abschluss eines MoU notwendig.[103]

4. Umschuldungsklauseln (Collection Action Clauses)

Seit 2013[104] werden im Rahmen des ESM-Vertrags sog. Umschuldungsklauseln (Collection Action Clauses – CACs) in die Emissionsbedingungen der Staatsanleihen aller Mitgliedstaaten der Eurozone integriert.[105] Diese standardisierten Klauseln sind fester Bestandteil der Vertragsbedingungen aller neu ausgegebenen Staatsanleihen mit einer Laufzeit von über einem Jahr.[106] Umschuldungsklauseln ermöglichen einer (qualifizierten) Gläubigermehrheit, die Anleihebedingungen im Falle von Umschuldungs- oder Umstrukturierungsmaßnahmen bindend für alle Gläubiger zu ändern.[107] Ohne diese vertraglich vorgesehenen Klauseln bräuchte es für solche Änderungen bzw. Maßnahmen die Zustimmung sämtlicher Gläubiger.[108]

101 Anders hingegen Jürgen Matthes, 'Reform des Europäischen Stabilitätsmechanismus – eine Einordnung', Wirtschaftsdienst 101 (2021), 54-57 (56), welcher hierbei eine Erleichterung des Zugangs zum ESM sieht.

102 Attraktiver bedeutet jedoch nicht leichter zugänglich, vgl. zur Anwendung der Kriterien auf die aktuellen ESM-Mitglieder (Stand 2018) Grégory Claeys Antoine und Mathieu Collin, 'Does the Eurogroup's Reform of the ESM Toolkit Represent Real Progress?', Bruegel Blog Post, 13. Dezember 2018, <https://www.bruegel.org/blog-post/does-eurogroups-reform-esm-toolkit-represent-real-progress>, zuletzt besucht 28. Oktober 2024.

103 Art. 14 Abs. 3 reformierter ESM-Vertrag.

104 In Internationalen Anleiheemissionen wurden CACs bereits früher aufgenommen, siehe Economic and Financial Committee, 'Implementation of the EU Commitments on CACs in Documentation of International Debt Issuance', 12. November 2004, <https://economic-financial-committee.europa.eu/sites/default/files/docs/pages/cacs_en.pdf>, zuletzt besucht 28. Oktober 2024.

105 Zur Chronologie der Einführung von CACs im Euroraum siehe z. B. Christoph Grosse Steffen, Sebastian Grund und Julian Schumacher, 'Collective Action Clauses in the Euro Area: a Law and Economic Analysis of the First Five Years', Capital Markets Law Journal 14 (2019), 134-154.

106 Art. 12 Abs. 3 ESM-Vertrag, ErwGr. 11.

107 Zum typischen Inhalt von CACs siehe näher Georg E. Kodek, 'Collective Action Clauses und andere Detailfragen' in: Georg E. Kodek und August Reinisch (Hrsg.), *Staateninsolvenz* (2. Aufl., Bank Verlag 2012), 305-320 (312 ff.).

108 Siehe Wolfgang Wild, 'Umschuldungsklausel bei Anleihen der Euro-Staaten', Österreichisches Bank Archiv 71 (2023), 39-44.

Die aktuell in den Staatsanleihen der Euro-Staaten vereinbarten Umschuldungsklauseln folgen bei emissionsübergreifenden Änderungen (*cross-series*) dem Prinzip einer zweistufigen Aggregation (*double-limb*). Dies bedeutet, dass sowohl eine Mehrheit der Gläubiger aller betroffenen Anleihen insgesamt als auch die Mehrheit jeder einzelnen betroffenen Einzelemissionsserie erforderlich ist.[109] Im Rahmen der ESM-Reform ist vorgesehen, künftig Umschuldungsklauseln mit einstufiger Aggregation (*single-limb*) in den Anleihebedingungen der Euro-Staaten einzuführen.[110] Dadurch wäre für Umschuldungsmaßnahmen nur noch eine einzige Mehrheit über alle betroffenen Emissionsserien hinweg erforderlich. Mit der Einführung dieser *single-limb* CACs würde sich die Eurozone zudem stärker an internationale Standards angleichen, die zunehmend auf diesen einstufigen (*single-limb*) Abstimmungsmechanismus setzen.[111]

Der Wegfall der *double-limb* CACs würde bei Umschuldungsmaßnahmen den Abstimmungsprozess vereinfachen, da keine separaten Mehrheiten mehr auf Ebene jeder einzelnen Emissionsserie erforderlich wären.[112] Diese Änderung zielt insbesondere darauf ab, sog hold-out-Risiken zu minimieren und die Veto-Position einzelner Gläubiger bestimmter Emissionsserien zu schwächen. Dadurch soll eine geordnete und faire Schuldenrestrukturierung erleichtert werden. Wichtig ist jedoch, dass diese Reform nicht automatisch die Wahrscheinlichkeit von Umschuldungen erhöht.[113] Vielmehr geht es darum, solche Maßnahmen im Bedarfsfall effizienter umzusetzen. Das zentrale Kriterium des ESM, die (nachhaltige) Schuldentragfähigkeit eines Mitgliedstaats,

109 Siehe dazu ausführlich Wild (Fn. 108), 41 mit Tabellen; Grosse Steffen, Grund und Schumacher (Fn. 105), 136 f.; Deborah Zandstra, 'New Aggregated Collective Action Clauses and Evolution in the Restructuring of Sovereign Debt Securities', Capital Markets Law Journal 12 (2017), 180-203 (186 f.).

110 Siehe Art. 12 Abs. 4 reformierter ESM-Vertrag und ErwGr. 11 reformierter ESM-Vertrag. Zur Ausgestaltung siehe EFC Sub-Committee on EU Sovereign Debt Markets: 2022 Collective Action Clause, Explanatory Note, <https://economic-financial-committee.europa.eu/system/files/2021-04/EA%20Model%20CAC%20-%20Draft%20Explanatory%20Note.pdf>, zuletzt besucht 28. Oktober 2024.

111 Bspw. International Capital Markets Association (ICMA), Standard Aggregated Collective Action Clauses 2014 (CACs), <https://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-August-2014.pdf>, zuletzt besucht 28. Oktober 2024; IMF, 'Fourth Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contract (2019)', <https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671>, zuletzt besucht 28. Oktober 2024.

112 Wild (Fn. 108), 43 f.; Aitor Erce, 'Restructuring the European Stability Mechanism', Capital Markets Law Journal 15 (2020), 284-297 (287).

113 So auch Aerts und Bizzaro (Fn. 44), 171 f.; *Matthes* (Fn. 101), 56; vlg auch Mark Sobel, Merits of Single-Limb CACs, 9. Juli 2018, <https://www.omfif.org/2018/07/merits-of-single-limb-cacs/>, zuletzt besucht 28. Oktober 2024.

bleibt unverändert und erfordert nicht zwingend eine Schuldenrestrukturierung.[114] Ob diese „Erleichterung" von Umschuldungsprozessen zu höheren Risikoaufschlägen auf Staatsanleihen führt, bleibt umstritten.[115] Historische Daten liefern dafür keinen eindeutigen Beleg. So hatten auch die 2013 eingeführten Euro-CACs keine signifikanten Auswirkungen auf die Finanzierungskosten.[116] Vielmehr könnte das Risiko eines ungeordneten Ausfalls durch die neue Regelung in den Hintergrund treten, was zur Stabilisierung beiträgt.[117]

5. Gemeinsame Letztsicherung für den SRF

a) Grundlagen

Der einheitliche Abwicklungsfonds (Single Resolution Fund – SRF)[118] ist Bestandteil des einheitlichen Abwicklungsmechanismus (Single Resolution Mechanism – SRM),[119] der einen einheitlichen europäischen Rahmen für die geordnete Abwicklung von in Schieflage geratenen Kreditinstituten darstellt. Die zuständige Abwicklungsbehörde im SRM ist der einheitliche Abwicklungsausschuss (Single Resolution Board – SRB), die über Restrukturierungen und gegebenenfalls die Abwicklung systemrelevanter Banken im Euro-Währungsgebiet entscheidet.[120] Der SRB organisiert und koordiniert die Abwicklung dieser Institute nach einheitlichen Vorgaben und kann dabei auf den SRF zurückgreifen, um die wirksame Anwendung von Abwicklungsinstrumenten sicherzustellen.[121] Der SRF sollte bis Ende 2023 mit einem

114 Aerts und Bizzaro (Fn. 44), 171.

115 Siehe z. B. Kodek (Fn. 107), 317 'erscheint zwar einleuchtend, lässt sich aber empirisch […] nicht bestätigen', mit Verweis auf Torbjörn Becker, Anthony Richards und Yunyong Thaicharoen, 'Bond Restructuring and Moral Hazard: Are Collective Action Clauses Costly?', Journal of International Economics (2003), 127-161.

116 Vgl. Grosse Steffen, Grund und Schumacher (Fn. 105), 144 ff.; Matthes (Fn. 101), 56.

117 Vgl. Kay Chung und Michael G. Papaioannou, Do Enhanced Collective Action Clauses Affect Sovereign Borrowing Costs?, IMF Working Paper August 2020, WP/20/162; Grosse Steffen, Grund und Schumacher (Fn. 105), 142 ff.

118 Vgl. Art. 67 ff. SRM-VO (VO 2014/806/EU).

119 Siehe Art. 1 Abs. 2 SRM-VO, ErwGr. 19 SRM-VO.

120 Siehe ausführlich zum SRM Tobias Tröger und Alexander Friedrich, '§ 18 Der Einheitliche Abwicklungsmechanismus (Single Resolution Mechanism, SRM)' in: Ulrich Hufeld und Christoph Ohler (Hrsg.), *Europäische Wirtschafts- und Währungsunion* (Nomos 2022), Rn. 3 ff.; Christos V. Gorstos, 'Banking Resolution: The EU Framework Governing the Resolution' in: Fabian Amtenbrink und Christoph Herrmann (Hrsg.), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), Rn. 38 ff.

121 Vgl. Art. 76 SRM-VO; dazu auch Tröger und Friedrich (Fn. 120), Rn. 77 ff.

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Zielvolumen von 1 % der gedeckten Einlagen in der Bankenunion ausgestattet werden.[122] Die Mittel des Fonds stammen gem. Art. 70 und 71 der SRM-Verordnung aus Beiträgen der Kreditinstitute in den teilnehmenden Mitgliedstaaten, die von den nationalen Abwicklungsbehörden erhoben werden.[123] Seine rechtliche Grundlage bilden die SRM-Verordnung, die die Einrichtung, Verwaltung und Nutzung des Fonds regelt, sowie ein zwischenstaatliches Übereinkommen (Intergovernmental Agreement – IGA),[124] das die finanzielle Ausstattung des SRF definiert.

Trotz der Existenz des SRF wird als notwendig erachtet,[125] ein zusätzliches gemeinsames Sicherheitsnetz für die Abwicklung von Banken in der Bankenunion zu schaffen, um Fälle abzudecken, in denen die Mittel des SRF aufgebraucht sind oder nicht ausreichen. Mit der Einführung einer gemeinsamen Letztsicherung (*common backstop*) im Rahmen des ESM soll der SRB die Möglichkeit erhalten, auf Mittel des ESM zurückzugreifen, wenn der SRF keine ausreichenden Ressourcen zur Verfügung hat. Dieses Instrument würde das ultimative Sicherheitsnetz für Bankenabwicklungen im Rahmen des SRM darstellen, die finanzielle Schlagkraft des SRF stärken und zur Sicherung der Finanzstabilität in der Bankenunion beitragen.[126]

Die Einführung der Backstop-Funktion, bei der der ESM als letztinstanzlicher Kreditgeber für den SRB bei Bankenabwicklungen fungiert, markiert ein völlig neues Element im Aufgabenbereich des ESM. Diese Erweiterung seiner Zuständigkeiten spiegelt sich auch im vertraglichen Zweck des ESM wider: Der neu eingefügte Abs. 2 des Art. 3 des ESM-Vertrags nimmt die Backstop-Funktion ausdrücklich auf. Gleichzeitig wird mit der Einführung

122 Art. 69 Abs. 1 SRM-VO. Dazu Tröger und Friedrich (Fn. 120), Rn. 83. Mit den Beiträgen aus dem Jahr 2023 erreichte der SRF ein Volumen von 77,6 Mrd EUR, siehe <https://www.srb.europa.eu/en/content/single-resolution-fund-grows-eu113-billion-reach-eu-776-billion>, zuletzt besucht 28. Oktober 2024.

123 Art. 67 Abs. 4 SRM-VO; siehe auch Tröger und Friedrich (Fn. 120), Rn. 80 ff.

124 Übereinkommen über die Übertragung von Beiträgen auf den Einheitlichen Abwicklungsfonds und über die gemeinsame Nutzung dieser Beiträge (IGA), abrufbar unter <https://data.consilium.europa.eu/doc/document/ST%208457%202014%20INIT/EN/pdf>, zuletzt besucht 28. Oktober 2024.

125 Statement of Eurogroup and ECOFIN Ministers on the SRM backstop vom 18. Dezember 2013, <https://www.consilium.europa.eu/media/21899/20131218-srm-backstop-statement.pdf>, zuletzt besucht 28. Oktober 2024; Der Bericht der fünf Präsidenten (Fn. 18), 11. War auch im Vorschlag zur Errichtung eines EWF vorhanden, vgl. COM (2017) 827 final 6.

126 Auf dem Weg zur Vollendung der Bankenunion, Mitteilung der Kommission an das Europäische Parlament, den Rat, die Europäische Zentralbank, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, COM (2015) 587 final, 24. November 2015, 5.

des *common backstops* das bisher ungenutzte Instrument der direkten Bankenrekapitalisierung abgeschafft.[127]

Im Kontext der ESM-Reform stellt sich vor allem die Frage nach der institutionellen und rechtlichen Ausgestaltung der dauerhaften Verflechtung des ESM, eines völkerrechtlichen Vertragswerks, mit der EU und insbesondere mit der zweiten Säule der Bankenunion (SRM). Obwohl das neue Instrument rechtlich im internationalen ESM-Vertrag verankert ist, wird der ESM funktional Teil der Bankenunion.

b) Konkrete Ausgestaltung

Die Ausgestaltung dieses neuen Finanzhilfeinstruments findet ihren rechtlichen Rahmen primär in Art. 18a reformierter ESM-Vertrag sowie im neu eingefügten Anhang IV[128] des ESM-Vertrags. Ergänzend gibt es spezifische Leitlinien, die den Einsatz dieser Fazilität regeln.[129] In der SRM-Verordnung selbst wird dieses Instrument hingegen nicht erwähnt. Die Letztsicherungsfazilität wird in Form einer revolvierenden Kreditlinie eingerichtet,[130] mit einem festgelegten Gesamtvolumen von max. 68 Mrd EUR.[131] Dieses Volumen begrenzt ausdrücklich das finanzielle Risiko, das der ESM durch das neue Instrument übernimmt, und führt nicht zu einer Erhöhung der in Art. 8 Abs. 5 ESM-Vertrag festgelegten Haftungsobergrenze.[132]

Der reformierte ESM-Vertrag sieht für die Nutzung der Letztsicherungsfazilität ein zweistufiges Entscheidungsverfahren vor.[133] Zunächst be-

127 Siehe Resolution regarding annulment of the instrument for the direct recapitalisation of institutions, 6. Dezember 2019, <https://www.esm.europa.eu/sites/default/files/migration_files/20191206_-_draft_bog_resolution_3_-_annulment_of_the_dri_-_publication_version.pdf>, zuletzt besucht 28. Oktober 2024. Ausführlicher zum Instrument der direkten Bankenrekapitalisierung Aerts und Bizzaro (Fn. 44), 163.

