ZaöRV

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

4|2024
84. Jahrgang
Seiten 741–1024

HJIL
Heidelberg Journal of International Law

Aus dem Inhalt

Luke Dimitrios Spieker
Trust the Treaties! Protecting EU Values Does Not Require Treaty Change 745

Armin von Bogdandy
Die Befreiung: Moslers europaföderale Sprengung des staatsrechtlichen Denkens 763

Special Issue:
Progress and International Law: A Cursed Relationship?
Edited by Júlia Miklasová, Sara Wissmann, Paula Rhein-Fischer, Alexander Holzer, Rebecca Kruse, Lisa Kujus, Jasper Mührel, Lorenz Wielenga 785

With Contributions by
Hilary Charlesworth, Giulia Raimondo, Julian Hettihewa, Eliana Cusato, Tania Atilano, Janina Barkholdt, Spyridoula (Sissy) Katsoni, Martin Schwamborn, Angelika Nußberger 801

C.H.BECK

MAX-PLANCK-INSTITUT
FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)

The Journal may also be cited as:

Heidelberg Journal of International Law (HJIL)

Herausgeber/Editors in Chief: Armin von Bogdandy, Anne Peters
in Gemeinschaft mit Jochen Abr. Frowein, Rüdiger Wolfrum

Schriftleitung/Managing Editor:
Robert Stendel

Schriftleitung Comment/Comment Editor:
Carolyn Moser

Schriftleitung Rezensionen/Book Reviews Editor:
Richard Dören

Wissenschaftlicher Beirat/Academic Advisory Board:
Matthias Goldmann, Rainer Grote, Laura Hering, Michael Ioannidis, Jannika Jahn, Martin Andrew Jarrett, Florian Kriener, Christian Marxsen, Carolyn Moser, Christiane Philipp, Raphael Schäfer, Dana Schmalz, Mark Somos, Luke Dimitrios Spieker, Saskia Stucki, Pedro Villarreal

V.i.S.d.P.: Armin von Bogdandy, Anne Peters

Postanschrift: Redaktion MPI für Völkerrecht, Andrea Hug, Im Neuenheimer Feld 535 D-69120 Heidelberg,

zaoerv@mpil.de

Mit der Einreichung eines Manuskripts bietet der Autor den Herausgebern die Übertragung der Nutzungsrechte, einschließlich des Rechts zur öffentlichen Zugänglichmachung (§ 19 a UrhG), das Recht zur Aufnahme in Datenbanken, das Recht zur Speicherung auf elektronischen Datenträgern und das Recht zu deren Verbreitung und Vervielfältigung sowie das Recht zur sonstigen Verwertung in elektronischer Form an. Das in § 38 Abs. 4 UrhG niedergelegte zwingende Zweitverwertungsrecht des Autors nach Ablauf von 12 Monaten nach der Veröffentlichung bleibt hiervon unberührt.

Manuskriptsendungen an die Redaktion werden erbeten unter der Adresse:

https://www.editorialmanager.com/heidelbergjil

Sie müssen den unter https://www.nomos.de/zeitschriften/zaoerv/#autorenhinweise einsehbaren Manuskriptrichtlinien entsprechen und werden nur unter der Voraussetzung angenommen, dass der*die Autor*in nicht denselben Gegenstand in einer anderen Publikation behandelt. Sie geben die wissenschaftliche Auffassung der*s jeweiligen Autorin*s wieder.

Erscheinungsweise: Vier Ausgaben und ein Registerband jährlich
Bezugspreis 2024: Normalpreis jährlich € 229,00 (inkl. MwSt.)
Einzelheft: € 69,00 (inkl. MwSt.)
Jeweils zuzüglich Versandkosten.
Hinweise zu Preiserhöhungen finden Sie in den beck-shop AGB unter Ziff. 10.4.

With the submission of a manuscript the author offers to transfer to the editors the rights of use, including the right of communication to the public (§ 19 a German Copyright Law), the rights to publicly reproduce or access, the rights to include in any databank, the rights to store on electronic data carriers and the rights to distribute and copy as well as the rights to any other utilisation in electronic form. The mandatory statutory secondary rights of the author after 12 months from the date of publication as set out in § 38 section 4 Copyrights Act (UrhG) shall not be affected hereby.

Manuscripts should be sent to the editorial office at the following address:

https://www.editorialmanager.com/heidelbergjil

They need to comply with the manuscript guidelines available at http://www.zaoerv.de and will only be accepted if the author has not treated the same subject in another publication. They reflect the scientific view of the respective author.

Subscription price for the complete volume (4 issues and index): € 229,00
Single issue: € 69,00
Postage and handling fees will be added.
Cancellation of subscriptions: Publisher must be notified no later than 6 weeks prior to the end of the calendar year.

Verlag: C.H. BECK oHG, Wilhelmstr. 9, D-80801 München. Postanschrift: 40 03 10, 80703 München, Tel.: 089/3 81 89-0, Fax 089/3 81 89-398, info@beck.de, Postbank München IBAN: DE82 7001 0080 0006 2298 02, BIC: PBNKDEFFXXX. Der Verlag ist oHG. Gesellschafter sind Dr. Hans Dieter Beck und Dr. h.c. Wolfgang Beck, beide Verleger in München.

Bestellungen über jede Buchhandlung und beim Verlag.

Abo-Service: Tel.: 089/38189-750, Fax 089/38189-358, E-Mail: kundenservice@beck.de.

Abbestellungen müssen 6 Wochen vor Jahrgangsende erfolgen.

Adressenänderungen: Teilen Sie uns rechtzeitig Ihre Adressenänderungen mit. Dabei geben Sie bitte neben dem Titel der Zeitschrift die neue und die alte Adresse an.

Hinweis gemäß Art. 21 Abs. 1 DS-GVO: Bei Anschriftenänderung kann die Deutsche Post AG dem Verlag die neue Anschrift auch dann mitteilen, wenn kein Nachsendeauftrag gestellt ist. Hiergegen kann jederzeit mit Wirkung für die Zukunft Widerspruch bei der Post AG eingelegt werden.

ISSN 0044-2348

Druck: Druckerei Himmer GmbH, Steinerne Furt 95, 86167 Augsburg.

myclimate shape our future

chbeck.de/nachhaltig
produktsicherheit.beck.de

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

MAX-PLANCK-INSTITUT

FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT
UND VÖLKERRECHT

ZaöRV 84 (2024)

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Inhaltsverzeichnis

Editorial

Robert Stendel: Introducing the Marguerite Wolff Article Prize 741

Comment

Luke Dimitrios Spieker: Trust the Treaties! Protecting EU Values Does Not Require Treaty Change 745

Re-Reading Historic Articles in the ZaöRV: Anniversary Series

Robert Stendel: Introducing the Anniversary Series 761

Armin von Bogdandy: Die Befreiung: Moslers europaföderale Sprengung des staatsrechtlichen Denkens* 763

Abhandlungen

Júlia Miklasová / Sara Wissmann / Paula Rhein-Fischer / Alexander Holzer / Rebecca Kruse / Lisa Kujus / Jasper Mührel / Lorenz Wielenga: Editorial: Progress and International Law: A Cursed Relationship? 785

Hilary Charlesworth: Progress and International Law: A Cursed Relationship? Working Group of Young Scholars in PIL and German Society of International Law (Cologne, 23 September 2023), Searching for Progress in International Law 801

Giulia Raimondo: Beyond Progress: Interrogating the Limits of Jurisdiction and Migrant Rights Through Negative Dialectics* 815

Julian Hettihewa: Constructing Youth as Progress: Tracing Shared Efforts of the League of Nations and the United Nations* 843

Eliana Cusato: Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity* 865

Tania Atilano: Visions of International Law in the Nineteenth Century: The Experience of the French Intervention in Mexico* 895

Janina Barkholdt: Progress Through Preservation of the Legal *Status Quo*: Paradox or Prerequisite?* 925

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Spyridoula (Sissy) Katsoni: A Feminist Reinterpretation of Access to Abortion Under the European Convention on Human Rights* 955

Martin Schwamborn: The Responsibility *to* and *for* Progress in International Law* 979

Angelika Nußberger: Progress Renegotiated – Closing Remarks on a Remarkable Conference 999

Buchbesprechungen

Gaillet, Aurore: La Cour constitutionnelle fédérale allemande. Reconstruire une démocracie par le droit (1945-1961) (*Peter M. Huber*) 1001

Rodriguez-Garavito, César (Hrsg.): Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action (*Michael Kalis*) 1007

Mahlmann, Matthias: Mind and Rights. The History, Ethics, Law and Psychology of Human Rights (*Mónica Mazariegos Rodas*) 1013

Duve, Thomas and *Herzog, Tamar* (eds.): The Cambridge History of Latin American Law in Global Perspective (*Juan C. Herrera*) 1019

* Alle mit Sternchen versehenen Beiträge haben zuvor ein Begutachtungsverfahren (double-blind peer review) durchlaufen. / All articles marked with an asterisk were subject to double-blind peer review.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Editorial

Introducing the Marguerite Wolff Article Prize*

Over the last decades, the number of journals, edited volumes, and monographs competing for readers' attention has increased almost exponentially.[1] As time is scarce, readers need to make hard choices about what they read. While reputation is likely to persuade readers as well as editors and publishing houses to spend their time with pieces by well-established scholars,[2] early-career researchers find themselves on the receiving end of the system. Thus even outstanding scholarship may pass unnoticed. With a view to increase the visibility of early-career scholars, the ZaöRV/HJIL introduces the Marguerite Wolff Article Prize (MWAP) as of 2025. The Prize aims to honour excellent scholarship published by early-career scholars in the journal.

Peer-reviewed articles in the Journal (German or English) are automatically eligible for the Prize if the author qualifies as early-career scholar, i. e. is a pre-doctoral researcher, doctoral candidate, or postdoctoral researcher (within five years of the defense of the thesis).[3] The Editors of the Journal select the Prize winner on the basis of academic excellence. Prize winners are awarded an Institute grant[4] to conduct a four week research stay at the Max Planck Institute for Comparative Public Law and International Law. The winners will have the opportunity to present their article to staff and visiting researchers of the Institute.

There could hardly be an Issue better suited to announce this Prize than the current one. It is a Special Issue based on a Conference organised by the 'Arbeitskreis junger Völkerrechtswissenschaftler*innen (AjV)' and the German Society of International Law comprising a selection of articles by early career scholars with different methodological approaches and a wide variety of topics tied together by the overarching theme of international law's cursed relationship with progress. Thus, the Issue itself is a testimony to the Jour-

* This prize would have never seen the light of day without the ideas and work of Julia Emtseva, Angelo Golia and Tom Sparks. We are indebted to them.

1 See Oona A. Hathaway and John D. Bowers, 'International Law Scholarship: An Empirical Study', Yale J. Int'l L. 49 (2024), 101-124 (103).

2 As Hathaway and Bowers demonstrate, the most-cited articles they identify were mostly written by a small number of renowned scholars, see Hathaway and Bowers (n. 1), 122 et seq.

3 In case of a co-authored piece, both authors must fulfill the criteria.

4 See for the details on Institute Grants <https://www.mpil.de/en/pub/research-interaction/visiting-scholars/institute-grants.cfm>, last access 19 November 2024.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

nal's strong commitment to ensure that early-career scholars' research finds a platform.

By naming the Prize after Marguerite Wolff (1883-1964), we underline our commitment to academic excellence while striving to enhance the visibility of scholars historically marginalised. Her work embodies all the qualities of fine scholarship while her biography is a painful reminder of the forgotten role of women in international legal academia: Many readers might be unfamiliar with the name of Marguerite Wolff. Even for those acquainted with the Institute's past, this is a name shrouded in mystery due to divergent accounts of her role and position.[5] Yet all we know about her life and work is a testimony to her lifelong commitment to excellent scholarship, intellectual curiosity, and cosmopolitanism. Born in London to a Jewish-Prussian family, she studied English Literature at Cambridge University. She married a German legal scholar, Martin Wolff, in 1906 and moved to Germany where she stayed until 1933.[6] While not being a lawyer by training, she developed a keen interest in legal academia, e. g. publishing a monograph on the law of the press in the UK.[7] At the heart of her academic œuvre was translating between the German and the English legal culture. In both directions (translating German into English and *vice versa*[8]), she excelled in producing context-sensitive translations.[9] Acutely aware of the differences in the legal and academic cultures, her translations ensured the translated piece's relevance for the audience in the other legal culture as reviews on her translations such as the one of Martin Wolff's *International Private Law*[10] testify.[11]

Between 1925 and 1933, when she was dismissed under somewhat unclear circumstances by the institute's director Viktor Bruns,[12] she occupied a

5 See Gerhard Dannemann, 'Marguerite Wolff at the Kaiser Wilhelm Institute for Comparative Public Law and International Law', <https://mpil100.de/>, last access 10 December 2024, doi: 10.17176/20240403-102936-0.

6 See Marion Röverkamp, *Juristinnen: Lexikon zu Leben und Werk* (1st edn, Nomos 2005), 436 et seq.

7 Marguerite Wolff, *Das Preßrecht Großbritanniens* (Verlag Georg Stilke 1928).

8 See for a translation into German Frederick Alexander Mann, *Das Recht des Geldes* (Alfred Metzner 1960).

9 Dannemann (n. 5).

10 Martin Wolff, *Private International Law* (Oxford University Press 1945), which saw a second edition in 1950.

11 Dannemann (n. 5); see John H. C. Morris, 'Private International Law. By Martin Wolff', L. Q. R. 62 (1946), 88-92; see also for another praise of her work Patrick W. Duff, 'Review: Fritz Schulz: Principles of Roman Law. Translated by Marguerite Wolff.', The Classical Review 51 (1937), 238 et seq. ('The translator is to be congratulated on her success in a difficult task. Refractory Law-German has been reduced to clear, readable English […]').

12 See for a discussion Dannemann (n. 5) (concluding that Marguerite Wolff's dismissal was induced by the racist policies of Nazi Germany).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

prominent role within the Institute, especially in its early phase. Most importantly for us, her involvement in the establishment and editing of this journal's very first issues inspired us to name the Prize in her honour.[13] While not formally acknowledged on the journal's title page, the journal could probably not have happened without her. Bruns himself quite openly confessed in the editorial to the journal's first volume how little time he was left for editing the journal.[14]

Given her forgotten role in the formative period of the journal, it is more than fitting that a prize for early-career researchers reminds us of her biography. This is also important in two more ways: Remembering a former member of an institution with a prize always risks uncritically celebrating a 'glorious' past that never was. In the case of Marguerite Wolff, it is rather the opposite: The Prize is about giving credit to a person who has been largely excluded from institutional memory. Awarding a prize in her memory is also about highlighting counter-narratives: The institute was not just male and – rather – conservative, but its intellectual community was also formed by female and more liberal scholars. To be sure, this was a minority, but it reminds us that women also played prominent roles in the development of international legal scholarship. Needless to say, legal scholarship was – and of course still is – also lacking diversity in many other respects.[15] Awarding a prize in Marguerite Wolff's honour reaffirms this Journal's commitment to becoming more inclusive by being a forum for everyone working on topics of international, European and comparative public law.[16] Highlighting Wolff's biography does also not absolve from reckoning with the Institute's history during the Nazi period. Clearly, not all of the Institute's staff were victims of the Nazi regime.[17] Yet, enhancing the visibility of female legal

13 See Dienstzeugnis for Marguerite Wolff by Victor Bruns, 19 December 1933, APMG, I-1A-3170.

14 See Viktor Bruns, 'Vorwort', ZaöRV 1 (1929), III-VIII (V); see on this editorial Robert Stendel, 'Editorial', ZaöRV 84 (2024), 1-6 and 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.

15 See for German legal academia and practice Michael Grünberger, Anna Katharina Mangold, Nora Markard, Mehrdad Payandeh and Emanuel Vahid Towfigh, *Diversität in Rechtswissenschaft und Rechtspraxis* (Nomos 2021).

16 See Armin von Bogdandy and Anne Peters, 'Editorial', ZaöRV 81 (2021), 1-6 (6).

17 See, e. g. the contributions of Carl Bilfinger, 'Die Kriegserklärungen der Westmächte und der Kelloggpakt', ZaöRV 10 (1940), 1-3; Herbert Kier, 'Über die Gestaltung eines Volksgruppenrechtes', ZaöRV 7 (1937), 497-510; Hermann Raschhofer, 'Entwicklung und Funktion des neuen Volksgruppenrechts', ZaöRV 11 (1942), 418-444; see on Herman Raschhofer: *Samuel Salzborn, 'Zwischen Volksgruppentheorie, Völkerrechtslehre und Volkstumskampf. Hermann Raschhofer als Vordenker eines völkischen Minderheitenrechts'*, *Sozial.Geschichte 21 (2006), 29-52.*

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

scholars in the Institute's past resonates well with this Prize's aim of increasing the visibility of early-career scholars. We truly hope that the Prize will fulfill its purpose. We therefore strongly encourage early-career researchers to submit manuscripts within the wider areas of general international law, European Union law, and comparative public law.

Robert Stendel

 DOI 10.17104/0044-2348-2024-4-741

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Comment

Trust the Treaties! Protecting EU Values Does Not Require Treaty Change

I. Treaty Change to Protect EU Values: Revival or Repose? 745
II. Flaws of Treaty Change 747
1. Unrealistic 747
2. Unnecessary 749
3. Unproductive 750
III. Improvements *à droit constant* 751
1. Interlinking Instruments 752
2. Accelerating Action 753
3. Hitting Harder 754
4. Enhancing Transparency 755
5. Broadening Focus 758

I. Treaty Change to Protect EU Values: Revival or Repose?

For some time now, a familiar rumour has been running through the European discourse. In media columns or expert fora, in national cabinets or on the corridors of Berlaymont … all around the European Union one can hear a soft, cautious but growing whisper: Treaty reform.

Considering past experiences, this comes as a surprise. After the Constitutional Treaty was rejected in two national referenda and eventually revamped in the guise of the Lisbon Treaty, the negotiators appeared to be fed up with any future Treaty change. Being the outcome of a highly conflictual process stretching over nearly a decade, the current Treaty framework – Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) – contains a difficult compromise between centripetal and centrifugal forces. For the foreseeable future, this compromise seemed to mark an endpoint of the integration process. This was suggested not least by several constitutional courts, which begrudgingly accepted the Lisbon Treaty but indicated limits in almost every area not transferred to the European Union (EU) level: thus far and no further! As a result, it was a commonly held view that future developments of the Union would rather be achieved in an incremental fashion *à droit constant*. And indeed, the current Treaty framework has served us well. Consider only the past decade. The Treaties were robust and flexible enough to allow for far-reaching responses to a

DOI 10.17104/0044-2348-2024-4-745 ZaöRV 84 (2024), 745-759

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

financial, migration, values, and pandemic crisis.[1] Certainly, the Treaties are not perfect. But, hand to heart, which constitution really is?

So, is this as good as it gets? Not quite it seems. In view of possible enlargement rounds in Eastern Europe, the will to reform the Union seems to have been rekindled. In a joint declaration the institutions summoned the Conference on the Future of Europe, a new format that aimed at identifying wishes in European society.[2] Reactions to the final report were ambivalent. The Council's General Secretariat, on the one hand, ascertained that the overwhelming majority of proposals could be implemented within the current Treaty framework (nearly 95 %).[3] The Parliament, on the other hand, called for a Convention to revise the Treaties[4] and submitted a highly ambitious proposal.[5] This has placed the issue of Treaty change on the official agenda again.

The Parliament's proposal emerges from a thick discursive context of ideas by stakeholders, think tanks, and academics.[6] Their common aim is to make the EU fit for the new geopolitical situation, in particular for future rounds of enlargement. Specific attention is being paid to the Union's founding values set out in Article 2 TEU: democracy, the rule of law, and human rights. Strengthening their protection has been described as 'the mother of all internal "reforms" to prepare the Union for further enlargement'.[7] And indeed, it seems like a necessary step, considering that the departure of some Member States from these values, such as Hungary and formerly Poland, poses an existential threat to the Union. Improving the protection of these values has

1 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law', in: Commission Legal Service (ed.), *70 Years of EU Law* (Publications Office of the European Union 2022), 377-388.

2 Joint Declaration on the Conference on the Future of Europe Engaging with citizens for democracy – Building a more resilient Europe 2021/C 91 I/01.

3 Conference on the Future of Europe, 7 December 2023, 16054/23, AG 157, INST 475, paras 11 and 13.

4 Resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties (2022/2705(RSP)).

5 European Parliament, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

6 See only recently, Report of the Franco-German Working Group on EU Institutional Reform, Sailing on High Seas (18 September 2023); Elise Muir, 'Winds of Treaty Change?', MJ 30 (2023), 543-553; Paolo Ponzano, 'Reforme des Traités européens: nécessaire mais introuvable', Revue du droit de l'Union européenne 4/2023, 3-10; Bruno de Witte, 'Towards a Reform of the European Treaties?', Quaderni costituzionali 3/2024, 727-729; Edgar Lenski, 'Die Reform der Europäischen Union als strategische Notwendigkeit', KritV 107 (2024), 233-245; Petra Bárd, Dimitry V. Kochenov, Jan Wouters and Laurent Pech, 'Treaty Changes for a Better Protection of EU Values in the Member States', ELJ (2025) (forthcoming).

7 Editorial Comments, 'Another "Big Bang" Enlargement? Three Candid Suggestions to Start Preparing', CML Rev. 61 (2024), 899-912 (904).

 DOI 10.17104/0044-2348-2024-4-745

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

thus become part and parcel of every amendment project. This comment suggests a different view. As far as the protection of EU values is concerned, the Treaty change discourse should be laid to rest again. With other words: trust the current Treaties!

II. Flaws of Treaty Change

The proposals currently under consideration suffer from several flaws: they are unrealistic, unnecessary, and unproductive. Either the drafts are over-ambitious and suffer from a lack of political realism or they underestimate the potential of the current Treaties and thus exhibit a lack of legal imagination. Eventually, this discourse might even jeopardise current action to protect the Union's values.

1. Unrealistic

Let's take a step back. The Treaty change discourse concerning the protection of EU values started already in the aftermath of Lisbon. In 2013, then Commissioner for Justice Viviane Reding made far-reaching proposals. Hungary had just started its descent towards an 'illiberal democracy', Poland had not yet come under *PiS* rule – put differently: the world had a very different outlook. Still, she suggested

> 'lowering the very high thresholds for triggering at least the first stage of the Article 7 procedure […] or abolishing Article 51 of our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States.'[8]

Since then, much has changed – but the proposals largely remained the same. First, many call for amending the Article 7 TEU procedure. Its first step allows the Council to identify the risk of a breach of EU values in a Member State by four-fifths majority (Article 7(1) TEU). The second step, the determination of said breach, requires unanimity (Article 7(2) TEU). Only then can the Council – in a third step – adopt certain sanctions, such as the suspension of voting rights. In light of these majority requirements, it was hardly surprising that the proceedings initiated against Poland and Hungary lingered on for years without ever being put to a vote. To over-

8 Viviane Reding, The EU and the Rule of Law – What Next?, SPEECH/13/677 (4 September 2013).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

come this obstacle, the Franco-German Working Group advised shifting the unanimity in Article 7(2) TEU to a four fifths majority.[9] The Parliament's proposal goes even further: the determination of a risk under Article 7(1) TEU shall be adopted by qualified majority within six months after triggering the procedure. Instead of the second step, the Members of the European Parliament opted for an involvement of the Court of Justice in Luxembourg to determine a breach of Article 2 TEU. Only then shall the Council – again by qualified majority – decide on appropriate sanctions, including suspension of EU payments, voting rights, or the right to hold the Council presidency.[10]

Second, there are several calls for expanding the scope of the EU Charter of Fundamental Rights. According to its current Article 51(1), the Charter applies to the Member States only when they are 'implementing' EU law. The calls for expanding EU fundamental rights to situations beyond their current confines – with other words: to make them generally applicable in the Member States – predate even the Charter itself.[11] In this spirit, some have developed creative proposals to expand the Charter's scope without any Treaty amendment.[12] Others have suggested a new provision allowing individuals to challenge systemic human rights deficiencies occurring in the Member States directly before the Court of Justice.[13] Viviane Reding went even a step further advocating to abolish Article 51 'so as to make all fundamental rights directly applicable in the Member States'.[14] This was later embraced by the European Parliament[15] and taken up by the Conference on the Future of Europe. Pursuant to the 25th recommendation of the final report the Charter 'should be made universally applicable and enforceable'.[16]

9 Report of the Franco-German Working Group (n. 6), 17. See also Bárd, Kochenov, Wouters and Pech (n. 6); Jan Wouters et al., 'Report addressed to the European Parliament and the Commission on policy recommendations and on Treaty changes and amendments to the EU Charter of Fundamental Rights', Reconnect (26 May 2022), 37.

10 European Parliament (n. 5), Amendments 9-12.

11 See already AG Jacobs in: *Christos Konstantinidis v. Stadt Altensteig*, judgment of 30 March 1993, case no. C-168/91, para. 46.

12 See e. g. András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights', Cambridge Yearbook of European Legal Studies 24 (2022), 239-261; Armin von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', CML Rev. 49 (2012), 489-519.

13 Ferdinand von Schirach, *Jeder Mensch* (Luchterhand 2021), Art. 6.

14 Reding (n. 8).

15 European Parliament, Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), para. 20.

16 Conference on the Future of Europe, Report on the final outcome (May 2022).

 DOI 10.17104/0044-2348-2024-4-745

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

This claim made it even into the coalition agreement of the former German government.[17]

Beyond these two avenues, the wish list in legal scholarship is as diverse as it is farfetched. At a substantive level it has been suggested to amend Article 2 TEU by adding that the Union shall be competent 'as far as necessary' for the enforcement of these values or to adopt a 'Charter of EU Fundamental Values' specifying each value.[18] Others have advocated for a 'European Charter for Democracy', which should define 'the common denominators of European democracy that build on Article 2 TEU'.[19] At the procedural level, some have proposed an expulsion mechanism in case of violations of EU values.[20]

Leaving the merits of such approaches aside, they have one obvious flaw: Treaty amendments require the unanimous consent of all Member States (Article 48 TFEU). In an EU of 27 Member States, any reform that leads to tighter control of the Member States' constitutional structures seems to be no more than a pie in the sky – at least for the foreseeable future.[21] The Parliament's bold proposal will unlikely increase the pressure. Throughout the history of European integration, it often came up with innovative bids for Treaty change that seldom materialised.[22]

2. Unnecessary

At the same time, many participants of the debate seem to underestimate the potential of the current Treaties. This applies especially to remedies before the Court of Justice. In 2013, Viviane Reding suggested 'to expand the role of the Court […] by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU against Member States'.[23] Similarly, the

17 Mehr Fortschritt wagen – Koalitionsvertrag 2021-2025, 105: 'Wir wollen, dass die Rechte aus der EU-Grundrechtecharta vor dem EuGH künftig auch dann eingeklagt werden können, wenn ein Mitgliedstaat im Anwendungsbereich seines nationalen Rechts handelt.'

18 Inke Böttge, 'Rearranging the Puzzle: How Treaty Change Can Strengthen the Protection of EU Values', Croatian Yearbook of European Law and Policy 19 (2023), 39-78 (66, 73). On the development of Article 2 TEU into 'a legal basis for legislative measures to be adopted under the ordinary legislative procedure', see already European Parliament (n. 15), para. 20.

19 Paul Nemitz, 'Acting Before it is Too Late: Promoting Democracy and the Rule of Law in the Member States of the EU' in: Allan Rosas et al. (eds), *The Rule of Law's Anatomy in the EU* (Hart 2023), 123-138 (133 ff.).

20 See e. g. Wouters et al. (Fn. 9), 38 f. or Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7', Res Publica 28 (2022), 693-713.

21 See also Editorial (n. 7), 900.

22 See the 'Spinelli' and 'Herman' drafts, Draft Treaty establishing the European Union [1984] OJ C77/ 33 and Second Report of the Committee on Institutional Affairs on the Constitution of the European Union (9 February 1994), European Parliament, Session Doc. A3- 0064/ 94.

23 Reding (n. 8).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

European Parliament's mechanism on democracy, the rule of law and fundamental rights – the 'European Pact for Democracy, the Rule of Law and Fundamental Rights in the EU (DRF) pact – submitted that a future Treaty revision should allow national courts to refer violations of Article 2 TEU to the Court of Justice.[24] Certainly, these statements occurred before the Court rendered the values in Article 2 TEU operational. With the 2018 judgment in *Associação Sindical dos Juízes Portugueses* and the wave of decisions in its aftermath, however, it became quickly apparent that violations of EU values can be litigated before the Court of Justice.[25] Still, the Parliament invited in 2021 the 'Conference on the Future of Europe to consider strengthening the role of the CJEU in protecting the Union's founding values'.[26] In the same vein, Olaf Scholz called in his 2022 speech at Charles University in Prague for 'a new way to launch infringement proceedings when there are breaches of what unites us at the very core: our fundamental values'.[27]

A *new* way? What Scholz formulated as a wish is already a reality. In its rule of law conditionality judgments, the Court emphasised that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are given concrete expression in principles containing legally binding obligations for the Member States'.[28] On this basis, the Commission initiated proceedings against Hungary for the violation of LGBTIQ* rights and the so-called 'sovereignty bill' based on Article 2 TEU.[29] As the process in Article 48 TFEU is extremely cumbersome and costly, there is no need for purely declaratory Treaty revisions. Thus, any reform that simply codifies the status quo seems unnecessary.

3. Unproductive

Still, the envisaged amendments would certainly render the Union's responses to illiberal developments in the Member States more effective.

24 European Parliament (n. 15), para. 20.

25 On the pathbreaking *ASJP* judgment, see Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023), 19 ff.

26 European Parliament, Resolution of 24 June 2021 on the Commissions 2020 Rule of Law Report (2021/2025(INI)), para. 55.

27 Speech by Federal Chancellor Olaf Scholz at the Charles University in Prague, 29 August 2022, <https://www.bundesregierung.de/breg-de/aktuelles/scholz-rede-prag-karls-uni-2079410>, last access 14 January 2025.

28 *Hungary v. Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:20233:97, para. 232.

29 See the pending case *European Commission v. Hungary*, case no. C-769/22 and 'February infringement package: key decisions', INF/24/301, 7 February 2024.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Further, the incremental, court-driven developments are far-reaching. Hence, it is hardly surprising that there has been growing criticism not only from Member States like Hungary, but also from legal scholarship.[30] An explicit Treaty amendment would provide additional legitimacy for these steps and fend off much of these objections.

At the same time, the Treaty revision process has severe downsides. Leaving aside the fact that most, if not all, amendments suggested before will not gain the unanimous support of the Member States, proposing Treaty changes entails certain risks. On the one hand, calling for amendments in areas, where such practice is already reality, might question the legitimacy of current action. The Court of Justice is limited to its judicial function. It can only interpret, but not amend primary law. Considering that a future Treaty amendment must feature a stronger role for the Court, for instance by bringing Article 2 TEU expressly into the ambit of its jurisdiction, could lead to the perception that the Court has overstretched its mandate. As Jean-Paul Jacqué stressed: 'on ne révise pas pour le plaisir de réviser'.[31] Thus, Treaty amendments are usually constitutive, not declaratory. If the institutions consider an amendment necessary, they do not see the Court's jurisprudence covered by the current Treaty framework. This might fuel resistance among non-compliant Member States. On the other hand, the revision discourse might become a distraction. When shifting the view to amending the Treaties, we lose sight of what can be achieved within the currently existing framework. In this sense, the EU – and its academic interlocutors – could fall into the same trap as 'a home repair DIYer who constantly goes to the hardware store to buy new tools, rather than actually getting started on projects'.[32]

III. Improvements *à droit constant*

As far as the protection of European values is concerned, the Treaty change discourse is neither realistic nor productive. However, this is no reason to despair. The existing Treaties are a robust and flexible framework that allows for swift reactions to unprecedented challenges. The past decade of crises demonstrated as much. The financial, migration, values, and pandemic crisis

30 See e. g. Matteo Bonelli and Monica Claes, 'Crossing the Rubicon?', MJ 30 (2023), 3-14; Benedikt Riedl, 'ECJ Encroachment on Domestic Judicial Autonomy?', European Public Law 30 (2024), 157-186; Martin Nettesheim, 'European "Frankenstein Constitutionalism": TEU Article 2 as a Federal Homogeneity Clause', AJIL Unbound 118 (2024), 167-171.

31 Jean-Paul Jacqué, 'De la révision des traités', RTDE 60 (2024), 115-118 (116).

32 Daniel Kelemen, 'Curing the Virus of Autocracy in Europe: Q+A with Daniel Kelemen', UCL European Institute, 7 December 2020.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

– all these challenges were processed within the confines of the current Treaty framework, sometimes by interpreting the respective provisions in a dynamic or creative way. As such, we should recentre the debate: moving away from possible Treaty changes and rather towards improvements *à droit constant*. In this spirit, the Commission has indicated its support for Treaty change 'if and where it is needed', while underlining that improvements can be achieved by 'using to the full the potential of the current Treaties'.[33] In my view, there is room for improvement in five directions.

1. Interlinking Instruments

First, the already existing instruments should be better linked. Today, the protection of EU values operates at three-levels, from *monitoring* over *determination* to *sanction*. First, the Commission has developed elaborate monitoring instruments, such as the annual rule of law reports or the EU Justice Scoreboard. These are compiled based on submissions from various stakeholders and enable the early identification of potential breaches in the Member States. If such a risk is identified, the Commission can, at a second level, initiate infringement proceedings and ask the Court to determine a breach of the common values. If a Member State refuses to comply with such a judgment, the European institutions can increase the pressure either by bringing another case before the Court under Article 260(2) TFEU and request penalty payments or by freezing EU funds. The disbursement of EU funds can be made conditional upon the achievement of certain conditions, which could include compliance with judgments by the Luxembourg court.

Currently, there are three instruments that provide the basis for freezing funds.[34] First, the rule of law conditionality regulation allows to freeze payments when breaches of the rule of law risk affecting the EU's financial interests.[35] Judgments by the Court of Justice can be taken into account when assessing such breaches (see Recital 16). Second, there is the Recovery and Resilience Facility as part of 'Next Generation EU', which aims at overcoming the impact of the pandemic and which is linked to country specific, negotiated milestones. In the case of Poland this included compliance with

33 Communication on Pre-Enlargement Reforms and Policy Reviews, Brussels, 20 March 2024, COM/2024/146 final. See also Bárd, Kochenov, Wouters and Pech (n. 6) calling 'not for a revolution in procedure but for a renaissance in commitment'.

34 In detail, see e. g. Eulalia Rubio et al., 'The Tools for Protecting the EU Budget from Breaches of the Rule of Law', European Parliament, PE 747 – April 2023.

35 Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

judgments by the Court of Justice. And third, the Common Provisions Regulation concerning the management of cohesion funds contains so-called horizontal enabling conditions that Member States must fulfil before the disbursement of the funds. These enabling conditions relate, inter alia, to compliance with the Charter.[36]

These instruments provide the Union with much leverage when it comes to protecting its values. Besides several successful infringement proceedings against Poland and Hungary, the Union suspended over 137 billion Euro for Poland and over 21 billion Euro for Hungary (in detail, see Section 4). However, there is one central shortcoming. Rule of law reports, infringement proceedings, and the freezing of EU funds are only loosely connected.[37] In my view, the Commission should establish stronger links and bring these measures into a clear chronological order. Already at the stage of the rule of law reports, it should clearly articulate an assessment of possible breaches. If such a risk is identified, it should immediately trigger an infringement procedure. Should the Court determine a breach and should the Member State fail to comply, the Commission should not only bring an action under Article 260(2) TFEU, but immediately assess the conditions to freeze EU funds too. Even though these procedures have a different thrust – enforcement under Article 260(2) TFEU and the protection of the Union's financial interests under the conditionality regimes – they can both be triggered by the non-compliance with judgments by the Court of Justice. In this sense, the Commission could introduce an automaticity that increases predictability, transparency, and legal certainty and that counters possible allegations of shady 'deals' (see below, Section 4). Such an understanding could easily be articulated in form of a communication and eventually become a 'constitutional practice'.

2. Accelerating Action

Second, the Commission must accelerate its procedures.[38] Infringement proceedings to protect EU values simply take too long. Examples include the infringement proceedings concerning the Polish disciplinary regime for

36 Art. 9(1), 15(1) and Annex III of Regulation 2021/1060.

37 See also Bárd, Kochenov, Wouters and Pech (n. 6).

38 This has been repeatedly stressed, see only Kim Lane Scheppele, 'The Treaties without a Guardian: The European Commission and the Rule of Law', Columbia Journal of European Law 29 (2023), 93-183 or Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', Hague Journal on the Rule of Law 13 (2021), 1-43 (22 f.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

judges (adopted in December 2017, action before the Court in December 2019), the muzzle law (adopted in February 2020, action before the Court in April 2021) or – even more striking – concerning the captured Polish Constitutional Tribunal. The latter infringement proceedings were opened in December 2021, but concern to a large extent the tribunal's capture in December 2015. The decision to refer the matter to the Court was taken in March 2023, so again more than a year after opening the proceedings.[39] Even though these procedures are extremely urgent they exceed the Commission's own guidelines, which set the deadlines for the Member States' compliance after a letter of formal notice and reasoned opinion each at two months.[40] In any case, the Court has accepted that 'very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach'.[41] This might even justify a deadline of one week (!) in both stages of the pre-litigation procedure.[42] Against this backdrop, the previously mentioned delays are difficult to justify.

3. Hitting Harder

Third, the Commission should hit harder. Before the Court has rendered its decision, it should request interim measures under Article 279 TFEU and daily penalty payments in case the order is not complied with. This possibility was admitted by the Court of Justice in the *Białowieża forest* and *Turów mine* cases.[43] The full potential of such penalty payments was later revealed in the fourth rule of law related infringement procedure against Poland,

39 'The European Commission decides to refer Poland to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal', IP/23/842, 15 March 2023. The application was lodged on 17 July 2023, see *European Commission v. Republic of Poland*, case no. C-448/23.

40 See e. g. Bernhard Schima, 'Article 258 TFEU', in: Marcus Klamert, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and Charter of Fundamental Rights* (2nd edn, Oxford University Press 2024), paras 21, 23.

41 *Commission v. Belgium*, judgment of 2 February 1988, case no. C-293/85, ECLI:EU:C:1988:40, para. 14. More recently, see *Commission v. Poland, Hungary and the Czech Republic*, judgment of 2 April 2020, case nos C-715, 718 and 719/17, ECLI:EU:C:2020:257, para. 92.

42 See *Commission v. Austria*, judgment of 15 November 2005, case no. C-320/03, ECLI:EU:C:2005:684, para. 33.

43 *Commission v. Poland (Białowieża Forest)*, order of 20 November 2017, case no. C-441/17 R, ECLI:EU:C:2017:877 and *Czech Republic v. Poland (Turów Mine)*, order of 20 September 2021, case no. C-121/21 R, ECLI: EU:C:2021:752. For a critical evaluation, see Karol Piwoński, 'How Much is Too Much? On the Need to Regulate the CJEU's Power to Order Financial Penalties Under Article 279 TFEU', in: Darren Harvey et al. (eds), *Reforming the EU Treaties* (Nomos 2023), 125-172.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

where the Court imposed a daily penalty payment of 1 Million Euro until the Polish government complies with its interim order.[44]

After the final judgment, the Commission should closely monitor the concerned Member State's compliance and initiate a second infringement proceeding under Article 260(2) TFEU. While the Court decided merely one case on the basis of Article 260(2) TFEU in 2022,[45] there seems to be a growing awareness in this respect. The latest judgment against Hungary could provide a further impulse.[46] Already in December 2020, the Court had ascertained Hungary's disregard for central provisions of the Union's common asylum policy.[47] As Hungary did not comply with this ruling, the Commission launched proceedings under Art. 260 TFEU requesting a humble lump sum of 1 Million Euro and a daily penalty payment of 16,000 Euro.[48] The Court exceeded this amount many times over ordering a record lump sum of 200 Million Euro – nearly 200 times what the Commission had sought – and a daily penalty payment of 1 Million Euro.[49] This example shows that the Commission can and should be much bolder in suggesting lump sums and penalty payments. Further, it should immediately recover the amounts through offsetting.[50] This is established practice for lump sums and penalty payments ordered by the Court of Justice.[51]

4. Enhancing Transparency

Fourth, there is a need for greater transparency. Decisions on freezing and releasing EU funds are made in rather opaque procedures that give rise to accusations of shady 'deals' with veto-prone Member States. This applies

44 *Commission v. Poland*, order of 27 October 2021, case no. C-204/21 R, ECLI:EU:C:2021:878.

45 See <commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law_en>, last access 14 January 2025.

46 *Commission v. Hungary*, judgment of 13 June 2024, case no. C-123/22, ECLI:EU:C:2024:493.

47 *Commission v. Hungary*, judgment of 17 December 2020, case no. C-808/18, ECLI:EU:C:2020:1029.

48 *Commission v. Hungary* (n. 47), para. 1.

49 *Commission v. Hungary* (n. 47), para. 132. In detail Gavin Barrett, 'Rule of Law Chickens Coming Home to Roost', Verfassungsblog, 21 June 2024.

50 Art. 101 and 102 of Regulation 2018/1046.

51 Art. 29(2) and 31 of Commission Decision C(2018)5119 final of 3 August 2019. In detail Pekka Pohjankoski, 'Rule of Law with Leverage', CML Rev. 58 (2021), 1341-1364 (1358 ff.). This practice was only recently confirmed by the General Court, see *Poland v. Commission*, judgment of 29 May 2024, case nos T-200/22 and T-314/22, ECLI:EU:T:2024:329.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

with increasing intensity to the three conditionality regimes. While the rule of law conditionality regulation follows a relatively open process,[52] the conditions for the disbursement of the funds under the Recovery and Resilience Facility are already much trickier to identify.[53] The lack of transparency becomes particularly evident in the freezing of EU funds under the Common Provisions Regulation, which constitute the biggest chunk of EU funding. Already in September 2021, it was reported that the Commission was looking into possible links between compliance with the Charter and the Common Provisions Regulation.[54] Starting from October 2022, the Commission then decided to put words into deeds and freeze these funds with regard to Poland until compliance with certain judgments by the Court is guaranteed.[55] This was a monumental decision: over 75 billion Euro – approximately 10 % of Poland's gross domestic product (GDP)! – were put on hold. Yet, the Commission did not even issue a press release, leaving journalists, scholars, politicians, and even EU officials confused. The public was informed only through fuzzy press reports.[56] Similar uncertainty concerned the freezing of funds for Hungary.[57] On 22 December 2022, the Commission took a range of implementing decision to suspend the financing of Hungary's programmes under the Common Provisions Regulation – 22 billion Euro in total.[58] Even

52 See Council of the EU, 'Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 billion Given only Partial Remedial Action by Hungary', 12 December 2022.

53 These were set out in Council implementing decisions and are publicly available, see Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, ST 15447 2022 INIT, 5 December 2022 and Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, ST 9728 2022 INIT, 14 June 2022. The milestones, which need to be fulfilled before releasing the funds, can be found in detailed annexes, see Annex ST 15447 2022 ADD 1 (for Hungary) and Annex ST 9728 2022 ADD 1 (for Poland).

54 See e. g. Sam Fleming and Henry Foy, 'Poland and Hungary Face Threat to EU Regional Aid over Human Rights Concerns', Financial Times, 22 September 2021.

55 This happened by way of individual implementing decisions regarding each fund, see for an example, Commission Implementing Decision approving the programme 'European Funds for Eastern Poland 2021-2027', C(2022)7157, 6 October 2022, which simply states in its Art. 3 that the horizontal enabling condition of compliance with the Charter is not fulfilled, without any further explanation.

56 See e. g. Sam Fleming, Henry Foy and Raphael Minder, 'Rule of Law Stand-Off Threatens New EU Funding to Poland', Financial Times, 16 October 2022.

57 Kim Lane Scheppele and John Morijn, 'What Price Rule of Law?', in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023), 39-45 (41 ff.).

58 The individual decisions are listed here, Hungarian Helsinki Committee et al., Assessment of Compliance by Hungary with Conditions to Access European Union Funds, April 2023, <helsinki.hu/en/wp-content/uploads/sites/2/2023/04/HU_EU_funds_assessment_Q1_2023.pdf>, last access 14 January 2025, 46. They all contain an Art. 3(2), which features requirements of improving judicial independence and compliance with the Charter.

 DOI 10.17104/0044-2348-2024-4-745

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

though the Commission issued a press release,[59] it was completely unclear if, when, and how many funds were frozen.

Such a practice seems highly problematic in three respects. First, especially the decisions under the Common Provisions Regulation are taken by the Commission without any involvement of other institutions. Hence, there is little democratic accountability as astonished questions by Parliamentarians aptly demonstrate.[60] Second, one may wonder whether such an approach might conflict with the rule of law, especially with the duty to state reasons established under Article 296 TFEU and Article 41 of the Charter. Unlike Commission decisions in competition or state aid law, which are addressed to specific undertakings, the decisions to freeze EU funds are of great interest not only to the respective Member States, but also to their citizens as ultimate beneficiaries. And third, the previously mentioned decisions are at odds with the principle of transparency.[61] Both Articles 1(2) and 10(3) TEU stipulate that decisions should be taken 'as openly and as closely as possible to the citizen'. Similarly, Article 15 TFEU requires that each institution 'shall ensure that its proceedings are transparent'. If a legal scholar, such as this author, must do detective work to *find* the relevant decisions in the first place, let alone *understand* them, these standards are most likely not met.

The Commission has tried to remedy these flaws by providing more detailed information in the context of unfreezing these funds.[62] However, also the release has been subject to legitimate criticism, in particular with regard to Hungary. On 13 December 2023, the Commission decided in close proximity to the European Council meeting negotiating Ukraine aid to release 10 billion Euro of funds under the Common Provisions Regulation.[63]

---

59 European Commission, 'Investing in a Fair Climate and Digital Transition while Strengthening Hungary's Administrative Capacity, Transparency and Prevention of Corruption', IP/22/7801, 22 December 2022.

60 See MEP Daniel Freund's question to Marc Lemaître, who was Director-General for Regional and Urban Policy at that time, <x.com/daniel_freund/status/1584940214870769664?s=20&t=1aX6gxubamBigi4EUHxAZQ>, last access 14 January 2025.

61 See also the European Court of Auditors, 'Special Report 03/2024: The Rule of Law in the EU – An Improved Framework to Protect the EU's Financial Interests, but Risks Remain', para. 101, 50, 52.

62 After the elections in Poland and the new government's commitment to comply, the Commission decided to release these funds, see European Commission, 'Poland's Efforts to Restore Rule of Law Pave the Way for Accessing up to €137 billion in EU Funds', IP/24/1222, 29 February 2024. See also the Q&A under <ec.europa.eu/commission/presscorner/detail/en/qanda_24_1223>, last access 14 January 2025.

63 European Commission, 'Commission Considers that Hungary's Judicial Reform Addressed Deficiencies in Judicial Independence, but Maintains Measures on Budget Conditionality', IP/23/6465, 13 December 2023.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

In lack of any publicly available documents,[64] many suspected a shady deal: Orbán lifting his veto in exchange for releasing these funds.[65] The European Parliament even launched an action for annulment alleging not only a violation of the duty to state reasons, but also a misuse of powers due to a trade-off with Hungary.[66]

5. Broadening Focus

Finally, it seems that we will have to broaden our focus to better protect the Union's values. This applies in at least three respects. *Substantively*, we have realised that the protection of EU values goes far beyond the rule of law in the formal sense. In this spirit, the institutions started to expand the scope of their actions, for instance by going after violations of democratic values in Hungary.[67]

This substantive insight needs to be reflected *procedurally* by developing a stronger toolbox for the protection of democracy, civil society, press, and academia.[68] The EU has already adopted promising legislation in this respect, such as the Anti-SLAPP Directive or the European Media Freedom Act.[69] However, there is room for improvement both at the level of monitoring and sanctioning. On the one hand, the rule of law reports should be extended to cover also the value of democracy. These reports are based on the Commission's general monitoring power under Article 17 TEU in combination with Articles 2, 3(1) and 7 TEU. Hence, they could easily be extended to the value of democracy.[70] On the other hand, the current conditionality regime, especially under the Common Provisions Regulation, is limited to respecting Charter rights, which cannot cover all threats to the democratic process. For that reason, the Finish and Swedish Ministers for European Affairs called in a

64 Meanwhile, the Commission's decision has been made available, see Commission Decision C(2023) 9014 final/2.

65 Eventually, such a deal was indicated by the Commission itself, see Eddy Wax, 'Commissioner Hints at EU "Deal" to Unfreeze Hungary's Billions', Politico, 12 July 2024.

66 See pending case *Parliament v. Commission*, case no. C-225/24.

67 See the infringement procedure against the 'sovereignty bill, Fn. 29.

68 On the importance of such institutions, see Barbara Grabowska-Moroz and Olga Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland', Utrecht Law Review 17 (2021), 56-69.

69 In detail on such measures, see Communication on Defence of Democracy, COM/2023/630 final.

70 Petra Bárd and Laurent Pech, *The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values* (European Parliament, February 2022, PE 727.551), 26.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

joint letter for extending the current conditionality regime to all the values mentioned in Article 2 TEU.[71]

Third, the broadening of focus has a *temporal* dimension too. The Union should not only *react* to violations of its values but engage in *preventive* as well as *successive* support. Following a phrase often associated with Jean Monnet – 'si c'était à refaire, je recommencerais par la culture' – the Union should aim at promoting and rooting a culture that cherishes its common values.[72] Possible avenues could include civic education,[73] so-called 'mainstreaming' (ensuring compliance in all EU policy areas),[74] or a better communication of relevant actors.[75] Successive support is required once a former, illiberal government has been voted out of office. As evidenced in Poland, restoring the democratic rule of law and rebuilding society's trust in constitutional checks and democratic institutions is a pressing task. The new government faces constitutional obstacles and opposition not only by the president but also by the captured constitutional tribunal.[76] The Union's law and institutions can and must support the new government in overcoming these deadlocks and achieving the democratic transition.[77]

These are tasks not only for EU officials, but for legal scholars as well. Developing ways of anchoring the Union's common values in European society and supporting democratic transitions should become a top priority. To succeed, however, we need to embrace creative realism as our guiding star. For now, this means setting aside debates on potential Treaty changes to better protect our shared values.

Luke Dimitrios Spieker

---

71 'Sweden and Finland Want to Apply Conditionality Linked to Rule of Law to all EU Funding', Bulletin Quotidien d'Europe No. 13489, 25 September 2024.

72 On promoting a rule of law culture, Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors', Columbia Journal of European Law 29 (2023), 214-226 (223 ff.).

73 Kris Grimonprez, *The European Union and Education for Democratic Citizenship* (Nomos 2020).

74 Werner Schroeder, 'Transition 2.0 and Rule of Law-Mainstreaming in the European Union', in: Michal Bobek, Adam Bodnar, Armin von Bogdandy and Pál Sonnevend (eds), *Transition 2.0* (Nomos 2023), 535-562 (557 ff.).

75 On building trust in the judiciary, see at the Member State level Francesco Viganò, 'Protecting Judicial Independence by Strengthening Public Confidence in the Judiciary', in: Filipe Marques and Paulo Pinto de Albuquerque (eds), *Rule of Law in Europe* (Springer 2024), 47-54 and Silvia Steininger, 'Creating Loyalty', Global Constitutionalism 11 (2022), 161-196.

76 See e. g. Armin von Bogdandy and Luke Dimitrios Spieker, Viewpoint: 'Democracy Can Be Dismantled more Quickly than It Can Be Restored', MaxPlanckResearch 1/2024, 14-19.

77 On possible ways ahead, see Michal Bobek, Adam Bodnar, Armin von Bogdandy and Pál Sonnevend (eds), *Transition 2.0* (Nomos 2023).

DOI 10.17104/0044-2348-2024-4-745 ZaöRV 84 (2024)

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Re-Reading Historic Articles in the ZaöRV: Anniversary Series

Introducing the Anniversary Series

In December 2024, the Max Planck Institute for Comparative Public Law and International Law (MPIL) celebrates its centenary. While a key part of this anniversary is a blog dedicated to the institute's history,[1] it was obvious that the journal should also contribute to these efforts. After all, the journal formed a vital part of the original plans for the Institute as Philipp Glahé was able to uncover during his research on the institute.[2] Given the blog's focus on the past, we decided to complement this rather historical perspective with a series which aims at connecting past, present, and future. To this end, we asked scholars to reflect on historic pieces published in the ZaöRV. The aim of the series is not primarily to appraise these historical contributions as such. Rather, we invited the authors to take these contributions as starting points for reflection on the topic under discussion. In the spirit of a fruitful debate, we left it to the authors' discretion how to approach the articles and equally welcomed critical, historical as well as future-oriented engagements with the topic.

Over a period of two years, each issue of the ZaöRV will contain one or two articles dedicated to the topics of earlier ZaöRV contributions. The historical papers were written by former directors and by prominent researchers who were important for the MPIL. All of them deal with topics that were particularly dear to the respective authors. The articles selected cover most of the lifespan of the ZaöRV, notably also the years of Nazi Germany (1933-1945).

It is our great pleasure that Armin von Bogdandy's reflection on Hermann Mosler's article 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl – Entstehung und Qualifizierung' kicks off the series. The article exemplifies what the series is all about: von Bogdandy offers a fresh appraisel of Mosler's rather understated and sober analysis of the treaty on the Euro-

1 See <https://mpil100.de/>,; see also on the blog Philipp Glahé and Alexandra Kemmerer, '100 Years of Public Law: International, Transnational, Comparative: An Introduction to MPIL100' ZaöRV 84 (2024), 23-25.

2 See the diary of Viktor Bruns' wife Marie Bruns transcribed by Philipp Glahé which can be found here: Marie Bruns, 'Eine "„ganz unverhoffte Freude". Eindrücke aus der Gründungszeit des Instituts 1924-1926', available at: <https://mpil100.de/2024/10/eine-ganz-unverhoffte-freude-eindruecke-aus-der-gruendungszeit-des-instituts-1924-1926/#comments>.

DOI 10.17104/0044-2348-2024-4-761

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

pean Coal and Steel Community by highlighting the paradigm shift underlying Mosler's argument. In von Bogdandy's account, Mosler liberated German legal thinking from its obsession with the State by presenting alternative frameworks for understanding politcal community. Yet, von Bogdandy also identifies the void in Mosler's argument: his (probably conscious) omisssion of any engagement with German guilt for the atrocities in the Second World War and the Holocaust. Despite its groundbreaking character, the article remains a creature of its time. This historical reflection on an influential article in the ZaöRV is but the beginning of a series which will, as we hope, provide much food for thought and discussion. After all, there is still a lot to discover in the journal's volumes which merits re-discovery, engagement, and critique.

Robert Stendel

 DOI 10.17104/0044-2348-2024-4-761

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Die Befreiung
Moslers europaföderale Sprengung des staatsrechtlichen Denkens

Armin von Bogdandy*
Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, Deutschland/Germany
bogdandy@mpil.de

Abstract 763
I. These und Programm 764
II. Die Fesseln *Bilfingers* 766
III. Die Befreiung *Moslers* 769
1. Die Lage 770
2. Das Neue 773
3. Die Sprengung 777
IV. Die Befreiung, die fehlt 783
Summary: The Liberation: Mosler's European Constitutional Thinking for Postwar Germany 784

Abstract

1951 befreite *Hermann Mosler* das deutsche juristische Denken transnationaler Phänomene aus den Fesseln des staatsrechtlichen Denkens. Medium der Befreiung war die Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Anlass der Vertrag zur Gründung der Europäischen Gemeinschaft für Kohle und Stahl (EGKS). Konkret legte *Mosler* einen Weg frei, das Gemeinschaftsrecht jenseits des staatsrechtlichen Dualismus von Landesrecht und Völkerrecht als eine neue und neuartige Rechtsordnung zu denken, und zwar in föderalen und verfassungsrechtlichen Kategorien. Er zeigt, dass der politische Wille zu einer völkervertraglich verfassten Föderation souveräner Staaten kein juristisches Paradoxon ist, sondern vielmehr ein Weg in eine bessere Zukunft. Voraussetzung ist allerdings staatsrechtliche Dogmen zu sprengen. So geht es zunächst geht es um die Fesseln, veranschaulicht an Aufsätzen, mit denen Carl Bilfinger in der ZaöRV das juristische Denken in

* Direktor am Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg. Ich danke Felix Lange, Reinhard Mehring sowie zwei Reviewern für hilfreiche Anregungen.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

der ersten Sattelzeit zu orientieren suchte. In deren Gegenlicht gewinnt *Moslers* Befreiung klare Konturen. Abschließend wird untersucht, welchen Fesseln *Mosler* nicht entkam.

I. These und Programm

1951 befreite *Hermann Mosler* das deutsche juristische Denken transnationaler Phänomene aus den Fesseln des staatsrechtlichen Denkens. Die Befreiung erfolgte mittels der Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), die sich so einer neuen Zukunft öffnete. Den Anlass bot der Vertrag zur Gründung der Europäischen Gemeinschaft für Kohle und Stahl (EGKS).[1] *Mosler* leistete ganze Arbeit, denn sein Zugriff war nicht nur kritisch, sondern konstruktiv.[2]

Konkret legte *Mosler* einen Weg frei, das Gemeinschaftsrecht jenseits des staatsrechtlichen Dualismus von Landesrecht und Völkerrecht[3] als eine neue und vor allem neuartige Rechtsordnung zu denken, und zwar in föderalen und verfassungsrechtlichen Kategorien. Er zeigt, dass der politische Wille zu einer völkervertraglich verfassten Föderation souveräner Staaten kein juristisches Paradoxon ist, sondern vielmehr ein Weg in eine bessere Zukunft. Eine Voraussetzung dafür ist allerdings, staatsrechtliche Dogmen zu sprengen.

Sprengen ist ein Begriff *Moslers* (S. 24), auch für seine eigene Arbeit.[4] Eine solche performative, für manche aktivistische und daher problematische Rechtswissenschaft[5] ist für *Mosler* wissenschaftsadäquat und sogar geboten. Denn zu den Aufgaben der Rechtswissenschaft gehört, politische Verbände „zu regeln", „den Ausgleich der gesellschaftlich wirksamen Interessen zu fördern" und dabei „Integration" voran zu bringen (S. 37). *Mosler* konzipiert das Verhältnis von Rechtswissenschaft und Gesellschaft als dialektisch, auch

1 Hermann Mosler, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl. Entstehung und Qualifizierung', ZaöRV 14 (1951), 1-45. Seitenzahlen im Text (S. X) beziehen sich auf diesen Beitrag.

2 Insofern leistet der heutige *critical turn* nur halbe Arbeit; Editorial Comments, 'The Critical Turn in EU Legal Studies', CML Rev. 52 (2015), 881-888.

3 Heinrich Triepel, *Völkerrecht und Landesrecht* (C. L. Hirschfeld 1899); Carl Schmitt, 'Über die zwei großen "Dualismen" des heutigen Rechtssystems. Wie verhält sich die Unterscheidung von Völkerrecht und staatlichem Recht zu der innerstaatlichen Unterscheidung von öffentlichem und privatem Recht?' in: *Mélanges Streit. Bd. 2*, (Pyrsos 1940), 315-328.

4 So in Hermann Mosler, 'Begriff und Gegenstand des Europarechts', ZaöRV 28 (1968), 481-502 (500).

5 Dazu Patrick Hilbert, 'Republikanismus und Rechtswissenschaft – Ein Kommentar zu Armin von Bogdandy' in: Armin von Bogdandy, Angelika Siehr und Patrick Hilbert (Hrsg.), *Renaissance des Republikanismus* (Mohr Siebeck 2024), 161-181.

 DOI 10.17104/0044-2348-2024-4-763

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

wenn er das nie so formuliert hat. Denn zum einen muss „die Rechtswissenschaft dem gesellschaftlichen Faktum folgen", dem „Substrat der rechtlichen Konstruktion", zum anderen soll sie förderungswürdigen gesellschaftlichen Dynamiken einen Weg bahnen (S. 37).[6] Aus heutiger Sicht erscheint *Moslers* Beitrag von 1951, nur um den geht es hier, als ein Werk des rechtswissenschaftlichen Konstruktivismus.[7]

Diese Befreiung bleibt nach 70 Jahren unvollständig, denn der staatsrechtliche Zugang prägt weiter Teile des deutschen Europarechtsdenkens. Gewichtige Stimmen konzipieren das Unionsrecht als „Staatsrecht III", als „delegiert" oder als kreisend um die Kontrollkompetenz des Bundesverfassungsgerichts.[8] So bleibt *Moslers* ZaöRV-Beitrag aktuell, selbst wenn der EGKS-Vertrag wenig erfolgreich war,[9] am 23. Juli 2002 erlosch und bereits die Römischen Verträge auf seinen Leitbegriff verzichteten: die Überstaatlichkeit (supranationalité). Natürlich war diese Befreiung eine kollektive Operation.[10] Die deutsche Rechtswissenschaft erinnert jedoch wenige Beiträge der ersten Sattelzeit des Gemeinschaftsrechts[11] wie diesen, zu Recht, wie im Folgenden zu zeigen.

Zunächst geht es um die Fesseln, veranschaulicht an Aufsätzen, mit denen *Carl Bilfinger* in der ZaöRV das juristische Denken in der ersten Sattelzeit zu orientieren suchte (II.). In deren Gegenlicht gewinnt *Moslers* Befreiung klare

---

6 Habermas theoretisiert dies später als Transzendenz demokratischen Rechts, Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992), 15 ff.

7 Mit anderer Tendenz zu *Moslers* Gesamtwerk Felix Lange, *Praxisorientierung und Gemeinschaftskonzeption. Hermann Mosler als Wegbereiter der westdeutschen Völkerrechtswissenschaft nach 1945* (Springer 2017). *Mosler* selbst bezeichnete sich als Positivist, Nachweis bei Lange, *Praxisorientierung und Gemeinschaftskonzeption* (Fn. 7), 2.

8 Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (C. H. Beck 2017); Peter M. Huber, *Der Gerichtshof der Europäischen Union und das Bundesverfassungsgericht als Hüter der unionalen Kompetenzordnung* (Duncker & Humblot 2023); zuspitzend Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019).

9 Detailliert Oliver Buntrock, *Problemlösung im europäischen Mehrebenensystem: Das Beispiel der Stahlpolitik der Europäischen Gemeinschaft für Kohle und Stahl (EGKS)* (Deutscher Universitätsverlag 2004).

10 Antoine Vauchez, *L'Union par le droit. L'invention d'un programme institutionnel pour l'Europe* (Presses de Sciences Po 2013), 49 f.; Anna Katharina Mangold, *Gemeinschaftsrecht und deutsches Recht. Die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (Mohr Siebeck 2011), 189, 258, 433.

11 Der Begriff der Sattelzeit entstammt Reinhart Koselleck, 'Einleitung' in: Otto Brunner, Werner Conze und Reinhart Koselleck (Hrsg.), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*n. *Bd. 1*, (Klett-Cotta 1972), XIII-XXVII; zur Anwendung auf das Gemeinschaftsrecht, Armin von Bogdandy, *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp 2022), § 8.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Konturen (III.), so dass ich eine Bruchstelle in der Institutsgeschichte markiere.[12] Methodisch folge ich *Michael Stolleis'* literaturgeschichtlichem Ansatz,[13] allerdings durchsetzt mit juristisch-konstruktivistischen Überlegungen. Abschließend untersuche ich, welchen Fesseln *Mosler* nicht entkam (IV.).

II. Die Fesseln *Bilfingers*

Die staatsrechtlichen Fesseln, aus denen *Mosler* das deutsche öffentlich-rechtliche Denken befreite, zeigen zeitgenössische Aufsätze in der ZaöRV. Paradigmatisch sind die Beiträge *Carl Bilfingers*. Dieser war ab 1949 Gründungsdirektor des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht, und zwar zur „Sicherung der Kontinuität".[14]

Was kontinuierte *Bilfinger*? Es war deutsches staatsrechtliches Denken in einem geradezu etatistischen Zuschnitt: Ihn kennzeichneten eine tiefe Prägung durch den Wilhelminismus, eine enge Verbindung zu *Carl Schmitt* und anderen Exponenten etatistischen Denkens, eine bekennende NSDAP-Mitgliedschaft und, dank dieser Credentials, sein vorheriges Wirken im Direktorenamt des Kaiser-Wilhelm-Instituts ab 1943, testamentarisch empfohlen vom Gründungsdirektor *Viktor Bruns*. Dieses Direktorenamt und die höchstprominente Platzierung seiner Beiträge in der 1950 wiederbelebten ZaöRV zeigen *Bilfingers* Anspruch, die Stoßrichtung der Zeitschrift, der Institutsarbeit, der Forschung, des öffentlich-rechtlichen Denkens im Nachkriegsdeutschland auszurichten.

Bilfinger beginnt die wiederbelebte ZaöRV mit einem Nachruf auf den Begründer des Dogmas des Dualismus von Landesrecht und Völkerrecht, worin er die Verbindlichkeit des Dogmas unterstreicht.[15] Gefesselt durch die Staatsidee findet er keinen Weg nach vorne. Bilfinger ist einfallslos wie *Carl*

12 Zu Kontinuitäten von Bruns über Mosler bis zum heutigen Tage Anne Peters, 'Völkerrecht als Rechtsordnung: 1929 – 1976 – 2024', MPIL100, 20. September 2024; Armin von Bogdandy und Philipp Glahé, 'Alles ganz einfach? Zwei verlorene Weltkriege als roter Faden der Institutsgeschichte', MPIL100, 30. April 2024.

13 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Bd. 1. Reichspublizistik und Policeywissenschaft 1600-1800* (C. H. Beck 1988), 43.

14 Zu *Bilfinge*r als Wissenschaftler und Direktor Felix Lange, 'Carl Bilfingers Entnazifizierung und die Entscheidung für Heidelberg', ZaöRV 74 (2014), 697-731; umfassend zu *Bilfinger* Philipp Glahé, Reinhard Mehring und Rolf Rieß, *Der Staats- und Völkerrechtler Carl Bilfinger (1879-1958). Dokumentation seiner politischen Biographie* (Nomos 2024). Dass dies der Mainstream war, zeigt etwa Frieder Günther, *Denken vom Staat her. Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949-1970* (De Gruyter 2004).

15 Carl Bilfinger, 'Heinrich Triepel', ZaöRV 13 (1950), 1-13 (5 ff.).

 DOI 10.17104/0044-2348-2024-4-763

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Schmitt in *Der Nomos der Erde*, gewiss, ein jeder auf seinem Niveau. So ruft *Bilfinger* im allerersten Nachkriegsbeitrag der ZaöRV („PROLEGOMENA") die deutsche Völkerrechtswissenschaft auf, sich auf das „nicht spezifisch politische Völkerrecht" zu konzentrieren. Zugleich suggeriert er, bemerkenswert inkonsistent, die alliierte Besatzung Deutschlands als völkerrechtswidrig und die Kriegsverbrecherprozesse als politisch.[16] Auf dieser Linie verstehe ich den verquasten Anfang mit *Kaiser Friedrich III.* (1414-1493): Er ermöglichte *Bilfinger*, auf die Relativität historischer Beurteilung hinzuweisen und damit eben *nicht* „die Frage nach der Schuld zu stellen". Das erlaubt ihm „die Frage nach dem Tag des Gerichts und der Abrechnung […] im Dunkeln" zu lassen.[17]

Noch deutlicher werden die Fesseln in dem konzeptionell ausgerichteten Aufsatz „Friede durch Gleichgewicht der Macht?", mit dem *Bilfinger* die „Abhandlungen" der ZaöRV wiederbelebt. Für sein staatsrechtliches Denken gibt es nur zwei Grundlagen internationaler Ordnung: Gleichgewicht mächtiger Staaten und, wie es *Heinrich Triepel*, *spiritus rector* des Kaiser-Wilhelm-Instituts, monumental festgehalten hatte, Hegemonie.[18] In *Bilfingers* Aufsatz geht es um das Verhältnis der beiden: Angesichts der Vormachtstellung der Vereinigten Staaten in Westeuropa stellt sich die Frage, ob das Gleichgewichtsdenken in deren Schatten eine Rolle hat.

Bilfingers Aufsatz versucht genau das zu zeigen: Dem Gleichgewicht der Mächte könne auch im Rahmen einer Hegemonie eine konstruktive, also insbesondere friedenssichernde Rolle zukommen. Ich habe den tieferen Sinn vieler Passagen dieses gewundenen und mir prätentiös erscheinenden Beitrags[19] nicht wirklich verstanden, entnehme ihm aber eine Kernaussage: Die Westalliierten sollten zwecks einer stabilen europäischen Friedensordnung mit dem besiegten Deutschland so umgehen wie die Heilige Allianz mit dem besiegten Frankreich auf dem Wiener Kongress.[20]

---

16 Carl Bilfinger, 'PROLEGOMENA', ZaöRV 13 (1950), 22-25 (23); ähnlich Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Greven 1950), 232 ff., 255; die Ansicht war weit verbreitet, dazu Philipp Glahé, *Amnestielobbyismus für NS-Verbrecher – Der Heidelberger Juristenkreis und die alliierte Justiz 1949-1955* (Wallstein 2024), 208-209.

17 In diesem Punkt liegen *Bilfinger* und *Mosler* auf einer Linie, artikuliert von Alexander Mitscherlich und Margarete Mitscherlich, *Die Unfähigkeit zu trauern. Grundlagen kollektiven Verhaltens* (Piper 1967).

18 Dazu Heinrich Triepel, *Die Hegemonie. Ein Buch von führenden Staaten* (Kohlhammer 1938). Zur Bedeutung *Triepels* für das Institut, siehe *Bilfingers* Nachruf.

19 Man kann *Moslers* abfällige Bemerkung vom "völkerrechtlichen Geschwafel" auf diesen Beitrag beziehen, nachgewiesen in Felix Lange, 'Wider das "völkerrechtliche Geschwafel" – Hermann Mosler und die praxisorientierte Herangehensweise an das Völkerrecht im Rahmen des Max-Planck-Instituts', ZaöRV 75 (2015), 307-343.

20 Paul-Louis Couchoud und Jean-Paul Couchoud (Hrsg.), *Mémoires de Talleyrand. Tome II*, (Calmann Lévy 1957), 436 ff.; Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Nomos 1984).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Die Vier Mächte machten keinen solchen Schritt auf Deutschland zu, wohl aber Frankreich auf die Bundesrepublik. Der war letztlich viel weiter und sollte zu einem viel größeren Erfolg führen. Frankreich erklärt sich mit der Schuman-Erklärung vom 9. Mai 1950 bereit, gemeinsam mit Deutschland den Weg in eine gemeinsame Föderation aufzunehmen, womit es von seinem ursprünglichen Plan einer dauerhaften Schwächung auf amerikanischen Druck Abstand nahm. *Adenauer*, der den Wilhelminischen Etatismus stets abgelehnt hatte, erblickte die Chance und machte das Gelingen des Schuman-Plans zu einem Kernanliegen deutscher Außenpolitik. Es entsprach dem Selbstverständnis der ZaöRV, dieses Projekt prominent zu besprechen, eben durch *Bilfinger* als Direktor des Instituts.[21]

Da das Heidelberger Institut die Regierungsnähe des Berliner Instituts fortführte, war die Grundtendenz von *Bilfingers* Aufsatzes gesetzt. Kritik war ausgeschlossen. Umso verquaster gerät er. Immerhin macht der Aufsatz klar, wenngleich unausgesprochen, dass das Gleichgewichtsdenken nicht passt. Nirgends versucht *Bilfinger* den Schuman-Plan in den Kategorien seines Friede-durch-Gleichgewicht-der-Macht-Aufsatzes zu deuten, weil der Schuman-Plan diese Anschauungswelt verlässt. Diese Einsicht, die auch *Moslers* Aufsatz prägt, war bedeutend und keineswegs allen vergönnt.[22]

Zentral ist in *Bilfingers* Beitrag vielmehr der Begriff des Politischen. Im Hintergrund glimmt, unausgewiesen, der berühmteste Gedanke *Bilfingers* berühmtesten Freundes.[23] Damit gelingt es *Bilfinger* immerhin zu identifizieren, wo für die etatistische Tradition das Kernproblem des Schuman-Plans liegt. Der Plan will das Politische völkerrechtlich bändigen, weil es ihm um die Undenkbarmachung eines Krieges unter den beteiligten Staaten geht, also um die Zügelung ihrer „Lebensinteressen". Dieses gewaltige Ziel wirft die Forschungsfrage von Bilfingers Beitrag auf: die „Grenzen vernünftiger Rechtsetzung".

Auch in diesem Aufsatz habe ich *Bilfingers* Gedankengang nicht wirklich verstanden. Mir scheint, dass er die Praktikabilität des Schuman-Plans an die Anerkennung eines Vorbehalts knüpft. Ungeachtet aller vertraglichen Pflichten muss den teilnehmenden Staaten eigenmächtiges Handeln erlaubt sein,

21 Carl Bilfinger, 'Vom politischen und nicht-politischen Recht in organisatorischen Kollektivverträgen. Schuman-Plan und Organisation der Welt', ZaöRV 13 (1950), 615-659. Diese Tradition lebt fort, siehe zur Außenpolitik der ‚Ampelkoalition' Anne Peters, '"Füg' dich, meine Schöne": Plädoyer für ein feministisches Foreign Relations Law', ZaöRV 84 (2024), 7-22.

22 Zum Fortwirken dieses Denkens Dirk Kroegel, 'Das Gleichgewicht als Integrationsfaktor bei Entstehung und Ausbildung der Europäischen Gemeinschaft' in: Armin von Bogdandy (Hrsg.), *Die Europäische Option. Eine interdisziplinäre Analyse über Herkunft, Stand und Perspektiven der europäischen Integration* (Nomos 1993), 199-216.

23 Carl Schmitt, *Der Begriff des Politischen. Mit einer Rede über das Zeitalter der Neutralisierungen und Entpolitisierungen* (Duncker & Humblot 1932).

 DOI 10.17104/0044-2348-2024-4-763

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

wenn sie ihre Lebensinteressen betroffen sehen.[24] Dieser Ansatz lebt in dem Theorem der Verfassungsidentität fort. Wie lebendig er auch heute noch ist, zeigt anschaulich die Vehemenz, mit welcher der Europäische Gerichtshof (EuGH) auf die Autonomie des Unionsrechts pocht, 1963 wie 2022.[25]

Wahrt der EGKS-Vertrag damit die „Grenzen vernünftiger Rechtsetzung"? Die Fesseln des staatsrechtlichen Denkens hindern *Bilfinger*, selbst mit seinem Vorbehalt, zu einer klaren positiven Stellungnahme zu gelangen. Er kaschiert dies, indem er seinen Beitrag nach seitenlangen, ziellos mäandrierenden Ausführungen zum Weltpostverein einfach versiegen lässt. Der Weltpostvertrag, diesen Eindruck nehme ich mit, ist für staatsrechtliches Denken im Stile *Bilfingers* ein Denkmal, und Mahnmal, was vernünftiger internationaler Rechtsetzung zugänglich ist.

III. Die Befreiung *Moslers*

Nicht so für *Hermann Mosler* (1912-2001), der dem Weltpostverein wie *Bilfingers* Bemühen um den Schuman-Plan keine Zeile schenkt.[26] Das Nachwuchstalent aus dem Berliner Institut für ausländisches öffentliches Recht und Völkerrecht kannte sich aus, da Teil der deutschen Verhandlungsdelegation.[27] Die Berufung dazu erreichte ihn an der katholisch geprägten Georgetown-Universität, an welcher der katholisch geprägte *Mosler* einen Forschungsaufenthalt durchführte, vermittelt durch den zum Katholizismus konvertierten jüdischen Gelehrten *Heinrich Kronstein*. Dieses katholische Moment ist relevant, da der rheinische Katholizismus, anders als etwa der schmittianische oder spanische Nationalkatholizismus, der protestantisch erdachten Staatsverehrung eher fernstand.[28] Das sollte *Moslers* Befreiung erleichtern.

---

24 Bilfinger (Fn. 21), 635. Zur Verfassungsidentität auf der staatrechtlichen Linie BVerfGE 123, 267 – *Lissabon*.

25 EuGH, *van Gend en Loos*, Urteil v. 5. Februar 1963, Rs. 26/62, ECLI:EU:C:1963:1; EuGH, *Costa/E. N. E. L.,* Urteil v. 15. Juli 1964, Rs. 6/64, ECLI:EU:C:1964:66; EuGH, *EMRK-Beitritt (Plenum)*, Gutachten 2/13 v. 18. Dezember 2014, ECLI:EU:C:2014:2454, Rn. 155-176, 179-200; EuGH, *Ungarn/Parlament u. Rat (Plenum)*, Urteil v. 16. Februar 2022, Rs. C-156/21, ECLI:EU:C:2021:974, Rn. 125, 232.

26 In den 90 Fußnoten des Artikels taucht *Bilfinger* einmal auf, pauschal in Fußnote 1 und ohne Auseinandersetzung.

27 *Mosler* war somit befangen, ohne es im Text ausweisen. Das erscheint heute problematisch, siehe Vereinigung der deutschen Staatsrechtslehrer, *Gute wissenschaftliche Praxis im öffentlichen Recht* (2012), Leitsatz 46. Allerdings dürfte seine Rolle damals allgemein bekannt gewesen sein.

28 Wolfram Kaiser, *Christian Democracy and the Origins of the European Union* (Cambridge University Press 2007), 12 ff., 164-191. Zum rheinischen Katholizismus, Michael Klöckner, '"rheinisch-katholisch". Zur Mentalität des rheinischen Katholizismus', Römische Quartalschrift für Christliche Altertumskunde und Kirchengeschichte 100 (2005), 288-312.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

In der deutschen Verhandlungsdelegation war *Mosler* so erfolgreich, dass *Adenauer* ihn anschließend zum ersten Leiter der Rechtsabteilung des bundesrepublikanischen Auswärtigen Amtes berief,[29] von wo er zur Universität Frankfurt und 1954 in das Direktoramt am Heidelberger Institut wechselte. *Mosler* gehörte also, neben seinem Förderer *Walter Hallstein* und *Carl Friedrich Ophüls*, zu den maßgeblichen deutschen Juristen in den Verhandlungen zum EGKS-Vertrag.