128 Dort sind die Kriterien für die Genehmigung von Darlehen und Auszahlungen geregelt, vgl. Art. 18a Abs. 1, UAbs. 1 reformierter ESM-Vertrag.

129 European Stability Mechanism Guideline on the Backstop Facility to the SRB for the SRF, 23. April 2021, <https://www.esm.europa.eu/sites/default/files/migration_files/draft_backstop_guideline_-_early_intro_version_for_publication.pdf>, zuletzt besucht 28. Oktober 2024.

130 Art. 18a Abs. 2 reformierter ESM-Vertrag.

131 Siehe Draft Resolution for the Nominal Cap and the Provisions on the Procedure for the Verification of Compliance with the Condition of the Permanence of the Legal Framework for Bank Resolution, 6. Dezember 2019, <https://www.esm.europa.eu/sites/default/files/migration_files/20191206_-_draft_bog_resolution_1_-_nominal_cap_-_publication_version.pdf>, zuletzt besucht 28. Oktober 2024.

132 Der Gouverneursrat kann die ursprünglich festgelegte nominale Obergrenze jedoch im gegenseitigen Einvernehmen anpassen.

133 Vgl. Menelaos Markakis, 'The Reform of the European Stability Mechanism: Process', Substance and the Pandemic, Legal Issues of Economic Integration 47 (2020), 359-384 (369); Rathke (Fn. 86), Rn. 149.

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schließt der Gouverneursrat über die Bereitstellung der Kreditlinie für den SRB. Grundlage hierfür ist ein Antrag des SRB sowie ein Vorschlag des geschäftsführenden Direktors des ESM.[134] In einem zweiten Schritt entscheidet das Direktorium über die Gewährung und Auszahlung konkreter Darlehen aus dieser Kreditlinie, sofern ein spezifischer Abwicklungsfall vorliegt.

Die Bereitstellung der Letztsicherungsfazilität durch den Gouverneursrat kann für alle unionsrechtlich vorgesehenen Zwecke des Einheitlichen Abwicklungsfonds erfolgen, vorausgesetzt, dass angemessene Schutzmaßnahmen eingehalten werden.[135] Insoweit erstreckt sich die Nutzungsmöglichkeit der *common backstop* Funktion sowohl auf die Besicherung von Vermögenswerten oder Verbindlichkeiten, die Gewährung von Darlehen, den Erwerb von Vermögenswerten des in Abwicklung befindlichen Kreditinstituts sowie die Bereitstellung von Kapital für Brückeninstitute oder Zweckgesellschaften zur Vermögensverwaltung. Darüber hinaus kann die Fazilität auch für Entschädigungszahlungen an Gläubiger oder Anteilseigner bei einer Verletzung des *No Creditor Worse Off* (NCWO)-Prinzips genutzt werden.[136] Ebenso sind Beitragsleistungen an bestimmte Gläubiger im Rahmen des Bail-in-Instruments möglich.[137] Die spezifischen finanziellen Modalitäten und Bedingungen der Letztsicherungsfazilität werden vom Gouverneursrat in einer Vereinbarung festgelegt, die anschließend vom Geschäftsführenden Direktor unterzeichnet wird.[138]

Sobald die Letztsicherungsfazilität für den SRB bereitgestellt wurde, kann dieser einzelne Darlehen für konkrete Abwicklungsmaßnahmen im Rahmen der Kreditlinie beantragen. Über die Gewährung und Auszahlung entscheidet das Direktorium des ESM. Grundlage dafür sind ein entsprechender Antrag des SRB, ein Vorschlag des Geschäftsführenden Direktors und eine Bewertung der Rückzahlungsfähigkeit des SRB.[139] Die Entscheidung erfolgt anhand von Kriterien, die im Anhang IV des reformierten ESM-Vertrags festgelegt sind. Zu den zentralen Kriterien gehören die Dauerhaftigkeit des EU-Rechtsrahmens,[140] die finanzielle Rückzahlungsfähigkeit des SRB sowie

134 Art. 18a Abs. 1 UAbs. 1 reformierter ESM-Vertrag; Art. 2 Z. 1 on the Backstop Facility to the SRB for the SRF, 23. April 2021.

135 Art. 18a Abs. 1 UAbs. 1 reformierter ESM-Vertrag.

136 Art. 76 Abs. 1 lit. a-e SRM-VO.

137 Art. 76 Abs. 1 lit. f SRM-VO.

138 Art. 18a Abs. 3 reformierter ESM-Vertrag; Art. 2 Z. 2 Guideline on the Backstop Facility to the SRB for the SRF, 23. April 2021.

139 Art. 18a Abs. 5 reformierter ESM-Vertrag; Art. 4 Z. 1 Guideline on the Backstop Facility to the SRB for the SRF, 23. April 2021.

140 Siehe Art. 18a Abs. 8, 9 reformierter ESM-Vertrag; auch Westerhof Löfflerová (Fn. 60), 20 f.

der Grundsatz der mittelfristigen Haushaltsneutralität. Die Dauerhaftigkeit des Rechtsrahmens, die in Art. 18a Abs. 9 näher erläutert wird, bezieht sich insbesondere auf das zwischenstaatliche Übereinkommen (IGA), das Bail-in-Instrument sowie das Rahmenwerk zu den Mindestanforderungen an Eigenmittel. Der Grundsatz der mittelfristigen Haushaltsneutralität bedeutet, dass alle gewährten Finanzmittel vollständig vom SRB zurückgezahlt werden, sodass keine dauerhafte Belastung für den Haushalt des ESM entsteht.[141] Zudem darf der Rückgriff auf die Letztsicherungsfazilität nur als *ultima ratio* vorgenommen werden.[142] Dies bedeutet, dass die beantragten Mittel nur dann gewährt werden dürfen, wenn die Finanzmittel des SRF vollständig ausgeschöpft oder für den Abwicklungsfall unzureichend sind, nachträglich erhobene Beiträge den unmittelbaren Bedarf nicht decken können oder alternative Finanzierungsmöglichkeiten nicht akzeptabel sind. Zudem ist Voraussetzung, dass der Mitgliedstaat, in dem das betroffene Kreditinstitut ansässig ist, alle seine Verpflichtungen erfüllt hat, insbesondere die Übertragung der erhobenen Beiträge an den SRF. Darüber hinaus darf kein Ausfallereignis bei bestehenden Darlehen des SRB vorliegen.[143]

Das Direktorium ist verpflichtet, über den Antrag innerhalb von zwölf Stunden zu entscheiden,[144] wobei die nationalen verfassungsrechtlichen Vorgaben einzuhalten sind.[145] Der Antrag des SRB gem. Art. 18a Abs. 5 enthält alle relevanten Informationen, die es dem Direktorium ermöglichen, innerhalb der strikten Frist eine fundierte Entscheidung zu treffen. Gleichzeitig müssen die Vertraulichkeitsanforderungen des Unionsrechts eingehalten werden.[146] Diese klaren Verfahrensregeln und Vorgaben gewährleisten eine zügige, aber dennoch sorgfältige Entscheidungsfindung, um im Bedarfsfall eine wirksame Unterstützung sicherzustellen.[147]

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141 Z. 2 lit. b Anhang IV. Was konkret unter mittelfristig zu verstehen ist, wird nicht ausgeführt.

142 Art. 12 Abs. 1a reformierter ESM-Vertrag; Z. 2 lit. a Anhang IV.

143 Z. 2 lit. d und e Anhang IV.

144 ErwGr. 15 b reformierter ESM-Vertrag; Art. 4 Z. 5 Guideline on the Backstop Facility to the SRB for the SRF, 23. April 2021. Vgl. auch Aerts und Bizzaro (Fn. 44), 163 'over the weekend'. Zur Möglichkeit der Verlängerung auf maximal 24 Stunden, siehe Art. 4 Z. 6 on the Backstop Facility to the SRB for the SRF, 23. April 2021.

145 In gewissen Mitgliedstaaten ist es Voraussetzung, dass das nationale Parlament – als Träger der Budgethoheit – der Stimmenabgabe des Vertreters zustimmt, dazu auch BVerfG, Urteil v. 12. September 2012, 2 BvR 1390/12 Rn. 153.

146 Art. 4 Z. 1, Art. 10 Guideline on the Backstop Facility to the SRB for the SRF, 23. April 2021. Siehe dazu ausführlich Westerhof Löfflerová (Fn. 60), 18 ff.

147 Art. 4 Z. 1 a, und die Möglichkeit zusätzliche Informationen anzufordern Z. 1 a Guideline on the Backstop Facility to the SRB for the SRF, 23. April 2021.

c) Bewertung

Die Einführung der gemeinsamen Letztsicherung für den SRF ist zweifellos das umfassendste Element der ESM-Reform und zugleich jenes, worüber die Mitgliedstaaten bereits seit Einführung des SRM sprechen. Auf den ersten Blick mag sie wie eine bloße Erweiterung des Finanzhilfeinstrumentariums wirken und Parallelen zur Fazilität für die direkte Bankenrekapitalisierung aufweisen. Dennoch sollte die Besonderheit dieses neuen Instruments nicht unterschätzt werden.

Zum einen intensiviert es die Verbindung des intergouvernementalen ESM mit dem Unionsrecht,[148] indem der ESM mit dem SRB erstmals direkt eine Agentur der Europäischen Union und keinen Vertragsstaat unterstützt.[149] Die Bereitstellung der Letztsicherung als Finanzhilfe für die zweite Säule der Bankenunion verstößt dabei nicht gegen Art. 125 Abs. 1 AEUV und stellt auch keine Umgehung dieser Vorschrift dar.[150] Dies liegt daran, dass die Letztsicherungsfazilität keine Stabilitätshilfe an einen Mitgliedstaat darstellt, sondern vielmehr als ultimative Absicherung für den SRB dient, um dessen Abwicklungsinstrumente und -befugnisse zu unterstützen. Infolgedessen kommt die gemeinsame Letztsicherung in erster Linie direkt dem Bankensektor zugute und leistet einen wichtigen Beitrag zur Stabilität des Finanzsystems. Eine Entlastung der Haushalte der ESM-Mitglieder könnte hierbei – falls überhaupt – lediglich als indirekter Effekt eintreten.[151]

Die Reform des ESM und die begleitenden Unterlagen lassen bemerkenswerterweise eine detaillierte Auseinandersetzung mit der Konditionalität im Zusammenhang mit der gemeinsamen Letztsicherungsfazilität weitgehend vermissen, insbesondere in der Form eines „klassischen"[152] MoU. Gemäß Art. 136 Abs. 3 AEUV ist jedoch vorgeschrieben, dass alle Finanzhilfen im Rahmen des ESM strengen Auflagen unterliegen. Diese Konditionalität wird üblicherweise in einem MoU zwischen dem ESM und dem begünstigten Mitgliedstaat festgehalten. Im Fall der Letztsicherungsfazilität für den SRB

148 So sind bereits die Kommission und die EZB in das Verfahren zur Gewährung von Stabilitätshilfen eingebunden, zudem unterzeichnet die Kommission im Namen des ESM das MoU. Ebenso ist in Art. 37 ESM-Vertrag ein Verfahren zur Auslegung und Streitbeilegung vorgesehen, indem es (u. U.) zur Zuständigkeit des EuGH kommt.

149 Vgl. auch Aerts und Bizzaro (Fn. 44), 164; Rathke (Fn. 86), Rn. 148.

150 Art. 125 AEUV, sog 'Bail-out Verbot'; vgl. dazu Michael Potacs, 'Die Europäische Wirtschafts- und Währungsunion und das Solidaritätsprinzip', EuR 2 (2013), 133-145 (135). Fraglich ist, ob überhaupt Art. 125 Abs. 1 AEUV auf diese Konstellation Anwendung findet.

151 Indirekt i. d. S., dass durch die gemeinsame Letztsicherung auf etwaige notwendige staatliche Beihilfen verzichtet werden kann.

152 Art. 13 Abs. 3; Art. 14 Abs. 2; Art. 15 Abs. 2; Art. 16. Abs. 2; Art. 17. Abs. 2; Art. 18 Abs. 3 ESM-Vertrag.

stellt sich die Besonderheit, dass der SRB als Kreditnehmer auftritt, während das letztendliche Ziel der Unterstützung das jeweilige in Abwicklung befindliche Kreditinstitut ist. Dies macht die Anwendung eines klassischen MoU schwierig, da dem SRB als Agentur der EU keine strengen wirtschaftspolitischen Auflagen – vergleichbar denen für einen Mitgliedstaat – auferlegt werden können.[153] Dennoch ist die Einhaltung der primärrechtlich vorgegebenen Konditionalität zu gewährleisten. Zwar macht Art. 136 Abs. 3 AEUV keine genauen inhaltlichen Vorgaben, welche Form diese „strengen Auflagen" annehmen müssen, doch ergibt sich aus dem Zweck der Vorschrift, dass *moral hazard* vermieden und der betreffende Empfänger zu einer soliden Haushaltspolitik bewegt werden soll.[154] Diese Anforderungen können durch „angemessene Schutzvorkehrungen"[155] erfüllt werden, die an die spezifischen Instrumente angepasst sind,[156] wie es auch Erwägungsgrund 5 a des reformierten ESM-Vertrags betont. Für die *common backstop* Funktion finden sich solche Schutzvorkehrungen bereits im Antragsverfahren und den grundlegenden Bedingungen für die Nutzung der Fazilität.[157] So darf auf den *common backstop* nur als *ultima ratio* zurückgegriffen werden, die Rückzahlungsfähigkeit des SRB muss gewährleistet sein, und der Grundsatz der mittelfristigen Haushaltsneutralität ist einzuhalten. Darüber hinaus ist die Nutzung eng mit der Einhaltung des europäischen Bankenabwicklungsrahmens verbunden, insbesondere dem Bail-in-Instrument und den Mindestanforderungen an Eigenmittel.[158] Zusätzlich sieht Art. 18a Abs. 3 des reformierten ESM-Vertrags eine spezifische Vereinbarung zwischen dem ESM und dem SRB vor, die die finanziellen Modalitäten und Bedingungen der Letztsicherungsfazilität festlegt. Diese Vereinbarung bildet eine weitere Ebene der Konditionalität. In ihrer Gesamtheit erfüllen diese Voraussetzungen und Vorkehrungen die Anforderungen „strenger Auflagen" gem. Art. 136 Abs. 3 AEUV und gewährleisten die primärrechtliche Legitimität des Instruments.

Im reformierten ESM-Vertrag bleibt die konkrete Regelung zur Rückzahlung der Letztsicherungsfazilität durch den SRB offen, insbesondere die Frage, aus welchen Quellen der SRB die erforderlichen Mittel für die

153 Rathke (Fn. 86), Rn. 149 spricht von einem 'Sonderregime'; siehe zur Art der möglichen Auflagen Christoph Ohler, 'Art. 136 AEUV' in: Helmut Siekmann (Hrsg.), Kommentar zur Europäischen Währungsunion (Mohr Siebeck 2013), Rn. 21.

154 EuGH, *Pringle* (Fn. 14), Rn. 137, 143. Den weiten primärrechtlichen Spielraum bestätigend Ulrich Palm, 'Art. 136 AEUV' in: Eberhard Grabitz, Meinhard Hilf und Martin Nettesheim (Hrsg.), Das Recht der Europäischen Union (54. EL, C. H. Beck September 2014), Rn. 60.