Das Gelingen des Schuman-Plans durch den EGKS-Vertrag war *Mosler* eine „Herzensangelegenheit".[30] Damit bezog er Position, denn anderen galt der Plan als „Landesverrat", als Kniefall „vor der amerikanischen Finanzoligarchie", aber auch als die „Mitteleuropa-Konzeption der deutschen Imperialisten von 1914".[31] So behandelt *Moslers* Aufsatz aus einem tiefen Anliegen heraus ein großes und umstrittenes Thema, und das mit enormer Sachkenntnis, politischer Peilung und juristischer Schlagkraft. Das sind die Zutaten großer Beiträge.

1. Die Lage

Moslers Methode war, das wurde bereits gesagt, konstruktivistisch, aber zudem, und darauf kommt es jetzt an, „situativ", was man mit *Felix Lange* auch als „pragmatisch" bezeichnen kann. Der Beitrag lebt aus dem Verständnis der politischen Lage, bezieht Position und wirkt auf sie ein. Die Lage ist *Moslers* Aufsatz nichts Äußeres, das er, wie viele dogmatische Beiträge, mit ein paar einleitenden Sätzen abhandelt, um sich dann der Pflege des umfriedeten dogmatischen Gartens zu widmen. Die genaue Erfassung der Lage ist vielmehr elementar für *Moslers* rechtwissenschaftliche „Qualifizierung" des Vertrags, weit wichtiger als dessen Bestimmungen. Nur so versteht sich, dass er über die Hälfte seines Beitrags der Lage widmet, dargestellt anhand der politischen Interessen, Konflikten, Positionen, Projekten und Prozessen der Konsensbildung (S. 1-23, 27-29). *Mosler* versteht dies als eine Beschreibung der „Entstehung", heute spricht man von *process tracing.*[32]

---

29 Im Einzelnen Lange, *Praxisorientierung und Gemeinschaftskonzeption* (Fn. 7), 58 ff. Später bemühte sich *Adenauer, Mosler* als Staatssekretär im Auswärtigen Amt und sogar im Bundeskanzleramt zu gewinnen, erfolglos.

30 Nachweise Lange, *Praxisorientierung und Gemeinschaftskonzeption* (Fn. 7), 173.

31 Nachweise Lange, *Praxisorientierung und Gemeinschaftskonzeption* (Fn. 7), 177 f. Diese Vorwürfe kamen vor allem von Juristen aus der DDR, mit denen die Westdeutschen damals noch gemeinsam tagten. Zur Distanz des westdeutschen Mainstreams vgl. Günther (Fn. 14).

32 Zu dieser politikwissenschaftlichen Methode David Collier, 'Understanding Process Tracing', PS 44 (2011), 823-830.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Mosler versteht die Lage, für die der EGKS-Vertrag zu entfalten ist, im Grunde wie *Schuman*: Der Friede in Europa braucht eine neue Form internationaler Ordnung. Allerdings verzichtet *Moslers* Lageanalyse auf den Begriff der Solidarität, dem in der Schuman-Erklärung eine Schlüsselrolle zukommt. *Schuman* denkt die europäische Einigung wohl mit *Durkheims* Soziologie solidarischer Vergesellschaftung, ein Ansatz, den *Léon Duguit* ins Verfassungs- und Verwaltungsrecht und *Georges Scelle* ins Völkerrecht einbrachten.[33] Das fehlt bei *Mosler*, ebenso wie jeder Hinweis auf den ähnlich ausgerichteten sozialdemokratischen Europaföderalismus seines früheren Institutskollegen *Hermann Heller* oder auf den republikanischen Föderalismus des damals intensiv diskutierten Manifests von Ventotene.[34] Ich frage mich, ob der heutige deutsche Europarechtsdiskurs vertrauter mit dem Prinzip europäischer Solidarität wäre, hätte *Mosler*, mit *Schuman*, die europäische Integration als ein Projekt solidarischer Vergesellschaftung begriffen.[35]

Mosler fokussiert ab dem allerersten Satz allein auf die „Große Politik", also die Politik um Krieg und Frieden, die eine kleine Gruppe mächtiger Personen prägt.[36] Er präsentiert die Montanunion als Antwort auf die Dysfunktionalität des Sicherheitsrats der Vereinten Nationen (S. 2). Es fehlt damit jeder Hinweis nicht nur auf Fragen der solidarischen Vergesellschaftung, sondern insgesamt auf die sozialen Konflikte der Zwischenkriegszeit, die zu autoritären, totalitären und damit oft aggressiven Regimen geführt hatten, ohne die der Zweite Weltkrieg und der nachfolgende Ost-West-Konflikt kaum zu verstehen sind.

Mosler blendet somit Wichtiges aus, was aber seiner Scharfsichtigkeit nicht schadet. Letztere zeigt seine ungewöhnliche Artikulation der Lage. Es gehe 1951 nicht darum, Westeuropa zu integrieren, so das übliche Verständnis. Die Montanunion solle vielmehr seine Desintegration verhindern: „Die Verflech-

33 Zur Bedeutung Dieter Grimm, *Solidarität als Rechtsprinzip. Die Rechts- und Staatslehre Léon Duguits in ihrer Zeit* (Athenäum 1973); Hugo Canihac, 'Du solidarisme aux Communautés européennes. Le concept de solidarité dans la pensée de Georges Scelle', Revue Française d'Histoire des Idées 51 (2020), 195-230.

34 Hermann Heller, 'Politische Demokratie und soziale Homogenität (1928)' in: Martin Drath und Christoph Müller (Hrsg.), *Gesammelte Schriften. Bd. 2* (Sijthoff 1971), 421-434 (433); Altiero Spinelli und Ernesto Rossi, 'Per un'Europa libera e unita. Progetto di un manifesto' in: Altiero Spinelli und Ernesto Rossi (Hrsg.), *Il Manifesto di Ventotene* (Guida 1982), 9-30 (22 ff.). Zur Bedeutung Lucio Levi (Hrsg.), Altiero Spinelli and Federalism in Europe and in the World (Angeli 1990); Frank Schorkopf, *Die unentschiedene Macht. Verfassungsgeschichte der Europäischen Union 1948-2007* (Vandehoeck 2023), 167 f.

35 Zur Debatte Anuscheh Farahat, *Transnationale Solidaritätskonflikte. Eine vergleichende Analyse verfassungsgerichtlicher Konfliktbearbeitung in der Eurokrise* (Mohr Siebeck 2021).

36 Ein ähnlich exekutiv fokussiertes Verständnis der Integration, das staatsrechtlichen Fesseln ebenfalls entkommt, findet sich in Luuk van Middelaar, *Vom Kontinent zur Union. Gegenwart und Geschichte des vereinten Europa* (Suhrkamp 2016).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tung der Wirtschaftsinteressen soll die tatsächlichen Voraussetzungen schaffen, die eine erneute politische Desintegration der zur Zeit durch die gemeinsame Bedrohung seitens des Ostblocks verbundenen Mitgliedstaaten unmöglich machen soll." (S. 23)

Damit artikuliert *Mosler* das „window of opportunity" der ersten Sattelzeit. Dieses Fenster öffnet sich durch erstens die militärische, ökonomische, politische und weltanschauliche Abhängigkeit der westeuropäischen Staaten von den Vereinigten Staaten von Amerika, zweitens das amerikanische Bestreben, die europäischen Staaten in ihrer Einflusszone zu föderieren,[37] und drittens die Wahrnehmung sowjetischer Bedrohung. Diese Lage impliziert den Verlust der Weltmachtstellung europäischer Staaten, aber auch eine gewisse Gemeinsamkeit ihrer Gesellschaftsordnung als Teil des sich formierenden geopolitischen Westens (S. 9). Dieser Machtverlust, dieser Gleichklang, diese Abhängigkeit, diese US-Politik und diese militärische Konfrontation bestimmen die Lage, aus der heraus sich die Montanunion versteht. *Mosler* versteht zwar den Schuman-Plan als ein autonomes französisches Projekt, das aber dieser Lage zu verdanken ist (S. 5).

Die „Große Politik" reagiert mit diversen Projekten auf diese Lage. *Mosler* präsentiert sie knapp: die Organisation für europäische wirtschaftliche Zusammenarbeit (OEEC) (heute Organisation für wirtschaftliche Zusammenarbeit und Entwicklung [OECD]), den Brüsseler Fünf-Mächte-Vertrag und den Europarat. Sie alle genügen nicht, denn sie bleiben in den Fesseln geschlagen, die in Deutschland das staatsrechtliche Denken artikuliert. Erst der Schuman-Plan „verläßt diese Anschauungswelt" (S. 8) und bietet, so *Moslers* Ergebnis, den einzig brauchbaren Weg zu einer belastbaren Friedensordnung. So wiesen *Moslers* weltpolitischer Realismus und katholischer Idealismus denselben Weg.

Moslers Analyse ist verkürzend, aber gleichwohl ebenso scharf- wie weitsichtig. Denn bis in die 1970er Jahre erschien es offen, ob es überhaupt einen Weg aus der staatsrechtlich determinierten Anschauungswelt gab und welche Organisation ihn eröffnen würde. Laut *Kiran Klaus Patel* gab es für die Entwicklung zur heutigen Europäischen Union „keinen Masterplan, sondern [sie] resultierte aus vielschichtigen historischen Prozessen mit den für sie typischen überraschenden Wendungen und Brüchen sowie den Lernprozessen mit vielen Sackgassen und Neuanfängen".[38] *Mosler* setzte auf den Pfad, der erfolgreich sein sollte.

37 Gregoire Mallard, *Fallout. Nuclear Diplomacy in an Age of Nuclear Fracture* (University of Chicago Press 2014), 115, 132, 140.

38 Kiran Klaus Patel, *Projekt Europa. Eine kritische Geschichte* (C. H. Beck 2018), 22-64, Zitat S. 64; ähnlich Tony Judt, *Postwar. A History of Europe Since 1945* (Penguin 2005), 8.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

2. Das Neue

Der EGKS-Vertrag verlässt die Anschauungswelt des überkommenen Völkerrechts und damit des überkommenen Staatsrechts. *Mosler* erschließt dies mittels einer kategorialen Verortung seines „Wesens" (andere würden von „Idee", „Rechtsnatur", „Begriff", „Identität" oder „Logik" sprechen) im Lichte der Lage. Diese Verortung erfolgt ausgehend vom „Wesen internationaler Zusammenschlüsse im derzeitigen Stadium der Völkerrechtsentwicklung" (S. 25 f.). Eine solche begriffsanalytische „Wesensschau" juristischer Phänomene konstituiert den vielleicht wichtigsten Gegenstand rechtswissenschaftlicher Grundlagenforschung und erfolgt selbstredend mit eigenen Methoden. *Mosler* reflektiert also die politische Lage, operiert aber unter der Prämisse rechtswissenschaftlicher Autonomie. Solche rechtswissenschaftlichen Operationen sind politisch und gesellschaftsweit bedeutsam, weil sie die soziale Ordnung eigenständig entwickeln (S. 37).

Mosler bestimmt die „Anschauungswelt", aus der sich das „Wesen" internationaler Zusammenschlüsse ergibt, mit dem Begriff der souveränen Gleichheit der Staaten (S. 28). Das trifft den Nagel auf den Kopf. Denn souveräne Gleichheit ist ein Schlüsselbegriff der genossenschaftlichen Völkerrechtslehre (S. 18, „bon voisinage"), welche den staatsrechtlichen Ansatz auf zwischenstaatliche Rechtsphänomene erstreckt. Nach *Hegel* wie *Jellinek* kann alles „durch die Souveränität und aus der Souveränität erklärt werden".[39] Auf dieser Spur erscheint das Völkerrecht als eine Ordnung autonomer, freier und gleicher Rechtssubjekte, was zu seiner Fassung in Kategorien privatrechtlicher Provenienz führt.[40] Das Wort *public* in *public international law* erklärt sich daraus, dass Staaten (also nicht private Personen) die Rechtsgenossen sind, aber nicht, weil das Völkerrecht wie staatliches *public law* öffentliche Gewalt (*public authority*) konstituiert.[41] Just darum geht es dem EGKS-Vertrag.

Moslers Befreiung wählt nicht den einfachen Weg, staatliche Souveränität als unumschränkte Herrschaftsmacht zu definieren und dann an den scharfen Klippen der Lage (III. 1.) als obsolet kentern zu lassen. Vielmehr deutet er

---

39 Georg Jellinek, *Die Lehre von den Staatenverbindungen (1882)* (A. Hölder 1996), 36 (Zitat); Georg Wilhelm Friedrich Hegel, 'Grundlinien der Philosophie des Rechts (1821)' in: Eva Moldenhauer und Karl Markus Michel (Hrsg.), *Werke in zwanzig Bänden mit Registerband. Bd. 7* (Suhrkamp 1970), § 278.

40 Schmitt, *Dualismen* (Fn. 3); zur Entwicklung und bleibenden Bedeutung Robert Christoph Stendel, *Immaterieller Schadensersatz und der Wandel völkerrechtlicher Privatrechtsanalogien* (Nomos 2023), 97-115.

41 Näher Armin von Bogdandy, Matthias Goldmann und Ingo Venzke, 'From Public International to International Public Law. Translating World Public Opinion into International Public Authority', EJIL 28 (2017), 115-145.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

den Grundsatz im Lichte der Satzung der Vereinten Nationen (VN), welche diese Lage reflektiert und gleichwohl die souveräne Gleichheit als Grundsatz postuliert (Art. 2 Nr. 1 VN-Charta). Doch nicht nur das: *Mosler* sieht durchaus die Möglichkeit, dass die Charta irgendwann einmal internationale öffentliche Gewalt begründen könnte.[42] Er versteht sie als Teil einer Entwicklung, „in der das Axiom der Gleichheit durch die zum Gemeinwesen sich steigernde Staatengemeinschaft erschüttert zu werden beginnt", insbesondere durch die Zwangsgewalt des per Mehrheit entscheidenden Sicherheitsrats (S. 31). Doch selbst mit diesem weichgespülten Souveränitätsbegriff ist der EGKS-Vertrag nicht zu fassen.

Alles philosophische Denken ist eine Fußnote zu *Plato*,[43] jede neue juristische Idee kann man aus einer vorherigen folgern. Und doch gibt es Innovation. Einen Weg bietet die Einbettung von Überbrachtem in einen neuen Kontext und neue Kombinationen alter Ideen. So der Schuman-Plan, dessen innovativer Mix von den Franzosen gesetzt und nicht verhandelbar war. Dieser Punkt ist *Mosler* so wichtig, dass er die entsprechende Auseinandersetzung zwischen Frankreich und dem Vereinigten Königreich schildert, was die zentrale Idee besser als jede Normanalyse verdeutlicht.

Was ist das befreiende Neue, das *Mosler* performativ mittels rechtsbegrifflicher Artikulation in seiner Geschichtsmächtigkeit unterstützt? Er fixiert den Schlüsselgedanken in der Lageanalyse. Es ist der Schritt, „ein zentrales wirtschaftliches Problem mit organisatorischen Mitteln zu lösen, die bisher nur dem Zusammenschluss selbständiger Länder zu einem Bundesstaat gedient haben" (S. 8).

Das erste bundesstaatliche Element findet sich in der öffentlichen Gewalt, die der Vertrag begründet. Die Hohe Behörde, ein Gemeinschaftsorgan, kann einseitig verpflichtende Entscheidungen erlassen, die innerstaatlich gegenüber Behörden wie Privaten wirken (S. 10, 36). Bei Ungehorsam müssen mitgliedstaatliche Behörden die Entscheidungen vollstrecken, ohne dass es auf nationales Recht dabei ankäme. Dies impliziert die unmittelbare und vorrangige Wirkung der Entscheidungen und damit des Gemeinschaftsrechts, analog einem Bundesrecht (S. 44). Dagegen beanspruchen selbst Entscheidungen des Sicherheitsrats keine innerstaatliche Wir-

42 In den 1990er Jahren schien dies greifbar nahe, zur Debatte Anne Peters, 'Rechtsordnungen und Konstitutionalisierung. Zur Neubestimmung der Verhältnisse', ZÖR 65 (2010), 3-63; Matthias Goldmann, 'Hopes of Progress. European Integration in the History of International Law', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-26, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262453, 20.

43 Alfred Whitehead, *Process and Reality. An Essay in Cosmology* (The Free Press 1978), 39.

 DOI 10.17104/0044-2348-2024-4-763

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

kung.[44] Die nationale Souveränität steht dieser Wirksamkeit nicht entgegen. Es gibt auch keinen Souveränitätsvorbehalt, wie *Mosler* in Abgrenzung zum Briand-Plan europäischer Föderation festhält (S. 24).

Die zweite Innovation kreist um die Unabhängigkeit des hoheitlich entscheidenden Organs. Nun setzt bereits der Begriff der internationalen Organisation eine gewisse Verselbständigung gegenüber ihren Mitgliedern voraus, wie der Internationale Gerichtshof (IGH) wegweisend 1947 feststellte.[45] Der Schuman-Plan übertrifft aber kategorial diese Verselbständigung, wie der Schlüsselbegriff der Überstaatlichkeit der Hohen Behörde verdeutlicht („supranationalité", Art. 9 EGKS-Vertrag). Überstaatlichkeit erfordert, dass die Behörde unabhängig entscheidet.

Diverse Bestimmungen dienen solcher Unabhängigkeit.[46] Dazu zählt, dass die Behörde ein handlungsfähiges Gremium ist (bestehend aus nur 9 Personen), per Mehrheit entscheidet und ihre Amtsträger weisungsfrei sind. Zudem müssen sich weder das Organ noch die Amtsträger vor nationalen Institutionen verantworten, sondern nur vor der EGKS-Versammlung, der Keimzelle des Europäischen Parlaments. Dagegen unterliegen die Entscheidungsträger des VN-Sicherheitsrats staatlichen Weisungen und Verantwortungsstrukturen.

Das dritte Moment ist die Bedeutung der supranationalen Kompetenz, die sie kategorial von der des Weltpostvereins unterscheidet, bei allem Respekt vor der Bedeutung gelingender Kommunikation. Die Entscheidungen der Hohen Behörde sollen Relevanz für politische Fragen im Sinne der „Großen Politik" erlangen, für Fragen von Krieg und Frieden. Deshalb hat die Gemeinschaft ein eigenes politisches Gewicht und ist weit mehr als nur eine Verwaltungsunion, die seit dem späten 19. Jahrhundert existierten.[47]

Moslers, wie *Schumans*, Blick ist ganz auf die Hohe Behörde gerichtet. Er thematisiert nicht die öffentliche Gewalt des EGKS-Gerichtshofs, der ebenfalls unabhängig ist, per Mehrheit entscheidet und Private betrifft. Als EuGH

44 Das ist in diesem Jahrhundert etwas ins Rutschen geraten, vgl. Clemens A. Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' in: Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann und Matthias Goldmann (Hrsg.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010), 101-132.

45 IGH, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11. April 1949, ICJ Reports 1949, 174; aus heutiger Sicht Jan Klabbers, *An Introduction to International Organizations Law* (4. Aufl., Cambridge University Press 2022), 46 ff.

46 In Detail aufbereitet in dem auf Moslers Abhandlung folgenden Beitrag, Günther Jaenicke, 'Die Sicherung des übernationalen Charakters der Organe internationaler Organisationen', ZaöRV 14 (1951), 46-117.

47 Dazu als Pionier staatsrechtlichen Denkens Jellinek (Fn. 39).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

wird er ab 1963 dank des Vorabentscheidungsverfahrens des Vertrags zur Gründung der Europäischen Gemeinschaft (EWGV) die Europarechtswissenschaft weit mehr als die europäische Exekutive beschäftigen.[48] Damit erscheint *Moslers* Fokus veraltet, obwohl er zum Gerichtshof durchaus etwas zu sagen hat. So hat er ihn als eine rechtsschöpferische Institution konzipiert: „Da die Hohe Behörde im Rahmen der Ziele des Vertrags einen weiten Spielraum für ihre Tätigkeit besitzt, ist die Nachprüfung ihrer Maßnahmen an den Zielen der Gemeinschaft durch eine schöpferische, in der Kasuistik der Praxis sich bildende Rechtsprechung eine dringende Notwendigkeit" (S. 41). Das dient der Aktualität von *Moslers* Denken, gerade auch mit Blick auf die bezweifelte Legitimität Luxemburger Rechtsfortbildung.[49] *Moslers* Position lässt an Deutlichkeit nichts zu wünschen übrig. Eine solche „Rechtsprechung ist keine politische oder wirtschaftspolitische Justiz. Jede Entscheidung ist Aktualisierung der Gemeinschaftsidee in dem der Entscheidung unterbreiteten Fall" (S. 42).

Mosler sieht das Potenzial des Gerichtshofs für die Verwirklichung der „Gemeinschaftsidee", bleibt aber, soweit es um das Neue geht, exekutiv zentriert. Und doch denkt er das Neue nicht in international-administrativen Kategorien, etwa mit *Bilfinger* als Verwaltungsunion.[50] Aber ebenso wenig denkt er die „Gemeinschaftsidee" mit *Hallstein* und *Monnet* als ein werdendes Staatsrecht.[51] Nach seinem Verständnis zielt die „Gemeinschaftsidee" vielmehr eine per Vertrag verfasste Föderation souveräner Mitgliedstaaten (S. 32) und sprengt damit die bisherige Anschauungswelt. Es bleibt die Frage, wie die Rechtswissenschaft diese Sprengung begrifflich nachvollziehen kann.

---

48 Auf der Linie von *Moslers* Intuitionen dann wegweisend Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', AJIL 75 (1981), 1-27; Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483. Weder *Stein* noch *Weiler* zitieren *Moslers* Aufsatz, der aber auch nur auf Deutsch vorliegt. Die knappen Ausführungen in Hermann Mosler, *La organización internacional y la distribución de competencias* (Escuela de Funcionarios Internacionales 1957), 48-54, bilden keinen Beitrag zur internationalen Diskussion.

49 Jean-Pierre Colin, *Le gouvernement des juges dans les Communautés européennes* (Librairie générale de droit et de jurisprudence 1966); rekurrierend auf den Klassiker der Justizkritik Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Giard 1921).

50 Aufgefrischt als 'Zweckverband funktioneller Integration', Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr 1972), 196 ff., 1055; dazu Wolfgang Kahl und Paul Hüther, *Der "Zweckverband funktioneller Integration" nach Hans Peter Ipsen – Ein Beitrag zur Begriffsgeschichte und zur Finalitätsdebatte in der Europawissenschaft* (Duncker & Humblot 2023).

51 Jean Monnet, *Les États-Unis d'Europe ont commencé: la communauté européenne du charbon et de l'acier. Discours et allocutions 1952-1954* (1955); Walter Hallstein, *Der unvollendete Bundesstaat. Europäische Erfahrungen und Erkenntnisse* (Econ 1969).

 DOI 10.17104/0044-2348-2024-4-763

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

3. Die Sprengung

Der EGKS-Vertrag etabliert, was staatsrechtlichem Denken ein Paradoxon ist: eine nicht-staatliche und Staaten-überspannende *haute autorité*, also öffentliche Gewalt ohne Staatlichkeit. Doch was dem einen als ein Paradoxon erscheint, mag der anderen eine Selbstverständlichkeit sein. So war für *Schuman*, *Adenauer*, *de Gasperi* und eben *Mosler* als gläubigen Söhnen der Katholischen Kirche (für sie daher die „katholische" Kirche) eine nicht-staatliche öffentliche Gewalt eine existenzielle Evidenz.[52]

Mosler thematisiert diese Grundlage nicht, weder in kognitiver noch normativer Hinsicht.[53] Ebenso wenig reflektiert er das Neue im Lichte seiner früheren völkerrechtstheoretischen Konzeption, die *Bilfingers* Denken nahestand.[54] Man mag das so verstehen, dass mit dem EGKS-Vertrag für das juristische Denken ein neuer Tag begann und, weil die Eule der Minerva eben erst abends fliegt, die Zeit nicht reif war für eine Verfassungstheorie nichtstaatlicher Föderationen. Man kann *Moslers* Enthaltsamkeit aber auch so deuten, dass er sein früheres Denken nicht konfrontieren wollte.[55]

Moslers rechtswissenschaftlicher Sprengakt implementiert keine politiktheoretische Revolution, sondern den politischen Sprengakt des EGKS-Vertrags, der den Weg in eine verfasste Föderation souveräner Staaten freimachen sollte. *Moslers* rechtswissenschaftlicher Sprengakt ist darauf kalibriert: Er will einen juristischen Weg zur Auflösung dieses vermeintlichen Paradoxons einer verfassten Föderation souveräner Staaten freilegen, also gerade nicht zu einem europäischen Bundesstaat. Ginge es um Bundesstaatlichkeit, „so mag dieser Gedanke politisch revolutionär sein, eine schöpferische Rechtskonstruktion indes ist er nicht" (S. 33).

Diese Sprengung soll also keiner europäischen Integration die Bahn brechen, wie sie etwa *Friedrich Naumann* nach dem Ersten Weltkrieg propagiert hatte. *Naumann* zielte auf „die Bildung von ‚Mitteleuropa' als des vierten Groß-Staates neben dem Britischen Reich, Rußland und den Vereinigten

52 Art. 129 Kodex des Kanonischen Rechts; dazu Alexander Hollerbach, 'Staat und Kirche' in: Meinrad Schaab (Hrsg.), *40 Jahre Baden-Württemberg: Aufbau und Gestaltung 1952-1992* (Theiss 1992), 111-124. Dessen problematische Seite zeigt etwa Carl Schmitt, *Römischer Katholizismus und politische Form* (Theatiner Verlag 1925).

53 Zur Bedeutung der Katholischen Kirche für die europäische Integration, Joseph H. H. Weiler, *Ein christliches Europa. Erkundungsgänge* (Anton Pustet 2004); Kaiser (Fn. 28).

54 Vgl. seinen 1946 gehaltenen, *Bilfinger* gewidmeten Habilitationsvortrag, Hermann Mosler, *Die Großmachtstellung im Völkerrecht* (Schneider 1949); dazu Florian Kriener, 'Das Interventionsverbot in autoritären Kontexten. Hermann Moslers Intervention im Völkerrecht', MPIL100, 22. Dezember 2023.

55 Und Ungeduld mit theoretischer Arbeit, zum "völkerrechtlichen Geschwafel" Lange, 'Wider das "völkerrechtliche Geschwafel"' (Fn. 19).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Staaten“ (S. 45). Das erscheint *Mosler* als der falsche Weg: „Die zweite Katastrophe sollte den Blick dafür geöffnet haben, dass das Nebeneinander isolierter Einzelstaaten nicht durch einen Zusammenschluss gleicher Natur überwunden wird, sondern durch einen Bund, dessen Glieder auf den einzelnen Lebensgebieten in unterschiedlicher Intensität verbunden sind.“ (ebenda)

Wenn Staatlichkeit nicht mehr die politische Leitidee ist, dann muss die Rechtswissenschaft ihre überkommene Anschauungswelt verlassen. Nur so kann sie das politische Projekt des EGKS-Vertrags adäquat begleiten, das als eine „engere Gemeinschaft, die in der Völkerrechtsordnung geläufigen Formen und Einrichtungen sprengt“ (S. 24). Zu konzipieren ist eine politische Föderation (S. 32), die nicht unter dem Telos künftiger Staatlichkeit steht.

Um die alte Anschauungswelt zu verlassen, aber gleichwohl brauchbare Bausteine in die neue Anschauungswelt mitzunehmen, bedarf es einer genau kalibrierten Sprengung. *Mosler* sprengt deshalb allein das überkommene Dogma der unteilbaren Souveränität (S. 32), indem er sie kurzum als teilbar und partiell fusionierbar setzt (S. 12, 24, 34, 39).[56] So wird es konzeptionell möglich, dass die EGKS-Mitgliedstaaten Teile ihrer Souveränität durch den Gesamtakt der nationalen Ratifikationen fusionieren und damit überstaatliche öffentliche Gewalt begründen.

Mosler reflektiert diesen Prozess mit dem Begriff der Föderation.[57] Dies liegt nahe, denn seit den *Federalist Papers* sind die Debatten über die Teilbarkeit von Souveränität und über das Wesen von Föderationen eng verbunden.[58] Allerdings rekurriert *Mosler*, in seiner theoretischen Enthaltsamkeit, nicht auf diese verfassungstheoretische Tradition. Ihm reicht es, dass das juristische Denken mit diesem Schritt *Schumans* „föderale Gemeinschaftsidee“ grundbegrifflich nachvollziehen kann. Angesichts des offensichtlichen demokratischen Willens bedarf es keiner weiteren theoretischen Legitimation. So konzipiert *Mosler* das Gemeinschaftsrecht als ein föderales Recht, das sich als Ausdruck fusionierter Souveränität kategorial von einem Staatsrecht wie vom internationalen Recht unterscheidet (vgl. nur S. 9, 24, 34).

56 Natürlich ist die Idee der Teilbarkeit der Souveränität nicht *Moslers* Erfindung, vgl. dazu Till Patrik Holterhus und Ferdinand Weber, ‘Orte und Bedeutungsebenen von Souveränität’ in: Till Patrik Holterhus und Ferdinand Weber (Hrsg.), *Handbuch Europäische Souveränität – Zur inneren und äußeren Selbstbehauptung der Europäischen Union* (Mohr Siebeck 2024), 1-47 (20 ff.).

57 Näher Matteo Bozzon, ‘Which Federalism for Europe? A Moslerian Path’, MPIL100, 6. Juni 2024.

58 Matteo Bozzon, ‘“In the Vertigo of this Freedom”: Democracy between Procedural and Divided Popular Sovereignty’, European Journal of Social Theory 24 (2021), 562-580; Robert Schütze, *From Dual to Cooperative Federalism: the Changing Structure of European Law* (Oxford University Press 2009), 77.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Das ist ein großer Schritt, grundbegrifflich wie politisch. Es ist bemerkenswert, dass *Mosler* gerade ihn nicht nur mit den entsprechenden Positionen in der „Großen Politik" absichert, sondern zudem auf die öffentliche Meinung rekurriert: Sie wolle diesen Schritt zur Teilbarkeit von Souveränität und deren Fusion in einem nicht-staatlichen Verband (S. 13). Damit dokumentiert er, dass seine grundbegriffliche Arbeit nicht die isolierte Meinung politischer Eliten, sondern eine gesellschaftsweite Auffassung nachvollzieht.

Der Fusionsgedanke ist folgenreich. So ist in der neuen Anschauungswelt die überstaatliche öffentliche Gewalt nicht mehr, wie in der alten, als eine Beschränkung der mitgliedstaatlichen Souveränität zu verstehen. Denn sie ist, da eben die fusionierten mitgliedstaatlichen Souveränitäten, nichts ihnen Gegenüberstehendes, kein „Anderes", sondern vielmehr sie selbst in einem neuen Zustand. Just deswegen steht Rechtsakten der EGKS kein Souveränitätsvorbehalt entgegen. Mit diesem grundbegrifflichen Schritt grenzt *Mosler* die EGKS von internationalen Organisationen ab. Deren Maßnahmen konzipiert er nicht als Ausdruck fusionierter Souveränität, sondern als (völkerrechtlich zulässige) Beschränkung staatlicher Souveränität, wie er mit Blick auf Maßnahmen des VN-Sicherheitsrats festhält (S. 26 f.).

Die Teilbarkeit vermeidet weiter, dass die Fusionierung als Kernschmelze mitgliedstaatlicher Souveränität und europäische Staatsgründung missverstanden wird. Das wäre in der Lage 1950 ein gänzlich unplausibles Ergebnis gewesen. Es stand außer Frage, dass die völkerrechtliche Souveränität der Mitgliedstaaten gegenüber dritten Staaten fortbestand. Ein plausibler juristische Nachvollzug muss diese politische Grundentscheidung spiegeln.

Es bleibt die Frage, ob dieser grundbegriffliche Schritt in eine teilbare Souveränität, der eine nichtstaatliche Föderation ermöglicht, elementare Errungenschaften verrät. Die Frage beschäftigt bis heute das europäische Verfassungsrecht. Die heutigen Zweifler fokussieren auf die Volkssouveränität und bestreiten, dass die Union ohne ein souveränes, sich selbst bestimmendes Unionsvolk als demokratisch gelten kann.[59] Angesichts eines ausdrücklichen politischen Willens, damals zu einer Fusionierung, heute zu einer europäischen Demokratie ohne ein europäisches Volk (Art. 2, Art. 10 EUV), geraten die Zweifler leicht auf naturrechtliche Schienen.

Mosler zeigt sich dem Naturrecht zwar verbunden (S. 29), hat aber keine Geduld für solche Positionen. Deren Vorstellungswelt erscheint ihm defizi-

59 Zur Debatte Angelika Siehr, '"Renaissance des Republikanismus". Eine Auseinandersetzung mit den Thesen von Rolf Gröschner und Armin von Bogdandy' in: Armin von Bogdandy, Angelika Siehr und Patrick Hilbert (Hrsg.), *Renaissance des Republikanismus* (Mohr Siebeck 2024), 91-160.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tär, weil idiosynkratisch. Es sei eine spezifisch deutsche Blickverengung, Föderation mit Bundesstaatlichkeit gleichzusetzen: „Der Gedanke an die deutsche Vergangenheit der letzten anderthalb Jahrhunderte legt ihm (d. h. dem deutschen Betrachter) die Vorstellung nahe, überstaatliche Zusammenschlüsse nur in etatistischer Form sehen zu können. [… Dies] ist den anderen Mitgliedern der Gemeinschaft fremd" (S. 33 f.).[60] Damit sieht *Mosler* den Weg frei, Souveränität zu teilen und die EGKS als föderal zu begreifen.

Das Theorem der teilbaren und transnational fusionierbaren Souveränität sprengt so den Weg zu neuen begrifflichen Konstruktionen frei. Es erlaubt, die EKGS als Trägerin öffentlicher Gewalt zu konzipieren, die sie gegenüber ihren Gliedern und den Rechtsunterworfenen ausübt. Zur näheren Fassung dieser Gewalt nutzt *Mosler* bundesstaatliche Begriffe: Rechtserzeugung, Verwaltung und Rechtsprechung (S. 36). Dank seiner begrifflichen Grundoperation impliziert diese Qualifizierung keine Bundesstaatlichkeit. Heute ist es selbstverständlich, das gesamte Arsenal öffentlich-rechtlicher Begriffe auf die Union anzuwenden, ohne damit eine europäische Staatlichkeit zu implizieren.[61] *Moslers* Beitrag steht am Anfang dieser Rekonstruktion überstaatlicher öffentlicher Gewalt.

Die Fusionierung der Souveränität für eine überstaatliche Föderation erfolgt durch einen völkerrechtlichen Vertrag. *Mosler*, seinem sprengfreudigen Impetus weiter folgend, qualifiziert dies als die „Vertragliche Errichtung eines verfassungsrechtlichen Teilgebildes" (S. 32). Diese verfassungsrechtliche Qualifikation folgt zwanglos aus dem bisherigen Gedanken: Wenn die EGKS dank teilfusionierter Souveränitäten öffentliche Gewalt ausübt, dann klärt es die Rechtsnatur der diese Gewalt konstituierenden Grundbestimmungen, sie in verfassungsrechtlichen Kategorien zu begreifen.

Mehr noch: Da die neue Anschauungswelt demokratische Rechtsstaatlichkeit in Westeuropa entfalten soll, ist ihr konstruktives wie kritisches Potenzial für den neuen Verband zu nutzen. *Mosler* wird geradezu pathetisch: „Die Völker des kontinentalen Westeuropa ergriffen für die Staatsauffassung der nichtkommunistischen Länder Partei, die die demokratische Legitimierung öffentlicher Gewalt und ihre rechtsstaatliche Begrenzung als notwendige Bestandteile jeder gesellschaftlichen Ordnung der Gegenwart

60 Natürlich macht er es sich damit etwas einfach: Zum Dogma der Unteilbarkeit aus französischer Sicht Stéphane Pierré-Caps, 'Préface' in: Félicien Lemaire und Stéphane Pierré-Caps (Hrsg.), *Le principe d'indivisibilité de la République: mythe et réalité* (Presses Universitaires de Rennes 2010), 7-9; Roland Debbasch, *Le principe révolutionnaire d'unité et d'indivisibilité de la République: essai d'histoire politique* (Economica [u.a.] 1988).

61 Näher von Bogdandy, *Strukturwandel* (Fn. 11), § 12.

 DOI 10.17104/0044-2348-2024-4-763

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

halten" (S. 2). Es entspricht dieser Grundentscheidung, die neue öffentliche Gewalt verfassungsrechtlich zu deuten, eben im Sinne der „notwendigen Bestandteile jeder gesellschaftlichen Ordnung", die nun auch die EGKS erbringt.

Mosler ist umsichtig: Er unterscheidet den Begriff des Verfassungsrechts, den er adjektivisch für den EGKS-Vertrag verwendet, von dem der Verfassung, den er für den Übergang in eine europäische Staatlichkeit reserviert (S. 39). Damit bringt er zum Ausdruck, dass das, was er als ein verfassungsrechtliches Teilgebilde bezeichnet, nur in Ansätzen dem entspricht, was man im westlichen Erfahrungs- und Erinnerungshorizont unter einer *Verfassung* versteht.[62] Damit bleibt der Begriff der *Verfassung* als semantischer Marker für den Schritt auf eine weitere Stufe der Integration. Wichtig aber ist, dass die völkerrechtliche Grundlage die Qualifizierung nicht entscheidet: die verfassungsrechtliche Qualität ist letztlich eine evolutionäre Errungenschaft.[63] *Mosler* ist eben kein Jurist, der allein seinen dogmatischen Garten sieht, sondern begreift juristische Phänomene aus ihrem gesellschaftlichen Kontext heraus.

Mosler unterstreicht, das kritische Potenzial verfassungsrechtlicher Rekonstruktion nutzend, die Notwendigkeit verfassungsrechtlicher Weiterentwicklung. Obwohl er keinen republikanischen Föderalismus wie das Manifest von Ventotene vertritt,[64] ist es auch für seinen föderalen Ansatz offensichtlich, dass die EKGS-Versammlung zu einem Parlament auszubauen ist, er spricht sogar von einer europäischen Volksvertretung (S. 43). Die weitere Entwicklung hat zwar kein europäisches Volk generiert, wohl aber, so Art. 2 EUV seit 2009, eine europäische Gesellschaft, die sich durch die Prinzipien des demokratischen Konstitutionalismus charakterisiert. Der Pfad von *Moslers* Aufsatz zu diesem Art. 2 EUV ist leicht zu ziehen, zumal es in der *Moslerschen* Anschauungswelt konzeptionell leichter als in der staatsrechtlichen

62 Dazu Uwe Volkmann, *Grundzüge einer Verfassungslehre der Bundesrepublik Deutschland* (Mohr Siebeck 2013), 95 f.

63 Zu diesem evolutiven Verständnis Leonard Besselink, 'The Notion and Nature of the European Constitution after the Lisbon Treaty' in: Jan Wouters, Luc Verhev und Philipp Kiiver (Hrsg.), *European Constitutionalism beyond Lisbon* (Intersentia 2009), 261-281; András Jakab, *European Constitutional Language* (Cambridge University Press 2016); José Martín y Pérez de Nanclares, 'La Unión Europea como comunidad de valores. A vueltas con la crisis de la democracia y del Estado de Derecho', Teoría y Realidad Constitucional 43 (2019), 121-159 (insb. 129 f.); Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot 2001); Jacques Ziller, 'La naturaleza del derecho de la Unión Europea' in: José M. Beneyto, Jerónimo Maillo Gonzáles-Orús und Belén Becerril Atienza (Hrsg.), *Tratado de derecho de la Unión Europea, Tomo IV: Las fuentes y principios del derecho de la Unión Europea* (Thomson Reuters Aranzadi 2011), 25-110.