155 Siehe die Wortwahl in Art. 18a Abs. 1 reformierter ESM-Vertrag.

156 Auch im Rahmen der reformierten PCCL wird auf ein MoU verzichtet, siehe II. 3.

157 Siehe Anhang IV.

158 Art. 18a Abs. 9 lit. b reformierter ESM-Vertrag.

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Rückführung der Kredite bezieht. Anhang IV Z. 2 lit. b verlangt lediglich, dass die Rückzahlungsfähigkeit des SRB ausreichend sein muss, um das Darlehen „mittelfristig vollständig" zurückzuzahlen. Eine detaillierte Ausgestaltung fehlt jedoch. Die Leitlinien geben in Art. 8 Z. 2 an,[159] dass der SRB gemeinsam mit dem ESM die Rückzahlungsfähigkeit des SRB bewertet, einschließlich der Fähigkeit, die benötigten Mittel vom Bankensektor wieder einzuziehen. Damit orientiert sich die Beurteilung der Rückzahlungsfähigkeit des SRB im Wesentlichen an der Stabilität des europäischen Bankensektors insgesamt. Naheliegend ist, dass für die Mittelbeschaffung Art. 71 Verordnung über den einheitlichen Abwicklungsmechanismus (SRM-VO) herangezogen wird. Dieser erlaubt dem SRB, vom Bankensektor außerordentliche nachträgliche (*ex-post*) Beiträge einzufordern, wenn die verfügbaren Mittel des SRF nicht ausreichen, um die mit Abwicklungsmaßnahmen verbundenen Kosten, Verluste oder Ausgaben zu decken.[160] Diese nachträglichen Beiträge würden von den teilnehmenden Kreditinstituten erhoben und in den SRF eingezahlt, der diese Gelder wiederum an den ESM weiterleitet, um die Darlehen zu tilgen.[161] Mit anderen Worten finanziert der Bankensektor letztlich selbst die Rückzahlung der durch die Letztsicherungsfazilität des ESM ermöglichten Abwicklungsmaßnahmen. Diese Konstruktion trägt entscheidend dazu bei, dass der *common backstop* mittelfristig keine Belastung für die öffentlichen Haushalte der ESM-Mitgliedstaaten darstellt. Stattdessen wird die Last auf den Bankensektor verteilt, was auch zur Eigenverantwortung des Finanzsektors selbst beiträgt.

Zu bedenken gibt es in dieser Hinsicht auch, dass alle Vertragsparteien des ESM den Euro als gemeinsame Währung eingeführt haben und somit Euro-Staaten sind. Die Liste der teilnehmenden[162] Mitgliedstaaten der Bankenunion ist demgegenüber nicht nur auf die Euro-Staaten beschränkt.[163] Das hat vor allem deshalb Bedeutung, weil die Schaffung der gemeinsamen Letztsicherung eine Art Brücke zwischen ESM und Bankenunion darstellt, wodurch der „Anwendungsbereich" des ESM in gewisser Weise auch auf Teilnehmer der Bankenunion ausgedehnt wird. Auf den Umstand, dass sich die Teilnehmer der Bankenunion nicht zwingend mit den ESM-Mitgliedern de-

159 Guideline on the Backstop Facility to the SRB for the SRF, 23. April 2021.

160 Gem Art. 71 Abs. 1 SRM-VO darf der Gesamtbetrag der jährlichen außerordentlichen *ex-post* Beiträge nicht das dreifache der in diesem Jahr gesetzlich vorgesehene *ex-ante* Beiträge übersteigen.

161 So auch SRB, 'The Common Backstop – a Welcome Step Forward', 10. Dezember 2020, <https://www.srb.europa.eu/en/content/common-backstop-welcome-step-forward>, zuletzt besucht 28. Oktober 2024.

162 Siehe Art. 4 Abs. 1 SSM-VO; Art. 2 SRM-VO.

163 In Art. 7 SSM-VO, bspw. wurde eine enge Zusammenarbeit mit Bulgarien beschlossen.

cken,[164] wird in Erwägungsgrund (ErwGr.) 9 a[165] Rücksicht genommen. Von diesen wird erwartet, dass sie sich zu gleichwertigen Bedingungen über Kreditverträge an der gemeinsamen Letztsicherung beteiligen, um dadurch eine ungleiche Lastenverteilung zu vermeiden. Sie stellen jedoch keine „offiziellen" ESM-Mitglieder dar.

III. Fazit und Ausblick

Die in diesem Beitrag dargestellten Aspekte der ESM-Reform markieren einen wichtigen Schritt in die richtige Richtung, bleiben jedoch in ihrem Umfang begrenzt. Trotz über zehn Jahren seit der Gründung des ESM und sechs Jahren intensiver Reformgespräche handelt es sich im Wesentlichen um eine schrittweise Weiterentwicklung des Mechanismus außerhalb des Unionsrechts.[166] Die Reform adressiert bestehende Lücken, reagiert auf internationale Veränderungen und schafft notwendige Klarstellungen. So wird die Rolle des ESM in der Gestaltung, Verhandlung und Überwachung der Konditionalität bei Stabilitätshilfen gestärkt und an bestehende Praktiken angepasst. Ebenso kommt es zu einer präziseren Regelung der unterstützenden Funktionen von Europäischer Kommission und EZB sowie zu Verbesserungen bei den präventiven Finanzhilfen. Mit der Einführung der *single-limb* CACs wird zudem ein internationaler Standard umgesetzt, der die Effizienz möglicher Umschuldungen erhöht. Ein wesentlicher Fortschritt ist die Schließung der bislang offenen Lücke durch die Einführung der gemeinsamen Letztsicherung für den SRF, womit der ESM eine neue Schlüsselrolle im Rahmen der Bankenunion übernimmt.

Die zukünftige Rolle des reformierten ESM bleibt jedoch unklar, insbesondere angesichts der im Zuge der COVID-19-Krise entwickelten alternativen Krisenlösungen.[167] Diese zeigten nicht nur den „politischen Preis"

164 Das gilt zurzeit für Bulgarien.

165 ErwGr. 9a reformierter ESM-Vertrag '[…] wird erwartet, dass sie neben dem ESM parallele Kreditlinien für den SRF bereitstellen. Diese Mitgliedstaaten werden sich zu gleichwertigen Bedingungen an der gemeinsamen Letztsicherung beteiligen ("beteiligte Mitgliedstaaten"). Die Vertreter der beteiligten Mitgliedstaaten sollten als Beobachter zu den Sitzungen des Gouverneursrats und des Direktoriums eingeladen werden, auf denen Fragen im Zusammenhang mit der gemeinsamen Letztsicherung erörtert werden, und sollten denselben Zugang zu Informationen erhalten. Für den Informationsaustausch und die rechtzeitige Koordinierung zwischen dem ESM und den beteiligten Mitgliedstaaten sollten angemessene Vorkehrungen getroffen werden […].'

166 Ähnlich kritisch Markakis (Fn. 133). 376.

167 Dazu etwa Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', CML Rev. 58 (2021), 635-682; Dirk Meyer,

traditioneller ESM-Finanzhilfen, sondern auch, dass während der Krise günstige ESM-Mittel nicht genutzt wurden.[168] Stattdessen stand die supranationale Krisenbewältigung im Rahmen der EU-Strukturen im Vordergrund.[169] Dies könnte als Indikator für eine verstärkte Nutzung von EU-Mitteln in künftigen Krisen dienen,[170] was die Bedeutung des ESM weiter schmälern könnte.

Die Relevanz der Reform sollte jedoch nicht unterschätzt werden. Sie stärkt den ESM als Institution und bereitet ihn auf künftige Herausforderungen vor. Dennoch bleibt die Reform unvollendet, solange ihre Ratifizierung aussteht. Die anhaltende Blockade durch Italien verzögert den Abschluss weiterhin, auch wenn die Eurogruppe die Ratifizierung als Priorität für das zweite Halbjahr 2024 festgelegt hat.[171] Wann der Prozess tatsächlich abgeschlossen wird, hängt maßgeblich von Italiens Haltung ab. Bis dahin bleibt die Reform ein Fragment und lässt Raum für Unsicherheiten über ihre tatsächliche Wirksamkeit.

'Next Generation EU. Neues Eigenmittelsystem weist in eine Fiskalunion', EuZW 32 (2021), 16-22; Martin Nettesheim, 'Größe und Tragik. Zum Eilbeschluss des Bundesverfassungsgerichts zu "Next Generation EU"', Verfassungsblog, 21. April 2021, doi: 10.17176/20210421-221206-0.

168 ESM, 'Pandemic Crisis Support', <https://www.esm.europa.eu/content/europe-response-corona-crisis>, zuletzt besucht 28. Oktober 2024.

169 'Next Generation EU' sieht eine Kreditaufnahmeermächtigung direkt durch die EU i. H. v. 750 Mrd EUR vor.

170 So auch Forsthoff (Fn. 14), Rn. 107 f. Siehe auch Matthias Ruffert, 'Nikolaus 2.0. Zum NGEU-Urteil des Bundesverfassungsgerichts vom 6. Dezember 2022', Verassungsblog, 9. Dezember 2022, doi: 10.17176/20221209-121632-0.

171 Siehe ER, Arbeitsprogramm der Euro-Gruppe für das zweite Halbjahr 2024, 15. Juli 2024, 'The Ratification of the Agreement Amending the ESM Treaty Is a Priority.', <https://www.consilium.europa.eu/media/bcqnoz2v/eurogroup-work-programme-until-march-2025.pdf>, zuletzt besucht 28. Oktober 2024.

Review Symposium

Digital Empires – A Review Symposium

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In this issue, the ZaöRV for the very first time publishes a book review symposium. That is, instead of our customary individual reviews of different books in international, European, and comparative public law, we publish three reviews of one single book, namely Anu Bradford's *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023), followed by a brief response from the author. As many, if not most, other academic journals that publish book reviews, the ZaöRV has previously published single pieces reviewing multiple books, including occasionally multiple books by the same author.[1] When appearing in new editions, books have occasionally been reviewed a second or third time.[2] The ZaöRV has published thematic book review sections, for example, a separate section with

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We are grateful to Richard Dören for helpful comments and to the ZaöRV's student assistants for excellent research assistance.

1 See, e. g., Thilo Marauhn, ZaöRV 57 (1997), 1170-1177 (reviewing, among others, multiple works by Julie Dahlitz).

2 See, e. g., the reviews of the first three editions of Alfred Verdroß's *Völkerrecht*: Ulrich Scheuner, ZaöRV 8 (1938), 590-593; Ulrich Scheuner, ZaöRV 14 (1951/52) 354-357; Hermann Mosler, ZaöRV 16 (1955), 712-713.

ten reviews of books on the law of the sea.[3] The ZaöRV has also exceptionally published a review together with a reply by the author.[4] To the best of our knowledge, however, the ZaöRV has never before published a book review symposium.

To introduce this symposium, we will, first, make a case for holding such symposia in academic journals. Secondly, we will explain why Anu Bradford's *Digital Empires* is particularly well suited to form the subject of our first review symposium. Thirdly, we will introduce the different contributions to the symposium. The introduction concludes with an outlook on continuing the conversation that this symposium is intended to commence.

I. The Value of Book Symposia in Academic Journals

Book review symposia are more than just multiple reviews of the same book. Because a book review symposium brings together different contributions, sometimes preceded by an introduction and often concluded by the author's response, the individual reviews can be more succinct in summarising the book under review and more selective in picking an angle to reflect on the book in greater detail. In that sense, the individual contributions are perhaps more accurately described as a set of comments on the book. As such, they can be more analytical and less descriptive than stand-alone pieces. The contributions to this review symposium illustrate this idea.

We cannot, of course, claim intellectual ownership of the idea for such a format. Book review symposia have become particularly well-established formats in academic blogs, including well-known international, European, and public law blogs.[5] Such book symposia seem to be somewhat less common with academic journals. There have been a few notable exceptions in recent years, including the following illustrations in the field of international and comparative public law. In 2021, EJIL published no less than 12 reviews of Martti Koskenniemi's *To the Uttermost Parts of the Earth: Legal Imagination and International Power* (Cambridge University Press 2021) – each commenting on a different chapter of the book – and a response by the

3 ZaöRV 38 (1978), 983-999.

4 See ZaöRV 76 (2016), 1001-1021 (Günther Frankenberg reviewing Uwe Kischel's *Rechtsvergleichung*, with Kischel replying, followed by François Venter reviewing Frankenberg's *Comparative Law as Critique*).

5 See, for example, <https://www.ejiltalk.org/category/ejil-book-discussion/>, last access 1 August 2025; <https://voelkerrechtsblog.org/article-categories/book-review/>, last access 1 August 2025.

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author.[6] In 2023, the Yearbook of International Humanitarian Law published two reviews of Samuel Moyn's *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021).[7] In the same year, ICON published four reviews of Melissa Crouch's edited volume *Women and the Judiciary in the Asia-Pacific* (Cambridge University Press 2021).[8] Finally, our fellow German Archiv des Völkerrechts recently published ten reflections on re-reading Carl Schmitt's *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Greven 1950).[9]

Unlike early comments on current affairs, which may benefit particularly from the speedy publication process offered by academic blogs, there is no good reason why book review symposia should not be held in academic journals, too. Indeed, academic blogs with a high volume of submissions may sometimes find it difficult to squeeze in a multi-piece symposium, disrupting their feed of current affairs pieces for several days or longer. This is an issue that academic journals do not face or only to a much lesser extent. Academic journals are also naturally in a position to publish an entire symposium at once. Publishing the symposium as a whole may contribute to a holistic perception of the symposium, also for future reference.

We therefore believe that there is distinct value in publishing book review symposia in an academic journal such as the ZaöRV. At the same time, we are conscious of the distinct advantages of blog symposia. Publishing different contributions to a symposium piece by piece over period of several days, weeks, or even months on a blog may have the benefit of attracting the attention of a greater number of readers for a sustained period of time. Depending on their editorial policy, blogs may be less constrained – given the absence of page limits – in how many posts they publish. Blogs can thus sometimes include a greater diversity of perspectives in a review symposium than academic journals. Lastly, blogs may also be somewhat more creative and include non-written, that is, audio-visual material. As an experiment spanning different publication formats, we intend to combine the advantages of a journal review symposium with a continuation by way of a sustained, multi-perspective blog conversation on Völkerrechtsblog, which will feature

6 EJIL 32 (2021), 943 ff. In its 2024 volume, EJIL's book review section featured a series of reviews of different books related to the overarching theme 'International Law and Technology as a Critical Project: A Collective Reading' (EJIL 35 (2024), 963 ff.) and a review symposium with the aim and theme of 'reflecting on a century of scholarship at the Hague Academy of International Law', featuring different scholarly works (EJIL 35 (2024), 527 ff., 787 ff.).

7 Yearbook of International Humanitarian Law 24 (2021), 141 ff. (published in 2023).

8 I.CON 21 (2023), 690 ff.

9 AVR 61 (2023), 123 ff.

reactions to the book as well as to the contributions to this symposium. We will return to the practicalities of this experiment at the end of this introductory piece.

Starting with the present issue, the ZaöRV will thus occasionally feature book review symposia. To be clear, such symposia will remain the exception. The volume of books published in international, European, and comparative public law continues to increase, as far as we can tell, and the ZaöRV thrives to review as many high quality books in these fields as we possibly can. The traditional standalone book review will therefore remain the ZaöRV's standard and we will have to be selective in choosing books for review symposia. The added value of discussing a book from various angles in several comments – and thus the value of holding a review symposium – is greater the wider the ground a book covers, the greater its potential to reshape the field, and the more thought-provoking its argument in doing so.

II. (Re-)Reading *Digital Empires*

Anu Bradford captures the complex global landscape of digital governance in the analytically potent image of three competing 'digital empires', that is, the world's major digital powers, and their distinct approaches to digital regulation: the United States (US) with a market-driven, China with a state-driven, and the European Union (EU) with a rights-driven approach. *Digital Empires* explains how digital regulation around the world is shaped by 'horizontal' battles between these empires for spreading their regulatory approach globally as well as 'vertical' battles between these powers and private technology corporations. Bradford is not the first to describe these distinct regulatory approaches.[10] But her book is unique in bringing well-

[10] For an extensive study of the European 'rights-based' approach, see Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022) (contrasting 'digital constitutionalism' with 'digital capitalism'); on the EU's rule-making power in the digital sphere, see Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020); for an early assessment of conflicts between different 'sovereigns' in 'cyberspace' (and especially between Europe and the US), see Lawrence Lessig, *Code: Version 2.0* (Basic Books 2006), 294-310; for the different understandings of privacy in the US and Europe, see already James Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty', Yale L.J. 113 (2004), 1151-1222; on all three 'empires', see the geopolitical epilogue in José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society* (Oxford University Press 2018), 163-166, and more extensively (also including Mexico) Ingrid Schneider, 'Democratic Governance of Digital Platforms and Artificial Intelligence? Exploring Governance Models of Chi-

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accepted structural characteristics of key regulatory models together. The book skilfully develops a powerful narrative that is sufficiently simple to build an intelligible framework of digital regulation around the globe, sufficiently nuanced to understand different approaches in their own terms as well as differences and similarities between them, and sufficiently dynamic to draw out tensions as well as convergence.

It is therefore hardly surprising that the book has already attracted significant attention since its publication in 2023. It has been cited hundreds of times in subsequent academic literature,[11] and has been reviewed more than a dozen times, in academic journals[12] as well as in outlets reaching a wider audience,[13] in English as well as, for example, in French,[14]

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na, the US, the EU and Mexico', JeDEM – eJournal of eDemocracy and Open Government 12 (2020), 1-24.

11 See <https://badge.dimensions.ai/details/id/pub.1164501651>, last access 1 August 2025.

12 See, e. g., Kal Raustiala, 'Digital Empires: The Global Battle to Regulate Technology', AJIL 118 (2024), 592-599; Han-Wei Liu and Weihuan Zhou, 'Digital Regulation in the Shadow of Digital Empires: a Quest for Cooperation?' JIEL 27 (2024), 186-191; Mahmoud Javadi, 'Digital Empires: the Global Battle to Regulate Technology. By Anu Bradford', Int'l Aff. 100 (2024), 849-850; Liam Gregor Moorhouse, 'Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology*', Edinburgh Law Review 28 (2024), 320-322; Neha Mishra, 'Review of Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology*', UC Berkeley Journal of Law and Political Economy 4 (2024), 989-990; Patrick Leblond, 'Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology*', World Trade Review 23 (2024), 548-550; Marta Soprana, 'Digital Empires: The Global Battle to Regulate Technology by Anu Bradford, Oxford University Press, 2023, 352 pp' Chinese (Taiwan) Yearbook of International Law and Affairs 41 (2023), 403-406.

13 John Thornhill, 'AI and the Next Great Tech Shift', Financial Times, 14 September 2023, <https://www.ft.com/content/e2452e84-133b-4674-bfe8-cd82e2d9aeeb>, last access 1 August 2025; Akash Kapur, 'Can the Internet Be Governed?', The New Yorker, 29 January 2024, <https://www.newyorker.com/magazine/2024/02/05/can-the-internet-be-governed>, last access 1 August 2025; Anja Schiffrin, 'Fixing Disinformation Online: What Will It Take to Regulate the Abuses of Big Tech Without Undermining Free Speech?', The American Prospect, 13 October 2023, <https://prospect.org/culture/books/2023-10-13-fixing-disinformation-online-bradford-stebbins-review/>, last access 1 August 2025; Audrey Hatfield, 'The Battle for Digital Supremacy: No Clear Victor in Sight', Medium, 19 September 2023, <https://medium.com/journalism-trends/the-battle-for-digital-supremacy-no-clear-victor-in-sight-80993498d90f>, last access 1 August 2025; Sofia Bonilla, 'The Impact of Competing Tech Regulations in the EU, US and China: A Review of Anu Bradford's Digital Empires', European Journalism Observatory, 12 September 2023, <https://en.ejo.ch/ethics-quality/the-impact-of-competing-tech-regulations-in-the-eu-us-and-china>, last access 1 August 2025.

14 See, e.g, Chloé Bérut, 'Anu Bradford, *Digital Empires. The Global Battle to Regulate Technology*, New York, Oxford University Press, 2023, 599 p.', Politique Européenne 83 (2024), 130-134; Mathilde Velliet, 'Digital Empires: The Global Battle to Regulate Technology. Anu Bradford. Oxford, Oxford University Press, 2023, 608 pages', politique étrangère (2024), 196-199; Catherine Prieto, 'Digital Empires: The Global Battle to Regulate Technology', Concurrences N° 2-2024, Art. N° 118800, (244-246).

Italian,[15] German,[16] Dutch,[17] and Czech.[18] At the same time, ours is the first review symposium of *Digital Empires*, to the best of our knowledge. A symposium is particularly suited to review this book.

This is so for three main reasons. First, *Digital Empires* is an exceptionally broad work, which covers a variety of developments across the globe in the fields of platform regulation, data protection, data security, copyright, and Artificial Intelligence (AI), among others, from the perspectives of law, economics, and policy. Thus, it allows to be commented on from different disciplines, and its scope is prone to spark further suggestions for enriching the perspectives on digital regulation around the globe. This symposium reads *Digital Empires* not as the end of the conversation on the global battle for regulatory influence, but rather as a starting point which allows scholars to deploy – and critique – the lens offered by Bradford.

Secondly, the book is (only or already) two years old. As such, it is a testimony to a particular moment in time. Re-reading it today, the author's hopes and assumptions for alignment between the European and the US approaches stand out much more brightly than at the time of the book's publication. The book describes broad, long-term developments. But at least in hindsight, its underlying policy outlook seems to have viewed geopolitics – as was perhaps inevitable – through the lens of the Biden presidency. Even if the extent of the rupture may have come as a surprise, the early 2020s were thus – already then and even for a Democratic presidency – exceptionally transatlantic. At the time, hopes for transatlantic alignment reflected – at least to a certain degree – a more widely shared expectation of liberally-minded scholarship. Not least under the impression of Russia's full-scale invasion of Ukraine, the US and Europe had come together to jointly support the attacked. There was also a strong conviction by politicians in both regions (or 'empires' in Bradford's terminology) that Big Tech had accumulated too much power, that it needed to be constrained, and that the errors of the laissez-faire approach to tech regulation in the 2000s should not be repeated

15 See, e. g., Siria Carrara, 'A. BRADFORD, Digital Empires. The Global Battle to Regulate Technology, New York, Oxford University Press, 2023, pp. 599' Nomos Le attualità nel diritto (2024), <https://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2024/10/3.-Recensione_Carrara-ultima.pdf>, last access 1 August 2025.

16 See Gerhard Wagner, 'Künstliche Intelligenz – die EU als globaler Regulierer?', Frankfurter Allgemeine Zeitung, 4 March 2024, 18.

17 Caroline de Gruyter, 'Waarom Europa de toon zet in de strijd tussen grote tech-bedrijven', NRC, 7 December 2023, <https://www.nrc.nl/nieuws/2023/12/07/waarom-europa-de-toon-zet-in-de-strijd-tussen-grote-tech-bedrijven-a4183595>, last access 1 August 2025.

18 See, e. g., Martin Erlebach, 'BRADFORD, A.: Digital Empires: The Global Battle to Regulate Technology' Revue pro právo a technologie 29 (2024), 213-220.

in the advent of generative AI. European regulation had just started to gain traction: the GDPR was a couple of years old (and the EU took pride in its power to regulate globally via the 'Brussels Effect'[19]), the Digital Services Act and the Digital Markets Act had been enacted, but were not yet applicable, and the AI Act was already in the making. Today, one looks back at this time of so-close but so-distant history almost with a sense of nostalgia, so sharp is the contrast to the policies of the current US administration, as the contributions to this symposium emphasise.

Thirdly, as we are trying something new with this format – not only a symposium as such, but also a cooperation with a blog to allow for an ongoing exchange – it seemed only fitting that the first book deals with the mutual influences between law and new technologies in an international context.

III. (Re-)Reviewing *Digital Empires*

Against the backdrop of the 'unholy alliance of Big Tech and the Trump administration', Erik Tuchtfeld suggests that there is more to explore in the global regulatory landscape than just three empires (with by now two of them being authoritarian). He points towards Brazil and India as two democratic states which have chosen their own pathway to diminish the influence of private Big Tech companies. In Brazil, the judiciary has confronted Big Tech in what has become a remarkably personalised stand-off between Supreme Court judge Alexandre de Moraes and Elon Musk. In India, the government understands digital infrastructure as public infrastructure and has started to develop an 'India Stack', which offers digital identification and payment services for millions of citizens. Tuchtfeld thus finds looking beyond Bradford's three empires valuable – and, indeed, more uplifting.

Stefania di Stefano's contribution focuses on the role of technology companies as agents in the regulatory space and the interaction between what Bradford describes as horizontal and vertical regulatory battles. Di Stefano emphasises the connections between these two battle dimensions as companies strategically use the horizontal battles between different regulatory empires to win their own vertical battles with states and the EU. She finds this strategy illustrated in companies' shift from alignment with the EU's

19 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

rights-driven approach to alignment with the US's more aggressive deregulation stance in the second Trump presidency. As this re-alignment weakens the EU's rights-driven as well as the traditional US's market-driven approach, di Stefano concludes that this development ultimately stands to benefit the global influence of the Chinese state-driven approach.

In their joint review, Amnon Reichman and Kai Purnhagen identify three underexplored elements in *Digital Empires*: the cost and uncertainty of regulation, the fluidity of regional market competition, and the geopolitical implications of 'data colonialism'. Reichman and Purnhagen highlight the constant regulatory competition faced by the EU. In order to survive as an 'empire', it must demonstrate the added value of its regime to both its constituency and the regulated industry. The authors argue that such value can be found in the function of the European rights-driven model as a legal shield against extractive data collection by foreign companies. At the same time, they highlight how the far-reaching effect of this regulation is also subject to criticism. To some, it is a new form of colonialism, realised by imposing law beyond European borders. Overall, Reichman and Purnhagen conclude, the analytical framework developed by Anu Bradford, can help structure this discussion.

In her response, Anu Bradford agrees that Global South jurisdictions deserve more thorough examination, as they re-position themselves amid growing tensions among the three digital empires and reconsider their dependencies on those empires. Two years after the publication of her book, she finds her hopes of the US and the EU aligning as techno-democracies countering China's digital authoritarianism dashed by the US pivoting towards authoritarianism. At the same time, she notes that the EU's internal challenge of losing confidence in its rights-based regulatory approach threatens the core of its digital empire more than any rupture with an increasingly authoritarian US. As the narrative in EU digital policy increasingly embraces de-regulation to enhance competitiveness, Bradford insists that rights-based digital regulation and competitiveness should not be seen as inherently incompatible. By giving up its regulatory model, the EU would capitulate in the horizontal battle between the digital empires, at a time when the rule of law and liberal democracy are increasingly under pressure globally. Instead, Bradford urges the EU to 'demonstrate that a digital order based on fundamental rights and democracy creates stability and prosperity'.

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IV. Outlook: an Invitation to a Global Conversation

This symposium is intended as the opening of a broader conversation. To this end, we aim to continue the exchange of ideas at Völkerrechtsblog in their open-ended 'ReflectiÖns' review format. This format allows readers of *Digital Empires* to share and further develop the thoughts and critique sparked by this symposium on an ongoing basis, and in a variety of formats – whether in written text, audio, or video comments. Given the global scope of the book, we particularly invite contributions adding additional perspectives from more diverse geographical backgrounds than the review symposium in these pages could reflect.[20]

20 The call for 'reflectiÖns' can be accessed here: <https://voelkerrechtsblog.org/call-for-reflections-digital-empires>.

It's Worth to Look Beyond the Empires – It's Also Less Disappointing

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Anu Bradford's *Digital Empires* is an impressive study of key regulatory approaches across the globe influencing the power of private tech companies. The starting point for the book is the 'concentration of economic, political, and cultural power in a few large tech companies' (p. 2), in particular concerning the dissemination of harmful content, the moderation of democratic discourse, and the all-encompassing tracking of human behaviour online in an economic system rightfully conceptualised as 'surveillance capitalism'[1]. Against this backdrop, she compares the three (main) competing models for the regulation of digital technology: the American market-driven, the Chinese state-driven, and the European rights-driven regulatory model.

Reviewing such a prestigious book two years after its publication provides the opportunity to shorten the usual summary of the author's line of argumentation,[2] and instead to focus on re-reading the book in the light of

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1 Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).

2 To avoid repeating what others have already done extensively, see for example Kal Raustiala, 'Digital Empires: The Global Battle to Regulate Technology. By Anu Bradford', AJIL 118 (2024), 592-599; Patrick Leblond, 'Anu Bradford, Digital Empires: The Global Battle to Regulate Technology', World Trade Review 23 (2024), 548-550; Han-Wei Liu and Weihuan Zhou, 'Digital Regulation in the Shadow of Digital Empires: A Quest for Cooperation?', JIEL 27 (2024), 186-191.

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current developments. In doing so, I will first apply the analytical framework developed by Bradford on the unholy alliance of *Big Tech* and the Trump administration which drives the current constitutional crisis in the USA. The developments of the last months stand in stark contrast to the tentative optimism expressed by Bradford throughout the book, which assumes – or at least hopes for – a progressing convergence of the European and American models for regulating digital technology. Second, I would like to point towards one of the gaps caused by the choice of analysing the regulation of digital technologies (solely) through the lens of three 'digital empires': the lack of attention to (alternative) regulatory models deployed by states in the Global South, such as Brazil and India.

I. The Structure of the Book

Anu Bradford identifies the US, China, and the EU as the three 'digital empires' which are the dominant digital powers in today's world. All equipped with a distinct governance model (market-driven, state-driven, rights-driven) and a unique vision for the digital economy, they have '[n]ot unlike the empires of the past […] further exported their domestic models in an effort to expand their respective spheres of influence' (p. 6). In the first part, consisting of three chapters, each of the models is described in detail. This part is an excellent introduction to the legal regulation of digital technologies under the respective legal frameworks. It becomes particularly interesting when Bradford not only emphasises the differences between the three governance models but also highlights their similarities. In these parts, the book's at times belligerent narrative ('empires', 'wars', 'battles') is left behind and a refreshing nuance is added to the comparison, which is often lacking in political and legal discussions.

The three 'digital empires' engage in 'horizontal battles' amongst each other, where they fight for rule-setting power, market shares, and digital sovereignty (chapter 5-6, curiously, no chapter is dedicated to a conflict between China and the EU). Furthermore, they also fight 'vertical battles' on privacy, data access, and content moderation with private – primarily foreign – companies (chapter 4). The last part of the book analyses the strategies of each of the 'empires' to enlarge its sphere of influence, from the private power of American *Big Tech* companies promoted by the government's 'internet freedom agenda' (currently experiencing a stark backlash, chapter 7) and the export of Digital Authoritarianism through infrastructure by China (chapter 8) to the extra-territorial effects unfolding from Europe's digital

regulation (chapter 9, described in more detail in Bradford's book on the Brussels Effect[3]).

II. Vertical Battles as System of Checks and Balances

Discussing the book today, more than half a year into the second term of the Trump administration, one must recognise that a cautious, but hopeful prediction by Anu Bradford has not become reality. At the end of the chapter on the 'US-EU Regulatory Battles', she paints the picture of a 'new era in transatlantic digital policy where the United States (US) and the European Union (EU) are prepared to put aside their mutual regulatory battles in order to focus on the battle that many argue matters the most: the joint battle to defeat digital authoritarian norms embedded in the Chinese state-driven regulatory model and to defend liberal democracy as a foundation of the digital economy' (p. 254, see also p. 387). Unfortunately, current developments suggest that quite the opposite is the case.