64 Vgl. Spinelli und Rossi (Fn. 34).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ist, demokratische Verfasstheit ohne Volk und Selbstbestimmung zu konzipieren.[65]

Moslers Sprengung dient dem Weg in eine nicht-staatliche Föderation, ihr gilt seine deutliche Präferenz. Gleichwohl schließt er eine europäische Staatlichkeit nicht aus. *Mosler* beschreibt die Schwelle mit einem Strauß von Gesichtspunkten, die sich um die Begriffe Macht und Schicksal gruppieren. Laut *Mosler* erschließt sich Bundesstaatlichkeit zum einen aus dem Außenverhältnis: Europäische Bundesstaatlichkeit ist erreicht, wenn die Mitgliedstaaten zu einem einheitlichen politischen Schicksal dergestalt verbunden sind, dass sie gegenüber dritten Mächten eine Einheit darstellen (S. 35 f., 45). Man kann Bundesstaatlichkeit aber auch aus dem föderalen Verhältnis folgern: Danach liegt eine Staatswerdung vor, wenn ein Austritt eines Mitgliedstaats ihm ähnliche Schwierigkeiten bereitet wie der Austritt aus einem Bundesstaat (S. 39), weil die „Lebenssphären" so eng verbunden sind (S. 44). Ein weiterer Gesichtspunkt ist, ob „die Gemeinschaft die Sezession im Sanktionsweg zu verhindern fähig" ist (S. 44).

Betrachtet man diese Kriterien im Lichte der finanziellen „Nahtoderfahrung" griechischer Bürger aufgrund von Entscheidungen der Europäischen Zentralbank im Jahr 2015,[66] im Lichte der politischen und gesellschaftlichen Konvulsionen des Vereinigten Königreichs im Zuge des Brexit, im Lichte der Positionierung der Union im Ukrainekrieg, im Lichte von Behauptungen, die Kommissionspräsidentin sei der (ja, *der*) vielleicht mächtigste Politiker Europas,[67] so erscheint in *Moslers* Perspektive die Schwelle einer europäischen Staatswerdung in Sichtweite, wenn nicht gar erreicht.

Was sagt uns *Moslers* Text zu diesem Szenario? Auf den ersten Blick: nichts. Denn sein letzter Satz lautet: „Der Nutzen rechtswissenschaftlicher Systematisierung findet hier sein Ende" (S. 45). Bei genauerer Lektüre sagt er aber etwas überaus Relevantes. Für *Mosler* ist der Übergang in eine Bundesstaatlichkeit ein empirischer Vorgang, der wohl ohne einen neuen Vertrag erfolgen könnte (S. 32, 44 f.).

---

65 Eine wichtige Etappe auf diesem Weg ist der Vedel-Bericht unter Mitwirkung von *Moslers* Nachfolger im Direktorenamt *Jochen Frowein*, vgl. Jochen Abr. Frowein, 'Erinnerungen an die "Groupe Vedel"' in: Ulrich Becker, Armin Hatje, Michael Potacs und Nina Wunderlich (Hrsg.), *Verfassung und Verwaltung in Europa: FS für Jürgen Schwarze zum 70. Geburtstag* (Nomos 2014), 57-62; bemerkenswert die Neuorientierung des Zweiten Senats des Bundesverfassungsgerichts zur Rolle des Europäischen Parlaments, BVerfG, Beschluss v. 6. Februar 2024, 2 BvE 6/23; 2 BvR 994/23, NVwZ 43 (2024), 725 (723, Rn. 123) – *Sperrklausel IV*.

66 ECB Press Release 28. Juni 2015, ELA to Greek Banks Maintained at Its Current Level, <https://www.ecb.europa.eu/press/pr/date/2015/html/pr150628.en.html>, zuletzt besucht 1. Juli 2021; ECB Press Release 6. Juli 2015, ELA to Greek Banks Maintained, <https://www.ecb.europa.eu/press/pr/date/2015/html/pr150706.en.html>, zuletzt besucht 1. Juli 2021.

67 The Economist, 'Who is in Charge of Europe?', 8. Januar 2024.

 DOI 10.17104/0044-2348-2024-4-763

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Wo stehen wir heute? Aus einer Distanz von mehr als 70 Jahren bringt mich *Moslers* Beitrag ins Grübeln über diese elementare Frage des europäischen Verfassungsrechts. Ich sehe darin den ultimativen Beweis seiner Aktualität.

IV. Die Befreiung, die fehlt

Der Titel dieses Beitrags klassifiziert *Moslers* Aufsatz über den Vertrag zur Gründung der Europäischen Gemeinschaft für Kohle und Stahl als eine *Befreiung*. Dieses Wort wiegt schwer. Bislang habe ich es genutzt, um *Moslers* Aufsatz zu feiern, weil er einen Weg aus dem staatsrechtlichen Denken sprengt und erlaubt, die Rechtsordnung der EGKS in föderalen und verfassungsrechtlichen Kategorien zu entfalten. So leistete er einen erinnerungswürdigen Beitrag auf dem Weg in die heutige europäische Gesellschaft.

Ich nutze das Wort *Befreiung* allerdings mit einem Doppelsinn. Es soll ebenso eine bedrückende Leerstelle in *Moslers* Aufsatz sichtbar machen. Denn für uns Heutige prägt, soweit es um Nachkriegsdeutschland geht, *Richard von Weizäckers* Rede vom 8. Mai 1985 das Wort *Befreiung*. Diese Rede zum 40. Jahrestag der Kapitulation der Wehrmacht deutet dieses Ereignis nicht nur als Niederlage Deutschlands, sondern zugleich als eine Befreiung auch der Deutschen, nicht zuletzt von sich selbst.[68]

Von einer solchen Deutung war *Mosler,* wie viele Zeitgenossen, weit entfernt. Obwohl sein Beitrag mit der „Großen Politik" beginnt und politische Positionen minutiös darstellt, taucht der Nationalsozialismus kaum auf. Der Fokus auf den neuen Ost-West-Konflikt erlaubt es den deutschen Aggressionskrieg und die deutschen Menschheitsverbrechen außen vor zu lassen.[69] *Mosler* verweist vage, beiläufig und beschönigend auf eine „öffentliche Meinung", welche die „Katastrophe des zweiten Weltkriegs dem Fortbestand der einzelstaatlichen – im politischen Sinne verstandenen – Souveränität zuschrieb" (S. 27).

---

68 <https://www.bundespraesident.de/SharedDocs/Reden/DE/Richard-von-Weizsaecker/Reden/1985/05/19850508_Rede.html?nn=129626>, zuletzt besucht 27. November 2024. Zu der Rede, ihrem Hintergrund und ihrer Rezeption Norbert Frei, *Im Namen der Deutschen. Die Bundespräsidenten und die NS-Vergangenheit* (Beck 2023), 262 ff.

69 Zu *Moslers* ambivalenter, aber letztlich distanzierter Haltung zum Nationalsozialismus Lange, *Praxisorientierung und Gemeinschaftskonzeption* (Fn. 7), 96 ff. Der in derselben Ausgabe der ZaöRV publizierte Aufsatz zur Gründung des Staates Israel schafft es, dieses Ereignis zu erörtern, ohne den deutschen Massenmord beim Namen zu nennen, Günther Weiss, 'Die Entstehung des Staates Israel', ZaöRV 13 (1950/1951), 146-172; 786-808.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Mosler fusioniert Sieger wie Besiegte in der Gruppe der „Völker des kontinentalen Westeuropa" (S. 2), die ein „Kreuzzug amerikanischer Bürger zu demokratischen Institutionen zurückgeführt" habe (S. 2). Diese Kreuzzugsmetapher ist geradezu schmittianisch.[70] Allerdings, und hier unterscheidet *Mosler* sich nicht nur von *Schmitt,* akzeptierte, ja begrüßte er die amerikanisch geleitete Westintegration Westdeutschlands, seinem Chef *Adenauer* folgend. Damit half er den Boden zu bereiten, dem eine Generation und viele Auseinandersetzungen später *Weizsäckers* Befreiungsverständnis entwuchs, und auf dem es gedieh.[71]

Summary: The Liberation: Mosler's European Constitutional Thinking for Postwar Germany

In 1951, Hermann Mosler liberated German legal thought on transnational phenomena from the shackles of statist constitutional thinking. The forum of this liberation was the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, and the occasion was the Treaty Establishing the European Coal and Steel Community (ECSC). Mosler paved the way to conceptualise Community law beyond the constitutional dualism of domestic law and international law – as a new and novel legal order, conceived in federal and constitutional categories. He demonstrated that the political will to establish a treaty-based federation of sovereign states is not a legal paradox but rather a path to a better future. However, this requires breaking constitutional dogmas. The article first addresses these dogmas, illustrated by essays in which Carl Bilfinger sought to orient legal thought after World War II. In the light cast by these essays, Mosler's liberation gains clear contours. Finally, the article shows that Mosler's liberation still missed out the elephant in the room.

70 Schmitt, *Der Begriff des Politischen* (Fn. 16), 141; dazu Reinhard Mehring, 'Land, Meer und Luft', AVR 61 (2023), 181-196, 189.

71 Erst mit Jürgen Habermas' Sieg im Historikerstreit (Aufschlag mit Jürgen Habermas, 'Eine Art Schadensabwicklung', ZEIT Nr. 29/1986, 11. Juli 1986), wurde diese Lesart herrschend. Eine Zusammenstellung wichtiger Beiträge in Rudolf Augstein, Karl Dietrich Bracher, Martin Broszat, Jürgen Habermas und Joachim C. Fest, '*Historikerstreit' Die Dokumentation der Kontroverse um die Einzigartigkeit der nationalsozialistischen Judenvernichtung* (Piper Verlag 1987). Zur gegenwärtigen Debatte um eine Neubewertung etwa Frank Bajohr und Rachel O'Sullivan, 'Holocaust, Kolonialismus und NS-Imperialismus. Forschung im Schatten einer polemischen Debatte', Vierteljh. Zeitgesch. 70 (2022), 191-202.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Abhandlungen

Editorial: Progress and International Law: A Cursed Relationship?

*Júlia Miklasová, Sara Wissmann, Paula Rhein-Fischer, Alexander Holzer, Rebecca Kruse, Lisa Kujus, Jasper Mührel, Lorenz Wielenga**

I. Introducing the Idea of Progress 787
II. The Self-Evidently Optimistic Vision of the Relationship between Progress and International Law 789
III. Scholarship's Critical Introspection of the Assumed Positive Progress Vision 791
IV. Zooming in on the Contributions 795
V. Conclusion: Criticism and Possible Ways Forward 799

The notion of progress understood as 'the gradual perfection of humanity'[1] is one of our time's dominant, formative notions. It 'involves a synthesis of the past and a prophecy of the future'.[2] Given this all-encompassing presence of progress, it comes as no surprise that the idea of progress also holds a special position in international law.[3] For instance, the International Law Commission (ILC), one of the most prestigious bodies of the United Nations, is entrusted with the progressive development of public international law. Despite this forward-looking attitude, seemingly ingrained in public international law, a tension between progress in international law and developments in other scientific and social areas is often perceived. Especially given the numerous violations of public international law, the field is fre-

* Dr. Júlia Miklasová is a postdoctoral researcher at the University of Cologne, Sara Wissmann is a research assistant and doctoral candidate at Paris Lodron University Salzburg, Dr. Paula Rhein-Fischer is a postdoctoral researcher at the University of Cologne, Alexander Holzer is a research associate at Hertie School of Governance and a doctoral candidate at Humboldt University Berlin, Rebecca Kruse is a research assistant and doctoral candidate at Helmut Schmidt University in Hamburg, Lisa Kujus is a doctoral candidate at the University of Cologne, Dr. Jasper Mührel, LL. M. (IHEID) is a research associate at Redeker Sellner Dahs Rechtsanwälte, Berlin, Lorenz Wielenga is a research assistant and doctoral candidate at the University of Cologne.

1 Ted Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford University Press 2005), 761.

2 John B. Bury, *The Idea of Progress: An Inquiry Into Its Origin and Growth* (Macmillan and Co, Limited 1920), 5.

3 See in detail below.

DOI 10.17104/0044-2348-2024-4-785 ZaöRV 84 (2024), 785-800

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

quently attested to go through a crisis. For example, in 1965, during a Sixth Committee meeting on the ILC's work regarding the Vienna Convention on the Law of Treaties (VCLT), the Kenyan representative traced this crisis back to, inter alia, progress. He stressed that '[i]f there was a crisis in international law, that was not the fault of the developing countries, but was the result of scientific and technical progress, the obsolescence of certain parts of the law, and the creation of relatively new areas of law, such as the succession of States, where there were few agreed "traditional" rules'.[4]

Against this backdrop and the centrality of the notion of progress to international law discourse, the AjV-DGIR conference 'Progress and International Law: A Cursed Relationship?', which took place at the University of Cologne from 22 to 23 September 2023, and a related symposium on Völkerrechtsblog unpacked the unsettled relationship between progress and international law.[5] In the tradition of its predecessors,[6] the conference jointly convened by the Association of Young International Law Scholars (AjV) and the German Society of International Law (DGIR) brought together young and established international law scholars, the latter kindly agreeing to comment on the former's papers and presentations.[7]

4 Statement by Kenya in the United Nations General Assembly, Sixth Committee, Official Records of the Twentieth Session, 850th Meeting, 13 October 1965, UN Doc. A/C.6/SR.850, 69, para. 30.

5 Alexander Holzer, Lisa Kujus, Rebecca Kruse, Júlia Miklasová, Jasper Mührel, Paula Rhein-Fischer, Lorenz Wielenga, Sara Wissmann, 'Introducing the Symposium "Progress and International Law: A Cursed Relationship?"', Völkerrechtsblog, 18 September 2023. In certain aspects, this Editorial builds on the Introduction to the Völkerrechtsblog symposium.

6 Since 2007, AjV-DGIR conferences have been held, inter alia, in Düsseldorf, Graz, Göttingen, Bochum, Berlin, and Bonn.

7 In that regard, we are more than grateful for the comments of Professors Tilmann Altwicker (University of Zurich), Başak Çalı (University of Oxford), Hilary Charlesworth (International Court of Justice), Philipp Dann (Humboldt University Berlin), Michaela Hailbronner (University of Münster), Machiko Kanetake (Utrecht University), Thomas Kleinlein (Walther Schücking Institute for International Law), Felix Lange (University of Cologne), Angelika Nußberger (University of Cologne), Phoebe Okowa (Queen Mary University of London), Birgit Peters (University of Trier), Valentin Schatz (Leuphana University Lüneburg), Thomas Skouteris (The American University of Cairo), Christian Tams (University of Glasgow and Sorbonne Law School) and Silja Vöneky (Albert Ludwigs University of Freiburg). We also thank our partners and sponsors: the Fritz Thyssen Foundation, the Seidl-Hohenveldern Association, the Association for the Promotion of Jurisprudence at the University of Cologne, the German Society of International Law, the law firms Luther and Osborne Clark as well as the publishers Duncker & Humblot, Nomos and Springer. We would also like to thank Völkerrechtsblog for accompanying the conference with an online symposium and a livestream of the keynote speech (see n. 5). We would also like to thank the editors of ZaöRV, especially Professor Anne Peters, as well as managing editor Dr. Robert Stendel for accepting and collaborating on this Special Issue. Finally, we are greatly indebted to Professor Angelika Nußberger and the Academy for European Human Rights Protection at the University of Cologne for their generous financial and organisational support.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

As the outcome of the conference, this Special Issue intends to inspire a new scholarly debate on the notion of progress and its specific meaning in and link with international law. Creating a platform for different methodological and theoretical approaches, the Special Issue centres around three objectives. First, the Special Issue aims to conceptualise the notion of progress itself, unpacking its constitutive elements, setting it in relation to the dimension of time and linearity, and discussing possible features of progress in international law. Second, it critically reflects on the notion of progress in international law by questioning the analytical value of the concept and identifying the strategic agendas behind progress narratives. Third, the Special Issue aims to pinpoint where progress can be identified in international law and where international law is perceived as lagging behind states' and societal expectations. In this respect, the Special Issue attempts to identify the factors that determine such a state of affairs and outline possible ways forward.

To this end, this Editorial proceeds in four steps: After providing an overview of the general idea of progress, the notion as developed and perceived by international law scholarship is presented. Subsequently, the Editorial displays critical perspectives on progress narratives in public international law. This is followed by a presentation of the contributions to this Special Issue with a view to its overarching aims.

I. Introducing the Idea of Progress

The contemporary idea of linear progress, understood as a continuous change towards improvement, is rather young.[8] Bury's influential 1920 account entitled *The Idea of Progress: An Inquiry Into Its Origin and Growth* shows, in particular, that the Greeks, and later the Romans, believed in a cyclical rather than linear vision of history.[9] Humanity was believed to be in a state of decay rather than one of positive, forward-

8 See Reinhart Koselleck, '"Fortschritt": Einleitung' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Wissenschaftliche Buchgesellschaft 2022, original 2004), 351-353: late 18th century.

9 According to this view, despite certain spontaneous events, 'disaster and decline' are 'inevitable'. Margaret Meek Lange, 'Progress' in: Edward N. Zalta and Uri Nodelman (eds) *The Stanford Encyclopedia of Philosophy,* <https://plato.stanford.edu/entries/progress/>, last access 30 December 2024; Bury (n. 2), 7-13. The cyclical vision of time was similarly present across the ancient world, in particular in India. In China, 'the absolute stability of cosmos' dominated the focus more so than deterioration and degradation. Tyson Retz, *Progress and the Scale of History* (Cambridge University Press 2022), 13-14.

DOI 10.17104/0044-2348-2024-4-785

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

looking development.[10] It was arguably no sooner than 1757 that the word progress was employed as a 'forward movement of civilization toward an ever more flourishing condition'.[11]

Originating in the intellectual movement of the Enlightenment, followed by the French Revolution, the concept's emergence cannot be separated from the emergence and advancement of sciences such as physics and medicine.[12] Just as the accumulation of human knowledge in sciences claimed improvement, it was claimed that improvement could be achieved through 'the organization of human society and the character of human conduct'.[13] Thus, in parallel with the demise of religious belief, a new 'secular faith' in progress emerged.[14]

This modern understanding of progress rests on a particularly optimistic interpretation of history and assumes processes which are propelled by *human* activity – not stemming from the divine or other external powers.[15] Undeniably, the concept is deeply rooted and embedded in European modernity.[16] Consequently, it also served European colonialism apologists in locating colonial expansion in a progress narrative of modernising 'the supposedly backward non-European world'.[17]

Against the backdrop of the 20th-century catastrophes, the totalising 18th and 19th-century ideas of progress were criticised and rejected. While the

10 Bury (n. 2), 8-13, 21; Lange (n. 9). See also on the Hellenistic philosophy Retz (n. 9), 15-16; Jacques Le Goff, *Must We Divide History Into Periods?* (Columbia University Press 2015), 8.

11 Le Goff (n. 10), 102 (*emphasis in original*). See, however, for certain elements of the medieval thought that led to the idea of progress: Bury (n. 2), 22-29; Lange (n. 9). The idea of a linear improvement took root only through the rise of Christianity in Ancient Rome, which interpreted world history from its point of view as a continual positive change in accordance with God's intentions. Christian Meier, 'Fortschritt in der Antike' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Wissenschaftliche Buchgesellschaft 2022, original 2004), 362. While the Renaissance refocused orientation on human life on earth, its engagements with Ancient Greek philosophy entailed the belief in the theory of decline and degeneration. This lasted until the late Renaissance. Bury (n. 2), 30-36.

12 Lange (n. 9); Meier (n. 11), 358-359.

13 Charles Frankel, 'Progress, History Of' in: *Encyclopedia*, <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/progress-idea>, last access 30 December 2024.

14 Retz (n. 9), 2; John Scott, *Oxford Dictionary of Sociology* (Oxford University Press 2014), 837; Reinhart Koselleck '"Protectus" im Mittelalter und "Fortschritt" im religiösen Bereich der Neuzeit' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Wissenschaftliche Buchgesellschaft 2022, original 2004), 352.

15 Bury (n. 2), 5; Retz (n. 9), 5.

16 Retz (n. 9), 58.

17 Lange (n. 9).

 DOI 10.17104/0044-2348-2024-4-785

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

scientific explorations of the notion generally seem to be in decline in contemporary philosophy and historical sciences, we are still under the sway of its logic.[18] However, already in 1920, Bury wrote that '[i]f there were good cause for believing that the earth would be uninhabitable in A. D. 2000 or 2100 the doctrine of Progress would lose its meaning and would automatically disappear'.[19] A hundred years ago, these prophetic words were portrayed as absurd, unimaginable claims, but today they weigh all too heavily.

II. The Self-Evidently Optimistic Vision of the Relationship between Progress and International Law

Given the idea of progress's origins, under persistent Kantian influence, progress has been one of the key structuring principles and narratives of international law. International law has been sketched as a tool of progress for humanity. In his *Idea for a Universal History from a Cosmopolitan Perspective* (1784), Kant posited that history – seemingly confused and irregular when zoomed in on single individuals – nevertheless can be perceived as consistently progressing.[20] In his view, humanity's 'nevitable antagonism' ultimately leads to peace and security, making progress a perpetual task.[21] According to Kant,

> 'through wars, through the excessive and ceaseless preparations for war, through the resulting distress that every state, even in times of peace, must ultimately feel internally, nature drives humankind to make initially imperfect attempts, but finally, after the ravages of war, after the downfalls, and after even the complete internal exhaustion of its powers, [nature] impels humankind to take the step that reason could have told it to take without all these lamentable experiences: to abandon the lawless state of savagery and enter into a federation of peoples'.[22]

As can be concluded from these poignant lines, Kant believed in international law as an indispensable element of this vision of progress. In his essay *Towards*

18 Retz (n. 9), 1 and see 37-46 and 58.

19 Bury (n. 2), 5.

20 Immanuel Kant, 'Idea for a Universal History from a Cosmopolitan Perspective' in: Pauline Kleingeld (ed.), *Toward Perpetual Peace and Other Writings on Politics, Peace and History* (Yale University Press 2006, original 1784), 3.

21 Reinhart Koselleck 'Die Ausprägung des neuzeitlichen Fortschrittsbegriffs' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Darmstadt: Wissenschaftliche Buchgesellschaft 2022, original 2004), 382.

22 Kant (n. 20), 10.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Perpetual Peace: A Philosophical Sketch (1795), Kant holds that a treaty among people, creating a pacific federation (*foedus pacificum*), is an essential requirement for lasting peace and the prevention of future wars.[23] Thus, from this perspective, international law carries within itself the seed of optimism; it is forward-looking, believing that we will move into the future with history as our ally.[24] Since public international law accordingly assumes progress, any defects in this system are viewed as barriers to this ultimate objective.[25]

An example of this self-evident and optimistic link between progress and international law is Hudson's 1932 book on *Progress in International Organization*, in which he examines the establishment of the League of Nations, the Permanent Court of International Justice, and other international organisations as institutions for co-operation in an applauding manner.[26] Despite the different crises that occurred during the first quarter of the 20th century, in Hudson's view

> '[i]n this brief period since the war, our generation has not been idle. It has suffered, as all generations suffer, from apathy, from ignorance, from opposition to its steady purpose. Yet it promises to leave something to show for its efforts. It has followed the method by which progress is achieved. It is building institutions which promise to serve future generations. It has made greater progress in organizing the world for co-operation and peace than was made in a hundred years before the war.'[27]

International legal scholarship is replete with similar attitudes. For example, in one of his essays, Brierly acknowledged that the assumption that international law merits preserving and refining needed no further justification and outlined the necessary conditions for its progress.[28] An increased abundance of law was thus automatically presumed to be progressive, and the international lawyer would be at the heart of this project, the 'organ of the legal conscience of the civilized world'.[29] One might even suggest that progress substituted the stabilising effect formerly offered to society by

23 Immanuel Kant, 'Towards Perpetual Peace: A Philosophical Sketch' in: Pauline Kleingeld (ed.), *Toward Perpetual Peace and Other Writings on Politics, Peace and History* (Yale University Press 2006, original 1795), 80.

24 David Kennedy, 'When Renewal Repeats: Thinking Against the Box', N. Y. U. J. Int' l L. & Pol. 32 (2000), 335-500 (347).

25 Phillip C. Jessup, *A Modern Law of Nations* viii (2nd edn, Macmillan 1949), 2.

26 Manley O. Hudson, *Progress in International Organization* (Oxford University Press 1932).

27 Hudson (n. 26), 122.

28 James L. Brierly, 'International Law: Some Conditions of Its Progress', Int'l Aff. 22 (1946), 352-360 (352) (*emphasis added*). See further references employing the notion of progress, Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMS Asser Press 2010), 2-3.

29 Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press 2009, original 2001), 516; Kennedy, 'When Renewal Repeats' (n. 24), 347.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

religion. In this sense, practising progress would ultimately lead to a utopian world, just as the observance of religion leads human life to heaven.[30]

These optimistic visions seem to be as true today as ever since referring to the concept of progress continues to be one of the most commonly used rhetorical strategies in international law.[31] Indeed, employing the progress narrative in its varied forms and facets has been central to many international law analyses in the wake of Russia's war of aggression against Ukraine. For example, scholars have asked whether the war marks the demise of the international legal order as we know it or called for its renewal and reimagination.[32] Emblematically, Hathaway has written that we should not give up on the pursuit of a more just world merely because some champions of justice and accountability are not entirely above criticism.[33] Allott has called on international lawyers to investigate every potential avenue for creating a better future for humanity, among others, through perfecting the rule of law.[34] Others have claimed that the Russia-Ukraine war may in fact spearhead progress in many areas of international law.[35] However, scholars have also raised questions, denouncing certain proposals for their exceptionality and selectivity.[36]

III. Scholarship's Critical Introspection of the Assumed Positive Progress Vision

While progress narratives have remained at the heart of international law doctrine, scholarship has also increasingly critically scrutinised the taking for granted of the link between international law, progress, and evolution. Notably inspired by Hudson's 1932 book on *Progress in International Organiza-*

30 See Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?', EJIL 25 (2014), 425-444 (429-431).

31 Skouteris, 'The Notion of Progress' (n. 28), 5.

32 Barrie Sander and Immi Tallgren, 'On Critique and Renewal in Times of Crisis: Reflections on International Law(yers) and Putin's War on Ukraine', Völkerrechtsblog, 16 March 2022; Paul Harper, 'Why Russia's Invasion of Ukraine is Not the End of the UN Charter System', MDX Minds, 28 March 2022; Rachael L. Johnstone, 'Is Ukraine The End of International Law as We Know It?', Journal of the North Atlantic & Arctic (JONAA), 10 April 2022.

33 Oona A. Hathaway, 'How Russia's Invasion of Ukraine Tested the International Legal Order', Brookings, 3 April 2023.

34 Philip Allott, 'Anarchy and Anachronism: An Existential Challenge for International Law', EJIL: Talk!, 1 April 2022.

35 Elena Chachko and Katerina Linos, 'International Law After Ukraine: Introduction to the Symposium', AJIL Unbound 116 (2022), 124-129 (124).

36 Ralph Wilde, 'Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting', OpinioJuris, 17 March 2022.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tion, Miller and Bratspies edited their own volume *Progress in International Law* in 2008. In their Introduction, Miller and Bratspies, among others, criticised Hudson's approach for not addressing the connection between progress, international law, and cooperation, but instead taking it for granted.[37] In their view, for Hudson, like for many international lawyers both before and after him, the idea that international law is a predestined tool for attaining progress 'was an accepted tenet of the faith […].'[38] Thus, through the critical perspectives offered in the Introduction to Miller and Bratspies' edited volume, postmodern criticism of Enlightenment ideas, such as the concept of human progress, has irrevocably made its way into the discourse on international law.[39] However, regarding the edited volume itself, Skouteris in his review assessed that, while the publication is notable for cataloguing the state of international law at the turn of the 21st century and highlighting the essential link between international law and progress, it misses a significant chance to enhance its analysis by engaging in a crucial dialogue with contemporary critiques of narratives of progress.[40] In doing so, the volume 'helps to confirm, rather than dislodge, historical narratives of progress' and 'nurtures a range of optimistic (in some cases enthusiastic) progress narratives'.[41]

Despite this criticism, the introduction to the edited volume indeed teased out some critical perspectives on this 'accepted tenet of faith'. Already since the late 1980s and 1990s, critical scholars have highlighted the paradoxes underpinning the progress narratives in international scholarship, even though at first the exploration of the notion of progress itself was not the key focus.[42] For example, Cass claimed that the mainstream continuously frames

37 Russell A. Miller and Rebecca M. Bratspies, 'Progress in International Law – An Explanation of the Project' in: Russell A. Miller and Rebecca M. Bratspies (eds), *Progress in International Law* (Martinus Nijhoff Publishers 2008), 9-29 (21-22).

38 Miller and Bratspies (n. 37), 22. Nevertheless, Galindo nuanced the critique of Hudson's approach to progress, highlighting that when Hudson was writing the book, he 'had no access to the vast literature on the critique of Enlightenment and the critique of progress, which was only produced years later'. While this is an important contextual factor to be taken into account, the paradigm of the self-evidence of progress has been persistent until today. George R. B. Galindo, 'Review Essay: Progressing in International Law', Melbourne Journal of International Law 11 (2010), 1-16 (10).

39 Thomas Skouteris, 'Review Essay: Russell A. Miller and Rebecca M. Bratspies (eds) Progress in International Law, foreword by José E. Alvarez, Developments in International Law 60, Leiden: Martinus Nijhoff Publishers, 2008', LJIL 22 (2009), 857-865 (858).

40 Skouteris, 'Review Essay' (n. 39), 864.

41 Skouteris, 'Review Essay' (n. 39), 865.

42 Galindo (n. 38), 1-2. For example, Koskenniemi in his Introduction to *The Gentle Civilizer of Nations* claims that in his book 'no assumption about history as a monolithic or linear progress narrative is involved, nor any particular theory about causal determination of ideas or by ideas of something else'. Koskenniemi (n. 29), 2. See Skouteris, 'The Notion of Progress' (PhD Thesis, University of Leiden 2008), 19-20.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the field's history 'as a "narrative of inevitable progress"'.[43] Kennedy argued that the construction of modern international argument has always been tied with a narrative of linear progress.[44] According to Galindo, indeed, this mainstream approach in international law scholarship is, in fact, the tacit or express pledge of several 19th and 20th-century doctrines.[45]

The first systematic monograph focusing on the notion of progress was written by Skouteris himself and titled *The Notion of Progress in International Law Discourse* (2010). Exploring the employment of the progress narrative and notion in the field's debates, Skouteris offers typologies of three uses of this notion: (i) international law *as* progress (international law has a self-evident and intrinsically progressive value); (ii) progress *within* international law (improvement of international law's internal development); (iii) instances which fall within both categories, i. e. international law *as* progress and international law *within* progress.[46] Skouteris claims that certain debates consider some of public international law's developments intrinsically positive for the field as such or for the international community. These tenets are 'beyond doubt' and accepted as a 'general truth'.[47] However, crucially, '[t]he language of progress is also a language of authority, to legitimize and delegitimize'.[48] It is, therefore, essential to shed light on and become aware of the fact that invoking progress narratives in a self-evident manner automatically places one's claims 'beyond the test of internal critique, a critique of internal contradictions and gaps'.[49] Ultimately, for Skouteris, the notion of progress is therefore not a neutral discursive device. He assumes that the notion is based on subjective premises and, as a result, is an expression of subjective (e. g., political, or ideological) perspectives and conflicts, while creating an objective guise.[50] Similarly, McGuinness and Bratspies claim that

43 Deborah Z. Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', Nord. J. Int'l L. 65 (1996), 341-384 (354).

44 David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', Nord. J. Int'l L. 65 (1996), 385-420 (420).

45 Galindo (n. 38), 1. See earlier.

46 Skouteris, 'The Notion of Progress' (n. 28), 6-8 and 30.

47 Skouteris, 'The Notion of Progress' (n. 42), 10.

48 Skouteris, 'The Notion of Progress' (n. 28), 5.

49 Skouteris, 'The Notion of Progress' (n. 42), 10.

50 Skouteris, 'The Notion of Progress' (n. 42), 185. In this context, Skouteris puts forward three arguments: (i) progress as the product of narratives (progress is essentially 'devoid of meaning' without being located in a specific context); (ii) progress narratives as politics (since they are 'non-objective', these narratives have a political function and compete with other narratives); (iii) discourse analysis as action ('demystification' of these opens up pathways for new intellectual and legal imagination). Skouteris, 'The Notion of Progress' (n. 42), 185. Altwicker and Diggelmann join Skouteris in this subjectivity-assessment, see Altwicker and Diggelmann (n. 30), 428.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the progress narratives tend to 'overlook the normative ambiguity of slippery and value-laden reference points'.[51]

Moreover, in this regard, special attention has been paid to uncovering and directing the reader's attention to how progress narratives and arguments are formed. For instance, according to Skouteris, progress arguments require a two-step narrative: First, historical facts need to be ordered linearly to construct a coherent timeline moving towards one goal. Second, this linear movement must be connotated positively.[52] Similarly, Altwicker and Diggelmann identified several specific techniques for constructing progress narratives and their underlying strategic assumptions.[53] These techniques include (i) ascending periodisation, (ii) evidence of increasing value orientation of international law, (iii) trend-talk and (iv) identification of paradigm shifts.[54] The argumentative technique of ascending periodisation sets out the tendency of dividing the field of law into different eras or periods and ascribing the most recent or ongoing era with the most positive term.[55] Prominent examples are the classification as 'classic' and 'modern', or 'old' and 'new' public international law.[56] When employing this argumentative technique, it is striking that the argument can be communicated on a subtle, even subconscious level. Simple as it may be, the chosen words for categorisations themselves carry a semantic connotation that describes a certain improvement. The social reality we live in with its linguistic specialities constructs the impression of progress all by itself.[57] The second technique of proving increasing value orientation leaves this guise of subtlety by openly and actively trying to prove progress via value orientation.[58] This technique, seemingly empirical in its methodological approach, detects hints at shared ethical convictions within a panoply of legal documents.[59] Accordingly,

51 Margaret E. McGuinness and Rebecca M. Bratspies, 'Progress and Paradox in the Regulation of the Use of Force', Proceedings of the Annual Meeting (ASIL) 102 (2008), 454-459 (457).

52 Thomas Skouteris, 'The Idea of Progress' in: Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 939-953 (947).

53 Altwicker and Diggelmann (n. 30), 432-443.

54 Altwicker and Diggelmann (n. 30), 433 f.

55 Oliver Diggelmann, 'The Periodization of the History of International Law' in: Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012), 997-1011 (1000-1001, 1008 f.); William E. Butler, 'Periodization and International Law' in: Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2nd edn, Edward Elgar 2020), 281-295.

56 Altwicker and Diggelmann (n. 30), 434.

57 Altwicker and Diggelmann (n. 30), 432-433.

58 Altwicker and Diggelmann (n. 30), 434-435.

59 Altwicker and Diggelmann (n. 30), 434.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

increasing value orientation can especially be observed when considering the increasing importance of human rights in public international law, a phenomenon that is also ascribed to the 'modernization' of public international law.[60] Criticism can though be raised since this seemingly methodologically sound endeavour may intentionally omit references to contrary trends to strengthen its own claim.[61] In contrast to increasing value orientation, the third technique of 'trend-talk' can be described as 'soft and elegant'.[62] It does not promise anything, but it suggests. It creates hope for a brighter future by engaging with current or recent developments in the discipline.[63] In doing so, this technique gazes into the crystal ball of public international law and offers a spirit of fortune-telling.[64] Lastly, the fourth technique engages in the identification of paradigm shifts, evidencing similarities with the first technique on periodisation.[65] Equally, underlying connotations simplify a choice between two paradigms (e. g., universalism vs. particularism).[66] Our intuition tells us what is good or bad, what is to be considered progressive or old fashioned.[67]

IV. Zooming in on the Contributions

It is against this background that the contributions of this Special Issue offer some novel perspectives on the relationship of progress and international law.

Hilary Charlesworth, in her colourful keynote contribution *Searching for Progress in International Law*, sheds light on the notion of progress in international law. The first of her three vignettes in which she offers to trace this relationship reads like a condensation of the historical struggle for that notion: The glass windows of the Peace Palace in the Hague, depicting 'The Evolution of the Peace Ideal' in four phases, the Primitive Age, the Age of Conquest, the Present Age and Peace Achieved, in her view, reflect two contradictory accounts of progress. One is a cyclical account emphasising the legitimacy of adjudication since time immemorial, the other a linear account

60 Ruti G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', Cornell Int'l. L. J. 35 (2002), 355-387 (359 f.).
61 Altwicker and Diggelmann (n. 30), 434.
62 Altwicker and Diggelmann (n. 30), 435.
63 Altwicker and Diggelmann (n. 30), 435.
64 See similarly Altwicker and Diggelmann (n. 30), 436.
65 Altwicker and Diggelmann (n. 30), 436-437.
66 Altwicker and Diggelmann (n. 30), 436.
67 Altwicker and Diggelmann (n. 30), 437.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

depicting adjudication as the culmination of history. At the same time, her interpretation demonstrates that the windows are emblematic of the Kantian vision of international law as promoting eternal peace. They are, as Charlesworth reminds us, 'very much a creation of their time', presenting international adjudication as a marker of civilisation. Delving further into the relationship in her two other vignettes – access to international adjudication and the field of women, peace, and security – she argues that progress is rarely linear, but most of the time a shuffling movement. Challenging the common understanding of international law as constituting progress *per se,* she highlights that normative progress can come with deplorable simplifications and injustices, when e. g. the United Nations' Women Peace and Security agenda portrays women and girls uniquely as permanent victims and neglects sexual crimes against other victims than women. Charlesworth also takes up the criticism of critical scholarship against progress speech and calls on international lawyers to be explicit about the frame they are using.

Typically, accounts of human rights development have been presented as intrinsically progressive. Giulia Raimondo's contribution *Negative Dialectics: Shifting Borders, Extraterritorial Jurisdiction and New Possibilities of Resistance* challenges this preconceived assumption of progress for the field of international migration law, highlighting what has been excluded from such a narrative. Building on Adorno's concept of negative dialectics, her analysis of the European Court of Human Rights' (ECtHR) case law on jurisdiction in extraterritorial border control examines the dialectic processes defined by, on the one hand, expanded protection of refugees and, on the other hand, states' cooperative deterrence policies and accountability gaps. Unlike the Hegelian view, according to which through tension and contradiction two opposites are sublated into progressive synthesis, Raimondo embraces the contradictions and seeks to unravel the inherent tensions the concept of jurisdiction under the European Convention on Human Rights (ECHR) seems to hold in order to reveal its limitations and injustices in the context of extraterritoriality. Ultimately, Raimondo calls for the critical reassessment of the very notion of progress and argues it should be freed from narratives of (historical and legal) advancement and emancipation.

The assessment that progress is but an illusionary construct is shared by Julian Hettihewa in his insightful contribution *Youth as Progress*. He tells the circular story of how international law, first and foremost the United Nations General Assembly 'Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples' of 1965, has historically idealised and demonised youth. Youth, so the narrative goes, must be educated to maintain peace and prevent another war, to secure progress and prevent decline. The author offers a fresh perspective on the

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

role of international law in this respect: international law not only reinforces this sharp dichotomy between dream and nightmare, but it also shares the Messianic feature with youth. Just as youth, international law exists as 'a promise of justice'. Hence, the author concludes, both youth and international law 'are constructed as progress'.

Undoubtedly, progress and time are intimately intertwined, and, therefore, the reflection on their relationship is of categorical importance. In her contribution *Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity*, Eliana Cusato demonstrates how deeply ingrained the Western linear conception of time is with the idea of progress through international law. She presents continuities of linear progress narratives in leading concepts of international environmental law, such as the concepts of sustainable development, environmental human rights and ambition. On this basis, she argues that (environmental) law's progressive direction towards an open future conceals that futurities are unevenly distributed. She critically highlights that the emphasis on an open future in a legal discourse determined by a linear progress narrative risks distracting from necessary mitigation measures in the present. Besides, she argues, mainstream discourse on future generations risks reproducing Western assumptions about unilinear time and does not sufficiently take into account that the future always inherits burdens from the past.

Tania Ixchel Atilano joins Cusato in revisiting dark sides of historical progress narratives. In her contribution, *Visions of Progress and International Law in Nineteenth Century Latin-America: The Experience of the French Intervention in Mexico*, she challenges the conventional formulations of progress narratives built upon the European and North-American visions of the world. In describing Mexico's way to independence and equal sovereignty using international law against its former colonisers, she analyses how Latin American visions of progress in international law came into being through legal and linguistic education. Furthermore, she delves into liberal internationalism and then-new Mexican laws as a manifestation of progress. She locates the precedents for the 'transformative visions of international law' (most significantly, international criminal law) outside Europe and the United States, more specifically in the context of the French Intervention in Mexico (1862-1867) and the following trial against Maximilian of Habsburg.

Janina Barkholdt critically scrutinises and reverses the supposed underlying notions found in the argumentative techniques of ascending periodisation and increasing value orientation. Innovatively and provocatively, she asks the reader: *Progress Through Preservation: Paradox or Prerequisite?* In attempting to outline under which conditions progress can be achieved, the author argues for the necessity of stabilisation in order to enable change.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Barkholdt understands 'preservative' rules, e. g., the principle of *uti possidetis*, as enablers of change since these rules build an equilibrium with what she labels as 'transformative' rules. Ultimately, she posits that a sensible and limited application of preservative rules – the natural antichrist of progress – leads to a fruitful environment for progress to unfold.

Intuitively, progress requires an element of power, but one can reverse the question: Is progress achieved when the original power-holder is constrained or resisted, ultimately displacing the locus of power? Several contributions in this issue relate to the complex and underexplored interrelationship between power and progress. Sissy Katsoni, in her contribution *Towards a Feminist Interpretation of ECHR's Provisions on Access to Abortion*, examines how in cases related to abortion, the ECtHR could implement a feminist interpretation of the ECHR by relying on customary interpretative techniques. Feminist scholars criticise the Court for its narrow interpretations of human rights provisions and argue against the alternative of 'abortion travelling', highlighting its inaccessibility to marginalised individuals. They also critique the Court's victimisation of pregnant persons. Katsoni's primary objective is to explore how the interpretative approach of the Court could be modified to address these concerns and to ensure that states grant access to abortion based on the impact of pregnancy and birth on the pregnant person's private life. She advocates for a broader, more contextual, and less formalistic approach to legal interpretation that takes the pregnant person's gendered experiences and the patriarchal nature of society into account. Finally, she asserts that this can already be achieved by emphasising contextual and dynamic considerations over other interpretative approaches without deviating significantly from customary rules of interpretation.

Finally, Martin Schwamborn, in his article *Progress and Responsibility: A Healing Relationship – The 'Responsibility to and for Progress' in International Law*, develops a novel approach to progress-related responsibility, particularly in scientific and technological development. According to Schwamborn, states have a duty to create a favourable environment to advance technological and scientific knowledge, which he calls responsibility *to* progress. Responsibility *for* progress, on the other hand, refers to questions of liability and compensation when the consequences of progress turn into damage. Historically, states have balanced promoting and restricting progress, and they are legally bound by a responsibility *to* and *for* progress. This responsibility, grounded in human rights and the UN Charter, requires a coordinated international effort to address the challenges of progress responsibly. This is how Schwamborn draws a parallel between the notion of scientific, technical, and technological progress on the one hand and the

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

notion of progress in international law on the other hand and highlights their interdependencies. He shows that regulating emerging technologies requires a delicate equilibrium between sovereignty, sovereign equality, human rights, and liability for damages.

In her epilogue, Angelika Nußberger reflects on the various meanings of progress, including progress as a linear movement directed towards a specific goal, improvements through proceduralisation, and the most modest form, a better understanding of law. She highlights the ambiguity of progress and its potential costs, pointing out unwanted side effects such as a shrinking universal recognition of human rights as a result of their expansion.

V. Conclusion: Criticism and Possible Ways Forward

'The relationship between progress and international law is not cursed, but neither is it charmed. It is rather a complicated relationship that is constantly being re-negotiated'. This conclusion by Hilary Charlesworth is best illustrated by the contributions of this Special Issue. The very notion of progress in international law, its assumed linearity and, in particular, the widespread assertion of 'international law *as* progress' (using Skouteris' typology), still at least implicitly acknowledged by most international lawyers, appears to stand on shaky ground. Progress, understood as improvement, most often comes about as a shuffling movement, not as a linear line. One step forward may be followed by two steps backwards.[68] Besides, progress through more international law may be beneficial for some, but detrimental for others as the effects ultimately depend on the content of the relevant norms. In addition, a prerequisite of progress may be its exact opposite, preservation, for change may be possible only in the state of stabilised order.[69]

More fundamentally, following the footsteps of Skouteris, Altwicker, Diggelmann, Kennedy and others, many contributions to this Issue challenge the usage of the notion of progress in international law as a line of argument altogether. Progress narratives are unravelled as techniques that legitimise and potentially enhance pre-existing power relationships, conceal counter-developments in opposition to improvement and emancipation,[70] fail to account for the uneven distribution of futurity resulting from climate

68 Hilary Charlesworth, 'Searching for Progress in International Law', ZaöRV 84 (2024), 801-814; Giulia Raimondo, 'Beyond Progress: Interrogating the Limits of Jurisdiction and Migrant Rights Through Negative Dialectics', ZaöRV 84 (2024), 815-842.

69 Janina Barkholdt, 'Progress Through Preservation of the Legal *Status Quo*: Paradox or Prerequisite?', ZaöRV 84 (2024), 925-954.

70 Raimondo (n. 68).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

change,[71] instrumentalise specific groups of people such as the Youth,[72] and reflect mostly Western values.[73] The various subfields of international law that are used to illustrate these claims, including human rights, international environmental, humanitarian and economic law, indicate that the arguments made in these articles can be applied more generally.

At the same time, turning to the progress *within* international law, Skouteris' second category, the various contributions demonstrate that in many areas, international law has brought about improvement in some respects, but is still lagging behind expectations. The reasons for this vary. To cite but a few examples, in the case of women, peace, and security, the implementation of international law is undermined by institutional cultures; in international refugee law, the 'progressive' expansion of migrants' rights by the ECtHR has led states to adopt counter-policies aiming at evading the resulting obligations.

This leads to the question of what may be possible 'ways forward' – to use a classic progress metaphor. One possible way might be to establish an environment in which progress can unfold. In this respect, Barkholdt, in her contribution, points to the adoption of 'preservative' rules stabilising the order to enable change.[74] Interestingly, Katsoni's plea for a contextual and dynamic interpretative approach of the ECtHR, in opposition to more static approaches,[75] can be seen in juxtaposition to this first technique. Schwamborn's identification of state responsibility *to* progress is a further factor that could point out possible ways for the future.[76]

The relationship between progress and international law is far from being settled. But we hope that this Special Issue brings us closer to possible solutions, even if in a non-linear, deconstructivist way.

71 Eliana Cusato, 'Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity', ZaöRV 84 (2024), 865-893.

72 Julian Hettihewa, 'Constructing Youth as Progress: Tracing Shared Efforts of the League of Nations and the United Nations', ZaöRV 84 (2024), 843-863.

73 Tania Atilano, 'Visions of International Law in the Nineteenth-Century: The Experience of the French Intervention in Mexico', ZaöRV 84 (2024), 895-924 and Cusato (n. 71).

74 Barkholdt (n. 69).

75 Sissy Katsoni, 'A Feminist Re-Interpretation of Access to Abortion Under the European Convention on Human Rights', ZaöRV 84 (2024), 955-978.

76 Martin Schwamborn, 'The Responsibility *to* and *for* Progress in International Law', ZaöRV 84 (2024), 979-998.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Progress and International Law: A Cursed Relationship?
Working Group of Young Scholars in PIL and German Society of International Law (Cologne, 23 September 2023)
Searching for Progress in International Law

Hilary Charlesworth*
International Court of Justice, The Hague, The Netherlands
h.charlesworth@unimelb.edu.au

I. Introduction 801
II. The Idea of Progress 802
1. The Great Hall of Justice in the Peace Palace 803
2. Access to International Adjudication 807
3. Women, Peace, and Security 810
III. Conclusion 813

I. Introduction

I thank the Organising Committee for its kind invitation to join this event. It is an honour and a pleasure to participate in this forum, which gives me great hope for the new generation of international lawyers. I will offer an introduction to our conference theme, Progress and International Law: A Cursed Relationship?

Progress is a popular term in every field, and unsurprisingly, in international law. It is regularly used in the titles of articles and books dealing with both general and specific topics.[1] The notion of progress is embedded in the

* I thank Azul Navarro and Nikiforos Panagis for their wonderful research for this paper.

1 E.g. Manley O. Hudson, 'The Progressive Codification of International Law', AJIL 20 (1926), 655-669; Jonathan I. Charney, 'Progress in International Criminal Law?', AJIL 93 (1999), 452-464; Russell Miller and Rebecca Bratspies, *Progress in International Law* (Nijhoff 2008); Donald McRae, 'The Work of the International Law Commission, 2007-2011: Progress and Prospects', AJIL 106 (2012), 322-340; Martha C. Nussbaum, 'Women's Progress and Women's Human Rights', HRQ 38 (2016), 589-622; Payam Akhavan, 'The Perils of Progressive Jurisprudence: The Nullum Crimen Sine Lege Principle in International Criminal Law', Current Legal Probs. 75 (2022), 45-70.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

text of the Charter of the United Nations. Its preamble refers to a determination 'to promote social progress'[2] and the UN General Assembly's mandate includes 'encouraging the progressive development of international law [along with] its codification'.[3] The General Assembly established the International Law Commission for precisely this purpose.

In this context, I note that the conference theme departs from the popular (usually celebratory) linkage of 'progress' and 'international law'. First it uses the powerful adjective 'cursed', which suggests a deep-seated failure of the relationship between progress and international law. It implies not only that there is a relationship between the terms but also that this is a doomed, toxic conjunction and that international law will always be regressive. So, it might be said, the idea of progress will inevitably disappoint or indeed that it will mask deep-seated inequalities.

Such a theme is echoed in the observation of the Belgian artist René Magritte – 'L'idée du progrès est liée à la croyance que nous nous rapprochons du bien absolu, ce qui permet à beaucoup de mal actuel de se manifester.'[4]

But then there is that question mark in the conference title. This punctuation mark is doing a lot of work, adding a measure of doubt, or ambivalence, to an otherwise dramatic proposition. I have been wondering whether my role is to dispel the question mark. Should I reject the notion of a curse altogether and argue that international law will, eventually, be on the right side of history through the forces of progress? Or indeed should I confirm the hex?

I've decided instead to focus on the idea of a search for progress in international law in a more descriptive sense. How should we think about progress in law? Where should we look for progress? What forms does it take? I will suggest, first, that we should be more careful when using the language of progress and should specify the frame we are using. Second, progress takes many forms in international law; it is not a linear, directional, movement, but may be best understood as a shuffle, with steps forward, back, and sideways. For this reason, it may be easier to locate in the interstices of international legal action than in its grand arcs.

II. The Idea of Progress

What is 'progress'? It isn't obvious what this means. One meaning of 'progress' is simply 'change' itself, in opposition to the idea of 'conservation'

2 See also Article 55 (a).

3 Article 13 1 (a).

4 René Magritte, 'Letter to Paul Nougé (August 1946)' in: André Blavier (ed.), *René Magritte: Écrits complets* (Flammarion 2009), 203.

 DOI 10.17104/0044-2348-2024-4-801

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

or preservation. Aphorisms such as 'you can't stand in the way of progress' draw on this sense. In this context, 'progress' may be associated with new technologies that can disrupt social orders.

Another meaning of progress is to add approbation to the word 'change' by gesturing at a moral or social advance. So, on this account, the antonym of such a meaning of progress is regress or decline. Thomas Skouteris has written lucidly about progress and international law ever since the days of his PhD thesis.

First, Skouteris notes that the idea of progress has an uppercase meaning, in the sense of a grand idea or narrative, but also a lowercase or everyday meaning. This latter sense is evident in the way that progress has become a cliché of management culture – think of terms such as 'progress reports', or the way that progress has been turned into a mundane verb – 'to progress' an agenda, for example – or (my particular *bête noire*) 'moving forward'. Second, Skouteris observes that all varieties of progress talk, whether lower or uppercase, are 'theoretical "all the way down"'.[5] This discourse provides a frame or lens on any change in direction from the past. For this reason, Skouteris posits that 'any evaluative statement that uses progress as the benchmark of choice must be treated as a normative mode of speaking the world'.[6] So, we should pay attention to the nature of the frame that progress imagery or language imposes in specific cases.

Let me present three vignettes of progress in international law from quite different perspectives.[7]

1. The Great Hall of Justice in the Peace Palace

The first account of progress I offer is visual – the idea of progress represented in the windows of the Great Hall of Justice in the Peace Palace. Paying attention to the art and architecture of an international institution can reveal the expectations of its founders, and also the way that these continue to shape the expectations and performance of the institutions. Such an approach calls into question the modernist separation between art and law: it uncovers the 'intimate links […] between power, law and images […]'.[8]

5 Thomas Skouteris, The Notion of Progress in International Law Discourse (Asser 2009), 720.

6 Skouteris (n. 5), 720.

7 For a careful analysis of the techniques by which progress narratives are constructed in international law see Tilmann Altwicker and Oliver Digglemann, 'How is Progress Constructed in International Legal Scholarship?', EJIL 25 (2014), 425-444.

8 Costas Douzinas, 'The Legality of the Image', M. L. R. 63 (2000), 813-830 (815).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

The art of the Peace Palace presents adjudication as an inexorable story of progress. The United Kingdom, on behalf of the Commonwealth, made a gift of the four huge stained-glass windows for the Great Hall. Each consists of four panels.[9] These windows infuse the Court room with light, in the manner of cathedrals, and immediately connect with a European religious tradition.[10]

The windows are titled 'The Evolution of the Peace Ideal' and they were made in 1914 by the Scottish artist Douglas Strachan. Strachan's idea was to depict the ideal of peace as it advanced through four phases: The Primitive Age; The Age of Conquest; The Present Age; and Peace Achieved. While Strachan left detailed notes about the images and allegories in the windows, a viewer can get a good idea of their meaning from simply looking at them.

The windows are read from left to right: a state of nature, a crisis, a transition, and a resolution.[11] The windows present a story of unremitting progress towards international adjudication, which emerges as a marker of civilisation. As you can see, Strachan invested his work with meaning: the windows are full of symbols, signs, and the colours all have significance, changing with each age.

What account do the windows present of the international system? Despite the Carnegie Foundation's strict taboo on religious images, we can see that the work abounds in Biblical imagery: the Fall, the Flood, the life of Jesus, the Apocalypse.[12] *The Primitive Age* depicts early human society: hunters, shepherds and harvesters live harmoniously with nature. The Latin inscription (from Ovid) declares that 'man lived in peace without the need of the military'. Panel III depicts the discovery of fire; and then Panel IV the art of metal working – figures appear with helmets, foreshadowing conflict. It is as if 'the very technologies and social hierarchies that enhanced the productive power of early societies spelled the end of their peaceful coexistence'.[13]

In the second window, *The Age of Conquest*, we see the collapse of peace: the skies are made red by Bellona, the goddess of war. Fires rage and there

9 According to Duranti, they reflect the attempts by the crafters to 'circumvent the Carnegie Foundation's prohibition on anchoring pacifist internationalism in the Christian inheritance of the West': Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017), 42.

10 Indeed, much of the designer, Douglas Strahan's, previous work is found in Scottish cathedrals. Duranti (n. 9), 43.

11 Daniel Litwin, 'Stained Glass Windows, the Great Hall of Justice of the Peace Palace' in: Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2018), 463-477 (469).

12 But Strachan placed the signs of the zodiac and the seasons above them rather than Christian icons. Duranti (n. 9), 43.

13 Duranti (n. 9), 45.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

are symbols of hunger and death. Labour is tied to a wooden stake and is powerless to stop the soldiers looting. Above them, fighters enter into battle. They are dressed in different national clothing, but all carry the same banner. The plough is broken. The conquered are forced to drag the battering ram to destroy the fruit of their labour. Panel IV however presents a 'Constructive Spirit' – a visionary who brings Justice and hope to encourage humans toward peace.

The Present Age (the third window) shows the realisation that war hinders progress and that scientific developments can rebalance the scales. Labour holds Bellona in chains in Panel II, as Science (Panel III), Philosophy and the Arts (Panel IV) prepare for peace. Finance looks down, one finger on a telegraph; note the bag of coins. Strachan wrote that this signals that international disputes should be 'settled between representatives, and not by the meaningless massacre of whole races.'[14] The upper Panels depict the search for mutual understanding and peace by all four quarters of the globe.

The final window, *Peace Achieved*, shows (in the artist's words) that Peace marks 'the real beginning of man's higher development'. We see Peace and Justice rising from the ashes; swords are made into ploughshares; lions lie down with the lambs; and doves fly all over the place – iconography from the Bible. There is a sense of the pastoral idyll of the first window of the Primitive Age, but this is a scientifically informed society.

In Panel II, Arbitration holds sway – symbolised by the four quarters of the earth coming together 'North and South holding the balance; East and West abiding by the verdict' (in Strachan's words). In Panel III, Bellona is dying in the arms of Peace. It is only then, in the final Panel, that international adjudication appears. This appears as the acme of civilisation.

Daniel Litwin has a marvellous chapter on the windows in the wonderful book *International Law's Objects*. His rich analysis proposes that the windows encode three major beliefs about international adjudication. First, that adjudication is essential to peace – peace can only be achieved by law; i. e. only justice and order could curb the chaos of international politics. Moreover, the windows associate law simply with adjudication.

Litwin's second observation is that, in the highly structured narrative of progress, the windows also present international adjudication as a marker of civilisation.[15] We can see an anthropological account of history, reflecting the scientific, positivist ideas of the late nineteenth century. This meshed with attempts by positivist international lawyers to detach interna-

14 Quoted in Litwin (n. 11), 470.

15 Litwin (n. 11), 471.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tional law from ideas of a natural law, and the evolutionary ideas of the era emphasised the value of science over belief. Anthropologists used categories such as civilised peoples as opposed to primitive peoples, barbarians, and savages, and these informed categorisations used by international lawyers also.

These are represented in the windows – *The Primitive Age* depicts a romantic idea of a pastoral society without weapons; *The Age of Conquest* = barbarians; and *Present* = civilised. States could only participate in international adjudication once they had reached civilised status and recognised that war could be avoided. Using the narrative of progress, Lassa Oppenheim wrote in 1908 that the science of international law requires 'a deep-rooted faith in the progress of the nations towards peace and civilization'.[16] Such a narrative shaped the story of international adjudication giving it some structure.

Third, Litwin argues, the windows present international adjudication as outside or above history – international adjudication comes out of a timeless past.[17] The windows are resolutely anti-modern in their interest in romantic symbols and in deploying a complicated story line.[18] This may be because Strahan was part of the Scottish arts and crafts tradition, which built on the Gothic style of the medieval era in stained glass.[19] But at the same time, the windows also reference improved technology, and the role of science.

In this sense, the windows reflect two contradictory accounts of progress, one cyclical and one linear.[20] One is to emphasise the legitimacy of adjudication through showing its long provenance back to time immemorial. The other is adjudication as the culmination of the struggles depicted in the three earlier windows. And yet, even at the darkest times of war, there may be visionaries who promote peace.

The architecture and iconography of the Peace Palace shows that the asserted universality of the institution is very much based on western values. It encodes a particular vision of civilisation, not a universal one. At the end of the First World War, when adjudication in the form of arbitration was largely discredited, it could mutate into a judicial form.

16 Quoted in Litwin (n. 11), 472.

17 Litwin (n. 11), 463.

18 Litwin (n. 11), 474.

19 The aim of the arts and crafts movement was to rescue local and regional folk traditions in art from the extinction threatened by the industrial revolution and its mass production. The windows are intensely romantic and traditional, referencing gothic style; the opposite of modernism. Compare the stained glass of the De Stijl movement, or the Bauhaus. An example is the work of Josef Albers, <https://www.guggenheim.org/blogs/findings/the-little-known-glass-works-of-josef-albers>, last access 26 November 2024.

20 Duranti (n. 9), 44.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

The windows, created originally for the Permanent Court of Arbitration, are now read in a different context: 'although the underlying meaning of international adjudication has changed significantly, its seeming immemorial association with peace and civilisation remains'.[21] So, although the windows were very much a creation of their time, some of that symbolism and meaning still resonates today – the idea that progress consists of strengthening adjudication. For example, we can find some of the romance and optimism about international adjudication contained in Strachan's windows in proposals for a World Court of Human Rights. So too, the creation of the courts of international criminal law is regularly hailed as progress. Adjudication is often presented as the acme of international legal endeavour.

2. Access to International Adjudication

The idea that the arc of the moral universe bends towards adjudication is not only traced in art. Adjudication is associated with progress in legal discourse, also.[22] In a legal system where adjudication has great status, it is unsurprising that progress is often measured through access to courts. On this account, the more adjudicative fora there are, and the more accessible they are, the more advanced is the international legal system. Observers of international (and national) courts often describe developments in jurisprudence in the language of progress. The idea seems to be that, with the passage of time, judicial institutions will tend to pay greater attention to the reality of human lives.[23]

My second vignette is, then, jurisprudential progress in the field of access to international justice. As far as the International Court of Justice is concerned, this story is often presented as a tale of two cases: on the one hand, the controversial judgment in *South West Africa*; on the other, the auspicious *obiter* in *Barcelona Traction*. First, a regressive institution that evades its duty to dispense justice; then, a court manifesting its readiness to ensure the protection of basic human rights.

---

21 Litwin (n. 11), 476.

22 See from the Interwar era, for example, Nicolas Politis, *La justice internationale* (Hachette 1924), 16-17, and Charles De Visscher, 'La Cour permanente de justice international et son role dans le règlement des différends entre Etats', Nordisk Tidsskrift for International Ret 4 (1933), 147-157; see Hart's criticism of international law as a legal system: Herbert L. A. Hart, *The Concept of Law* (2nd edn, Clarendon 1994), 213 f.; also Fuad Zarbiyev, 'On the Judge Centredness of the International Legal Self', EJIL 32 (2021), 1139-1166.

23 See Alaa Hachem, Oona Hathaway and Justin Cole, 'A New Tool for Enforcing Human Rights: *Erga Omnes Partes* Standing', Colum. J. Transnat'l L. 62 (2024), 259-332.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

South West Africa, revolves around the 1920 League of Nations Mandate for German South West Africa, or rather around its application after the Second World War by the mandatory power, South Africa. In addition to obligations owed to foreign nationals ('special interests' provisions), the Mandate also imposed obligations on South Africa with respect to the treatment of the inhabitants of the Mandated Territory ('conduct' provisions).[24] Indeed, it was precisely because of South Africa's alleged failure to live up to the conduct obligations that Ethiopia and Liberia resorted to the International Court of Justice.

As every international lawyer knows, in 1966 the Court held that the two applicants would have the right to invoke the responsibility of South Africa only if the latter bore any 'direct obligation' towards the other members of the League of Nations individually under the Mandate.[25] As it was unable to find any such obligation owed directly and individually to Ethiopia and Liberia, the Court denied them standing.

Four years later in the course of *Barcelona Traction*, the Court (re)discovered the concept of the 'international community' as a collective whole, which is the beneficiary of some fundamental obligations.[26] The Court affirmed that all States have a legal interest in the protection of the rights corresponding to those obligations and, according to the canon, the Court indicated that such protection may be implemented through judicial proceedings. The tension raised by *South West Africa* is resolved, and progress achieved.

A longer history presents a more nuanced image. To begin with, the idea that States may have a legal interest in the protection of collective rights had been suggested since the early days of the Permanent Court of International Justice in SS *Wimbledon*.[27] And yet, this legal interest is not enough in itself to waive the fundamental requirement of consent to international adjudication, which is the basis for the legality but also for the legitimacy of the Court's decisions.

24 The distinction between 'conduct' clauses and 'special interests' provisions was alluded to in ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), preliminary objections, ICJ Reports 1962, 319 (343) (where it was treated as a distinction without a difference), and developed in ICJ, *South West Africa*, Second Phase, ICJ Reports 1966, 6 (para. 11). See, for example, Article 2: 'The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate.'

25 ICJ, *South West Africa* (n. 24), para. 14.

26 ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), merits, judgment of 5 February 1970, ICJ Reports 1970, 3 (paras 33-34).

27 PCIJ, *SS Wimbledon*, merits, judgment of 17 August 1923, Series A no. 1, 20.

 DOI 10.17104/0044-2348-2024-4-801

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

This last point was illustrated in the case of *Armed Activities (DRC v. Rwanda)*, decided over thirty-five years after *Barcelona Traction*. In that case, the Court held that the invocation of rules creating *erga omnes* obligations, indeed of peremptory norms, could not compensate for the absence of a valid title of jurisdiction.[28]

A similar juxtaposition was observed just over a decade ago. Within the course of the same year – 2012 – the Court affirmed, on the one hand, that sovereign immunity validly precludes the adjudication by domestic courts of claims concerning alleged violations of peremptory norms[29] and on the other, that all States parties to the Torture Convention may hold a State accountable for failing to prosecute the crime of torture.[30]

There are many other jurisprudential shuffles. We might think of how the *Monetary Gold* principle was diluted in *Phosphate Lands in Nauru*, only to be reinvigorated three years later in *East Timor*. They may even be detected in the same case: a few pages after its celebrated passage in the famous *Barcelona Traction*, the Court was circumspect about an unqualified right to protect victims of human rights violations.[31]

Without a clear account of the benchmark by which progress is measured, it is challenging to determine which of those jurisprudential moves are geared at the direction of progress and which ones sail against the wind. Moreover, we can see that, on any measurement, progress does not take a linear form, but can move forward and backwards. In any event, we might question the association of progress with greater access to judicial institutions.[32] As international lawyers, we tend to assume that more law, more courts are good things, but there are many other ways to regulate, or to influence the course of events. The International Court and its jurisprudence can be seen as one thread in a tapestry of effective regulation, of influencing the course of events. But the thread can break if too much weight is placed on it alone, and its strength depends on it being woven with other types of

28 ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, ICJ Reports 2006, 6 (para. 64).

29 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), judgment of 3 February 2012, ICJ Reports 2012, 99 (para. 93).

30 ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), merits, judgment of 20 July 2012, ICJ Reports 2012, 422 (paras 69-70).

31 ICJ, *Barcelona Traction* (n. 26), para. 91.

32 Martti Koskenniemi, 'The Function of Law in the International Community: 75 Years After', BYIL 79 (2008), 353-366 (366): 'But judicalization also has its well-known disadvantages. It prefers some interests against others; some voices become heard in courts and tribunals whereas other voices only with difficulty if at all. There is still much work to be done on how interests and preferences get filtered in different institutions and thus contribute to form the structural bias of such institutions.'

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

regulation.[33] These might include institutional and political pressures, publicity, and activism as well as art, architecture, and literature.

3. Women, Peace, and Security

My third vignette, the field of women, peace, and security (WPS), illustrates apparent normative progress in international law.[34] The United Nations Security Council's WPS agenda commenced formally with the adoption of Security Council Resolution 1325 in October 2000.[35]

Resolution 1325 marked the first time that the Security Council had promoted the 'full involvement [of women] in all efforts for the maintenance and promotion of peace and security'.[36] Over the following 20 years nine further WPS resolutions were adopted.[37] WPS builds on existing regimes of international law – international humanitarian law, human rights law, international criminal law, and refugee law.

From a feminist perspective, it is a seeming success story, with Resolution 1325 described as 'the focal point for galvanising worldwide efforts to deal with the many challenges that women face in situations of conflict'.[38] WPS has generated normative changes in the international landscape. It has underscored the importance of women's participation and representation in decision-making with respect to conflict prevention, management and resolution, as well as in peacekeeping field operations, transitional justice processes

33 John Braithwaite, 'Conclusion: Hope and Humility for Weavers with International Law' in: Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict* (Cambridge University Press 2009), 270-288 (276).

34 Christine Chinkin, *Women, Peace and Security and International Law* (Cambridge University Press 2022), especially chapter two.

35 Resolution 1325 was based on a long history of peace activism by women and more recent antecedents such as the 1995 Beijing Platform for Action and its five-year follow-up. United Nations, *Beijing +5 Political Declaration and Outcome: Outcome of the Twenty-Third Special Session of the General Assembly entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century', 5-9 June 2000* (United Nations 2015), <https://www.un.org/womenwatch/daw/followup/beijing+5.htm>, last access 20 December 2024.

36 UNSC Res 1325 of 31 October 2000, S/RES/1325, preamble.

37 UNSC Res 1820 of 19 June 2008, S/RES/1820; UNSC Res 1888 of 30 September 2009, S/RES/1888; UNSC Res 1889 of 5 October 2009, S/RES/1889; UNSC Res 1960 of 16 December 2010, S/RES/1960; UNSC Res 2106 of 24 June 2013, S/RES/2106; UNSC Res 2122 of 18 October 2013, S/RES/2122; UNSC Res 2242 of 13 October 2015, S/RES/2242; UNSC Res 2467 of 23 April 2019, S/RES/2467; UNSC Res 2493 of 29 October 2019, S/RES/2493.

38 Radhika Coomaraswamy and others, *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of Security Council Resolution 1325* (United Nations 2015), 28.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

and as special envoys and representatives of the United Nations Secretary-General.

The WPS agenda has recognised sexual violence as a tactic of war that can 'significantly exacerbate situations of armed conflict'[39] and as a tactic of terrorism.[40] It has emphasised the need to end impunity for sexual violence. This WPS agenda has been amplified regionally and nationally, for example through the introduction of WPS policies by the African Union, the European Union and the North Atlantic Treaty Organization (NATO). It has been incorporated into military training and foreign policy.[41]

This apparent success of the WPS agenda illustrates however the simplification of feminist ideas. In using the language of gender and urging a 'gender perspective', the United Nations Security Council has confined the meaning of 'gender' to 'women', who are assumed to have 'special needs'[42] in post-conflict reconstruction and in protection from sexual violence in armed conflict. In contrast, sexual violence against men is referenced in only two WPS resolutions,[43] and harms to other persons targeted for their sexuality or gender identity are not directly mentioned at all. Women and girls are portrayed as permanent victims in need of protection by (male) peacekeepers and military forces. Their experiences of conflict are largely reduced to their sexual vulnerability rather than to other conflict-related harms such as displacement, or to pre-existing inequalities and disadvantage.[44]

Through the WPS agenda, international law has fashioned particular images of women that come within its gaze. The most popular is the victim of sexual violence during conflict. Another is the vulnerable mother with

39 UNSC Res 1820 (n. 37).

40 UNSC Res 2242 (n. 37).

41 For example, in 2012, the UK Government launched a foreign policy initiative on Preventing Sexual Violence in Armed Conflict: see Select Committee on Sexual Violence in Conflict, *Sexual Violence in Conflict: A War Crime* (House of Lords 2016, 123), paras 20 and 56-64. Over 100 states have adopted National Action Plans (NAPS) for the implementation of Resolution 1325. They include states in conflict such as Ukraine, Mali, and South Sudan and 'post-conflict' states such as Rwanda and Nepal. The Nordic states, with little overt conflict, and states that regularly undertake military actions abroad such as the United States and the United Kingdom have also adopted NAPs. See WPS National Action Plans <https://www.wpsnaps.org/>, last access 6 November 2024.

42 UNSC Res 1325 (2000) (n. 36).

43 UNSC Res 2106 (2013) (n. 37), preamble; UNSC Res 2467 (2019) (n. 37), para 18.

44 By contrast, the CEDAW Committee has presented a fuller picture of women's conflict-related experiences making recommendations for instance with respect to their access to health, education and employment, displacement and participation during and post-conflict. CEDAW Committee, 'General Recommendation no. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations', 1 November 2013, UN Doc CEDAW/C/GC/30.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

children. Yet another favoured image is the local stalwart who will detect early signs of radicalism and terrorist tendencies in their sons and spouses and their wider communities. Such limited images may be inevitable in legal systems, which operate with a unitary subject and factor out the complexity of intersecting forms of inequality.[45]

The Security Council's adoption of resolution 1325 in 2000 signaled that issues of women's lives in conflict-affected zones were brought into the most powerful body in the international legal order. WPS was promoted by women's Non-Governmental Organisations (NGOs) as a women's human rights agenda and a women's peace agenda. The latter aspect has almost entirely disappeared. Despite the three components – women and peace and security – there are only passing references in the WPS resolutions to conflict prevention[46] and no substantive actions for making or sustaining peace.

The 2015 Global Study on the implementation of resolution 1325 reported that women from around the world it had consulted overwhelmingly called for an end to militarisation and for prevention and protection through non-violent means.[47] But WPS has rather been securitised through the Council's call for the inclusion of more women in military bodies, for protective military action and the integration of WPS with agendas for countering terrorism and violent extremism. Engle, Nesiah, and Otto observe that resolution 1325 was adopted at a time of anxiety about the Security Council exerting increased powers. On this analysis, WPS bolsters the legitimacy of Council actions through its apparent concern for the welfare of women and girls during armed conflict while doing little to promote peace and to prevent such violence.[48]

Whatever the reasons for the adoption of this agenda, over twenty years after its adoption its implementation remains fragile, undermined by gendered institutional cultures. Indeed, the United Nations Secretary-General's 2022 report on WPS conceded that '[d]espite normative agreement since the year 2000 and evidence that gender equality offers a path to sustainable peace

45 Gina Heathcote, *Feminist Dialogues on International Law: Success, Tensions, Futures* (Oxford University Press 2019), 2-3. See also the critique of WPS by Ratna Kapur, '"The First Feminist War in all of History": Epistemic Shifts and Relinquishing the Mission to Rescue the "Other Woman"', AJIL Unbound 116 (2022), 270 f.

46 UNSC Res 1325 (2000) (n. 36) and subsequent resolutions urge women's increased representation in processes for conflict prevention but do not develop what those processes might require. The assumption is that peace is simply the absence of conflict.

47 Coomaraswamy and others (n. 38), 25.

48 Karen Engle, Vasuki Nesiah, and Dianne Otto, 'Feminist Approaches to International Law' in: Jeffrey L. Dunoff and Mark A. Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2022).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

and conflict prevention, we are moving in the opposite direction' and that 'the world is experiencing a reversal of generational gains in women's rights while violent conflicts, military expenditures, military coups, displacements and hunger continue to increase'.[49]

Using a feminist framing, then, WPS appears as normative progress. But its effect has been constrained by gendered institutional cultures. So, progress here manifests as two steps forward and one step back; or even one step forward and two steps back.

III. Conclusion

The idea of progress animates much discussion of international law. This is precisely what inspires and sustains many of us. David Kennedy has described a distinctive attribute of international lawyers – their fervent belief in the discipline. He points out that the discipline of international law is:

> 'a project[…] of reform as much as [a] field of study. […] At a minimum, such lawyers see themselves and their work *favoring* international law and institutions in a way lawyers working in many other fields do not – to work for a bank is not to be *for* banking.'[50]

For this reason, perhaps, the discourse of progress is irresistible to international lawyers.

Altwicker and Diggelmann have observed a resurgence of progress narratives in international law over the past two decades.[51] They suggest that such narratives were more fraught in the 1990s and the early 2000 s when critical thinking in international law had more influence. With the retreat of such critiques more recently, they argue, progress is back in vogue. So, returning to the conference theme, is the relationship between progress and international law cursed, or doomed to fail? This is surely too sweeping a proposition.

I have tried to argue, first, that progress talk can be valuable if we are explicit about the frame we are using. Second, that progress in international law seldom appears in linear form and rarely entails the construction of new legal principles. It is, rather, a shuffling movement, and may involve

49 UNSC, 'Women and Peace and Security: Report of the Secretary-General', UN Doc S/2022/740 of 5 October 2022, para 2.

50 David Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', Transnat' l L. & Contemp. Probs. 4 (1994), 329, 335.

51 Altwicker and Diggelmann (n. 7), 444.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

repair rather than construction.[52] We can say, then, that the relationship between progress and international law is not cursed, but neither is it charmed. It is rather a complicated relationship that is constantly being re-negotiated.

52 See the idea of The Great Repair in the architectural literature, rejecting the notions of innovation, growth and progress associated with capitalist modernity and focussing instead on maintenance, repair and servicing.

 DOI 10.17104/0044-2348-2024-4-801

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Beyond Progress: Interrogating the Limits of Jurisdiction and Migrant Rights Through Negative Dialectics

Giulia Raimondo*
University of Fribourg, Fribourg, Switzerland
giulia.raimondo@unifr.ch

Abstract 815
Keywords 816
I. Introduction 816
II. Defining Borders, Delimiting Jurisdiction 818
III. Jurisdiction, Extraterritorial Border Controls, and the European Court of Human Rights: A Dialectic of Progress and Regress 821
1. Progress and the Heterogony of Ends 823
2. Responding to the Unintended Consequences of Progress 828
3. Looking Ahead: A Principled Approach to Jurisdiction? 831
4. Jurisdiction and Strategic Human Rights Litigation 835
IV. Negative Dialectic and The Possibilities of a Failed Promise 837
V. Conclusion 842

'Progress occurs where it ends'.

Theodor W. Adorno, 'Progress', in: Theodor W. Adorno, *Critical Models: Interventions and Catchwords* (Columbia University Press 1998), 150.

Abstract

Received knowledge about the protection of migrants in international law tells a story of progress. A story of expanded refugee definitions, complementary protection, and extraterritorial obligations. Yet a counternarrative has also emerged, one of backlash, containment, and deterrence. As the scope of migrants' rights has expanded, states have also adopted policies that evade concomitant obligations through externalised border controls.

While progressive legal struggles, particularly concerning jurisdiction in externalised migration control, are crucial, this essay problematises the notion of jurisdiction as a means to achieve progress. Instead, it challenges the ostensible neutrality of jurisdiction, which often perpetuates systems of exclusion that concomitantly absolve states of their responsibility.