In its first months, the new Trump administration has proven not to be an ally in the battle against digital authoritarianism, but rather the very concrete incarnation of it. The new administration does not only dismantle the rule of law, ignore judgements by Federal Courts, deport people illegally, arrest judges, and dismiss thousands of civil servants,[4] but it aims to replace systems of good administration, public participation, and democratic processes with a new promise of Artificial Intelligence (AI)-driven automation.[5] Spearheaded in the first months by Elon Musk, CEO of X (formerly Twitter) and Tesla and then-part-time 'Senior Advisor to the President', and his newly-created 'Department of Government Efficiency' (DOGE), Musk-loyal engineers have taken over databases from departments all across the government. Some of these databases included highly sensitive information about US citizens and companies, such as health information, financial data, and contractual information of competitors of Musk. While it remains unclear what the exact

3 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

4 For an overview see collaborative projects like 'US Democracy Under Threat', Verfassungsblog, <https://verfassungsblog.de/us-democracy-under-threat/>, last access 18 May 2025; and 'Tracking Trump Administration Litigation', Lawfare, <https://www.lawfaremedia.org/projects-series/tracking-trump-administration-litigation>, last access 18 May 2025.

5 For an overview with further references on the concrete measures which have taken place, see Rainer Mühlhoff, 'The New Fascism Is Here – And Big Tech Is Running It', Verfassungsblog, 9 February 2025, <https://rainermuehlhoff.de/en/The-New-Fashism/>, last access 18 May 2025; Eryk Salvaggio, 'Anatomy of an AI Coup', Tech Policy Press, 9 February 2025, <https://techpolicy.press/anatomy-of-an-ai-coup>, last access 18 May 2025.

purpose to access all these information is, public statements of DOGE officials suggest the idea of one centralised data repository, one database containing all the information about all people and companies in the US.[6] This dream for the authoritarian surveillance state, and nightmare for liberal democracies, is qualified by scholars and political commentators as an 'AI coup'[7] paving the way to a 'new fascism'[8].

It's an odd variant of *state-driven* regulatory model which is currently unfolding in the US. The alliance of tech oligarchs with the Trump administration was most prominently depicted by iconic pictures of his inauguration, showing all of them assembled to cheer the new President.[9] It is not so much formed by legal coercion, such as regulation requiring *Big Tech* companies to act in a certain way, but by strategic anticipatory obedience.[10] This obedience to the erratic wishes of the political leader appears to be driven in some cases by personal convictions (e. g. Elon Musk – before publicly breaking ties with the Trump administration), in other cases it is probably based on purely economic considerations, as Di Stefano shows in her review in this symposium, and possibly also fear of retaliation measures in cases of disobedience.

Whatever the motivation of these companies is, it leads to the cessation of any kind of *vertical battle* within the US which could serve as an instrument of checks and balances towards the current administration. As Bradford points out, *Big Tech* companies have in the past, for example, restrained US government's surveillance operations by 'minimal compliance and aggressive litigation' (p. 61). While it is true that many of those companies were also wiling partners in national security and law enforcement efforts (p. 62), the partial resistance which had incorporated 'elements of the rights-driven and state-driven regulatory approaches' (p. 62) now seems to have been given up completely. It is this function of vertical battles to resist governmental overreach which the book already hints at, but which is only now coming to the forefront as it is falling away.

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6 Makena Kelly, 'DOGE Is Building a Master Database to Surveil and Track Immigrants', Wired, 18 April 2025, <https://www.wired.com/story/doge-collecting-immigrant-data-surveil-track/>, last access 18 May 2025.

7 Salvaggio (n. 5).

8 Mühlhoff (n. 5); published first in German: Rainer Mühlhoff, 'Trump und der neue Faschismus', Verfassungsblog, 9 February 2025, <https://verfassungsblog.de/trump-und-der-neue-faschismus/>, last access 12 March 2025.

9 Ali Swenson, 'Trump, a Populist President, Is Flanked by Tech Billionaires at His Inauguration', AP News, 20 January 2025, <https://apnews.com/article/trump-inauguration-tech-billionaires-zuckerberg-musk-wealth-0896bfc3f50d941d62cebc3074267ecd>, last access 18 May 2025.

10 For the companies' strategic alignment or disalignment with the different approaches of the US and Europe, see Stefania Di Stefano, 'Tech Companies in the Digital Wars: Rebels or Stormtroopers?', HJIL 85 (2025), 941-948.

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Instead, US companies seem to focus on vertical battles in Europe and are actively challenging the regulation there – by labelling it as 'censorship'.[11] Their alliance with the US government transforms these vertical battles to horizontal battles: From Vice-President Vance echoing the equation of content moderation with 'censorship' to the announcement that sanctions for non-compliance with European regulation will be understood as tariffs and met with countermeasures.[12] Such transformation of conflict is a phenomenon which Bradford already observed for the past (p. 221) but which reached a substantial new intensity under the current administration. The fact that the book's hopes for an alignment of the US-American and the European model have not materialised is a painful reminder of what was still considered possible two years ago.

III. There's More Than Three Empires – Brazil's Vertical Battles

Instead of further deepening this pain, it might be healthier to look for gaps, for areas of digital regulation which are left open by the book. The book's narrative, with its focus on the USA, China, and Europe, and the story of three 'empires' engaging in 'battles' with companies and amongst each other, simplifies today's complex multi-polar geopolitical landscape to a certain extent. The three chosen entities resemble the foundational post-World War II structure of geopolitics, leaving only Russia out of this old group of 'empires' (it's only mentioned as one example of state-driven authoritarianism, p. 308-313). As a consequence of this choice, the role of states of the Global South remains un(der)explored in *Digital Empires*.

One prominent example for this is Brazil. There, a special variant of a 'vertical battle' can be observed. While these are generally taking place between legislators or supervisory authorities, on the one side, and tech companies, on the other, it's the judiciary which became unusually active in Brazil. In March 2019, the then-President of the Supreme Federal Court,

11 Théophane Hartmann, 'US Tech Moguls Slam EU Digital Rulebook', Euractiv, 13 January 2025, <https://www.euractiv.com/section/politics/news/us-tech-moguls-slam-eu-digital-rulebook/>, last access 18 May 2025.

12 Deepa Shivaram, 'Vance Scorches European Allies in Munich Speech, Lecturing Them about Democracy', NPR, 14 February 2025, <https://www.npr.org/2025/02/13/nx-s1-5290258/vance-munich-security-conference-trump-putin-zelenskyy-russia-ukraine>, last access 18 May 2025; Anupriya Datta, 'Trump Threatens to Launch Tariff Attack on EU Tech Regulation', Euractiv, 22 February 2025, <https://www.euractiv.com/section/tech/news/trump-threatens-to-launch-tariff-attack-on-eu-tech-regulation/>, last access 18 May 2025.

Dias Toffoli, ordered an inquiry into personal attacks and false news concerning Supreme Court judges. This inquiry has developed into a year-long investigation, whose face Justice Alexandre de Moraes has become, crowned as 'Brazil's Defender of Democracy' by the New York Times.[13] In the course of this investigation, de Moraes has requested the takedown of thousands of social media posts and dozens of accounts.[14] When X (formerly Twitter) only geoblocked pieces of content, he did not shy away from ordering their global takedown[15] – raising complicated questions of overlapping jurisdictions. He also ordered the demonetisation of content disseminating disinformation during the Brazilian elections of 2022,[16] banned – in a remarkably personalised stand-off between de Moraes and Musk – X in Brazil for non-compliance with removal orders and included Musk as suspect in a criminal inquiry concerning the spread of false information.[17]

These actions by the Brazilian Supreme Court are all taking place at a time when democracies around the world start to deploy measures to protect the integrity of elections against disinformation and other forms of foreign interference. As the most populous state and biggest economy in Latin America, the actions of the Brazilian judiciary are closely followed by its neighbouring countries. As an established democracy with a strong judiciary, embedded in a regional human rights framework, the Brazilian case is also more comparable and accessible to European policymakers (and enforcement authorities) than, for example, Chinese approaches. Thus, it is evident that not only Brussels influences regulation in other states (as described extensively in chapter 9), but that also European regulation is informed by regulatory projects in other states. While several of such regulatory initiatives are briefly mentioned throughout the book, its general narrative of a (currently) tripolar digital world order tempts the reader to

13 Jack Nicas, 'He Is Brazil's Defender of Democracy. Is He Actually Good for Democracy?', The New York Times, 22 January 2023, <https://www.nytimes.com/2023/01/22/world/americas/brazil-alexandre-de-moraes.html>, last access 18 May 2025.

14 Nicas (n. 13).

15 Supremo Tribunal Federal (2020) INQ 4781 / DF; for an English summary see '*The Case of the Brazil Fake News Inquiry*', Global Freedom of Expression, <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-the-brazil-fake-news-inquiry/>, last access 18 May 2025.

16 Tribunal Superior Eleitoral (2021) 0600371-71.2021.6.00.0000; for an English summary see '*The Case of Disinformation Demonetization on Brazilian Social Media*', Global Freedom of Expression, <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-disinformation-demonetization-on-brazilian-social-media/>, last access 18 May 2025.

17 Supremo Tribunal Federal (2024) INQ 4.874 / DF; for an English summary see '*Federal Supreme Court of Brazil v. Elon Musk and X*', Global Freedom of Expression, <https://globalfreedomofexpression.columbia.edu/cases/federal-supreme-court-of-brazil-v-elon-musk-and-x/>, last access 18 May 2025.

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forget about the manifold regulatory interactions and entanglements of these 'empires' with other jurisdictions.

IV. Digital Sovereignty as a Question of Digital Public Infrastructure – the India Stack

The discussion on digital infrastructure is another area where the focus on the three 'empires' might have overshadowed the global influence of other states. Bradford highlights the importance of infrastructure mainly by analysing the dependence both of the US and the EU on Chinese manufacturing (but also on surveillance technologies, chapter 8). At the same, China strategically reduced its dependency on others by implementing strict data localisation measures, investment and export control (p. 199-207). These policies are discussed under the umbrella of 'techno-nationalism' or 'Digital Sovereignty' and comprise of a variety of measures to decrease dependence on foreign hardware, such as semi-conductors, or services, such as social media platforms. The motivation for such policies is manifold: the protection and security of citizen's data and sensitive information, economic rationalities to avoid being helplessly exposed to uniliteral price hikes, or the desire to increase the adherence to certain values, to name but a few. Bradford sharply observes how also the EU (pp. 133-136, 214-215) and the US (pp. 183-196, 212-214) are increasingly introducing such policy measures, which – at least partly – are considered to be inconsistent with the long-established aim of fostering free trade and reducing any kind of barrier.

This debate, however, is not unique to the three 'empires'. The question of dependency on foreign companies for providing essential services is discussed all around the world, often under the theme of 'digital *public* infrastructure'. On the international level, digital public infrastructure featured prominently in the Global Digital Compact, designated there as a 'key [driver] of inclusive digital transformation and innovation'.[18] One of the most ambitious projects in this field is the 'India Stack'. The idea of the India Stack is to provide a set of open standards, application programming interfaces (APIs) and basic components which facilitate broad access to, among others, digital identification and payment services.[19] Despite facing some criticism from privacy

18 'The Pact for the Future, Annex I – Global Digital Compact', UNGA Res 79/1 of 22 September 2024, A/RES/79/1, paras 14-17.

19 Vivek Raghavan, Sanjay Jain and Pramod Varma, 'India Stack – Digital Infrastructure as Public Good', Communications of the ACM 62 (2019), 76-81; Smriti Parsheera, 'Stack Is the New Black?: Evolution and Outcomes of the 'India-Stackification' Process', Computer Law & Security Review 52 (2024), 105947; see also 'India Stack', <https://indiastack.org/>, last access 18 May 2025.

activists and lawyers for collecting and sharing biometric information for identification purposes,[20] the Stack is generally considered to be the prime example of basic digital infrastructure being provided by a government, enabling access to financial and other essential services for millions of citizens.[21]

More recent initiatives like the EuroStack[22] or the 'Deutschland-Stack'[23], which are using the India Stack as point of reference, demonstrate India's pioneering role in this area in recent years. This development is one of the signals that there is more than three empires competing for global supremacy in tech regulation. The field is also being shaped by states of the Global South. They are not waiting to see the outcome of the battles being fought out by China, Europe, and the US, but are actively influencing the global development and regulation of technology by pursuing their own visions.

V. Conclusion

Digital Empires provides a fascinating and insightful analysis of the global (public) regulation of digital technology. By taking a state-centric perspective, it is able to present in detail the public law response to the ever-increasing accumulation of private power in the last decades. It is, thus, also a compelling argument against the cry of helplessness uttered too often by scholars and activists: regulation would come too late, always be reactive, and be distorted beyond recognition by lobbying efforts before becoming law. While all of these complaints are true to a certain extent, Bradford's *Digital Empires* shows that public regulation is not a mere bystander of technological development. Instead, the three distinct models described by her all have actively shaped it in different ways. This is in no way a trivialisation of the

20 Manish Singh, 'India's Database with Biometric Details of Its Billion Citizens Ignites Privacy Debate', Mashable (14 February 2017), <https://mashable.com/article/india-aadhaar-uidai-privacy-security-debate>, last access 18 May 2025.

21 Yan Carrière-Swallow, Manasa Patnam and Vikram Haksar, 'The India Stack Is Revolutionizing Access to Finance', *International Monetary Fund*, July 2021, <https://www.imf.org/external/pubs/ft/fandd/2021/07/india-stack-financial-access-and-digital-inclusion.htm>, last access 18 May 2025; Felix Sieker, 'Aadhaar and the Rise of Digital Public Infrastructure in India', reframe [Tech] / Bertelsmann Stiftung, 13 November 2024, <https://www.reframetech.de/en/2024/11/13/aadhaar-and-the-rise-of-digital-public-infrastructure-in-india/>, last access 18 May 2025.

22 Francesca Bria, Paul Timmers and Fausto Gernone, 'EuroStack – A European Alternative for Digital Sovereignty', Bertelsmann Stiftung 2025, <https://www.euro-stack.info>, last access 18 May 2025, with a short comparison to the IndiaStack on p. 95.

23 'Koalitionsvertrag (Coalition Treaty)' (CDU, CSU, and SPD 2025), 67, <https://www.koalitionsvertrag2025.de/sites/www.koalitionsvertrag2025.de/files/koav_2025.pdf>, last access 18 May 2025, for a reference to the EuroStack see p. 70.

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private power in the hands of very few companies, not least because Bradford also describes how some horizontal battles between tech companies might be, for example, 'a considerably more effective way to realise the goals of the General Data Protection Regulation (GDPR) than any effort by European privacy regulators' (p. 383). Instead, it is a compelling reminder that private power is not god-given, but the result of political choices. Hence, a different digital world is possible if only there is the will to build it.

Unfortunately, looking at the three 'empires' from today's perspective, it seems that the strongest will to change the digital world is the one of Donald Trump to make it a less free, less equal, and less just place. If this were the end of history, state-driven authoritarianism would be winning. But it is not. There are more than three 'empires' which shape technology globally. More states are part of these regulatory 'battles', many with distinct visions on how to shape the digital world. After all, global internet governance's multi-stakeholder approach always acknowledged that there is even more than states and companies. As the focus on the three 'empires' becomes increasingly depressing, it might be rewarding to zoom out a little and consider the global diversity of different regulatory approaches. There is a lot more to unfold and to learn – both for imitation and as a deterrent.

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Tech Companies in the Digital Wars: Rebels or Stormtroopers?

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I. Introduction

Anu Bradford's *Digital Empires* offers a compelling overview of the three regulatory models that shape digital governance globally: the United States (US), China and the European Union (EU). In her book, she explores how these models, while incorporating the same three constitutive elements, namely markets, states, and rights, each place a different emphasis on these elements. The US model is market-driven, the Chinese model is state-driven, and the EU model is rights-driven. In promoting different regulatory approaches, these 'digital empires' engage in horizontal battles with one another, as well as in vertical battles with technology companies. Bradford meticulously unpacks, with clarity and precision, how these battles take place, the conflicts that are yet likely to arise, and the challenges that regulators face in the context of digital governance within each of these regulatory models.