* Maître Assistante, Université de Fribourg.

DOI 10.17104/0044-2348-2024-4-815 ZaöRV 84 (2024), 815-842

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Drawing on Theodor Adorno's concept of negative dialectic, the paper illuminates the limitations of progress narratives and unravels the complexities inherent in international migration law. While unearthing the failed promise of universality, reading the struggles for migrant rights in terms of a negative dialectic can catalyse reflexivity and new possibilities of resistance.

Keywords

Extraterritorial Jurisdiction – Human Rights – Migration – Border Controls – Adorno – Negative Dialectics

I. Introduction

Received knowledge about the protection of migrants in international law tells a story of progress, a story of expanded refugee definitions, complementary protection, and extraterritorial obligations. Yet a counter-narrative has also emerged, one of backlash and deterrence. As the scope of migrants' rights has expanded, states have also adopted policies aimed at evading concomitant obligations with externalised and outsourced border controls. The dialectic between these two normatively opposite and chronologically overlapping logics underlies the development of international migration law.

Over the years, the jurisprudence of the European Court of Human Rights (ECtHR) has, in many ways, challenged the false premise according to which states can insulate their responsibility by shifting migration controls beyond their borders. This has resulted in states turning to cooperative containment policies aimed at further externalising border controls while eclipsing the applicability of human rights obligations. Cooperative containment policies pivot around the reciprocal commitments of participating actors. Destination states offer political, financial, and technical support in exchange for preventive border control measures directly performed by third states within their territories. In the face of policies that continue to spread and morph into various forms of migration governance, aimed at limiting or circumventing states' international obligations, scholars, Non-Governmental Organisations (NGOs), and human rights lawyers have put forward an integrated litigation strategy across various legal regimes.

Yet, in contrast to other regional and international fora, given the political sensitivity of immigration decisions, the ECtHR has adopted a rather defer-

 DOI 10.17104/0044-2348-2024-4-815

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ential attitude. This paper will explore the ECtHR's most recent decisions on European migration management to trace the interlaced stories of protection and deterrence. Cooperative policies, it will be argued, reflect the neo-colonial and neoliberal logic that still pervades both positive international law and the practice of migration control, in projecting political and economic power beyond the territorial borders of the power-wielding state.

International (refugee and human rights) law will remain a blunt weapon so long as it is interpreted according to this genealogy. Thus, advancing a progressive reading of migrants' human rights, particularly through the European Convention on Human Right's (ECHR) expanded jurisdiction, may ultimately be counterproductive. Such efforts risk reinforcing the very power structures they aim to dismantle by fostering state practices that externalise border controls and shift responsibility in increasingly obscure ways. Rather than solely focusing on (legal) progress, this paper calls for a shift in focus toward the migrants themselves and their acts of resistance, which challenge containment policies from within. This essay examines the interlaced stories of protection and deterrence in recent ECtHR decisions to highlight the limits of a unidirectional teleological reading of migrant rights. Drawing on Theodor Adorno's concept of *negative dialectics*, it seeks to show how acknowledging the law's contradictions and limitations can reveal new avenues for resistance and transformative change. Without denying the relevance and necessity of strategic litigation, this paper proposes the exercise of self-reflexivity to foster a more coherent human rights practice.

The essay is organised as follows: after a brief discussion of the relevant notions of extraterritorial border control and jurisdiction (section II.), it will outline some salient recent developments in the ECtHR's jurisprudence on jurisdiction over border control measures performed extraterritorially and examine how state practice subsequently evolved (section III. 1.). The paper will then analyse the various interpretations of the emerging challenges of cooperative containment practices (section III. 2.), highlighting the need for a coherent approach to the ECHR jurisdiction (III. 3.) and the shortfalls of strategic litigation (III. 4.). Against this background, the essay will present the limits and potential of a far-reaching yet principled understanding of jurisdiction under the ECHR. It will investigate the merits of enhancing strategic litigation efforts within a wider mobilisation for migrant rights, and cultivating resistance in non-institutional battlegrounds where migrant rights can be upheld beyond and against territorial constraints (IV.). The paper will conclude by reassessing the very notion of progress and its dialectical (historical and legal) advancement, with the intention of illustrating that acknowledging migration law and policy complexities can catalyse reflexivity and new possibilities of resistance, both before and beyond courts (V.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

II. Defining Borders, Delimiting Jurisdiction

Borders, as jurisdiction, have a polysemic nature: they do not mean the same thing to everyone. Borders and their inherently created divisions have been the subject of intense study in various disciplines and from a wide range of perspectives.[1] Borders can be seen as physical lines dividing territories and people and tracing the perimeter of bounded communities. As such, borders are sites where sovereignty is imagined and performed.[2] At the same time, borders are functions of jurisdiction as an administrative tool to enact sovereignty.[3] Accordingly, general international law conceives jurisdiction as 'one of the most obvious forms of the exercise of sovereign power'.[4] Concerning the power of a state to regulate or otherwise impact people, activities, and legal interests,[5] it delimits the powers of a plurality of sovereigns.[6]

The general rationale for establishing jurisdiction is a territorial or personal connection, with the state exercising its authority over a certain situa-

1 A complete account of all these different perspectives would require another paper. It suffices to mention some of the works that geographers, philosophers, social scientists, and lawyers devoted to the study of borders. Paul de Geouffre de La Pradelle, *La Frontière: Étude de Droit International* (Les Editions Internationales 1928); Charles De Visscher, 'Problèmes de Confins en droit international public', Bulletins de l'Académie Royale de Belgique 56 (1970), 70-72; JR Victor Prescott, *Boundaries and Frontiers* (Taylor & Francis 1978); David Miller and Sohail H. Hashmi, *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press 2001); Seyla Benhabib, 'Borders, Boundaries, and Citizenship', PS 38 (2005), 673-677; Daniel-Erasmus Khan, 'Territory and Boundaries' in: Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012), 225-249; Giuseppe Nesi, 'Boundaries' in: Marcelo G. Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar 2018), 193-233; Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (Manchester University Press 2020). Beyond the academic keyword, border studies emerged as a field in the social sciences which is now the object of interdisciplinary courses and a number of scientific journals. See Olivier J Walther and others, 'Border Studies at 45', Political Geography 104 (2023), 102909, <https://doi.org/10.1016/j.polgeo.2023.102909>, last access 30 December 2024.

2 Anssi Paasi, 'Bounded Spaces in a "Borderless World": Border Studies, Power and the Anatomy of Territory', Journal of Power 2 (2009), 213-234.

3 Paulina Ochoa Espejo, *On Borders: Territories, Legitimacy, and the Rights of Place* (Oxford University Press 2020).

4 PCIJ, *Legal Status of Eastern Greenland* (Denmark v. Norway), judgment of 5 September 1933, Ser. A/B, No. 53.

5 Among the vast literature on the topic, see: Frederick A Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', RdC 186 (1984), 9-116; Bruno Simma and Andreas Müller, 'Exercise and Limits of Jurisdiction' in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), 134-157; Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2015).

6 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995), 56.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tion.[7] The validity of a claim then hinges on the quality and strength of the connection.[8] Yet, traditionally, this connection is presumed to be territorial.[9] Even if the pressures of an increasingly globalised and liberalised world have led some to seriously question the territorial foundation of the idea of jurisdiction,[10] that principle still dominates most of the accounts of jurisdiction in contemporary general international law.[11] The border is the conceptual limit of state jurisdiction: it is a set of practices that make the abstract lines drawn on a map significant.[12] In this sense, jurisdiction, just like borders, represents a form of cartographic power, mapping the limits of state sovereignty.

Yet, while borders and jurisdiction are traditionally perceived as signifiers that distinguish people and territories (based on lines drawn on a map), both notions have evolved to trespass beyond their traditional territorial understanding. On the one hand, under human rights law, jurisdiction has assumed a specific connotation. It determines the applicability of human rights treaties irrespective of territorial boundaries. While human rights are presumed to apply within states' territory,[13] scholarship and practice – albeit with different interpretations and to varying extents – have long acknowledged their extraterritorial applicability.[14] On the other hand, borders change over time and situations, and can be constructed as historically contingent social artefacts.[15] Borders shape collective identities but also categorise individuals – as either citizens or foreigners, which become both objects and agents of surveillance within and beyond national fronteirs.[16] Today, border controls are performed

7 Jan Klabbers, *International Law* (3rd edn, Cambridge University Press 2021), 100-107.

8 Vaughan Lowe, *International Law* (Oxford University Press 2007), 171.

9 Alex Mills, 'Rethinking Jurisdiction in International Law', BYIL 84 (2014), 187-239.

10 See most notably: Mann, 'Doctrine of International Jurisdiction' (n. 5); Bhupinder S. Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective', LJIL 35 (2021), 29-54; Nico Krisch, 'Jurisdiction Unbound: (Extra)Territorial Regulation as Global Governance', EJIL 33 (2022), 481-514.

11 Ryngaert (n. 5), 29.

12 Richard T. Ford, 'Law's Territory (A History of Jurisdiction)', Mich. L. Rev. 97 (1999), 843-930.

13 ECtHR (Grand Chamber), *Banković et al. v. Belgium et al.*, judgment of 12 December 2001, no. 52207/99, para. 70; ECtHR, *Ilaşçu et al. v. Moldova and Russia,* judgment of 8 July 2004, no. 48787/99, paras 314-316.

14 Philipp Janig, 'Extraterritorial Application of Human Rights' in: Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022), 180-191.

15 Michael Collyer and Russell King, 'Producing Transnational Space: International Migration and the Extra-Territorial Reach of State Power', Progress in Human Geography 39 (2015), 185-204.

16 Nick Vaughan-Williams, 'Borderwork Beyond Inside/Outside? Frontex, the Citizen-Detective and the War on Terror', Space and Polity 12 (2008), 63-79.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

away from states' physical frontiers via digitalised, offshored, and outsourced controls over people's movements.[17] Trespassing states' territorial limits, they extend state power beyond frontier lines. No longer stable and delineated, borders now shift in location and meaning – and how they are experienced.[18] This does not imply that territorial borders are no longer relevant, rather it signals another shift: from the control of space to that of people and their unauthorised access.[19]

Physical frontiers are demarcated by fences and walls; diverse private and third-state entities equipped with new technologies[20] and legal innovations[21] have contributed to the multiplication of border controls within and beyond national frontiers.[22] This dense and multilevel network of controls displaces the border, both inward and outward, surveilling people's movements and predicting future migratory paths.[23] Border controls have thus become liquid – that is, they are characterised by non-linear (externalised, outsourced, and dematerialised) enforcement infrastructures.[24] In this sense, 'borders are everywhere',[25] shifting, multiplying their functions and effects across different groups of people.[26] The shifting border is polysemic and heterogeneous; it is a device both of inclusion and exclusion filtering and selecting people,[27] unequally distributing the freedom to move.[28]

---

17 Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017), 13-46.

18 Alison Kesby, 'The Shifting and Multiple Border and International Law', Oxford J. Legal Stud. 27 (2007), 101-119.

19 Violeta Moreno-Lax, 'Meta-Borders and the Rule of Law: From Externalisation to "Responsibilisation" in Systems of Contactless Control', NILR 71 (2024), 21-57.

20 Philip Hanke and Daniela Vitiello, 'High-Tech Migration Control in the EU and Beyond: The Legal Challenges of "Enhanced Interoperability"' in: Elena Carpanelli and Nicole Lazzerini (eds), *Use and Misuse of New Technologies: Contemporary Challenges in International and European Law* (Springer 2019), 3-35.

21 Daniel Ghezelbash, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees', Am. J. Comp. L. 68 (2020), 479-516.

22 Albert Kraler, Maegan Hendow and Ferruccio Pastore Introduction: 'Multiplication and Multiplicity – Transformations of Border Control', Journal of Borderlands Studies 31 (2016), 145-149.

23 Moreno-Lax, *Accessing Asylum in Europe* (n. 17).

24 Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"', EJIL 29 (2018), 1173-1196.

25 Étienne Balibar, *We, the People of Europe?* (Princeton University Press 2004).

26 Shachar (n. 1).

27 Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor* (Duke University Press 2013), 7.

28 Shreya Atrey, Catherine Briddick and Michelle Foster, 'Guest Editor Introduction: Contesting and Undoing Discriminatory Borders', International Journal of Discrimination and the Law 22 (2022), 210-223.

 DOI 10.17104/0044-2348-2024-4-815

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

III. Jurisdiction, Extraterritorial Border Controls, and the European Court of Human Rights: A Dialectic of Progress and Regress

Border controls often entail human rights violations.[29] This becomes especially evident when they are performed extraterritorially.[30] Yet, the responsibility deriving from such violations largely depends on the reading of jurisdiction applied in individual situations. As the readers of this journal know all too well, the application of human rights treaties requires state jurisdiction, [31] which is presumed to be exercised within the territory of a state and is only exceptionally exercised extraterritorially.[32] The ECtHR regards jurisdiction as the *sine qua non* for the applicability of ECHR obligations in specific situations.[33]

Hence, the relevance of ascertaining the elements through which jurisdiction should be determined. Academics and practitioners have suggested various approaches and techniques to establish jurisdiction beyond territorial borders. Some, like Milanović, have suggested that jurisdiction depends on the nature and content of obligations.[34] Besson, on the other hand, considers jurisdiction as a relationship between rights holders and duty bearers, one that activates human rights obligations and provides the practical conditions for them to be feasible.[35] Others, like Raible, base jurisdiction on public institutions' political power to affect individuals irrespective of their physical location.[36] Overall, there is a common thread running through all these discussions: the tension between the universality of human rights and their effective (territorial) manifestations.

---

29 Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations', GLJ 21 (2020), 311-334 (312).

30 Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011); Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012); Moreno-Lax, *Accessing Asylum in Europe* (n. 17).

31 E. gg. Article 1, ECtHR; Article 2, ECtHR.

32 ECtHR, *Banković* (n. 13), para. 70; ECtHR, *Ilaşçu* (n. 13), paras 314-316.

33 ECtHR (Grand Chamber), *N. D. and N. T. v. Spain,* judgment of 13 February 2020, nos 8675/15 and 8697/15, para. 102.

34 Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

35 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', LJIL 25 (2012), 857-884.

36 Lea Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (Oxford University Press 2020).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

The jurisprudence of the ECtHR, whose troubled development on the matter has often been criticised as confused and fragmentary, reflects this dialectic.[37] Whereas in some junctures the Strasbourg Court has expanded the scope of the ECHR to situations beyond the territory of contracting states (but over which they have authority or effective control), in other instances it has taken a restrictive approach over extraterritorial migration control measures. The extraterritorial application of the ECHR has generally been asserted based on the spatial or personal model of jurisdiction.[38] The first view requires effective control over foreign territory,[39] while the second involves the exercise of power and authority over an individual abroad.[40] Nonetheless, the ECtHR jurisprudence has not always promoted coherent and principled interpretation, and it has generated confusion as to what amounts to jurisdiction.[41] Matters become even more complicated when the borders that define the authority and effective control from which jurisdiction is generally derived extend beyond states' territorial frontiers.

At first glance, border externalisation efforts seem to rest on the traditional understanding of borders as territorial markers. Under this assumption, human rights obligations, including respect for the prohibition of *refoulement*, begin and end at the border of the state concerned.[42] This implies that while migration control practices can operate extraterritorially, protection obligations arise only when their beneficiaries present themselves at the physical frontier of a state.[43] This position has been contested in theory and practice. The ECtHR has confirmed this orientation with particular regard to the prohibition of *refoulement*.[44] The scope of this obligation extends so far as

37 ECtHR, *Al-Skeini and Others v. the United Kingdom*, judgment of 7 July 2011, no. 55721/07, Concurring opinion of Judge Bonello, para. 4; ECtHR, *Georgia v. Russia [II],* judgment of 21 January 2021, no. 38263/08, Partly dissenting opinion of Judge Pinto De Albuquerque. For a detailed reconstruction: Conall Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?', Quest. Int'l. L. QDI 82 (2021), 31-51 (51).

38 ECtHR, *Al-Skeini and Others* (n. 37), para. 130.

39 ECommHR, *Cyprus v. Turkey*, judgment of 28 May 1975, nos 6780/74 6 and 6950/75, para. 76; ECtHR (Grand Chamber), *Loizidou v. Turkey*, preliminary objections of 23 March 1995, no. 40/1993/435/514, para. 62; *Ilaşcu* (n. 13), paras 331-335.

40 ECtHR, *Al-Skeini* (n. 37) paras 131-140; ECtHR (Grand Chamber), *Öcalan v. Turkey,* judgment 12 May 2005, no. 46221/99, para. 91; ECtHR, *Ukraine and the Netherlands v. Russia*, judgment of 25 January 2023, nos 8019/16, 43800/14 and 28525/20, para. 571.

41 Mallory (n. 37).

42 Kay Hailbronner, 'Comments On: The Right to Leave, the Right to Return and the Question of a Right to Remain' in: Vera Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1996), 109-118.

43 Moreno-Lax, *Accessing Asylum in Europe* (n. 17), 247.

44 ECtHR (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012, no. 27765/09.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

contracting states exercise their legal or factual control over a given situation, within or beyond their borders.[45]

As the next sections will show, however, state practice has evolved in line with the progressive development of human rights law in the context of extraterritorial jurisdiction.[46] New deterrence practices are less clearly extraterritorial, as they are delegated much more to third countries or private actors. This allows states to keep up appearances while escaping their international obligations, as it is more difficult to establish jurisdiction over externalised and delegated border control practices with no physical connection to the victims. As the move to this model of vicarious containment gains traction in many parts of the world, it may be argued that international law is part of the problem – because it reproduces the fundamental inequality that structures the externalisation and outsourcing of border controls, creating a system of regional containment.[47] This dysfunction rests on the problematic assumption that where there is no direct physical contact, there is no jurisdiction and, therefore, no responsibility.

1. Progress and the Heterogony of Ends

Many readers will be familiar with the *Sale* and *Hirsi Jamaa* decisions.[48] In *Sale*, in the wake of the Haitian refugee crisis, the United States (US) Supreme Court interpreted the Refugee Convention as inoperative in the context of maritime interdiction on the high seas.[49] Years later, the European Court of Human Rights took a strong position regarding maritime interceptions. In its leading case, *Hirsi Jamaa v. Italy*,[50] the Court found that the Italian practice of intercepting migrants on the high seas and returning them

45 ECtHR, *Hirsi Jamaa* (n. 44), para. 81.

46 Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', Columbia Journal of Transnational Law 53 (2015), 235-284; Thomas Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law', European Journal of Migration and Law 20 (2018), 373-395; Annick Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?', HRLR 20 (2020), 306-332.

47 E. Tendayi Achiume, 'Governing Xenophobia', Vand. J. Transnat' l L. 51 (2018), 333-398; Loren B. Landau, 'Crisis and Containment: Risks of Enhanced Global Migration Governance', *Global Shifts Colloquium* (Perry World House University of Pennsylvania 2018), 1-6; Bhupinder S. Chimni, 'Aid, Relief, and Containment: The First Asylum Country and Beyond', International Migration 40 (2002), 75-92.

48 *Sale v. Haitian Centres Council*, 113 S. Ct. 2549, 509 US 155, 21 June 1993; ECtHR, *Hirsi Jamaa* (n. 44).

49 *Sale* (n. 48).

50 ECtHR, *Hirsi Jamaa* (n. 44).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

to Libya was in breach of the principle of *non-refoulement*, which has a broader scope of application under human rights law than the Refugee Convention.[51]

Generally, we are told that the (bad) precedent set in *Sale* has been corrected by human rights bodies. *Sale* was but a waystation in the 'complex enforcement process triggered by transnational public law litigation'.[52] Indeed, the Inter-American Commission of Human Rights found that US interception practices violated the state's international obligations and affirmed the extraterritorial application of the principle of *non-refoulement*.[53] In Europe, *Hirsi Jamaa* prompted a sense that the promise of human rights could be vindicated transnationally through strategic litigation. The narrative is one of progressive development emerging as the synthesis of a dialectic of a continuous legal struggle.[54] Following *Hirsi Jamaa*, Italy launched Operation *Mare Nostrum*, rescuing migrants in distress in the Italian, Maltese, and Libyan Maritime Rescue Regions. Strategic litigation has since been used in various contexts to hold states accountable for human rights violations at the borders of Europe and to shape legal and policy frameworks to protect migrant rights better.

Yet, state practice has adapted to these new legal challenges and morphed to evade the expanding notion of human rights jurisdiction and concomitant responsibility.[55] *Mare Nostrum* was increasingly criticised as an 'unintended pull factor' for irregular migration, encouraging more migrants to attempt the dangerous journeys; it was eventually discontinued and replaced by more limited European Union (EU)-led operations.[56] At the same time, Italy established a new and less transparent cooperation with Libya,[57] despite the

51 ECtHR, *Hirsi Jamaa* (n. 44), para. 81.

52 Harold Hongju Koh, 'The "Haiti Paradigm" in United States Human Rights Policy', Yale L. J. 103 (1994), 2391-2435 (2406).

53 IAmCommHR, *The Haitian Centre for Human Rights et al. v. United States,* Case No 10.675, 13 March 1997, para. 157.

54 Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013', Harv. Int'l. L. J. 54 (2013), 315-391.

55 Gammeltoft-Hansen and Hathaway (n. 46); Thomas Gammeltoft-Hansen, 'Extraterritorial Human Rights Obligations in Regard to Refugees and Migrants' in: M Gibney, Krajewski and W Vandenhole (eds), *Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021), 153-168.

56 Eugenio Cusumano and Matteo Villa, 'Over Troubled Waters: Maritime Rescue Operations in the Central Mediterranean' in: Philippe Fargues and Marzia Rango (eds), *Migration in West and North Africa and Across the Mediterranean: Trends, Risks, Development and Governance* (International Organization for Migration 2020), 202-214.

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

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

egregious human rights violations (possibly constituting crimes against humanity) reported in the country.[58]Accordingly, Italy trains, equips, and assists the Libyan Coast Guard (LCG) in its border control operations, often resulting in violent interceptions and pullbacks.[59] Similarly, the Italian government has strengthened its already existing cooperation with the Tunisian authorities to stem departures.[60]

In the aftermath of *Hirsi Jamaa,* Mann cogently noted that a dialectic of progress underlies these transnational legal actions, yet this process can also be self-defeating.[61] Indeed, by establishing jurisdiction based on *de iure* or *de facto* control over a boat carrying refugees, the ECtHR is implicitly inviting what was later labelled as 'contactless control' policies.[62] Such policies aim to sever the jurisdictional link to states sponsoring containment measures in third countries, thereby eclipsing their responsibility under international human rights and refugee law. While a clear-cut causality link might be challenged,[63] Wilde has warned us that progressive moves towards a truly universal protection of migrant rights might have serious side effects on those very rights.[64]

Twelve years after the *Hirsi Jamaa* decision, state practice is characterised by a move towards preventive and elusive border control policies in cooperation with third countries.[65] European states have increased cooperation with countries of origin and transit to outsource asylum responsibilities and stem migratory movements before departure. The EU-Turkey Deal is a significant case in point.[66] It has been followed by some similar policies, including ongoing plans to outsource asylum procedures (such as the recent Italian

58 See most recently: OHCHR, Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83, 3 March 2023. For further discussion see Giulia Raimondo, 'Invisible Crimes: Accountability for Crimes against Migrants in Libya', European Journal of Migration and Law 25 (2023), 328-357.

59 Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?', European Journal of Migration and Law 20 (2018), 396-426.

60 Fatma Raach, Hiba Sha'ath and Thomas Spijkerboer, *Country Report Tunisia* (ASILE Project 2022).

61 Mann, 'Dialectic of Transnationalism' (n. 54).

62 Mariagiulia Giuffré and Violeta Moreno Lax, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in: Satvinder S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar 2019), 82-108.

63 Anuscheh Farahat, 'Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters', NQHR 40 (2022), 180-201.

64 Ralph Wilde, 'The Unintended Consequences of Expanding Migrant Rights Protections', AJIL Unbound 111 (2017), 487-491.

65 Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices Through a Critical Eye', European Journal of Migration and Law 26 (2024), 108-135.

66 Statement of the EU Heads of State or Government of 7 March 2016 on Joint Action Plan of the EU-Turkey.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

cooperation with Albania[67]). Most recently, the Union signed a Memorandum of Understanding (MoU) with Tunisia that provides financial support to prevent people from reaching Europe and increasing returns, followed by a strategic and comprehensive partnership with Egypt and a more specific migration partnership with Mauritania.[68] The logic behind these policies is that they take place exclusively under the jurisdiction of third countries, and therefore, they imply their exclusive responsibility.

Meanwhile, unilateral state policies underpinned by an emergency discourse have become more violent and obstructive. After the short-lived *Mare Nostrum*, Italy has reduced State-sponsored maritime surveillance missions while hindering non-governmental Search and Rescue (SAR) operations. Since 2019, it has closed its ports to numerous private vessels that had continued SAR operations in the central Mediterranean.[69] Several EU member states, including Hungary, Poland, and Greece, have built border fences to impede irregular border crossing. Illegal push-back practices have been 'legalised' through emergency measures,[70] suspending *non-refoulement* obligations and limiting access to human rights and refugee law protection.[71]

67 Ratifica ed esecuzione del Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, 6 November 2023.

68 Mémorandum d'entente sur un partenariat stratégique et global entre l'Union européenne et la Tunisie (16 July 2023) available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887?insEmail=1&insNltCmpId=398&insNltSldt=10080&insPnName=euronewsfr&isIns=1&isInsNltCmp=1&utm_campaign=briefing_en&utm_content=&utm_medium=en&utm_source=newsletter&utm_status=true&utm_term=>, last access 9 December 2024; Commission, Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic Of Egypt and the European Union (17 March 2024) available at: <https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en>, last access 9 December 2024; Commission, The European Commission launches new migration partnership with Mauritania (7 March 2024) available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1335>, last access 9 December 2024.

69 Eugenio Cusumano and Kristof Gombeer, 'In Deep Waters: The Legal, Humanitarian and Political Implications of Closing Italian Ports to Migrant Rescuers', Mediterranean Politics 25 (2020), 245-253; Eugenio Cusumano and Matteo Villa, 'From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy', European Journal on Criminal Policy and Research 27 (2021), 23-40.

70 Special Rapporteur on the human rights of migrants, Felipe González Morales, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, A/HRC/47/30, 12 May 2021, para. 80.

71 Special Rapporteur on the human rights of migrants, Felipe González Morales, Human rights violations at international borders: trends, prevention and accountability, A/HRC/50/31, 26 April 2022, paras 33-39. See also: Sarah Ganty, Alexandra Jolkina, Aleksandra and Dimitry Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"', University of Copenhagen, MOBILE Working Paper Series, no. 18, 2023.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Excluding undesirable migrants via strategic emergency measures has not only become the permissible new norm – it is even presented as a necessary exercise of the sovereign right to exclude, often resulting in violent and racist border controls.[72]

Further regressive developments may already be underway, as evidenced by the role of international organisations and private actors in the development and implementation of border management programs between the EU and third countries.[73] For example, with the support of the EU Emergency Trust Fund for Africa, the International Centre for Migration Policy Development (ICMPD), an international organisation based in Vienna, has been supplying surveillance equipment and training to police and coast guards in Tunisia and Morocco.[74] Similar projects are ongoing in Libya.[75] Likewise, Frontex is collecting information regarding the location of individuals trying to reach Europe in the Mediterranean through unmanned drones managed by private companies. The information collected is shared with third-state authorities, including the LCG.[76]

By dispersing the responsibility of the beneficiary state among multiple actors, many of whom are not bound by the ECHR – or by simply denying responsibility by attributing any violation to the direct executor[77] – these orchestrated border management strategies entrench states behind a deep accountability gap.[78] Migrants find themselves in a Catch-22 situation.[79] In the words of Besson, '[w]ithout jurisdiction, there are no human rights applicable and hence no duties, and there can be no acts or omissions that would violate those duties that can be attributed to a state and a fortiori no

72 John Reynolds, 'Emergency and Migration, Race and the Nation', UCLA L. Rev. 67 (2020), 1768-1798; E. Tendayi Achiume, 'Racial Borders', Geo. L. J. 110 (2022), 445-508.

73 Zach Campbell and Lorenzo D'Agostino, 'How an EU-Funded Agency Is Working to Keep Migrants from Reaching Europe', *Coda Story*, 31 May 2023, available at: <https://www.codastory.com/authoritarian-tech/icmpd-eu-refugee-policy/>, last access 9 December 2024.

74 ICMPD, BMP Maghreb: Border Management Programme for the Maghreb Region (2018-2024), available at: <https://www.icmpd.org/our-work/projects/border-management-programme-for-the-maghreb-region-bmp-maghreb>, last access 9 December 2024.

75 ICMPD, EU Training Support to Libya's Border Security and Management Institutions (2023-2025), available at: <https://www.icmpd.org/our-work/projects/eu-training-support-to-libya-s-border-security-and-management-institutions>, last access 9 December 2024.

76 Judith Sunderland and Lorenzo Pezzani, 'Airborne Complicity: Frontex Aerial Surveillance Enables Abuse', HRW, Border Forensics, 2022, available at: <https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse>, last access 9 December 2024.

77 Moreno-Lax, 'Meta-Borders' (n. 19).

78 Joyce De Coninck, 'Relational Human Rights Responsibility', University of Pennsylvania Journal of International Law 45 (2024), 109-179.

79 Joyce de Coninck, The EU's Human Rights Responsibility. Deconstructing Human Rights Impunity of International Organisations Gap (Hart 2024).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

potential responsibility of the state for violating those duties later on'.[80] Yet, migrants are trapped in detention camps or die at sea as a result of those jurisdictional rules, which render them rightless.[81]

2. Responding to the Unintended Consequences of Progress

Externalisation policies, although not new,[82] have recently experienced a significant surge, proliferating in Europe and the Global North more generally while diversifying their legal and technical infrastructure.[83] Often presented as an efficient form of border management, these policies can result in serious human rights violations.[84] States keep paying lip service to their protection obligations even as they develop new tactics to hinder access to those very protections[85] – by building on the inherent limitations of legal frameworks and cooperating with transit countries.

Scholarship questioning the paradigm of extraterritorial jurisdiction as a procedural construction that undermines human rights remains rare.[86] Yet some have worked within this paradigm to address its shortcomings. One line of argument emphasises the extraterritorial effects of destination states' actions, such as instructing or funding border authorities in transit countries.[87] This perspective aligns with the Court's recognition that states' acts 'performed, or *producing effects*, outside their territories can constitute an

80 Besson (n. 35), 867.

81 Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', EJIL 29 (2018), 347-372.

82 Aristide R. Zolberg, 'The Archeology of "Remote Control"' in: Andreas Fahrmeir, Olivier Faron and Patrick Weil (eds), *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn Books 2003), 195-222.

83 David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019).

84 Moreno-Lax, *Accessing Asylum in Europe* (n. 17), 272 ff.; David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law', IJRL 34 (2022), 120-156.

85 Ghezelbash (n. 21). On the relevance of the right to leave as a precondition of the right to seek asylum see: Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries', EJIL 27 (2016), 591-616.

86 Sara Seck, 'Moving Beyond the E-Word in the Anthropocene' in: Daniel S. Margolies, Umut Özsu, Maïa Pal, Ntina Tzouvala (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019), 49-66; E. Tendayi Achiume, 'Race, Borders, and Jurisdiction', HJIL 82 (2022), 465-482.

87 Pijnenburg (n. 59), 422-424; Kristof Gombeer and Stefaan Smis, 'The Establishment of ETOs in the Context of Externalised Migration Control', *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021), 169-181 (177-178).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

exercise of jurisdiction'.[88] Another approach relies on rules of attribution of indirect responsibility to sidestep jurisdictional bars or override them with an expansive interpretation of jurisdiction in cases of extraterritorial complicity.[89]

In conceptualising 'contactless control' practices such as the Italian-Libyan cooperation, Giuffré and Moreno-Lax rely on the notion of 'decisive influence', as developed by the ECtHR.[90] They argue that conditioning, funding, training, and equipping the Libyan authorities for the purposes of 'managing' migratory flows and impeding departures towards Europe can be regarded as a form of decisive influence. Although this influence cannot be compared to direct control, it is decisive enough to determine the material course of events: the LCG would be virtually inoperable if not for European states' support.[91] Other scholars advocate a radical way forward, including the EU accession to the ECHR and the consequent recognition of concurrent jurisdiction and responsibility. De Coninck underscores the functionally different nature of transnational actors engaged in border management and distinguishes their differentiated obligations, including those applicable extraterritorially.[92]

Over the years, the ECtHR has become more cautious, if not ambiguous, in its findings of jurisdiction related to migration and border control measures. An example of this approach is the case of *M. N. and Others v. Belgium*, which concerned a Syrian family with two young children who were denied a humanitarian visa at the Belgian consulate in Lebanon.[93] Three years earlier, in a similar situation, the Court of Justice of the European Union (CJEU) found the EU Charter of Fundamental Rights inapplicable to the situation of a Syrian family.[94] Yet, things could have been different for the applicants in Strasbourg. According to the applicants, the Belgian authorities'

88 *Banković* (n. 13) para. 67; *Al-Skeini* (n. 37) para. 131; *Hirsi Jamaa* (n. 44), para. 72.

89 Gammeltoft-Hansen and Hathaway (n. 46); Izabella Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?', Silesian Journal of Legal Studies 7 (2015), 45-78; Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction', EJIL 27 (2016), 817-830.

90 See eg: ECtHR, *Ilaşcu* (n. 13); ECtHR (Grand Chamber), *Catan and Others v. the Republic of Moldova and Russia*, judgment of 19 October 2012, nos 43370/04, 8252/05 and 18454/06; ECtHR (Grand Chamber), *Mozer v. the Republic of Moldova and Russia*, judgment 23 February 2016, no. 11138/10; ECtHR (Second Section), *Panteleiciuc v. the Republic of Moldova and Russia,* judgment of 2 July 2019 no. 57468/08.

91 Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered', European Yearbook on Human Rights (2018), 373-394 (373).

92 De Coninck (n. 79).

93 ECtHR (Grand Chamber), *M. N. et al. v. Belgium,* judgment of 5 May 2020, no. 3599/18.

94 CJEU, *X and X,* Case C-638/16 PPU, 7 March 2017, ECLI:EU:C:2017:173.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

decisions on their visa applications produced effects beyond the national territory; moreover, those decisions were made in the exercise of an official state function, that of border control. This, they argued, was a manifestation of state jurisdiction, regardless of where it was exercised. The Court confirmed that acts of diplomatic and consular agents abroad could amount to an exceptional exercise of extraterritorial jurisdiction.[95] But it also introduced an important qualification. The actions or omissions of diplomatic or consular agents in a foreign territory may trigger jurisdiction where they exercise their authority in respect of their state's 'nationals or their property', or where they exercise 'physical power and control over certain persons'.[96] Neither of these two alternative conditions was met in the applicants' case.[97] Hence, the Court found no jurisdictional link.

Where a recalibration of its jurisdiction is not possible, the Court has sought the specific features of the case to rely on new exceptions to the applicability of absolute rights. The most notable example is *N. D. and N. T.*

In dealing with the arbitrary return of a group of Sub-Saharan migrants climbing the border fences of the Spanish enclave of Melilla, the Court's Third Chamber found that the applicants were under Spanish jurisdiction and recognised that, absent any examination of their individual situation, their refusals of entry amounted to a collective expulsion.[98] Reversing the previous Chamber judgment, the Court's Grand Chamber could not but confirm this stance regarding jurisdiction;[99] but it affirmed that the lack of individual removal decisions was due to the applicants' culpable conduct and, therefore, found no violation of their rights under the Convention.[100]A series of similar chamber rulings has confirmed this exception to the applicability of the prohibition of collective expulsions.[101]

In *Hirsi Jamaa*, as in *N. D. and N. T.*, the ECtHR was satisfied that the migrants came under state jurisdiction as a result of the combined exercise of

95 ECtHR, *M. N. et al. v. Belgium* (n. 93), para. 106. See ECommHR, *X v. the Federal Republic of Germany*, judgment 25 September 1965, no. 1611/62, para. 5; ECtHR, *Al-Skeini* (n. 37), para. 134.

96 ECtHR, *M. N. et al. v. Belgium* (n. 93), para. 106.

97 ECtHR, *M. N. et al. v. Belgium* (n. 93), paras 118-119.

98 ECtHR (Third Section), *N. D. and N. T. v. Spain,* judgment of 3 October 2017, nos 8675/15 and 8697/15, para. 107.

99 ECtHR, *N. D. and N. T. v. Spain,* (n. 33), paras 104-111.

100 ECtHR, *N. D. and N. T. v. Spain* (n. 33), paras 208 and 231.

101 ECtHR, *M. H. and Others v. Croatia,* judgment of 18 November 2021, no. 15670/18 and 43115/18, paras 293-294; ECtHR, *Shahzad v. Hungary*, judgment of 8 July 2021, no. 12625/17, para. 59; ECtHR, *A. A. and Others v. North Macedonia*, judgment of 5 April 2022, no. 55798/16 et al., para.112.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

de iure and *de facto* control. The precise impact of the *de iure* and *de facto* exercise of state power, as well as the relationship between the two, remains undefined. Ultimately, vagueness and inconsistencies may continue to plague the jurisprudence of the Court. Failure may just be part of the dialectic process toward a bright-line rule to define the Convention's scope of application.[102] However, the dual reading of jurisdiction, as extraterritorial and territorial, might also hinder any clarity and perpetuate controversies.

Rather than advancing toward the universality and indivisibility of human rights through a dialectic of progress, recent developments show that migrant rights are being increasingly constrained by neocolonial containment policies often rooted in racial considerations.[103] The story of progress in international refugee and migration law we are generally told (or are telling ourselves and others) will remain just that – a story – unless the very notion of jurisdiction is not problematised, contextualised, and contested (also) within a broad human rights strategy.

3. Looking Ahead: A Principled Approach to Jurisdiction?

The backlash of the European states against the expansion of the ECHR extraterritorial jurisdiction resulted in a turn to indirect and informal cooperation aimed at further externalising border controls. Shifting from direct to orchestrated involvement in externalised border controls is more cost-effective and faster than formal and direct involvement in *non-entrée* policies.[104] Most importantly, it also allows a reversal of the practical significance of the ECHR extraterritorial jurisdiction.[105] Human rights obligations might apply extraterritorially, but they remain abstract declarations of intent when states do not have direct contact with their (potential) beneficiaries.

This is one of the principal issues the ECtHR will face in deciding cases concerning Italian cooperation with Libyan actors.[106] The most notable – and most awaited – of these cases is *S. S. and Others v. Italy*, concerning the rescue operation of a migrant boat carrying over 100 migrants off the

102 Mallory (n. 37).

103 E. Tendayi Achiume, 'Migration as Decolonization', Stanford L. Rev. 71 (2019), 1509-1574.

104 Patrick Müller and Peter Slominski, 'Breaking the Legal Link but Not the Law? The Externalization of EU Migration Control Through Orchestration in the Central Mediterranean', Journal of European Public Policy 28 (2021), 801-820.

105 Wilde (n. 64).

106 ECtHR (First Chamber), *S. S. v. Italy,* communicated to the Italian Government on 26 June 2019, no. 21660/18.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Libyan coast.[107] The operation was carried out by the NGO Sea Watch and the LCG, using one of the four boats Italy donated to the Libyan authorities under the 2017 MoU. The Italian authorities informed both Sea Watch and the LCG about the presence of a vessel in distress. The Libyan authorities then assumed operational command. Yet they did not provide immediate assistance to the sinking boat; instead, they executed dangerous manoeuvres jeopardising people's safety and obstructing the work of Sea Watch. More than 20 people lost their lives during the shipwreck; 59 were rescued by Sea Watch, while the LCG returned the others to Libya, where 'their fate of detention and violence […] was clear to all actors involved in the events'.[108] This incident, far from being isolated, illustrates *Hirsi Jamaa's* heterogony of ends. While *Hirsi* forcefully recognised that extraterritoriality does not preclude the application of human rights obligations, it also gave European policymakers a tutorial on how to evade those very obligations.[109]

As discussed above, the scholarship is proposing various ways to push forward an interpretation of jurisdiction more coherent with the current interconnected reality. At the same time, some recent decisions by human rights monitoring bodies suggest that the lack of physical and direct control over victims of human rights violations does not *ipso facto* preclude the exercise of jurisdiction by supporting states.[110] Beyond the *Hirsi Jamaa* 'exclusive *de jure* and *de facto* control' formula,[111] the ECtHR has also made clear that jurisdiction can be triggered by forms of control that do not imply direct physical contact with state authorities. For example, in a case involving a maritime blockade impeding access to territorial waters, the jurisdictional link was uncontested.[112] However, as mentioned above, in later decisions, concerning the repatriation of nationals or the issuance of humanitarian visas

107 For a detailed reconstruction see: Forensic Oceanography, *Mare Clausum* (Goldsmiths, University of London, 2018), 87-101, available at: <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, last access 9 December 2024.

108 Forensic Oceanography (n. 107), 97.

109 Mann, 'Dialectic of Transnationalism' (n. 54); Pijnenburg (n. 59).

110 See CAT, Concluding observations on the fourth and fifth periodic reports of Australia, 26 November 2014, CAT/C/AUS/CO/4-5, para. 17; HRC, Concluding observations on the sixth periodic report of Australia, 9 November 2017, CCPR/C/AUS/CO/6, para. 35; HRC, *A. S., D. I., O. I. and G. D. v. Italy*, CCPR/C/130/D/3042/2017 4 November 2020, para. 7.8; CRC, *L. H., L. H., D.A, C. D. and A.F v. France*, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019, 2 November 2020, para. 9.7.

111 ECtHR, *Hirsi Jamaa* (n. 44).

112 ECtHR (Second Section), *Women on Waves v. Portugal,* judgment of 3 February 2009, no. 31276/05.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

abroad, it also suggested that the absence of physical power and control precludes jurisdiction.[113]

The Court has thus been called to articulate a coherent construction of jurisdiction 'that is principled and applicable across the board, within and beyond territorial borders'.[114] Along these lines, in relation to *S. S. and Others v. Italy*, Moreno-Lax – one of the leading counsels on the case – appraised jurisdiction paying specific attention to 'the entire constellation of all the relevant channels through which factual and/or legal state functions are exercised'.[115] Accordingly, the Italian implication with the operational capacity of the LCG should be considered against the background of its legal and factual context. This cooperation entails both direct technical and material participation, as well as an indirect yet decisive influence on the 'contactless containment' policy across the Central Mediterranean[116] – a policy that has a foreseeable impact on the human rights of migrants in distress at sea.[117]

Moreno-Lax's reading of jurisdiction points to the functions of state sovereignty,[118] and reveals how contactless containment policies impose European prerogatives on the borders of sovereign other countries.[119] It also illustrates how the very notion of jurisdiction challenges the operation of the sovereignty doctrine, according to which every country enjoys independence from and equality with all other states.[120]

At the same time, however, international law has traditionally been rather agnostic or at least ambiguous about what constitutes a sovereign function.[121] Hence, rather than being the expression of a state's sovereign functions, jurisdiction serves a *relational* function.[122] It requires a nexus between state authorities and those concerned by their decisions through factual or legal

113 ECtHR, *M. N. et al v. Belgium* (n. 93), para. 112; ECtHR, *HF and others v. France,* judgment of 14 November 2022, nos. 24384/19 and 44234/20, para. 186.

114 Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S. S. and Others v. Italy, and the "Operational Model"', GLJ 21 (2020), 385-416.

115 Moreno-Lax, 'Architecture of Functional Jurisdiction' (n. 114), 414.

116 *ECtHR, Ilaşcu* (n. 13), para. 392.

117 Moreno-Lax, 'Architecture of Functional Jurisdiction' (n. 114), 403-413.

118 Moreno-Lax, 'Architecture of Functional Jurisdiction' (n. 114), 403.

119 Chantal Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty?', Melbourne Journal of International Law 14 (2013), 392-450; Achiume, 'Migration as Decolonization' (n. 103).

120 Achiume, 'Race, Borders, and Jurisdiction' (n. 86), 465-482.

121 Frédéric Mégret, 'Are There "Inherently Sovereign Functions" in International Law?', AJIL 115 (2021), 452-492; Samantha Besson, 'The International Public: A Farewell to Functions in International Law', AJIL 115 (2021), 307-311.

122 Giulia Raimondo, *The European Integrated Border Management: Frontex, Human Rights, and International Responsibility* (Hart 2024), chapter 4.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

means or a combination of both. What matters is the relationship between the state and the affected person's rights.[123] As long as they represent a manifestation of state sovereign power, the legal and factual means that a state uses to change the situation of individuals within or beyond its borders reveal a jurisdictional connection.[124]

Yet again, one could question the use of confusing terminology (such as 'power') or the conflation of the factual 'capacity' to harm or protect with the duty to do so. This emerged, for example, in the case *A. S. et al. v. Italy*, where the Human Rights Committee established jurisdiction based on the 'special relationship of dependence' between a sinking migrant boat and the Italian authorities whom the people on board contacted.[125] It is, however, not clear which factors are relevant to ascertain the relationship of dependency. If ascertained via unclear – if progressive – concepts, this relationship runs the risk of further obfuscating the notion of jurisdiction and ultimately rendering its enforceability meaningless.

Ultimately, the very notion of extraterritorial jurisdiction posited as an exception to the territorial rule reinforces a misconception: that human rights that are applicable extraterritorially differ in nature and scope from those applicable territorially.[126] This misconception is often presented as a pure technicality, a corollary of the technical rule of territorial jurisdiction under general international law.[127] Instead, the language of relationality should speak to the objective legal nature of the obligations at stake, as well as to the interconnection of the right holders and duty bearers. Human rights jurisdiction, understood in this relational sense, results in a normative and factual relationship between a duty-bearing state and a right-holding individual.[128] Jurisdiction understood in relational terms, draws attention to the nature of the relationship between rights holders and duty bearers, and whether this relationship gives rise to legal obligations. Put differently, rather than focusing on the question of where to draw the line between territorial and extraterritorial obligations, this approach shifts the focus to the substantive relationship between the state and the individual, asking whether the state's

123 HRC, General Comment No. 36 on Article 6, on the Right to Life, CCPR/C/GC/36, 3 September 2019, para. 63.

124 Raimondo, *European Integrated Border Management* (n. 122); See also, extensively, Moreno-Lax, 'Meta-Borders' (n. 19).

125 *A. S., D. I., O. I. and G. D. v. Italy* (n. 110).

126 Samantha Besson, 'Extraterritoriality in International Human Rights Law: Back to the Jurisdictional Drawing Board' in: A. Parrish and C. Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (E Elgar 2023), 269-291.

127 For a critical analysis see: Daniel S. Margolies, Umut Özsu, Maïa Pal, Ntina Tzouvala, *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019).

128 Besson (n. 35).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

actions or authority give rise to human rights obligations, regardless of geographical locations.

4. Jurisdiction and Strategic Human Rights Litigation

Even if a clear and principled notion of extraterritorial jurisdiction were to be articulated by the ECtHR, the Court would still need to deal with pressure from states. And the latter could continue concealing illegal actions behind depoliticised policies and infrastructures enveloped in sanitised language.[129]

In the face of these regressive tendencies, scholars and practitioners have been advocating a 'topographical' or holistic approach to accountability in migration control.[130] It includes the possibility of establishing responsibility for extraterritorial migration control across different legal regimes, as well as beyond the human rights framework.[131] Among these regimes are international criminal law,[132] the law of the sea,[133] and EU (public procurement and liability) law.[134] Some experts have explored the potential of litigating migrant rights before regional courts;[135] others have looked at the domestic remedies available in (sponsoring) destination states[136] and countries of transit and

129 Niamh Keady-Tabbal and Itamar Mann, 'Weaponizing Rescue: Law and the Materiality of Migration Management in the Aegean', LJIL 36 (2023), 61-82.

130 Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control', GLJ 21 (2020), 335-354.

131 Gammeltoft-Hansen, 'Extraterritorial Human Rights Obligations in Regard to Refugees and Migrants' (n. 55); Annick Pijnenburg and Kris van der Pas, 'Strategic Litigation Against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', European Journal of Migration and Law 24 (2022), 401-429.

132 Ioannis Kalpouzos, 'International Criminal Law and the Violence Against Migrants', GLJ 21 (2020), 571-597; Itamar Mann, 'Border Crimes as Crimes Against Humanity' in: Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021), 1174-1190.

133 Efthymios Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm', GLJ 21 (2020), 417-435; Violeta Moreno-Lax, 'Protection at Sea and the Denial of Asylum' in: Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021), 483-501.

134 Thomas Spijkerboer and Elies Steyger, 'European External Migration Funds and Public Procurement Law', European Papers 4 (2019), 493-521; Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable', GLJ 21 (2020), 532-548.

135 ASGI, 'Ecowas Court of Justice called to judge the legality of Niger Law No. 36/2015' (22 September 2022), available at: <https://en.asgi.it/ecowas-court-of-justice-called-to-judge-the-legality-of-niger-law-no-36-2015/>, last access 9 December 2024.

136 See most notably: *R (on the application of AAA (Syria) and others)* [2023] UKSC 42, 15 November 2023.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

destination.[137] There have been suggestions of turning to 'soft courts', whose decisions in cases involving the interpretation of extraterritorial jurisdiction are generally expansive.[138]

Nevertheless, the decisions of domestic courts often remain anchored to traditional or confusing understandings of jurisdiction.[139] And the effects of 'soft courts' decisions are difficult to observe, particularly remedies granted to victims and broader policy changes. In the groundbreaking case of *A. S. and others v. Italy*, for instance, the government has yet to take any steps to redress the victims and correct its policies.[140] More generally, these efforts would still be exposed to the paradoxes of the dialectic of progress.[141]

The long-anticipated backlash against progressive developments, with its strategic accountability gaps, has in fact been occurring for some time – in the absence of judicial decisions and, possibly, in violation of international law.[142] While a clear-cut causality link might be difficult to defend, from the perspective of universal human rights protection, progressive litigation strategies may well result in dangerous side effects when not conceived within a larger human rights strategy.[143] This is not to dismiss the relevance and necessity of strategic litigation, but only to take a step back and invite an exercise of self-reflexivity.

This backlash against progressive developments may not just limit the extraterritorial reach or effectiveness of progressive developments – it could in fact reverse gains made in migrant rights protection. In this context,

137 Majd Achour and Thomas Spijkerboer, 'The Libyan Litigation About the 2017 Memorandum of Understanding Between Italy and Libya', EU Immigration and Asylum Law Blog, 2 June 2020.

138 Başak Çalı, Cathryn Costello and Stewart Cunningham, 'Hard Protection Through Soft Courts? Non-Refoulement Before the United Nations Treaty Bodies', GLJ 21 (2020), 355-384.

139 For instance, the Italian Consiglio di Stato rejected a complaint against the use of the EU Africa Fund to reinforce the Libyan authorities involved in maritime border surveillance. The decision compounds the question of attribution with that of jurisdiction and dismisses the claim of complicity by simply referring to the lack of (territorial) jurisdiction. Consiglio di Stato, Sentenza No. 4569/2020, 15 July 2020.

140 Andrea Saccucci and Roberta Greco, *L'Italia non adempie alla decisione ONU sul naufragio del 2013*, Saccucci&Partners, 2023, available at: <https://www.saccuccipartners.com/2023/02/17/il-governo-italiano-non-adempie-alla-decisione-onu-sul-naufragio-del-2013/>, last access 9 December 2024.

141 For example, the UK Supreme Court held that the state's policy to remove protection seekers to Rwanda was unlawful, and the new government has abandoned this idea. Yet, it also seeks to emulate Italy's bilateral cooperation with Albania. 'Starmer Seeks Lessons from Italy as Eight more Channel Migrants Die', The Times, 16 September 2024.

142 Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-"Refoulement" and the Externalization of Asylum by Australia and Europe', Government and Opposition 43 (2008), 249-269.

143 Farahat (n. 63), 185-86.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

strategic litigation is a fundamental component of a comprehensive human rights strategy to address the root causes of potential backlash, including socio-economic inequalities and related racial and xenophobic calibrations of the border policies of the Global North.

All in all, while the push for progressive interpretations of human rights jurisdiction often backfires, an overemphasis on strategic litigation may risk downplaying the significance of a more comprehensive human rights practice. The following section explores the potential of adopting a broader perspective on jurisdiction and the role of strategic human rights litigation. Rather than offering a radically different or refined approach, it – more modestly, I hope – proposes reading jurisdiction from a different angle that may inspire alternative strategies to mitigate the risk of backlash against migrant (human) rights.

IV. Negative Dialectic and The Possibilities of a Failed Promise

Every step forward, that is, every step taken towards a more protective legal and political management of migration in Europe (and globally), seems inherently to imply two steps back towards states' right to exclude. As long as territory is perceived as the defining feature of the enjoyment of human rights, and as long as material control determines any exception to the territorial applicability of human rights, their promise of universality will remain unfulfilled.[144]

The inadequacy of the dialectic of progress in transnational litigation for migrant rights cannot be overcome or bypassed without the risk of turning its narrative into romantic hyperbole. Nonetheless, the disillusion and loss of meaning generated by the failures of migrant (human) rights can lead to reflexivity and, one might hope, to new possibilities of resistance. The vertigo that any believer in the dogma of universality might feel should perhaps be embraced as an antidote to an obfuscating magnification.[145] A negative dialectics reading of the story of migrant rights protection promises this kind of lucidity.

The concept of negative dialectic, developed by Theodor Adorno, proves to be an essential resource in confronting the dangers of narratives of histor-

144 Moria Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', Berkeley J. Int' l L. 34 (2016), 1-43.

145 Martti Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?', LJIL 17 (2004), 229-246.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ical progress and emancipation. In *Negative Dialectics*, Adorno proposed a critical method that opposes the Hegelian view according to which, through tension and contradiction, opposites are sublated into a progressive synthesis.[146] Instead, negative dialectic embraces contradiction and seeks to unravel the inherent tensions within concepts and systems without resolving them into a progressive synthesis.

History for Hegel represents the unfolding of the absolute; for Marx, this absolute takes the form of human liberation.[147] And even for many critical theorists, society has followed a certain moral and political learning process culminating in European modernity.[148] For Adorno, however, history is not a unidirectional process towards progress and redemption. This means that we move from necessity to contingency, with all the possibilities this can bring. Drawing on Adorno's work, Amy Allen has shown how the notion of 'historical progress' articulates forms of oppression deployed in past and ongoing forms of coloniality and capitalism.[149] Without rejecting the idea of progress, these thinkers seek to disentangle it from a historical narrative that conceives it as the necessary result of dialectical processes.This approach stands in opposition to an inherently eurocentric idea of historical progress, it also allows one to imagine alleviating injustice without requiring a narrative of historical advancement.[150] By highlighting the limitations and contradictions present in any given concept or system, negative dialectics reveal the complexities and injustices embedded within them.

What does this mean for the present state of border control? The progressive expansion of the ECHR's applicability to extraterritorial border controls is often thought of as a necessary response to states' policies aimed at deflecting migrants elsewhere. Yet the legal category of jurisdiction has been instrumental to those very policies. This highlights the challenges of disentangling

146 Theodor W. Adorno, *Negative Dialectics* (Continuum 1981).

147 Karl R. Popper, 'What Is Dialectic?', Mind 49 (1940), 403-426.

148 In the End of Progress, Amy Allen refers to Habermas's theory of social evolution. Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press 2016), 79. See also most notably: Edward Said, *Culture and Imperialism* (Vintage 1993); Thomas McCarthy, *Race, Empire, and the Idea of Human Development* (Cambridge University Press 2009). Edward Said, *Culture and Imperialism* (Vintage 1993); Thomas McCarthy, *Race, Empire, and the Idea of Human Development* (Cambridge University Press 2009).

149 Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press 2016).

150 Adorno evokes Walter Benjamin's ninth thesis on the philosophy of history where progress is famously depicted as a storm blowing from Paradise and irresistibly propels the angel of history into the future. With his back to the future, the angel faces the past as a pile of debris that keeps growing before him. Walter Benjamin, *Illuminations: Essays and Reflections* (Hannah Arendt ed., Harry Zohn tr., Schocken Books 1969).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the law and its meaning in context. In this sense, '[t]hinking through law's contingency – the possibility of paths not taken – brings out those difficulties and helps to respond to them'.[151] Can there be a different understanding of jurisdiction in the context of EU border management under the prevailing power structures? This is not a rhetorical question to suggest that progressive judicial developments to bring accountability to the externalisation of migration control are flawed, nor that strategic litigation efforts to advance them are misled. Instead, this paper suggests that progress should not be considered the mere product of a dialectical litigation process. Rather, it can be achieved, with twists and turns, by problematising the notion of jurisdiction and broadening the mobilisation for change. Looking at jurisdiction from this perspective allows us to break the spell of a notion that, despite its ostensible neutrality, constructs a system of exclusion while disclaiming any responsibility for it.

This essay seeks to animate a critical reflection on the underlying assumptions and contradictions of the very notion of jurisdiction. In addition, it advocates for a broader perspective on the human rights agenda that informs strategic litigation efforts. Viewed through the lens of negative dialectics, this strategy is situated within a more comprehensive human rights process. Negative dialectics not only recognises the contradictory and potentially counterproductive outcomes of progressive developments, but also offers a way to reimagine the human rights agenda, (re)centring the voices of those most affected by it.

Reflecting on the role that jurisdiction plays as a form of racial technology, Achiume has cautioned that progress in the doctrine of jurisdiction risks remaining anchored in a liberal, neocolonial agenda.[152] Efforts to articulate a comprehensive litigation strategy should take into account the broader context in which a backlash against it could unfold.[153] However, such effort should be informed by a coherent interpretation of jurisdiction where all *de iure* and *de facto* applications of power are 'considered holistically, to evaluate their aggregate impact on the situation of those concerned'.[154] A relational reading of human rights jurisdiction contests the dichotomy between their territorial and extraterritorial scope; instead, it draws attention to the interconnection between rights holders and duty bearers, and whether and how this relationship gives rise to legal obligations.

151 Ingo Venzke, 'The Path not Taken: On Legal Change and Its Context' in: Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press 2023), 309-332.

152 Achiume, 'Race, Borders, and Jurisdiction' (n. 86), 481-482.

153 Wilde (n. 64).

154 Moreno-Lax, 'Meta-Borders and the Rule of Law' (n. 19).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

More radically, Chimni has advanced a reform proposal for the doctrine of jurisdiction that calls for the adoption of a declaration or a convention on jurisdiction to clarify its meaning and scope.[155] This would avoid the dangers of a case law patchwork undermining legal certainty and the rule of law. Such a reform project would allow civil society organisations to voice the concerns of groups significantly affected by (elusive) exercises of extraterritorial jurisdiction.[156] As they become more and more interconnected, migrants' networks and refugee-led organisations are demanding to be regarded as actors in migration policy decisions.[157] Broader mobilisation process often fosters firmer and more systemic change, involving legislative, institutional, and policy reforms.[158]

Looking beyond legal and strategic considerations, it is necessary to widen the scope of human rights practice and consider the voices of migrants and refugees challenging border externalisation policies. Media coverage mostly focuses on the 'spectacle of the border'.[159] Yet, through a variety of means, from graffiti to songs to books, migrants often denounce the socio-economic barriers preventing their mobility and the political structures underpinning those barriers.[160]

Concretely, a meaningful way forward would be advocating greater participation of civil society organisations representing migrants in human rights proceedings by expanding the standing of the actors that could bring claims to the Court.[161] Further, the direct involvement of affected groups in political and social action – such as advocacy, protests and human rights campaigns – could bolster litigation strategies. In this sense, strategic litiga-

155 Chimni, 'International Law of Jurisdiction' (n. 10); Bhupinder S. Chimni, 'The Limits of the All Affected Principle: Attending to Deep Structures', Third World Thematics: A TWQ Journal 3 (2018), 807-812.

156 Chimni, 'International Law of Jurisdiction' (n. 10).

157 Stefan Rother and Elias Steinhilper, 'Tokens or Stakeholders in Global Migration Governance? The Role of Affected Communities and Civil Society in the Global Compacts on Migration and Refugees', International Migration 57 (2019), 243-257.

158 Gráinne de Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021).

159 Katja Franko, 'The Two-Sided Spectacle at the Border: Frontex, NGOs and the Theatres of Sovereignty', Theoretical Criminology 25 (2021), 379-399.

160 See Océane Uzureau and others, '"NO MORE WALLS IN THE SEAS": Migration Graffscapes and Migrants' Messages While En Route to and in Europe', Journal of Refugee Studies 2024, feae014, 1-20; Karina Horsti, 'Temporality in Cosmopolitan Solidarity: Archival Activism and Participatory Documentary Film as Mediated Witnessing of Suffering at Europe's Borders', European Journal of Cultural Studies 22 (2019), 231-244.

161 See, in a different context, 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.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tion should be accompanied by a wider and more inclusive mobilisation process. This approach aligns with experimentalist thinking, which suggests that social and political change is not linear, but follows an iterative process of contestation, learning from on-the-ground experiences, and ongoing collective reflection and institutional response.[162] Over time, this interaction among various actors and institutions at different levels can foster more dynamic and sustainable change.

Broadening the scope of human rights practice in this context would also involve, for example, harnessing the potential of new technologies to raise public awareness and counter the obfuscation tactics used by governments to avoid accountability.[163] Consider the efforts of some NGOs operating in the Mediterranean to rescue people in distress at sea while documenting illegal interceptions. Sea-Watch documented and publicised an interception and return case operated by the Libyan authorities and involving Italian and European assistance.[164] Sea-Watch also asked Frontex to disclose relevant information, a request that was denied and only partially annulled by a recent judgment of the CJEU.[165]

Documenting and – most of all – proving European involvement in 'contactless migration control operations' is difficult, not least because of the lack of access to relevant information. However, rather than contributing to and normalising the EU border surveillance regime, this form of 'human rights countersurveillance' contests and publicises it.[166] Most importantly, it challenges the orthodoxy of jurisdiction by shedding light on the relationships between the various public actors exercising their legal and political authority over the situation of individuals attempting to cross European borders, independently of any physical contact. Technology enables migrants to undercut borders and jurisdictional constraints to expose the violence that states carefully obscure when they orchestrate border controls in distant places; in doing so, they can claim rights to which they are not yet entitled. While states violently oppose this development,[167] the discursive shift that migrants shape might have a meaningful impact on the rightless predicament designed by

162 de Búrca (n. 158), 38.

163 Daniel Ghezelbash, 'Technology and Countersurveillance: Holding Governments Accountable for Refugee Externalization Policies', Globalizations (2022), 1-15.

164 For a reconstruction of the case, see Sunderland and Pezzani (n. 76).

165 CJEU, case T-205/22, *Naass and Sea Watch v. Frontex,* 24 April 2024.

166 On the ambivalent role of technology in the politics of migration, see Lorenzo Pezzani and Charles Heller, 'AIS Politics: The Contested Use of Vessel Tracking at the EU's Maritime Frontier', Science, Technology, & Human Values, 44 (2019), 881-899.

167 The confiscation of smartphones for example is a documented practice of European border authorities. See e. g.: CJEU, case T-136/22, *Hamoudi*, 13 December 2023, ECLI:EU:T:2023:821, para. 36.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

jurisdictional rules. If technology has enabled the shifting border phenomenon, it can also contribute to contesting its violence.[168]

Reading strategic litigation efforts in the field of migrant rights through the prism of negative dialectics does not imply that we should all despair and move on, or that the struggle for migrant rights needs new tools or strategies.[169] It means that strategic litigation should be read into a broader human rights practice, one that takes place before courts but also in more mundane places, including in our streets and on our screens. Strategic litigation is an important dimension of the human rights movement in general and of the struggle for migrant rights specifically. It provides crucial impetus and support for wider processes of (progressive) change. It should, however, be read into a larger mobilisation process encompassing for example, advocacy, information and awareness campaigns, lobbying, or protests, which can, in turn, lead to institutional, social and political dialogue and reform. There is no guarantee that these struggles will lead to any meaningful change, let alone progress, 'but without them, we cannot even begin to consider this possibility'.[170]

V. Conclusion

The story of refugee and migration law is often told as a story of progress. Yet, a regressive counternarrative must also be acknowledged, one of faded commitment to *non-refoulement* obligations and migrant rights more generally. The existence of a straightforward causal relationship between these two developments may be challenging to prove, but border practices do reveal a dialectic process whereby restrictive measures are often contingent on expansive interpretations of extraterritorial human rights obligations. This unceasing dialectic invites us to acknowledge the complexity of migration processes and narratives and avoid reading them within a historically linear discourse. While unearthing the failed promise of universality, we can read the struggles for migrant rights as a negative dialectic, and this can catalyse reflexivity and new possibilities of resistance.

168 Sanja Milivojevic, 'Driving Social Change from Below: Exploring the Role of Counter-Security Technologies in Constructing Mobile Noncitizens', Citizenship Studies 24 (2020), 680-695.

169 Philip Alston, 'The Populist Challenge to Human Rights', Journal of Human Rights Practice 9 (2017), 1-15.

170 Ayten Gündoğdu, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford University Press 2015).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Constructing Youth as Progress: Tracing Shared Efforts of the League of Nations and the United Nations

Julian Hettihewa*
Institute for Public International Law, University of Bonn, Bonn, Germany
julian.hettihewa@fu-berlin.de

Abstract 843
Keywords 844
I. Thinking with Youth and Young People 846
II. Between Progress and Decline: a Mini-History 850
III. Continuity and Commonalities 858
IV. Conclusion 863

Abstract

A more comprehensive understanding of progress and international law can be obtained if youth is included in the analysis. While youth is gaining increasing prominence in international law, it continues to be neglected by international legal scholarship. This is especially problematic in the context of progress and international law as youth is constructed by international law as progress. This article presents a historical account of youth's construction as progress, focusing on the efforts of the League of Nations (LoN) and the United Nations (UN) to educate youth in order to promote peace, to prevent another world war. This contribution highlights the continuity of historical patterns and identifies the function of youth as progress as an instrument to conceal power-differentials. Furthermore, this article reveals structural commonalities between international law and youth. Both embody the Messianic announcement of something universally and inherently good, albeit always postponed: progress.

* PhD candidate, Institute for Public International Law, University of Bonn; law clerk (*Rechtsreferendar*), Higher Regional Court of Cologne. This paper is based on parts of my doctoral thesis, which is currently under review and has not yet been published. In particular, sections II. and III. of this paper are shortened and redrafted versions of parts of my thesis (147-158; 221-233). I wish to express my gratitude to Professor Thomas Skouteris for his valuable comments on an earlier draft of this paper during and after the AjV-DGIR conference. Similarly, I would like to thank Professor Sundhya Pahuja for her helpful and insightful remarks on my method. Special thanks are also due to the reviewers, the editors, as well as Levi Pfeuffer-Rooschüz, MA, who enriched the paper with their feedback.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Keywords

Education – International Legal History – League of Nations – Legal Theory – Peace and Security – United Nations – Young Approaches to International Law – Young People – Youth

'[Y]outh are not born; they are made by historical circumstances."[1]

It must have been 2019. Young people marched through the streets of the world demanding climate action, unleashing nothing short of a 'youth quake'.[2] No. It must have been 2022 when the valiant youth of Ukraine proved to be full of 'energy' in the face of certain defeat.[3] Or could it have been 1985 – the International Youth Year?[4] Or 2010, the other International Youth Year?[5] Or 1965? Or 1937? Or 1926? Under which historical circumstances was youth constructed as bright future, as vessel of hope, as dream, as progress? What is the role of international law in this context? I argue that a more comprehensive understanding of progress and international law can be gained if youth is included in the analysis.[6] More explicitly, I wish to exhibit how youth was – and continues to be – constructed in international law as promise/peril, dream/nightmare, progress/decline. In doing so, I aspire to add youth as a category to the scholarship on progress in international law. While the notion of progress is used in various forms in international legal discourse,[7] I wish to explore the relationship between the conceptions of 'international law as progress'[8] and 'youth as progress'.

Youth is gaining increasing prominence in international law. In 2022, the Office of the United Nations High Commissioner for Human Rights created

1 Jean Comaroff and John Comaroff, 'Reflections on Youth, from the Past to the Postcolony' in: Melissa S. Fisher and Greg Downey (eds), *Frontiers of Capital: Ethnographic Reflections on the New Economy* (Duke University Press 2006), 267-281 (273).

2 UNDESA, 'Young People are Changing the World', 8 April 2019, <https://www.un.org/development/desa/en/news/intergovernmental-coordination/young-people-are-changing-the-world.html>, last access 13 December 2024.

3 Sorbonne Université, 'Volodymyr Zelensky in Dialogue with the French Youth', 16 May 2022, <https://www.sorbonne-universite.fr/en/news/volodymyr-zelensky-dialogue-french-youth>, last access 13 December 2024.

4 UNGA Res 34/151 of 17 December 1979, A/RES/34/151, operative para. 1.

5 UNGA Res 64/134 of 18 December 2009, A/RES/64/134, operative para. 1.

6 For an illuminating inquiry into the production and function of progress in international legal discourses in a broader sense (i. e. without a focus on youth and young people): Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Leiden University Scholarly Publications 2008).

7 Skouteris (n. 6), 5.

8 Skouteris (n. 6), 6. Italics removed.

 DOI 10.17104/0044-2348-2024-4-843

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

a Youth Advisory Board.[9] The Director-General of the World Health Organization initiated his Youth Council in the middle of the COVID-19 pandemic in December 2020.[10] During the height of the global school strikes in 2019, the UN Secretary-General created his Youth Advisory Group on Climate Change.[11] In 2017, during the so-called 'European migration crisis', the UN High Commissioner for Refugees established a Global Youth Advisory Council.[12] The list of international organisations institutionalising and proliferating youth participation goes on and on. Yet young people and youth continue to be neglected by international legal scholarship.[13] This is especially problematic in the context of progress and international law as *youth is constructed by international law as progress*.

To support this thesis, my paper will advance in four steps. First, I will introduce my main analytical categories, youth and young people, and explain why I pursue a historical inquiry. I will then present my historical account of youth as progress in international law in a larger second step, focussing on the efforts of the League of Nations and the United Nations in the realm of education. In the third part, I will highlight the continuity of historical patterns and briefly identify structural commonalities between international law and youth. Drawing on Martti Koskenniemi's work, I will show that structural elements of international law and youth turn out to be identical. Both embody the Messianic announcement of something universally and inherently good, albeit always postponed: progress. This is not merely coincidental; constructing 'youth as progress' serves the notion of 'international law as progress' and the policies pursued in its name. In the fourth and final part, I will conclude by briefly summarising four dimensions of my engagement with youth as progress, comprising namely an analytical, normative, functional, and structural level.

---

9 United Nations Office of the High Commissioner for Human Rights, 'A New Youth Advisory Board Champions Youth Engagement', 1 April 2022, <https://www.ohchr.org/en/stories/2022/04/new-youth-advisory-board-champions-youth-engagement>, last access 13 December 2024.

10 WHO, 'WHO Launches Youth Council to Advise on Global Health and Development Issues Affecting Young People', 4 December 2020, <https://www.who.int/news-room/feature-stories/detail/who-launches-youth-council-to-advise-on-global-health-and-development-issues-affecting-young-people>, last access 13 December 2024.

11 United Nations, 'The Youth Advisory Group on Climate Change', <https://www.un.org/en/climatechange/youth-in-action/youth-advisory-group>, last access 13 December 2024.

12 United Nations High Commissioner for Refugees (UNHCR), Women's Refugee Commission, and UNHCR Global Youth Advisory Council, 'UNHCR GYAC Profiles', <https://www.unhcr.org/au/sites/en-au/files/legacy-pdf/5c90f5254.pdf>, last access 13 December 2024, 2.

13 Noting an important exception William D. Angel (ed.), *The International Law of Youth Rights* (2nd edn, Brill Nijhoff 2015). While the term 'young people' refers to natural persons, 'youth' denotes a social construct. For the distinction and meaning of the terms see 'I. Thinking with Youth & Young People'.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

I. Thinking with Youth and Young People

Present-day (critical) international legal scholarship offers plenty of categories to analyse international law. Disability Studies in international law,[14] International Elder Law,[15] Feminist Approaches to International Law,[16] Indigenous Studies in International Law,[17] Marxist Approaches to International Law,[18] Queer Studies in International Law,[19] as well as Third World Approaches to International Law[20] and Critical Race Theory,[21] develop and employ distinct analytical categories in order, for instance, to determine the relationship between international law and certain groups, assert certain legal shortcomings, highlight certain biases, etc.[22]

Youth and young people, however, have not been acknowledged by those approaches as central categories so far. The fact that youth and young people

14 For an introduction: Theresia Degener, 'International Disability Law – A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong', 13-17 December 1999', Berkeley J. Int'l L. 18 (2000), 180-195; Theresia Degener, 'A Human Rights Modell of Disability' in: Peter Blanck and Eilionóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2017), 31-49.

15 Proposing the name: Israel Doron, 'From National to International Elder Law', Journal of International Aging, Law and Policy 1 (2005), 43-67. Gerontologists are increasingly rejecting the term 'elderly' and favouring the term 'older adults' instead, see for instance: Dale Avers, Marybeth Brown, Kevin K. Chui et al., 'Use of the Term "Elderly"', Journal of Geriatric Physical Therapy 34 (2011), 153-154.

16 For a groundbreaking article: Hilary Charlesworth, Christine Chinkin, Shelley Wright, 'Feminist Approaches to International Law', AJIL 85 (1991), 613-645.

17 For a formative monograph: James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004).

18 For an introduction: Bhupinder S. Chimni, 'An Outline of a Marxist Course on Public International Law', LJIL 17 (2004), 1-30; Robert Knox, 'Marxist Approaches to International Law' in: Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 306-326.

19 For an overview: Dianne Otto (ed.), *Queering International Law. Possibilities, Alliances, Complicities, Risks* (Routledge 2018); Aeyal M. Gross, 'Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law', LJIL 21 (2008), 235-253.

20 For an introduction: Makau Mutua, 'What is TWAIL?', ASIL Proceedings 94 (2000), 31-40; Antony Anghie, 'Imperialism and International Legal Theory' in: Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 156-172.

21 For an introduction: Derrick Bell, 'Who's Afraid of Critical Race Theory?', U. Ill. L. Rev. (1995), 893-910; Ian Haney López, *White by Law: The Legal Construction of Race* (10th edn, New York University Press 2006); for parallels between Third Word Approaches to International Law and Critical Race Theory: E. Tendayi Achiume and Devon W. Carbado, 'Critical Race Theory Meets Third World Approaches to International Law', UCLA L. Rev. 67 (2021), 1462-1502.

22 Critical approaches to international law are heterogenous and ramified, decentralised networks, or even communities of scholars and friends. I am not covering every single line of thought of every approach as this would not contribute (significantly) to the aims of this section.

 DOI 10.17104/0044-2348-2024-4-843

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

harbour great analytical potential has already been discovered and stressed by the multi- and interdisciplinary research field of Youth Studies:

> 'why study youth? We suggest that it is important to study young people's lives precisely because the process of transition to adult life – for each individual – reflect both an individual and a collective process. The very nature of "youth" is the result of social and political processes through which social inequality is constructed and reconstructed. […] [*6*] It is important to study youth, because the points where young people engage with the institutions that either promote social justice or entrench social division are significant points of reference for every society. Hence, the study of youth is important as an indicator of the real "costs" and "benefits" of the political and economic systems of each society.'[23]

As is already apparent, the distinction between 'youth' and 'young people' is crucial. Youth researchers Rob White and Johanna Wyn emphasise this as follows:

> 'we aim in this book to explore the ways in which youth is framed and constrained (by institutions), shaped and acted on (by young people) and experienced in enactments of identity […]. We use the term "youth" to talk about a social category (as in institutional definitions of childhood, youth, adulthood) and we use the term "young people" to talk about specific people and groups.'[24]

I adopt this basic differentiation here. Thus, for my inquiry, 'young people' refers to natural persons aged ten to 35 years.[25] 'Youth', on the other hand, denotes a social construct comparable to gender and race. Feminist Approaches to International Law, to sustain the analogy, critique international law's role in the marginalisation of women around the globe.[26] Similarly, young people's

---

23 Johanna Wyn and Rob White, *Rethinking Youth* (SAGE Publications 1997), 5 f.

24 Rob White and Johanna Wyn, *Youth and Society* (3rd edn, Oxford University Press 2013), 5; for a slightly different wording in the new edition: Rob White, Johanna Wyn and Brady Robards, *Youth and Society* (4th edn, Oxford University Press 2017), 6. To simplify, it may be said that the task of Youth Studies is to investigate phenomena of youth as well as experiences and perspectives of young people.

25 There is no universally accepted definition of young people in international law. The upper age-boundary of 35 years is used by the African Youth Charter of 2 July 2006, 3268 UNTS. International organisations like the World Health Organization and the International Telecommunication Union refer to 10 years as the lower age-boundary, WHO, *Working for a Brighter, Healthier Future. How WHO Improves Health and Promotes Well-Being for the World's Adolescents* (2024), 3; ITU, *Youth Strategy Roadmap to 2021 and Beyond*, 1. Why exactly the age of ten and 35 have been chosen as outer limits is not subject of this paper but of my doctoral thesis, Julian Hettihewa, *Jugend im Völkerrecht*, 60-134 [submitted but not published].

26 Aptly noted: 'In fact, the international legal system fails all groups of women', Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law. A Feminist Analysis* (Manchester University Press 2022), 2.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

structural inequality in international law must be acknowledged too.[27] This is not to say that the forms and experiences of discrimination must be ranked or equated; it would be absurd to argue, for instance, that sexism is less severe than racism or that sexism and racism are the same. My point is rather that the categories of gender, race, and youth are comparable and useful because they demarcate and illuminate power-differentials in international law.

It also surfaces that one must differentiate between youth and another social construct: childhood. In the same vein, young people and children form different, albeit at times overlapping age-based groups. This crucial distinction has been widely explored and discussed in the research fields of Youth Studies and Childhood Studies,[28] and – what is perhaps even more important here – adopted by international law.[29] Thus, I will not imperil the focus of this paper by including international law's engagement with childhood and children.