Bradford convincingly demonstrates that while much attention has been devoted to the horizontal battle between the US market-driven model and the Chinese state-driven model, the relevance of the EU rights-based model should not be underestimated. She argues that the EU is not 'a bystander, caught between the two powers battling for technological supremacy', but 'has asserted itself […] as the most powerful regulator of the digital economy'

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(pp. 11-12). One of the key conclusions of the book is that, in light of the decline of the US market-driven model, prompted also by 'the tremendous success of the US tech companies' which 'may have sown the seeds of [its] demise' (p. 362), the US finds itself having to 'choose between joining forces with the EU or allowing China's influence to further grow' (p. 361). Bradford contends that a trend towards greater alignment between the US and the EU is on its way, with their horizontal conflict 'show[ing] signs of abating as the domestic preferences in the US are shifting toward those prevailing in the EU' (p. 387). Crucially, she argues that an alignment between the US and the EU in pursuing (at least some of) the goals of the rights-driven regulatory model could pave the way for a coalition of techno-democracies that could challenge techno-autocracies (pp. 387-393).

Throughout the book, a shiny spotlight is directly pointed at these digital empires. While tech companies are indeed big players in the tech wars analysed in the book, the light pointed at them seems somewhat dimmer. As a reader who wears 'international human rights law' spectacles, and who has devoted much attention to the role of tech companies themselves in shaping the regulatory approach towards content moderation, I found myself particularly captivated by the role that these companies have in the horizontal battles between these empires as well as in the vertical battles they engage in against these empires. While their role is mostly examined from the perspective of the empires themselves, a relevant question that would need to be unpacked more explicitly is how these companies strategically align (or disalign) with each of these empires' approaches to digital governance to their own advantage. Such a question becomes even more pertinent as, since the publication of the book in September 2023, the US has seen the beginning of a second Trump administration. In a short period of time, this administration has pulled away from the trajectory Bradford draws in the concluding chapter of the book. If, at the time of writing, 'the idea of a closer cooperation among techno-democracies [was] gaining momentum, in part because it benefit[ted] from strong political backing by the US government' (p. 390), such momentum seems now gone. Importantly, we are now witnessing shifting alliances between tech companies and these empires, with US tech companies moving away from the EU rights-driven model and openly siding with the Trump administration.

In this review, I therefore focus on how tech companies fit within the wider horizonal conflicts that Bradford analyses in her book. In particular, I argue that these shifts in tech companies' alliances with these digital empires exemplify how the companies are in fact leveraging the horizontal battles between these regulatory models to the benefit of their own vertical battles. As such, the alliances between tech companies and digital empires bear

significant weight for the outcome of the horizontal battles between regulatory models. To illustrate these dynamics, I will take Meta as a case-study. I then conclude that these recent developments further weaken the US market-driven model while endangering the position of the EU rights-driven model, ultimately benefitting the Chinese state-driven approach. In this landscape, for the EU to succeed in its vertical battles against tech companies, it must enforce its rights-driven model rigorously and harness the power of these companies to enforce regulations.

II. The Rights-Driven Approach Awakens

As Bradford well describes in her book, tech companies had gradually shifted towards the EU rights-driven model. In her view, such a move had also negatively impacted the relevance of the US market-driven model. The alignment of tech companies with a rights-driven approach demonstrated, in fact, that 'even the tech companies themselves no longer believe[d] in the techno-libertarian ethos that underlies the American market-driven regulatory model' (p. 384).

Tech companies' move towards a rights-driven model is to be situated in the context of the so-called techlash that had hit the sector from 2016 onwards. As also widely discussed in the book, the scandals that involved major tech companies resulted in vocal calls for regulation.[1] Interestingly, in this context, tech companies themselves began to call for regulation. In 2018, Mark Zuckerberg declared, through a note on his personal Facebook profile, that he believed 'the right regulations will also be an important part of a full system of content governance and enforcement' and that 'everyone would benefit from greater clarity on how local governments expect content moderation to work in their countries'.[2] He added that the company was 'working with several governments to establish these regulations […] including *hopefully* the European Commission to create a framework for Europe'.[3] Such a belief was reiterated other times, including in 2020, when in another Facebook note he stated that he did not think 'private companies should be

1 For an overview of the drivers of platform regulation, see, e.g., Robert Gorwa, *The Politics of Platform Regulation: How Governments Shape Online Content Moderation* (1st edn, Oxford University Press 2024).

2 Mark Zuckerberg, 'A Blueprint for Content Governance and Enforcement', Facebook, 15 November 2018, <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634>, last access 25 August 2020.

3 Zuckerberg, 'A Blueprint' (n. 2), emphasis added.

making so many important decisions that touch on fundamental democratic values' and he hoped to get clearer rules for the internet.[4]

Calls for regulation were also accompanied at Meta by an explicit commitment to international human rights law and the framework offered by the United Nations (UN) Guiding Principles on Business and Human Rights.[5] The creation of the Oversight Board[6] can also be seen as part of this commitment. The Board is empowered to interpret Meta's content policies and values, and must also consider the impact of the company's content decisions in light of human rights norms protecting free speech.[7] The Oversight Board, which has been compared to a 'de facto international human rights tribunal',[8] has taken an active role in translating the application of international human rights law for the company's implementation in their content moderation practices.[9]

Meta's commitment to human rights has been characterised as a co-optation of the language of human rights.[10] The international human rights law framework has also been deemed inappropriate for regulating these issues,[11] with Meta's engagement potentially amounting to cosmetic compliance.[12]

4 Mark Zuckerberg, 'Every New Year of the Last Decade I Set a Personal Challenge', Facebook, 9 January 2020, <https://www.facebook.com/zuck/posts/10111311886191191>, last access 8 April 2023.

5 Meta, 'Corporate Human Rights Policy', Human Rights, <https://humanrights.fb.com/policy/>, last access 24 July 2024.

6 Facebook, 'Establishing Structure and Governance for an Independent Oversight Board | Facebook Newsroom', <https://newsroom.fb.com/news/2019/09/oversight-board-structure/>, last access 28 October 2019.

7 'Oversight Board Charter', February 2023, Art 2, <https://www.oversightboard.com/wp-content/uploads/2023/11/3427086457563794.pdf>, last access 4 August 2025.

8 Laurence R. Helfer and Molly K. Land, 'The Facebook Oversight Board's Human Rights Future', Cardozo Law Review 44 (2023), 2233-2301.

9 Stefania Di Stefano, 'Translating and Developing International Human Rights Law in the Online Sphere: The Role of Meta's Oversight Board', in: Irene Couzigou (ed.), *International Law and Technology Change: Testing the Adaptability of International Law* (Elgar Publishing, forthcoming), available at SSRN: https://papers.ssrn.com/abstract=4920875, last access 10 November 2024.

10 See, for example, Evelyn Douek, 'The Limits of International Law in Content Moderation', UC Irvine Journal of International, Transnational, and Comparative Law 6 (2021), 37-76; Barrie Sander, 'Freedom of Expression in the Age of Online Platforms: Operationalising a Human Rights-Based Approach to Content Moderation' Fordham Int'l L. J. 43 (2020), 939-1006.

11 See, for example, Brenda Dvoskin, 'Expert Governance of Online Speech', Harv. Int'l L. J. 64 (2023), 85-136; Rachel Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality', European Law Open 2 (2023), 30-56.

12 Stefania Di Stefano, 'Diligence Raisonnable en Matière de Droits Humains et Réseaux Sociaux: Conformité Cosmétique et Fausses Promesses?', in Sarah Jamal and Javier Tous (eds), *Réseaux sociaux et droits de l'Homme: quel(s) droit(s), pour quelle protection ? Actes du colloque des 7 et 8 décembre 2022*, (Pedone 2024), 167-196.

Nonetheless, such an engagement with rights-driven approaches to digital governance has without doubt strengthened the appeal and relevance of the EU model. This approach also testifies how, 'in a world of shifting public consciousness and intensifying regulatory scrutiny, tech companies aim to strike a more conciliatory tone' (p. 385).

III. Reforging Old Alliances: the (US) Empire Strikes Back?

Yet, the developments of the past few months also lend truth to the claim that 'the conciliatory rhetoric often belies continuing attempts to shape the regulatory environment in ways that allow these companies to preserve their core business models' (p. 385). Since the beginning of the second Trump administration, tech companies have adopted a hostile approach to rights-driven models. This is exemplified by Mark Zuckerberg's announcement, in January 2025, that he will 'protect free expression worldwide' by working with President Trump to push back on regulation.[13] In his video announcement, Zuckerberg accuses foreign governments, including the EU, of 'going after American companies' and of enacting an 'ever-increasing number of laws institutionalising censorship'.[14] Such a positioning stands in stark contrast with the earlier calls for regulation and the previous alignment with the EU rights-driven model.[15]

In moving towards an open challenge to regulation, tech companies are seeking to create an alliance with the US in order to fight their vertical battle against the EU. This 'newfound' alignment with the US market-driven model is evidenced by the language used by Zuckerberg, which recalls the main elements of the US Internet Freedom Agenda: the nonregulation principle and the anti-censorship principle (pp. 265-276). Yet, the framing of these principles amounts to a distortion of language.[16] In his speech, in fact,

13 Mark Zuckerberg, 'It's Time to Get Back to Our Roots Around Free Expression. We're Replacing Fact Checkers with Community Notes, Simplifying Our Policies and Focusing on Reducing Mistakes. Looking Forward to This next Chapter', Video,| Facebook, 7 January 2025, <https://www.facebook.com/watch/?v=1525382954801931&ref=sharing>, last access 3 April 2025.

14 Zuckerberg, 'It's Time' (n. 13).

15 Stefania Di Stefano, 'Zuckerberg's "Updated" Recipe for Meta: "Prioritize Speech" and Neglect Human Rights', OpenGlobalRights, 23 January 2025, <https://www.openglobalrights.org/zuckerbergs-updated-recipe-for-meta-prioritize-speech-and-neglect-human-rights/>, last access 3 April 2025.

16 Rebecca Hamilton, 'Unpacking the Meta Announcement: The Future of the Information Ecosystem and Implications for Democracy', Just Security, 8 January 2025, <https://www.justsecurity.org/106156/unpacking-meta-announcement-democracy/>, last access 3 April 2025.

Zuckerberg repeatedly and consistently conflates content moderation with censorship. However, as also underscored by Rebecca Hamilton, while both content moderation and censorship can shutter speech, 'just like two different instruments playing the same note have a different quality, so too, the term content moderation has a different quality than the word censorship'.[17] Content moderation refers to the process of reviewing content to determine its alignment with existing company policies and standards. Censorship, on the contrary, refers to 'suppression of speech that, when done unlawfully by the government, can violate the U. S. Constitution, or international human rights law'.[18] As such, '[r]eplacing 'content moderation' with 'censorship' degrades our understanding of both terms.'[19]

The strategic use of the constitutive language of the US market-driven approach also signals a cessation of the vertical battles between tech companies and the US administration.[20] Yet, it is unclear whether an alliance between the US administration and US tech companies will allow the US market-driven model to strike back. As argued by Erik Tuchtfeld in his review in this symposium, the US market-driven model itself is eroded by the Trump administration, which has proven to be not 'an ally in the battle against digital authoritarianism, but rather the very concrete incarnation of it'. If the US market-driven model is weakened by the erratic developments unfolding in the US, the EU rights-based model is also at risk of being dangerously undermined in this landscape. Crucially, these developments confirm that the vertical battles between governments and tech companies are not to be underestimated, and that US companies in particular 'may occasionally feel that they are more powerful than the [Western] national governments trying to regulate them' (p. 164).

The corporate shift towards the EU rights-driven model was perhaps an attempt to strike a conciliatory tone, but it was also a strategic move aimed at avoiding full responsibility for the scandals tech companies had been involved in. Calls for 'clearer rules for the internet' and claims that tech companies should not be 'arbiters of truth' ultimately shift the responsibility of content moderation entirely on governments. The embrace of the EU model can therefore be seen as a 'weaponised incompetence' move, implying that it was also the lack of regulation that led to those scandals. It is also important to recall that, in that historical context, tech companies were

17 Hamilton (n. 16).

18 Hamilton (n. 16).

19 Hamilton (n. 16).

20 For an overview of the role of vertical battles as a potential system of checks and balances, see Erik Tuchtfeld's review in HJIL 85 (2025), 931-939.

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suffering from deep reputational damage and were therefore unable to take a combative stand against the EU (p. 382).

In finding an ally in the US government, such a combative stand is once again within reach. This alliance, however, directly undermines the creation of a coalition of techno-democracies that could counter the rise of techno-autocracies. The alliances that tech companies forge with these empires in the technology battlefield bear significant consequences for the outcome of the horizontal battles between the US, the EU and China. They also confirm that 'the question surrounding vertical battles is […] not whether governments, as a general matter, can control tech companies, but whether *democratic governments* can do so' (p. 393). As the US model now leans towards an emphasis on state control and techno-nationalism, it is rather the state-driven model that strikes back, establishing itself as the most effective for fighting vertical battles with tech companies.

IV. Conclusion

Digital Empires offers a much-needed framework for understanding the current tech wars between the US, the EU and China. As these battles continue to unfold, it is crucial to direct a brighter spotlight at tech companies' strategic choices and the alliances they forge in the battlefield. Tech companies, in fact, in an effort to preserve their core business models, are actively leveraging the horizontal battles between these digital empires. The alignment (or disalignment) of US tech companies with the EU rights-driven model is an example of the strategic alliances pursued by them. The embrace of this model came at a moment of significant trust deficit, and the alliance with the EU regulatory model (and the de-escalation of those vertical battles) represented the most conducive pathway to the preservation of tech companies' business models.

Yet, with the re-election of Trump, US tech companies have shifted towards reforging a newfound alliance with the US administration in order to fight their vertical battle against the EU on more solid grounds. While presenting themselves as *rebels* against the EU digital empire, tech companies may instead be becoming the new *stormtroopers* of the US digital empire. If these strategic choices are beneficial to tech companies' business models, they also represent a significant threat to the wider geopolitical battle between democracy and autocracy. These moves may significantly undermine the relevance and effectiveness of the EU rights-driven model but also fail to restore trust in the US techno-libertarian approach, which is currently leaning towards techno-nationalism.

The ultimate beneficiary of this state of affairs is neither the US tech industry nor the US market-driven model, but the Chinese state-driven model. In this context, the vertical battle between the EU and tech companies becomes even more critical. The horizontal war between techno-democracies and techno-autocracies will be determined by the outcome of these vertical battles. In this shifting landscape, the strategies of tech companies in the technology battlefield deserve more scrutiny. Crucially, the success of the EU will be determined by its ability to remain committed to the rights-driven values that guide its approach and 'follow through with more potent enforcement' (p. 380), but also by its ability to harness the power of tech companies to enforce its digital regulations.

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Taking Empires Seriously: Three Missing Elements in Bradford's 'Digital Empires'

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I. Introduction

Anu Bradford develops the framework of 'digital empires',[1] namely the economic and legal key regimes[2] that shape, directly or by exerting indirect influence, today's digital sphere at the global scale (pp. 33-145). She analyses the operational logic of the three contemporary digital empires: the United States (US) market-based logic, the state-based and infrastructure-driven logic of China, and the rights-oriented logic of the European Union (EU). The book examines the investment choices tech companies face in (or to-

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1 Anu Bradford, *Digital Empires* (Oxford University Press 2023).

2 Regime is defined as 'principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area' (Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in: Stephen Krasner (ed.) *International Regimes* (Cornell University Press 1983), 1.

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wards) each of these regimes, thereby expanding on Bradford's seminal scholarship on the 'Brussel's Effect'.[3]

'Digital Empires' provides a compelling account of global regulatory competition in the data market and the enduring impact of the Brussels Effect. By developing the conceptual framework of the digital empire and by unpacking the logic of the main players, this innovative book offers terms for the transnational conversation on law, policy, and technology.

We contend that taking the notion of 'digital empires' seriously – i. e., as a non-transient organising feature of the socio-economic digital landscape – attention should be paid to three elements the book either assumes or leaves under-explored: the cost and uncertainty of regulation, the fluidity of regional market competition, and the geopolitical implications of data colonialism. These factors are relevant to all three 'imperial' powers. For brevity, we will focus on the EU, and we will refrain from addressing the possible recent change of attitude by the Trump administration.

The EU meets the criteria of a digital empire since the industry within and outside its formal borders and decision-makers in other jurisdictions, are decisively incentivised to follow its regulatory approach, in particular as set forth in the General Data Protection Regulation (GDPR) (pp. 324-360). These incentives, formulated in Bradford's previous work, stem from the combined impact of five factors, that could be understood as conditions, since once met, the regulatory 'imperial' power emerges. These are: a significant market share, regulatory capacity, the political will to generate stringent rules, the inelasticity of the targets of the regulation, and the non-divisible nature of the products and production.[4] As Bradford shows, the EU meets these conditions. The first three are rather straightforward. As for the latter two – the EU focuses on consumer protection and therefore it is unlikely that consumers will migrate out of the EU (hence, the inelasticity), and it makes little sense to produce digital artifacts tailed solely to the EU market (hence, the non-divisibility). The EU thus may resist the market-base technological prowess of the US on the one hand, and state-run infrastructural powers of China on the other (pp. 324-360).

3 Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

4 Bradford, *Digital Empires* (n. 1), 324-360. For analysis, see e. g. Dominique Sinopoli and Kai Purnhagen, 'Reversed Harmonization or Horizontalization of EU Standards?: Does WTO Law Facilitate or Constraint the Brussels Effect?', Wis. Int'l L. J. 34 (2016), 92-119 (99).

II. Unpacking 'The Empires' and the Transnational Effects

We argue that three critical factors must be recognised, and then empirically examined, for Bradford's claim to stand: the impact of regulatory costs (including uncertainty cost), the role of regional competition beyond the Empires, and the structure of data colonialism (in preventing, circumventing, or overcoming data sovereignty).

1. Regulatory Optimisation: Costs and Uncertainties in the EU Model

The EU regulatory model is advanced and complicated. Deploying the rules, institutions and procedures entails substantial benefits, but also generates costs, associated with implementation and enforcement (but also with opportunities that are left unexplored). For the EU to sustain its 'empire', the internal community has to perceive the benefits of this model as sufficiently significant (and worthwhile) so that it is willing to bear the associated costs.[5] Seen from this perspective, rules must not only be stringent; They have to be *rational* (i. e., the means must be tailored to achieve the purpose in practice, not only 'in the books'[6]). They need to be *consistent* (so that one legal regime fits well with the requirements of a neighbouring legal regime[7]). They need to be *predictive*[8] so that the industry can plan accordingly, and they need to be *adaptive* (so as to address the fast pace and non-linearity of technological innovation to adjust for mitigating risks while facilitating responsible innovation[9]). The institutional capacity necessary to generate such a regime is not

5 Bradford recognises the importance of acceptance when she refers to Eurobarometer results (p. 107). She likewise addresses the 'cost' criticism (p. 354). However, she stops short of embracing a robust cost/benefit argument as needed to take the empire claim seriously.

6 Roscoe Pound, 'Law in Books and Law in Action', American Law Review 44 (1910), 12-36; Jean-Louis Halperin, 'Law in Books and Law in Action: The Problem of Legal Change', Maine Law Review 64 (2011), 45-76. The 'suitability' part of the proportionality test covers parts of this claim, however, what we mean by 'rational' goes beyond 'suitability' to include empirically observed impact.

7 Inge Graef and Bart van der Sloot (eds), *The Legal Consistency of Technology Regulation in Europe* (Hart 2024).

8 By 'predictive' we mean anticipatory: regulation should not only respond to past events but also to emerging patterns by anticipating their impact. Predictive regulation also seeks the return of compliance investments. Michelle Finck, 'Blockchains: Regulating the Unknown', GLJ 19 (2018), 665-692 (683-684); Daniel Martin Katz, 'Quantitative Legal Prediction – or – How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry', Emory L. J. 62 (2013), 909-966.

9 Finck (n. 8).

limited to the enactment of regulations; it must cover also its agile and streamlined implementation and enforcement, in a comprehensive, comprehensible, and reliable manner. This regulatory complex is expensive. Whether stakeholders are willing to bear the costs in exchange for the advantages depends on a variety of factors which need to be empirically assessed. Of particular interest are costs associated with external effects – such as ensuring compliance associated with sustaining the 'Brussels Effect' – or in other cases where future causal links to payoffs are difficult to establish, and benefits may not be immediately apparent.[10] It seems that the initial creation of protective regulation was met with relative approval, but this may change during the phases of implementation and as other protective layers are added.

Bradford characterises the EU's regulatory model as rights-driven (pp. 105-145). This captures a part of EU design and facilitates the comparison to Chinese and US empires. However, the theoretical regulatory underpinning of EU tech rules is more complex. It is a layered structure, a significant part of which is based on the notion of risk regulation.[11] Some of these layers protect the structure of the internal market, including competition and consumer welfare, some of which aims at mitigating structural risks to democracy and the rule of law, while others are risks related to potential violations of rights.[12]

We think that the underlying logic of EU digital regulation can be understood as aiming to control, by regulation, the risk of social control. More specifically, the risk of social control includes the risk that US, Chinese, or any other multinational corporations will misuse their techno-regulatory private power to curtail individual liberties and equality, capture governments, or undermine competition. It also includes the risk that governments will misuse their regulatory and technological powers to disproportionately infringe rights or capture the democratic process. This protective design is essential for a well-functioning market in a value-based Union of democracies, but it is complex.

By focusing on a rights-driven approach in the more traditional sense of the word, Bradford to some extent bypasses the difficult relationship be-

10 See on the example of GMO legislation in the EU Justus Wesseler and Kai Purnhagen, 'Is the Covid-19 Pandemic a Game Changer in GMO Regulation?', EuroChoices 19 (2021), 49-52 (49-50).

11 See generally on risk-based regulation of data regulation: Carsten Orwat, Jascha Bareis, Anja Folberth, Jutta Jahnel and Christian Wadephul, 'Normative Challenges of Risk Regulation of Artificial Intelligence', NanoEthics 18 (2024), #11, doi: 10.1007/s11569-024-00454-9; for the GDPR Alessandro Spina, 'A Regulatory Mariage de Figaro: Risk Regulation, Data Protection, and Data Ethics', European Journal of Risk Regulation 8 (2017), 88-94; on the AI act Nicoletta Rangone and Luca Megale 'Risks Without Rights? The EU AI Act's Approach to AI in Law and Rule-Making', European Journal of Risk Regulation 16 (2025), doi: 10.1017/err.2025.13.

12 Rangone and Megalen (n. 11).

tween risks and rights.[13] A classic rights-protection regime is premised on pre-determined, clearly defined, enforceable shields (or, positive, swords). Risk, on the other hand, recognises ex-ante uncertainty.[14] A rights-based regime may be understood in terms of risks, when it is not clear whether certain behaviours will result in rights violations. This is often the case with rapidly developing technologies; waiting for clearly demonstrable cases of rights violations may prove to be too late – as, some argue, is the case with privacy – in the sense that remedial action may not adequately restore the breach to the *status quo ex-ante*.[15] Risk-mitigation on the other hand, may add an important protective layer, but risks are not always fully understood. The impact of regulatory measures – including unintended consequences and potential variations, whether aimed at classic rights-based protection or risk mitigation – are also uncertain. Any regulatory regime, while protecting against some risks, generates new risks. On a higher level of abstraction, even the costs of assessing these risks are difficult to quantify at the time regulation is enacted. While EU regulatory expertise may reduce uncertainty by adopting techniques such as offering 'safe harbours' when certain risk-mitigation procedures were followed – significant underlying uncertainties may nevertheless persist. This is at least in part because compliance costs for the industry and implementation costs for regulators are difficult to foresee, especially given the noted dynamic nature of technological evolution.[16]

Given the uncertainties surrounding the effects and costs of regulatory interventions, the resilience of the EU legal empire requires rigorous risk analysis. Such risks include regulatory errors of underprotection or overprotection, misaligned costs and unintended consequences.[17] In particular, it

13 Rangone and Megalen (n. 11).

14 See John R. Krebs, 'Risk, Uncertainty and Regulation', Philosophical Transactions of the Royal Society A. (2011), 4842-4852.

15 Kai Purnhagen and Justus Wesseler, 'Precaution and the Precautionary Principle: A View on the EU – The Example of Modern Biotechnology' in: Alain Marciano and Giovanni Battista Ramello (eds) *Encyclopedia of Law and Economics* (Springer 2025), doi: 10.1007/978-1-4614-7883-6_835-1.

16 Mario Draghi, *The Future of European Competitiveness – A Competitiveness Strategy for Europe* (2024), available at: <https://commission.europa.eu/document/97e481fd-2dc3-412d-be4c-f152a8232961_en>, last access 30 July 2025; see for sustainability reporting Félix E. Mezzanotte, 'Corporate Sustainability Reporting: Double Materiality, Impacts, and Legal Risk', Journal of Corporate Law Studies 23 (2023), 633-663; for deforestation Roldan Muradian, Raras Cahyafitri, Tomaso Ferrando et al., 'Will the EU Deforestation-Free Products Regulation (EUDR) Reduce Tropical Forest Loss? Insights from Three Producer Countries', Ecological Economics 227 (2025), Article 108389, doi: 10.1016/j.ecolecon.2024.108389.

17 Kai Purnhagen and Peter Feindt, 'Better Regulatory Impact Assessment: Making Behavioural Insights Work for the Commission's New Better Regulation Strategy', European Journal of Risk Regulation 6 (2015), 361-368.

seems that the resilience of any digital empire depends on its ability to experiment. This holds for the US and Chinese models and definitely for the EU regulatory empire. Sandboxes or similar experimental tools are necessary for streamlining the existing regulation and ensuring on-going adaptation, which, in turn, requires commitment and unique Research and Development (R&D) costs.

Uncertainties are not limited to the internal EU community. The challenges extend to regulators (and industry) beyond European borders, especially when the regulation anticipates trans-jurisdictional application, given the structure of the supply chains. As experimentation and assessment tools become more complex, methodologies and protocols for trans-jurisdictional communication must be developed, which consider the different logics of the 'empires' and the supply chains connecting them. Put bluntly, since the empires do not operate in isolation but rather interact with each other, the medium for interaction is not only the market or technology; it is also the communicative fabric of risk-regulation (that itself, must be funded).

Bradford addresses the cost critique of the EU's regulatory model by noting that costs will appear on both sides of the border, inside and outside of the EU (p. 354). We agree, but it becomes a question of distribution. For cost-benefit analysis, a critical question is whether sufficient data exists to accurately assess the impact of EU regulations, internally and externally, and whether the data is effectively shared and analysed. The EU has identified the importance of data gathering strategies.[18] It remains to be seen whether these strategies will be implemented and deliver the information to the internal market and to the external stakeholders. It is no easy feat to ascertain which data is relevant and reliable. Neither is it easy to determine the role of external stakeholders in its assessment. Yet understanding the dynamics of supply chains, as well as how businesses and consumers respond to information and other stimuli along these chains, is essential for understanding potential counter pressures, and hence for the resilience of the digital empires.[19]

18 Considerable resources have been invested in data gathering strategies such as the EU's Better Regulation Agenda. For a critical analysis see Purnhagen and Feindt (n. 17).

19 Kai Purnhagen, 'Achieving Zero Hunger: Using Behavioural Insights and Contractual Regulation for the Achievement of UN SDG 2' in: Cass Sunstein and Lucia Reisch (eds), *Elgar Companion to Consumer Behaviour and the UN Sustainable Development Goals* (Edward Elgar Publishing 2025), 166-175.

2. The Potential Rise of Regional Competition

The Digital Empires capture market power and competition primarily as they exist today. Adopting, as we did in this review, an EU-centric perspective, Bradford (p. 324-360) attributes the success of the EU's model in no small part to the Union's consumer market power relative to the US and China (p. 326). However, global markets and competition dynamics may be less static. A fundamental characteristic of well-functioning competition is its fluidity – markets can rise and fall, and dominant players may be displaced by emerging ones.[20]

What, then, if regional competition emerges? Less developed markets outside of the dominant empires may leverage their trading position, thereby shifting global market dynamics. For instance, regions such as Asia-Pacific or South America could develop alternative data markets with regulatory standards lower than the GDPR but with comparable purchasing power, with profound implications. In recent years, the US has attempted to develop such an alternative to the EU.[21] If successful, the EU model would face a dilemma. While high exit costs might deter immediate shifts, pressures for reducing compliance burdens – such as through selective relaxation of EU data protection laws – may be difficult to counter. However, such relaxation could undermine the EU's regulatory competitive advantage, potentially sacrificing its rights-based data governance model in favour of retaining business within the Union.

A different scenario emerges if the internal EU community perceives the protective regulatory model as generating substantial individual value in such a way that increases demand and willingness to bear its associated costs. If the value generated for the internal market is sufficiently significant, the EU's rights-based approach could ultimately prevail in global regulatory competition despite a negative Brussels Effect. It may even convince others, such as Canada, Australia and other segments of the Commonwealth, to follow suit.

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20 The virtue of competition and its limits: Maurice E. Stucke, 'Is Competition Always Good?', Journal of Antitrust Enforcement 1 (2013), 162-197.

21 See the 'Asia Pacific Economic Cooperation Cross Border Privacy Rules ("APEC. CBPR")', established in 2021 and upgraded in 2023, which offers an alternative to the GDPR while complaining with most, but not all, of GDPR's requirements. It operates with an institutional structure that could relax the control of the EU on actual implementation and enforcement. In addition to the Unites States, participating states include Australia, Canada, Taiwan, Japan, Mexico, Republic of Korea, Philippines, and Singapore. It remains to be seen whether this organisation will indeed develop a counterbalance in terms of market power.

One viable strategy to confront potential regional competition would circle back to lowering compliance costs. This may be achieved by streamlining authorisation processes,[22] enabling regulatory sandboxes,[23] offering compliance guidance through specialised agencies,[24] and developing facilitative technologies that support compliance.[25] By optimising the cost-efficiency of compliance, the EU could enhance the appeal of its regulatory model while maintaining its globally competitive advantage.

3. Data (De-)Colonialisation?

Empires are in contest with each other. As Bradford emphasises, the primary contest cannot be reduced to a battle over models. Regulatory competition emerges as a secondary effect of the broader competition for data control (including harvesting, ownership access and uses) (p. 330-334). This perspective highlights the clash between data sovereignty and data colonialism. The latter signifies the process by which governments, non-governmental organisations, and corporations assert extra-territorial control over the data generated by entities that interact within the networked society.[26]

On this understanding, regulatory regimes generate friction points within the global data market by constructing checkpoints. In the Chinese context, this mechanism is intertwined with technologies to cabin not only the collection of data but also the flow of information. In the European context, such frictions can be viewed as a reaction to efforts to colonise data layers by multinational or non-European players. The EU's risk-based (or rights-based) regulatory framework – embodied also in the Artificial Intelligence

22 Alessandro Monaco, 'Regulatory Barriers and Incentives for Alternative Proteins in the European Union and Australia-New Zealand', British Food Journal 127 (2025), 171-189.

23 Finck (n. 8), 683-684; Tilman Reinhardt and Alessandro Monaco: 'How Innovation-Friendly Is the EU Novel Food Regulation? The Case of Cellular Agriculture', Future Foods 11 (2025) 100574, 1-13; Sofia Ranchordas and Valeria Vinci, 'Regulatory Sandboxes and Innovation-Friendly Regulation: Between Collaboration and Capture' Italian Journal of Public Law 16 (2024), 107-139; Dirk A. Zetzsche, Ross P. Buckley, Janos N. Barberis and Douglas W. Arner, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation', Fordham Journal of Corporate & Financial Law 23 (2017), 31-103.

24 Reinhardt and Monaco (n. 23).

25 Kai P. Purnhagen and Alexandra Molitorisová, 'Public and Private Enforcement in European Union Food Law', European Journal of Risk Regulation 13 (2022), 464-476.

26 Nick Couldry and Ulises A. Mejias, *The Costs of Connection: How Data Is Colonizing Human Life and Appropriating It for Capitalism* (Stanford University Press 2019); Nick Couldry and Ulises A. Mejias, *Data Grab The New Colonialism of Big Tech and How to Fight Back* (Chicago University Press 2024).

(AI) act and the Digital Services Act (DSA) – can thus be perceived as a legal shield against the US data governance model, which facilitates global extraction of data. Without shielding, this extractive data model would enable the US and US firms to exert significant influence over European data flows, and ultimately, as noted earlier, generate a type of social control through technological means.[27] The Brussels Effect and regulatory competition are thus not independent phenomena but rather consequences of the larger struggle for data sovereignty (or data autonomy, which could be understood as a spectrum).

Interestingly, the Brussels Effect could itself be interpreted not only as a regional defensive mechanism, but also as a global proactive move, to the extent it is indeed successful in establishing global standards. As such, it is subject to criticism as a new form of colonialism – not centred on data extraction, but rather on the imposition of legal frameworks, the compliance with which, or more specifically, the demonstration of such compliance, requires data-sharing with Europe. By exporting its regulatory model globally, the EU influences data governance beyond its borders, shaping the legal landscapes of other jurisdictions in a manner that mirrors traditional forms of economic and political dominance. An 'empire', by definition, generates a form of colonialism when dominance is exercised outside one's borders without parity-oriented mechanisms of co-governance. Given the trans-national flow of data, a collision point emerges when activities seen by one empire as protected by rights, are seen by another empire as a violation of rights. This raises questions regarding the evolving nature of power and checks on power in the digital age, where legal regimes and data control become central mechanisms of influence. Anu Bradford provided us with a framework for structuring our conversation, for a better understanding, and for potential models of justifiable equilibria.

III. Conclusion (Or: Where Do We Go from Here?)

In a world of digital empires, Bradford identified the logic that generates empires. We examined the elements that support their sustainability. The EU's ability to maintain and protect its rule of law and rights-based governance framework, (manifested now in a plethora of regulatory instruments), cannot be taken for granted. We argue that the sustainability of the EU regime will depend not only on the legal sophistication of its rules but also on its adaptive agility in calibrating these rules and on innovative enforce-

27 Couldry and Mejias (n. 26).

ment and compliance mechanisms. Demonstrating that the regime generates positive value (in both senses of the word: normative and economic) is important for garnering acceptability by the regulated industry and support by citizens, users, and consumers. Sensitivity to regulatory burdens and uncertainty are important. So is attention and support for technological evolution.

Moreover, as data becomes a principal vector of geopolitical and economic influence, regulatory competition is not limited to the three empires but is situated within a struggle for control over digital infrastructures and informational sovereignty among potential contenders. While other economies may not vie of an 'empire' status, they may seek to situate themselves in a favourable position, including by forming sub-empire alliances, which may alter the playing field.

In that context, regulation itself – the norms, institutions and procedures – is a structural element of a regime, as is the attitude and capacity of the regulators, and their access to learning and experimentation.[28] This latter point – regulatory innovation – affects the sustainability of an empire. Relatedly, recourse to technology itself is a regulatory tool, not only in the sense of 'code is law',[29] but more importantly, in the sense of developing hardware and software that support the development and implementation of acts, directives, regulations and the procedural and institutional mechanism of compliance and enforcement.[30] Of particular interest is the use of technology in order to check against misuse of technology.[31] A digital empire without the relevant digital infrastructure, including digital regulatory infrastructure, is less likely to survive as such.

Ultimately, the Brussels Effect should be understood as a dynamic, strategic and contested process embedded in a wider context of transnational

28 For the concept of agencification as capturing regulators capacity and attitudes beyond the written rules, see Guy Lurie, Amnon Reichman and Yair Sagy, 'Agencification and the Administration of Courts in Israel', Regulation & Governance 14 (2020), 617-860 (718). For the importance of infrastructures see Thomas Streinz, 'The Evolution of European Data Law' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021), 902-936; Angelina Fisher, Benedict Kingsbury and Thomas Streinz, 'Sensoring the Oceans: The Argo Floats Array in the Governance of Science Data Infrastructures' in: Fleur Johns, Gavin Sullivan and Dimitri Van Den Meerssche (eds), *Global Governance by Data: Infrastructures of Algorithmic Rule* (Cambridge University Press, forthcoming).

29 Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

30 This approach takes the notion of 'regulation by design' a notch further. For origin, see Ann Cavoukian, who served as Information and Privacy Commissioner of Ontario, advising to secure privacy by technological means, at: <https://iapp.org/media/pdf/resource_center/pbd_implement_7found_principles.pdf>, last access 30 July 2025.

31 Hans-Wolfgang Micklitz and Giovanni Sartor, 'Compliance and Enforcement in the AIA Through AI', *Yearbook of European Law 2025*, yeae014, doi: 10.1093/yel/yeae014.

power asymmetries. As such, future legal analyses must grapple with the dual role of EU regulation – as both a protective mechanism for fundamental rights and a potentially hegemonic force in the global ordering of data governance. The challenge for the EU lies in reconciling these roles through a regulatory approach which benefits are sufficiently evident so that the various stakeholders are willing to shoulder the higher costs involved in a rights-based approach.

Digital Empires: A Response to Book Reviews

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I was grateful to read the thoughtful reviews of *Digital Empires* by four prominent scholars. All three reviews are deftly written, full of intriguing insights. They affirm the fundamental claims of the book while engaging with new and unexplored arguments. They leave us with a richer and more nuanced view of the global digital economy and the digital empires, other countries, and tech companies' role in shaping that economy.

One benefit of revisiting *Digital Empires* two years after its publication is the opportunity to assess its claims in a new geopolitical landscape. Erik Tuchtfeld does this skilfully, acknowledging the fundamental nature of the geopolitical changes that are now rewriting the norms for the global economy. He makes two key arguments in his review. First, he notes how President Trump is now squashing any optimism of closer Transatlantic cooperation on digital governance that the book had predicted. Second, he invites us to examine other digital empires, including those in Brazil and India, that are also shaping the global digital economy.

Both arguments are compelling. I anticipated the second one – the limitation of an analysis focusing on just three jurisdictions – already while writing. A more complete account would have spent more time on countries outside the United States (US), China, and the European Union (EU). In many ways, this was a conscious choice that reflected my limited bandwidth. The book already sought to engage with digital regulation broadly, discussing antitrust law, data privacy, content moderation, Artificial Intelligence (AI) regulation, online copyright and more, focusing on legal, political, and economic developments in three jurisdictions. A more comprehensive book would likely still be in the making. But I agree that there have been exciting developments in Brazil and India that validate Tuchtfeld's invitation to pay more attention to those jurisdictions.

At the same time, I am not yet prepared to claim that those two regimes have risen to global prominence as new digital empires with a global reach comparable to that of the US, China and the EU. But even then, they warrant closer scrutiny, as do other jurisdictions in the Global South. This is particularly important today as the tensions among the three digital empires are deepening, which gives each of them new incentives to re-assess their relations with the rest of the world. The Global South is also likely reassessing its reliance on, or emulation of, any of the digital empires in the new geopolitical environment.

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Tuchtfeld's first observation about the changing nature of the United States, including the country's sliding into greater authoritarianism, is the most pertinent development since *Digital Empires* was published. Stefania Di Stefano similarly highlights the significance of this shift. She correctly draws our attention to the waning prospects of a coalition among the world's techno-democracies as the US is retreating from its commitment to democratic values. Di Stefano also agrees with Tuchtfeld's striking, yet unfortunately compelling, statement that the US today is not '[Europe's] ally in the battle against digital authoritarianism, but rather a very concrete incarnation of it'.

Like many others, I never predicted the fundamental nature of the political change that is now underway in the United States. I was writing at the time when the Biden administration was moving the United States decisively towards greater alignment with the EU and championing closer collaboration among the world's techno-democracies. I placed considerable hope in that collaboration, arguing that the US and the EU should put aside their differences to jointly challenge China's digital authoritarianism. Yet any such cohesive US-EU coalition no longer seems within reach. Instead, the Transatlantic relations are fracturing. The US is also retreating from its global leadership role while moving away from its commitment to democracy, rule of law, and international cooperation. The weakening of the American democracy is my biggest disappointment and the greatest source of concern today.

How tech companies and other nations are responding America's transformation has become a key question. Di Stefano argues that US tech companies are assuming a more combative stand towards European digital regulation and moving away from the EU's rights-driven model. At the same time, they are also aligning themselves more closely with the US government. But according to Di Stefano, that close alliance between Silicon Valley and Washington is not strengthening the US's market-driven model. Instead, the Trump administration itself is weakening the US model by emulating elements of China's state-driven model. I acknowledged this shift already at the time of writing the *Digital Empires*, noting how the tech war was leading to a partial decoupling of the global digital economy as the US was increasingly playing Beijing's game (*Digital Empires*, p. 171, 366). But today, export controls and other restrictive state-driven policies are complemented by invasive government surveillance methods, reinforcing the growing authoritarian trend in the US.[1]

1 'Trump's Immigration Crackdown Is Built on AI Surveillance and Disregard for Due Process', Freedom House, 21 May 2025, <https://freedomhouse.org/article/trumps-immigration-crackdown-built-ai-surveillance-and-disregard-due-process>, last access 1 August 2025; Dia Kayyali, 'AI Surveillance on the Rise in US, but Tactics of Repression Not New', Tech Policy Press, 26 March 2025, <https://www.techpolicy.press/ai-surveillance-on-the-rise-in-us-but-tactics-of-repression-not-new/>, last access 1 August 2025; Maya Yang, 'Trump Officials to Monitor Immigrants' Social Media for Antisemitism', The Guardian, 9 April 2025.

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Observing these developments, Di Stefano's conclusion is alarming to many: As the emboldened tech companies are endangering the EU's rights-driven model and the US government itself is abandoning its market-driven model, the greatest beneficiary is, Di Stefano claims, China and its state-driven model.

For the proponents of the EU and its rights-driven regulatory model, the pertinent question is whether the EU should adjust its regulatory model to the new geopolitical reality. Amnon Reichman and Kai Purnhagen's review is particularly helpful in examining the challenges the EU faces in sustaining its digital empire. The two authors argue that we need to carefully assess the risks associated with the EU's rights-driven model, including the possibility of regulatory errors and unintended consequences. I agree with their observation. The unintended consequences of the EU's General Data Protection Regulation (GDPR) illustrate this concern well. The GDPR imposes greater relative costs on small- and medium sized companies and hence inadvertently entrenches the power of the largest tech companies that can best afford to comply with costly regulations (*Digital Empires*, p. 138). I also fully agree with their argument that 'innovative enforcement and compliance mechanisms' is key to the regulatory model's success. The weak enforcement was one of the key criticisms of the EU's rights-driven model that I have emphasised, arguing that the weak enforcement is 'threatening to render [the EU's] victory in the battle of values a hollow one' (*Digital Empires*, p. 29).

Reichman and Purnhagen also eloquently discuss rising regional competition, which may increase pressures on the EU to re-assess the international competitiveness of its regulatory model. The authors suggest that this may cause the EU to lower the costs of compliance with its model to remain attractive globally, for example, by streamlining its authorization processes or otherwise supporting companies' compliance efforts. They also remind us how 'The challenge for the EU lies in reconciling these roles through a regulatory approach which benefits are sufficiently evident so that the various stakeholders are willing to shoulder the higher costs involved in a rights-based approach.'

This is an important observation. I would even take their criticism further today. In addition to the growing external challenge to the EU's regulatory model caused by the combative Trump administration and the emboldened tech companies, the EU is now facing an internal challenge to its regulatory model. Since the 2024 Report on 'The Future of European Competitiveness', – authored by Mario Draghi, the former president of the European Central Bank – there has been a paradigm shift in the EU economic policy, including digital policy. The conversation has moved from protecting digital rights to questioning if that goal can be reconciled with the increasingly existential need to enhance Europe's competitiveness and technological sovereignty. Calls are now growing for a regulatory pause and simplification. Alongside the EU's sustainability rules, digital regulation has become a target of this de-regulation effort, as shown by the shelving of the AI liability directive and the pointed criticism aimed at the AI Act.

Recently, I argued with Daniel Kelemen and Tomasso Pavone in *Foreign Affairs* that the EU is facing both an external and internal challenge to its regulatory hegemony.[2] In addition to President Trump's attempts to fold the EU's digital regulation into the broader trade war, the EU is on the verge of losing its own confidence in the rights-driven regulatory model. Innovation and technological progress have become key policy goals, and the EU is now battling the perception that digital regulation is an impediment to those goals. As a result, the EU risks undermining its own regulatory model if it is failing to convince its citizens that the model is sustainable and worth defending. The greatest threat to the EU's digital empire may therefore not come from the United States but from the EU's dwindling internal commitment to its rights-driven regulatory model.

Protecting digital rights and enhancing Europe's competitiveness are both important imperatives for the EU and the resilience of its regulatory model. But presenting the EU's rights-driven model as inherently incompatible with innovation is a false choice, as I briefly mentioned in *Digital Empires* (p. 371-376) and elaborate elsewhere more recently.[3] The EU's commitment to digital rights is not what is holding the EU's technological development back. Rather, its incomplete digital single market, absence of integrated and robust capital markets, punitive bankruptcy laws, and inability to compete with the US for global tech talent is what is hindering the EU's tech competitiveness.

In closing, the stakes in the global battle to regulate technology are even higher today than in 2023 when *Digital Empires* was published. All jurisdictions are racing towards enhancing their technological sovereignty, positioning themselves to prevail in the race to control AI and other key technologies. Amid these intensifying global battles around technology, the EU must ensure that it develops, and not only regulates, technology. There is an urgent need to reduce the EU's dependencies on American and Chinese technologies.

But it is equally important that the EU will stay committed to the values underlying its rights-driven regulatory model. The EU cannot afford to concede the horizontal battle to the US or China. This entails not capitulating to the Trump administration's demands to weaken its digital regulations. But neither can the EU give in to the internal narrative erroneously portraying its rights-driven regulations as the enemy for European technological sovereignty and economic progress. As the US is retreating from its commitment to a rules-based international order and sliding towards greater authoritarianism, it is up to the EU to assume global leadership and defend the rule of law and liberal democracy. As part of this leadership, the EU must demonstrate that a digital order based on fundamental rights and democracy creates stability and prosperity that allows Europe – and anyone emulating its model – thrive.

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2 *Anu Bradford, R. Daniel Kelemen and Tomaso Pavone, 'Europe Could Lose What Makes It Great', Foreign Affairs, 21 April 2025.*

3 Anu Bradford, '*The False Choice Between Digital Regulation and Innovation*', Nw. U. L. Rev. 119 (2024), 377-452.

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PD Dr. Thomas Spitzlei, in: PersV 9/2022; zur Vorauflage

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