As a social construct, youth is loaded with values and meanings, which are never fixed but always in flux.[30] There may be many social contexts in which notions of youth are (re-)produced, such as media, fashion, art, etc. This may bear the question why youth shall be traced in international law at all. Youth Studies certainly pay little if any attention to this area of the law.[31] However, this indifference is unjustified. There is a certain authority attached to international

27 While this cannot be treated in detail here, it is worth to point out that only two Heads of Government were under the age of 35 in 2020, Inter-Parliamentary Union, *Youth Participation in National Parliaments* (2021), 30. Globally, only 2,8 % of Members of Parliament were under the age of 30 in 2023, Inter-Parliamentary Union, *Youth Participation in National Parliaments* (2023), 7. The dates and age-boundaries were set by the reports. For a larger engagement with the situatedness, experiences, and perspectives of young people: WHO, *Global Report on Ageism* (2021), 81-91; Sharlene Swartz, Adam Cooper, Clarence M. Batan et al. (eds), *The Oxford Handbook of Global South Youth Studies* (Oxford University Press 2021); White, Wyn and Robards (n. 24); Andy Furlong, *Youth Studies. An Introduction* (Routledge 2013).

28 See for a brief introduction: White, Wyn and Robards (n. 24), 3-6; Johanna Wyn, 'Thinking About Childhood and Youth' in: Johanna Wyn and Helen Cahill (eds) *Handbook of Children and Youth Studies* (Springer 2015), 3-20; Yen Yen Woo, 'Age' in: Nancy Lesko and Susan Talburt (eds), *Keywords in: Youth Studies. Tracing Affects, Movements, Knowledges* (Routledge 2012), 111-116 (112 f.).

29 To share only one example, international law comprises distinct human rights protections with regard to young people and children. There is not only the Convention on the Rights of the Child of 20 November 1989, 1577 UNTS 3, but also the African Youth Charter as well as the Iberoamerican Convention on the Rights of Youth of 11 October 2005, 3295 UNTS.

30 For the parallel category of old age in Gerontology: Andrew W. Achenbaum, 'Ageing and Changing: International Historical Perspectives on Ageing' in: Malcolm L. Johnson (ed.), *The Cambridge Handbook of Age and Ageing* (Cambridge University Press 2005), 21-29; for the parallel notion of (dis-)ability in Disability Studies: Anne Waldschmidt, *Disability Studies zur Einführung* (Junius Verlag 2020), 38.

31 For an insightful exception in this context: Noah W. Sobe, 'Transnational Governance' in: Nancy Lesko and Susan Talburt (eds) *Keywords in Youth Studies. Tracing Affects, Movements, Knowledges* (Routledge 2012), 97-102.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

law, which may also be understood as a social phenomenon.[32] This authority gains even further relevance if we take international law's promise of universality seriously. A local newspaper, for instance, does not purport to be relevant in another region. International law, however, claims meaning around the globe. We cannot escape international law; 'if you don't do the law, the law will do you'.[33]

It is therefore that I seek to understand why and how international law produces meanings of youth. This is very much connected to the question of *when* international law found interest in youth. Admittedly, there is a considerable debate on when and where youth emerged as a distinct social category.[34] In order to strive in the context of international law towards universality, however, I wish to seek the points in time when the League of Nations and the United Nations – two international organisations, which pursue(d) universal membership and universal thematic scope –[35] imagined youth as progress.

The historical inquiry corresponding to this question is inspired by David Kennedy's call to 'trace the references', to 'trace the […] repetitions'.[36] Despite institutional, normative, or linguistic changes in international law, I believe in continuities, in repetitive patterns of power-differentials.[37] In this context, my focus rests on discourse or narratives. This is not to say that meanings of youth do not have real-life implications. I perceive this, however, as a secondary question which moves beyond the scope of this paper. Likewise, I will not restate why the notion of progress is crucial to international law and why studying the same is a worthwhile exercise.[38]

---

32 For a similar argument in the context of race and domestic law: Richard Delgado and Jean Stefancic, 'Critical Race Theory: Past, Present, and Future', Current Legal Probs. 51 (1998), 467-491 (477).

33 Robert Knox, 'Strategy and Tactics', FYBIL 21 (2010), 193-229 (224).

34 See only Stefan Ruppert, *Recht hält jung. Zur Entstehung der Jugend aus rechtshistorischer Sicht: Deutschland im langen 19. Jahrhundert (ca. 1800-1919)* (Vittorio Klostermann 2023), 40-45.

35 This is borrowed from Hannah Birkenkötter, '"What the Secretariat Makes It": How International Civil Servants Shape Contemporary International Law', International Organizations Law Review 20 (2023), 426-456 (435).

36 David Kennedy, 'A New Stream of International Law Scholarship', Wis. Int'l L.J. 7 (1988), 1-49 (10 f.).

37 This scepticism is borrowed from Critical Race Theory: Derrick Bell, 'Racial Realism', Conn. L. Rev. 24 (1992), 363-379.

38 See only: 'progress narratives are no longer descriptions of an objective reality but powerful rhetorical strategies of (de)legitimation.', Skouteris (n. 6), 1; 'The notion of progress is firmly embedded at the core of international law discourse.', Alexander Holzer, Lisa Kujus, Rebecca Kruse et al., 'Introducing the Symposium "Progress and International Law: A Cursed Relationship?"', Völkerrechtsblog, 18 September 2023, doi: 10.17176/20230918-100718-0, <https://voelkerrechtsblog.org/de/introducing-the-symposium-progress-and-international-law-a-cursed-relationship/>, last access 13 December 2024; for a brief overview: Thomas Skouteris, 'The Idea of Progress' in: Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 939-953.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

On a final note, thinking with youth and young people certainly enables us not only to revisit the history (or rather histories) of international law. As Youth Studies have shown, youth and young people can be found in various areas.[39] Similarly, I believe international law offers an infinite space that can be explored using the above-mentioned categories.[40] The sensibility and curiosity that place youth and young people at the centre of an international legal analysis can be understood as part of – if someone wants to put a label on it – Young Approaches to International Law (YAIL). While this constructed label offers language, it does not yet create community (like, for instance, Third World Approaches to International Law). The creation of community is a long-term project to which this article – irrespective of the exercise of labelling or branding – aims to contribute.

II. Between Progress and Decline: a Mini-History

Historically, youth has been constructed by international law as progress.

Acknowledging that history itself is a construct,[41] I want to narrate a specific story; a story of untold sorrow and reaffirmed faith, of heroes and villains, of a celebrated dream and a feared nightmare, of progress and decline. With these poles, I believe, a certain continuity can be grasped and traced throughout a century and two international organisations.

---

39 To offer a small glimpse of the breadth of the field: Daniel Marshall, 'What Is Queer Youth History?' in: Daniel Marshall (ed.), *Queer Youth Histories* (Palgrave Macmillan 2021), 1-40; Adam Cooper, Sharlene Swartz, Clarence M. Batan et al., 'Realigning Theory, Practice, and Justice in Global South Youth Studies' in: Sharlene Swartz, Adam Cooper, Clarence M. Batan et al. (eds), *The Oxford Handbook of Global South Youth Studies* (Oxford University Press 2021), 2-16; Jenny Slater, *Youth and Disability. A Challenge to Mr Reasonable* (Routledge 2015); Angela McRobbie and Jenny Garber, 'Girls and Subcultures' in: Angela McRobbie (ed.), *Feminism and Youth Culture. From 'Jackie' to 'Just Seventeen'* (Macmillan Education 1991), 1-15.

40 Proving this is the aim of my doctoral thesis: Hettihewa (n. 25). To illustrate this here, even such – subjectively speaking – 'remote areas' as the Council of the Baltic Sea States can be explored, see: Julian Hettihewa and Stefan Talmon, 'The Bornholm Declaration – Another Example of Germany's Support of Youth Participation in International Organisations?' in: Stefan Talmon (ed.), *German Practice in International Law 2020 Volume 2* (Cambridge University Press 2023), 342-343.

41 Following New Stream's critique of international legal history, we have to differentiate between the past (what has happened) and history (what we tell has happened), the latter allowing numerous accounts, see Thomas Skouteris, 'Engaging History in International Law' in: José María Beneyto and David Kennedy (eds), *New Approaches to International Law. The European and the American Experiences* (T. M. C. Asser Press 2012), 99-121 (112 f.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Our point of departure is the immediate aftermath of World War I. During the early days of the newly founded League of Nations, a large number of initiatives were introduced aiming at educating youth in the spirit of the values of the international organisation.[42]

The first resolution dealing with the education of youth was adopted during the fourth Assembly of the League of Nations on 27 September 1923, with the following wording:

> '[t]he Assembly urges the Governments of the States Members to arrange that the children and youth in their respective countries where such teaching is not given be made aware of the existence and aims of the League of Nations and the terms of its Covenant.'[43]

Education surfaces in the international arena as a means to promote the purposes of an international organisation. More precisely, the wording ('aims of the League of Nations') and the preparatory history of the resolution underline that education is placed in a specific service: the maintenance of peace.[44] Not Heads of State or Government were to be educated, but youth. Indeed, that the maintenance of peace and thus the success of the League depended in particular

---

42 For instance, as early as 13 May 1919, an 'Education Commission' within the system of the League of Nations was proposed, which was to promote the exchange of school and university students, see: LoN, Educational Problems – Proposed Education Commission under the League of Nations – Transmits note from Dr. Fisher to Lord R. Cecil, and minutes thereon, relative to proposed Education Commission under the League of Nations, 13 May 1919, United Nations Archives at Geneva – Reference Code: R636/12/114/269, (PDF, 5).

43 Assembly of the League of Nations, 4th Assembly, 27 September 1923, Work of the Committee on Intellectual Co-Operation, Res VIII, United Nations Archives at Geneva – Reference Code: R1059/13C/30862/30862, 4 (PDF, 18).

44 For instance, on 5 August 1921, the Federal Leadership of the German Pacifist Student League ('Bundesleitung des Deutschen Pazifistischen Studentenbunds') proposed to the League of Nations that the League Assembly may decide 'that each State shall include in its constitution an article with the following content: "League of Nations Studies is a subject in schools. Every pupil shall receive a copy of the League of Nations Covenant at the completion of compulsory education."' ('dass jeder Staat in seiner Verfassung einen Artikel folgenden Inhalts: "Völkerbundskunde ist Lehrfach der Schulen. Jeder Schüler erhält bei Beendigung der Schulpflicht einen Abdruck der Völkerbundsverfassung." aufzunehmen hat.', translated by the author). The Under-Secretary-General at the time reacted quite positively to the proposal: 'I sincerely hope that your desire to introduce instruction on the League of Nations in all the schools of States Members of the League may be realised. The same idea has been communicated to me from various quarters and certainly the education of youth in the spirit and tradition of peace is the most efficacious method of averting war.' This illustrates the essential idea of the resolution: the education of youth in the spirit of the League of Nations to maintain peace. For the proposal of the German Pacifist Student League: LoN, Inclusion in Curriculum of Schools of State Members of Matters concerning the League, 5 August 1921, United Nations Archives at Geneva – Reference Code: R1712/44/14534, (PDF, 12). For the reply: LoN (n. 44), (PDF, 11).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

on youth was a widespread idea.[45] However, triumph is anything but certain, while the consequences of failure would clearly be devastating: youth must be saved by education, as otherwise youth will fall victim to itself. Youth appears as threat to peace, as naturally leaning towards violence and war. It is exactly this haunting nightmare which justifies the paternalistic education of young people; a howl which shall echo through time.

On 19 October 1937, less than two years before the outbreak of World War II, the 'Declaration Regarding the Teaching of History (Revision of School Text-Books)' was opened for signature in Geneva under the auspices of the League of Nations.[46] This declaration, consisting of four preambular paragraphs and six 'principles', was aimed in particular at the revision of history textbooks in schools to combat prejudices against other States.[47] Here, too, the educated youth was to serve the maintenance of peace, while the violent, bellicose youth functioned as a grim warning sign.[48] Under the

45 'Politicians who had helped to design the Geneva institutions placed substantial hopes in young people, and particularly in university students.', Daniel Laqua, 'Activism in the "Students" League of Nations': International Student Politics and the Confédération Internationale des Étudiants, 1919-1939', English Historical Review 132 (2017), 605-637 (622); 'the recovery of international dialogue seemed to depend on the capacity of youth to develop peaceful relations with former enemies', Joëlle Droux, 'Children and Youth: A Central Cause in the Circulatory Mechanisms of the League of Nations (1919-1939)', Prospects 45 (2015), 63-76 (65); in agreement: Tobias Flessenkemper, 'The European Year of Youth 2022. Aspects of a Genealogy of European Youth Cooperation', Policy Paper Note De Recherche 132 (2022), 1-4 (4).

46 LoN, Declaration Regarding the Teaching of History (Revision of School Text-Books), 2 October 1937, 5C/32347/32347, United Nations Archives at Geneva – Reference Code: R4063/5C/32347/32347, 2-3 (PDF 13-14). The declaration came into force on 24 November 1937, LoN, Declaration Regarding the Teaching of History (Revision of School Text-Books), 24 March 1938, 5C/33051/32347, United Nations Archives at Geneva – Reference Code: R4063/5C/33051/32347, (PDF 21). See generally on textbook revision in the system of the League of Nations: Eckhardt Fuchs, 'Der Völkerbund und die Institutionalisierung transnationaler Bildungsbeziehungen', Zeitschrift für Geschichtswissenschaft 54 (2006), 888-899 (892-894); Elly Hermon, 'The International Peace Education Movement, 1919-1939' in: Charles Chatfield and Peter van den Dungen (eds), *Peace Movements and Political Cultures* (University of Tennessee Press 1988), 127-142 (130-135).

47 LoN, Declaration Regarding the Teaching of History (Revision of School Text-Books), 2 October 1937, 5C/32347/32347, United Nations Archives at Geneva – Reference Code: R4063/5C/32347/32347, 2nd Principle, 2 (PDF, 13).

48 To quote the first three preambular paragraphs: '[d]esirous of strengthening and developing the good relations uniting them [Governments] with other countries; Convinced that those relations will be further strengthened if the younger generation in every country is given a wider knowledge of the history of other nations; Realising the necessity of obviating the dangers that may arise through the tendentious presentation of certain historical events in school text-books', LoN, Declaration Regarding the Teaching of History (Revision of School Text-Books), 2 October 1937, 5C/32347/32347, United Nations Archives at Geneva – Reference Code: R4063/5C/32347/32347, preambular paras 1-3, 2 (PDF, 13).See Otto Göppert, *Der Völkerbund. B. Organisation und Tätigkeit des Völkerbundes* (W. Kohlhammer 1938), 660-661.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

impression of World War II and the low acceptance rate, the declaration is considered a failure.[49]

The League's engagement with youth can also be observed institutionally in this context. On 3 August 1926, the Sub-Committee of Experts for the Instruction of Children and Youth in the Existence and Aims of the League of Nations (Sub-Committee of Experts) met for the first time.[50] The task of the Sub-Committee was described as follows:

> 'consider the best methods of co-[*2*]ordinating all official and non-official efforts designed to familiarise young people throughout the world with the principles and work of the League of Nations and train the younger generation to regard international co-operation as the normal method of conducting world affairs.'[51]

To this end, Member States could voluntarily share information on their efforts with the Leagues' Secretary-General[52] who then prepared a report[53] which was forwarded to the International Committee on Intellectual Cooperation (ICIC).[54]

Quite strikingly, the United Nations Educational, Scientific and Cultural Organization (UNESCO) took up the education of youth again shortly after World War II. This is remarkable insofar as the International Institute for Intellectual Co-operation can be regarded as UNESCO's predeces-

---

49 See the position of Romania, whose role shall be explained later, on the declaration: UNGA, 15th session, 1050th meeting, UN Doc. A/C.3/SR.1050, 9 December 1960, 346, para. 7; Ken Osborne, 'Creating the "International Mind": The League of Nations Attempts to Reform History Teaching, 1920-1939', History of Education Quarterly 56 (2016), 213-240 (228).

50 Sub-Committee of Experts, 1st session, 1st meeting, 3 August 1926, Minutes of the First Meeting, held at Geneva at 10 a. m. on August 3rd, 1926, C. I. C. I./E. J./Ie session/ P. V.1. (1), United Nations Archives at Geneva – Reference Code: R1024/13/53014/48790, 1 (PDF, 167).

51 Assembly of the League of Nations, 6th Assembly, 22 September 1925, Work of the International Committee on Intellectual Co-Operation. Resolutions Adopted by the Assembly on September 22nd, 1925 (morning), A.107.1925.XII, United Nations Archives at Geneva – Reference Code: R1018/13/46053/41815, para. 2 lit. (c), 1-2 (PDF, 5-6).

52 Assembly of the League of Nations (n. 51), para. 2 lit. (a), 1 (PDF, 5).

53 See for instance: LoN Secretary-General, Instruction of Children and Youth in the Existence and Aims of the League of Nations. Supplementary Report by the Secretary-General, 9 July 1926, A.15.1926.XII, United Nations Archives at Geneva – Reference Code: R1023/13/ 52901/48790, 1-18 (PDF, 20-37).

54 Assembly of the League of Nations, 6th Assembly, 22 September 1925, Work of the International Committee on Intellectual Co-Operation. Resolutions Proposed by the Second Committee and Adopted by the Assembly on September 22nd, 1925 (morning), A.107.1925.XII, United Nations Archives at Geneva – Reference Code: R1018/13/46053/ 41815, para. 2 lit. (b), (c), 1 (PDF, 5).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

sor.[55] This forerunner was founded by the ICIC in 1925 with the task of supporting the ICIC in the implementation of its projects.[56] In 1947, the Executive Board of UNESCO agreed to work towards an 'Educational Charter for Youth', 'which would state the terms of equal educational opportunities without distinction of race, sex or social position'.[57] The goal of an 'Educational Charter for Youth' was never reached.[58]

A few years later, on 19 August 1960, Romania proposed the agenda item 'Measures designed to promote among youth the ideas of peace, mutual respect and understanding between peoples' for the 15th session of the UN General Assembly.[59] A normative point of reference for this was Art. 26 of the Universal Declaration of Human Rights.[60] More decisive, however, might be the maintenance of peace and security in accordance with the UN Charter, in particular the first paragraph of its preamble:

> '[t]he outcome of the efforts to save succeeding generations from the scourge of war largely depends on the spirit in which the youth, called tomorrow to lead the

55 Angel (n. 13), 7; Daniel Laqua, 'Transnational Intellectual Cooperation, the League of Nations, and the Problem of Order', Journal of Global History 6 (2011), 223-247 (224 f.); Jean-Jaques Renoliet, *L'UNESCO oubliée: La Société des Nations et la coopération intellectuelle (1919-1946)* (Publications de la Sorbonne 1999), 7; Otto-Ernst Schüddekopf, 'History of Textbook Revision 1945-1965' in: Council for Cultural Co-Operation of the Council of Europe (ed.), *History Teaching and History Textbook Revision* (Strasbourg 1967), 11-41 (17).

56 ICIC, 5th session, Report by the Committee to the Council, 27 May 1925, C.288.1925.XII, United Nations Archives at Geneva – Reference Code: R1035/13C/44165/14297, 1 (PDF, 10). For a more detailed account of the relationship between the two institutions: '[t]he Committee does not regard the Institute as an artificial improvisation; it considers it to be a natural extension of itself and as the outcome of the work accomplished by it since August 1st, 1922, down to the present day. It describes the Institute as a technical secretariat and an executive organisation placed at its disposal in order to enable it to attain the double object for which the Committee itself was founded by the League of Nations, namely, to work for moral disarmament and international reconciliation by developing intellectual co-operation among all countries throughout the world and to assist scientific work and place intellectual life on a higher level by that co-operation.' For a more comprehensive account of the International Institute for Intellectual Co-Operation from the perspective of a member: Alfred Zimmern, 'The League and International Intellectual Co-Operation' in: Committee of the Geneva Institute of International Relations (ed.), *The Problems of Peace. Lectures Delivered at the Geneva Institute of International Relations at the Palais des Nations August 1926* (Oxford University Press 1927), 144-150.

57 UNESCO, General Conference, 2nd session, Teachers' Charter, an Educational Charter for Youth, 5 October 1947, 2C/46, Digital Archives UNESCO – Catalog number: 222186, 2, (PDF, 2), <https://digital.archives.unesco.org/en/collection/governing-documents/detail/7e625628-962f-11e8-8718-d89d6717b464/media/6e8396d4-eb8e-1cdb-aba0-bb736fd96ef5>, last access 13 December 2024.

58 Angel (n. 13), 22-23.

59 UNGA 15th session of 19 August 1960, UN Doc. A/4442.

60 UNGA 15th session (n. 59), 2, para. 1. For the Universal Declaration of Human Rights see: UNGA Res 217 (III) of 10 December 1948, A/RES/217(III).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

> society, is brought up today. Hence, is it possible not to be deeply concerned about acts of racial intolerance and hatred, as well as about acts of instigation of aggression and revanche that are still encouraged? It is not by accident that such acts occur precisely where the education of youth in a spirit of militarism, of national and racial hatred has been promoted or where the fight against them has been neglected.'[61]

The education – not the emancipation – of youth was thus deemed to be of 'special importance for the maintenance and strengthening of peace and for the implementation of the Charter of the United Nations', which made it urgent to regulate the education of youth under international law.[62] The paternalistic impetus, grounded in and legitimised through the imagination of youth as nationalistic, militarised threat, as 'aggression', reverberates.

While Romania proposed various options to address the problem outlined, such as a UN General Assembly resolution recommending certain actions to governments, cooperation between the UN, especially UNESCO, and individual States, and a convention on education programmes,[63] the first proposal seems to have prevailed.

An intermediate step towards this was a resolution adopted on 18 December 1960 by the Third Committee of the UN General Assembly, entitled 'Measures designed to promote among youth the ideals of peace, mutual respect and understanding between peoples'.[64] Romania was aware of the path it was following, referring during the meeting of the Committee to the 'Declaration Regarding the Teaching of History (Re-vision of School Text-Books)' as well as to the role of UNESCO and its efforts to achieve a binding treaty.[65] It was precisely this formal goal that Romania wanted to take up again with the initiated resolution: 'the time had come to frame an international instrument imposing legal obligations on States'.[66] In terms of substance, Romania's intention was, as already described, to realise the purposes of the UN according to Art. 1 of the Charter:

> '[t]he future of the world depended, to a large extent, on the atmosphere in which the young were brought up. If, as they grew up, they absorbed peaceful ideas and were taught to respect the rights, culture and way of life of other peoples,

61 UNGA 15th session (n. 59), 2, para. 2.

62 UNGA 15th session (n. 59), para. 4.

63 UNGA 15th session (n. 59), para. 5 f.

64 UNGA Res 1572 (XX) of 18 December 1960, A/RES/1572; for information on the further development of the declaration: UNGA, 20th session, UN Doc. A/6120, 29 November 1965.

65 UNGA, 15th session (n. 49), 346, para. 7.

66 UNGA, 15th session (n. 49). However, this goal was never to be achieved in this form either.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

> one of the objectives of the United Nations Charter would be achieved thereby. If, on the other hand, hatred, prejudice, a liking for violence and feelings of racial superiority were inculcated into them, the chances of international peace and understanding would be much reduced.'[67]

Youth, therefore, should not acquire autonomy through education, but be gained and used as an instrument for *the* peace as defined by an international organisation. Once more, Romania tied this paternalistic policy to the regressive notion of youth as violence, as a threat consuming nothing less than '[t]he future of the world'. Youth reappears as a Janus-faced master over the fate of the international community.

About five years later, on 7 December 1965, the UN General Assembly proclaimed the awaited 'Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples'.[68] The declaration marks the preliminary climax of the presented decades-long engagement with youth and education in international law, and emerged as a crucial 'reference[s]'[69] for future documents.[70] Again, continuity was intended as the contributions of UNESCO 'towards the education of young people in the spirit of international understanding, cooperation and peace' were recognised in the declaration.[71] Even more, a certain resemblance with the mentioned resolution of the League's Assembly from 1923 can be inferred too.[72]

The declaration consists of eleven preambular paragraphs and six principles. Already the preambular paragraphs charge youth with an important task: 'young people […] are destined to guide the fortunes of mankind'.[73] What these fortunes are is defined by Principle I which loads youth with expectations: 'equal rights for all human beings and all nations, economic and social progress, disarmament and the maintenance of international peace and security'[74] – all of this is to be championed by youth. But this bright future rests upon a premise in the present:

---

67 UNGA, 15th session (n. 49), 345, para. 1. Romania understood young people to be persons between the ages of five and 19, and thus included only a limited part of the group defined here, see: UNGA, 15th session (n. 49), 345, para. 5.

68 UNGA Res 2037 (XX) of 7 December 1965, A/RES/2037 (XX).

69 Kennedy (n. 36), 10.

70 See Hannah Birkenkötter, Heidrun Fritze and Ann-Christine Niepelt, 'Jugendarbeit als Jugendpartizipation – Die Deutsche Gesellschaft für die Vereinten Nationen und Jugend' in: Norman Weiß and Nikolaus Dörr (eds) *Die Deutsche Gesellschaft für die Vereinten Nationen (DGVN). Geschichte, Organisation und politisches Wirken, 1952-2017* (Nomos 2017), 155-192 (158).

71 UNGA Res 2037 (XX) (n. 68), preambular para. 4.

72 Angel (n. 13), 9.

73 UNGA Res 2037 (XX) (n. 68), preambular para. 7.

74 UNGA Res 2037 (XX) (n. 68), Principle I.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

> '[y]oung people must become conscious of their responsibilities in the world they will be called upon to manage and should be inspired with confidence in a future of happiness for mankind'.[75]

Thus, once more, youth has to be educated as the preambular paragraphs suggest.[76] However, this endeavour is balanced on a knife-edge. The resolution recalls 'that under the terms of the Charter of the United Nations the peoples have declared themselves determined to save succeeding generations from the scourge of war'.[77] The term 'succeeding generations' is to be equated with 'young people' as the declaration is devoted to 'youth', 'young people', and 'the young' (terms which are used interchangeably), and as Romania – the State which initiated the declaration – clarified explicitly.[78] In this context a menacing image surfaces again: only an educated youth can save itself for the good of all. Youth re-emerges as the bright idealistic promise and as the looming disastrous betrayal.

With this account, the League's remarkable institutional and normative engagement with youth as well as its reception in the UN system becomes visible. The impetus always remained the same: the education of youth to maintain peace, to prevent another world war. Youth appears as ideal and as deviation. The nightmare of youth plunging the world into war haunts international law which dreams of youth honouring the promise of peace. As youth is charged with such important responsibilities as human rights, economic and social development, disarmament, and the maintenance of international peace and security, international law must act as regulator. Youth must be educated by States to not fall victim to itself. Youth's autonomy must thus yield to fear-induced paternalism. Social-anthropologists Jean and John Comaroff have identified and stressed youth's 'intrinsic bipolarity, its doubling'.[79] International law has historically idealised and demonised youth, which can be grasped best as a dichotomy.[80] International

75 UNGA Res 2037 (XX) (n. 68), Principle VI, para. 2.

76 UNGA Res 2037 (XX) (n. 68), preambular paras 4, 9, 10.

77 UNGA Res 2037 (XX) (n. 68), preambular para. 1.

78 'In adopting this Declaration, the United Nations, whose Charter opens With the words: "We the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind […]" for the first time addresses the new generation directly and solemnly, calling upon it to concentrate its efforts on the noble purposes of ensuring international peace and security based on the indestructible principles of mutual respect and understanding between peoples.', UNGA, 20th session, 1390th meeting, UN Doc. A/PV.1390, 7 December 1965, 3, para. 31.

79 Comaroff and Comaroff (n. 1), 280.

80 Gill Jones uses 'heroes and villains', albeit less as a dichotomy and more as a description: Gill Jones, *Youth* (Polity Press 2009), 2; see also: Sobe (n. 31), 99.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

law has constructed youth as promise/peril, dream/nightmare, as progress/decline.[81]

III. Continuity and Commonalities

This is not an account of the past. Despite the alluring international legal discourses on youth participation and youth protection, youth's construction can still be appreciated through the progress/decline dichotomy. To illustrate this, I will draw only on one, yet authoritative example: the UN Security Council.

Since 2015, the UN Security Council has adopted three 'Youth, Peace and Security resolutions' (YPS resolutions) as part of its 'Youth, Peace and Security Agenda' (YPS Agenda).[82] In these resolutions youth is constructed as 'unique demographic dividend that can contribute to lasting peace and economic prosperity',[83] as 'positive role models in preventing and countering violent extremism',[84] as 'agents of change in countering terrorism and violent extremism';[85] youth reappears as the promise of peace. Youth is further idealised as its manifold qualities are listed: 'maintenance and promotion of peace and security',[86] 'prevention and resolution of conflicts',[87] 'success of peacekeeping and peacebuilding',[88] 'justice and reconciliation'[89] – if the instrument of youth is only employed in the right manner, all those dreams may come true.

But there is a dark side to youth. The UN Security Council explicitly recognises 'the rise of radicalization to violence and violent extremism,

81 This is not to say that this is the sole dichotomy of youth (re-)produced by international law (just like there is more than one dichotomy with respect to gender, for instance), but rather that it is the one studied here.

82 UNSC Res 2250 of 9 December 2015, S/RES/2250; UNSC Res 2419 of 6 June 2018, S/RES/2419; UNSC Res 2535 of 14 July 2020, S/RES/2535.

83 UNSC Res 2250 (n. 82), preambular para. 9; UNSC Res 2535 (n. 82), preambular para. 12.

84 UNSC Res 2250 (n. 82), preambular para. 12.

85 UNSC Res 2535 (n. 82), preambular para. 16.

86 UNSC Res 2250 (n. 82), preambular para. 7; see also UNSC Res 2250 (n. 82), preambular para. 17; UNSC Res 2419 (n. 82), preambular para. 9; UNSC Res 2535 (n. 82), preambular para. 7; see also UNSC Res 2535 (n. 82), preambular para. 13.

87 UNSC Res 2250 (n. 82), preambular para. 8; UNSC Res 2419 (n. 82), preambular para. 10; UNSC Res 2535 (n. 82), preambular para. 7.

88 UNSC Res 2250 (n. 82), preambular para. 8; UNSC Res 2419 (n. 82), preambular para. 10; see also UNSC Res 2535 (n. 82), preambular para. 7.

89 UNSC Res 2250 (n. 82), preambular para. 9; UNSC Res 2535 (n. 82), preambular para. 12.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

especially among youth' which 'threatens stability and development, and can often derail peacebuilding efforts and foment conflict'.[90] Modern information and communication technologies used by terrorists – no longer history school textbooks distributed by States – incite youth to commit acts of violence and destruction.[91] While the medium has changed, the pattern remains the same.

But who exactly is this youth we have to fear? The YPS resolutions are embedded in the 'Youth Bulge Theory', according to which a surplus population of young people has the potential to destabilise a State.[92] Youth in the YPS resolutions' efforts of counterterrorism and extremism prevention is not something neutral as

> 'the youth bulge is personified in negative, racialized and gendered terms as an angry, young brown man from Africa, the Middle East, or parts of Asia or Latin America, often marked as a terrorist.'[93]

The racialised and gendered conceptualisation of youth leaves the progress/decline dichotomy intact. The question is not *whether* youth must be feared but *which* youth.

For the YPS resolutions, the impetus remains the same as in 1965: 'save succeeding generations from the scourge of war'.[94] Education, though no longer the sole focus, remains of great importance. The UN Security Council recognises 'the right to education and its contribution to the achievement of peace and security'[95] and expresses concern 'that the disruption of youth's access to quality education and economic opportunities has a dramatic impact on durable peace and reconciliation'.[96] Hence, States are once again called to duty. The UN Security Council '*[u]rges* Member States to support, as appropriate, quality education for peace that equips youth with the ability to engage constructively in civic structures and inclusive political processes'[97] and '*[c]alls upon* Member States, to protect educational institutions as spaces

90 UNSC Res 2250 (n. 82), preambular para. 10.

91 UNSC Res 2250 (n. 82), preambular para. 11; UNSC Res 2419 (n. 82), preambular para. 16; UNSC Res 2535 (n. 82), operative para. 9.

92 Maryssoun Sukarieh and Stuart Tannock, 'The Global Securitization of Youth', TWQ 39 (2018), 854-870 (857-859).

93 Anne Hendrixson, 'Beyond Bonus or Bomb: Upholding the Sexual and Reproductive Health of Young People', Reproductive Health Matters 22 (2014), 125-134 (128).

94 UNSC Res 2419 (n. 82), preambular para. 8; see also UNSC Res 2535 (n. 82), preambular para. 6.

95 UNSC Res 2535 (n. 82), preambular para. 23; UNSC Res 2419 (n. 82), preambular para. 19.

96 UNSC Res 2250 (n. 82), preambular para. 6; UNSC Res 2535 (n. 82), preambular para. 11.

97 UNSC Res 2250 (n. 82), operative para. 12; UNSC Res 2535 (n. 82), preambular para. 11.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

free from all forms of violence'.[98] More fundamentally, the Security Council promotes the protection and participation of youth (regardless of what exactly that might encompass) as a protected and participating youth delivers peace, while a neglected and ignored youth brings terror, thereby keeping an all too familiar dichotomy alive.[99]

The inspiring yet haunting portrait of youth is painted anew, albeit with different colours as the UN Security Council securitises more than just education.[100] If youth is not saved (be it by education, employment, online protection …), it will fall victim to itself. Youth is constructed as promise/peril, as dream/nightmare, as progress/decline.

Is this construction in any way deplorable? With the presented account, I did not only intend to describe the meaning of youth but forward a normative claim too. Instrumentalising youth for *the* peace is based on a preconception of peace. For instance, the UN Security Council may invite young people to promote peace but will never surrender its conceptual or definitional monopoly; the UN Security Council ultimately decides what peace is – not young people.[101] The mentioned education, protection, and participation of young people appears not as an end in itself, but as a means to exert power.[102] Beyond that, idealising and vilifying youth helps States and international organisations to circumvent tougher questions. For instance, during the meeting of the UN General Assembly's Third Committee in December 1960, Romania essentially acknowledged that other instruments than employing youth for the cause of peace are simply not available.[103] It is much more demanding for States to agree on a more effective and binding regime for the prohibition of the use of force. When diplomacy and negotiations fail, pointing at youth as the main bearer of all responsibility comes in handy. The

98 UNSC Res 2419 (n. 82), operative para. 12; UNSC Res 2535 (n. 82), operative para. 12.

99 UNSC Res 2250 (n. 82), preambular para. 17, operative para. 2; UNSC Res 2419 (n. 82), preambular para. 10, operative para. 2; UNSC Res 2535 (n. 82), preambular para. 13, operative para. 1.

100 Sukarieh and Tannock (n. 92), 854-870.

101 See for a similar critique with regard to the Council's Women, Peace and Security Agenda: Dianne Otto, 'Beyond Stories of Victory and Danger: Resisting Feminism's Amenability to Serving Security Council Politics' in: Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave Macmillan 2014), 157-172 (161).

102 Again, for a feminist parallel: '[t]his feminist alliance with the Security Council enables – even encourages – the Council to present itself as a champion of feminist goals and a creator of international law, and endorses the idea that violation of women's rights could provide a trigger for the imposition of sanctions, the collective use of force or a justification for military occupation. This surely gives the Security Council and its hegemonic "law" too much power, undermining democratic and redistributive politics, and women's agency.', Otto (n. 101).

103 UNGA, 15th session (n. 49), 345, para. 1.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

role of States vanishes in the fog of a narrative. Constructing youth as progress/decline thus served – and continues to serve – to conceal power-differentials and does nothing to prevent the outbreak of wars. Instrumentalising youth as progress does not encourage empowerment, but control over young people.[104] Ultimately, the imagery of youth as progress forms part of a larger 'language of progress', which is, as Thomas Skouteris aptly observes, a 'language of authority, to legitimize and de-legitimize', repressing 'competing claims or understandings'.[105] The rhetoric of progress thus serves particular interests and 'policy making',[106] something which I have tried to chronicle here with respect to youth and young people. Acknowledging this also means to recognise the space allocated to youth in stories of progress.

Having examined the progress/decline dichotomy, which is so inherent to youth, it may already surface that structural elements of international law and youth turn out to be identical. Martti Koskenniemi posed the question 'what is international law for?' and gave two answers which are of interest here.[107] According to Koskenniemi 'international law's objective is always also international law itself' as international law offers rather form than substance.[108] Here rests the possibility of manifold meanings:

> 'international law's value and its misery lie in its being the fragile surface of political community among states, other communities, individuals who disagree about their preferences but do this within a structure that invites them to argue in terms of an assumed universality.'[109]

As illustrated above, youth as such is an empty vessel; youth is loaded with different and conflicting values and meanings. As there is no agreement on the substance of youth, the notion of youth offers a structure to dispose interests. The objective of youth is always also youth itself. Youth is its own saviour; only the hero of youth can prevent the villain of youth.

While one may argue that any construct essentially embraces diverse and conflicting meanings, I want to go beyond that. To draw on Koskenniemi again, 'international law exists as a promise of justice'.[110] However, '[t]he justice towards which international law points cannot be enumerated in sub-

104 See Anita Harris, *Future Girl. Young Women in the Twenty-First Century* (Routledge 2004), 1.

105 Skouteris (n. 6), 5.

106 Skouteris (n. 6), 5.

107 For the other two responses see Martti Koskenniemi, 'What is International Law For?' in: Martti Koskenniemi (ed.) *The Politics of International Law* (Hart Publishing 2011), 241-267 (265 f.).

108 Koskenniemi (n. 107), 266.

109 Koskenniemi (n. 107), 266.

110 Koskenniemi (n. 107), 266.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

stantive values, interests, or objectives'.[111] International law can never fulfil its promise.[112] To emphasise this crucial point with Koskenniemi, '[t]here is a Messianic structure to international law, the announcement of something that remains eternally postponed'.[113] To use Skouteris' categorisation, this notion of international law can be read and classified as 'international law *as* progress',[114] meaning 'the idea that international law itself has a self-evident and immanent progressive value (for the world, for civilization, for humanity)'.[115] It is here where structural elements of youth are fully disclosed. Youth as progress turns out to be identical to international law's 'Messianic structure'; both are united in their announcement of a brighter future, in their dream to realise 'peace and security', 'human rights', 'international co-operation', etc. Youth as progress conveys an idea of justice, which can never be grasped in substantive terms. That is why the promise of youth is used by various actors in various settings, be it the Ukrainian self-defence against the Russian aggression, the UN Secretary-General's effort to remain relevant amid the climate crisis, the League of Nations's endeavour to prevent World War II, and so on and so forth. According to Koskenniemi, '[i]t is this "to-come" that enables the criticism of the law's own violence'.[116] Because international law has not reached the desired point of justice, international law can be condemned. Because youth has not metamorphosed into the long-awaited hero yet, the marauding villain of youth can be challenged. Hopes and aspirations are placed in youth and international law. Youth and international law are promises which are never to be kept. Youth and international law *are constructed as progress*.

How can we explain this finding? Can we make any sense of it? I believe 'youth as progress' and 'international law as progress' should not be considered as a coincidental parallel but as a strategic alliance. What I want to suggest is that the notion of youth as progress serves as an instrument for the idea of international law as progress and the policies forwarded in its name. Thus, an intimate, not a peripheral relationship emerges. Quite tellingly, Skouteris traced the use of the notion of international law as progress in the inter-war period and found that it was accepted that the future of international law, its progress, was put in the hands of a specific group:

111 Koskenniemi (n. 107), 266.

112 Koskenniemi (n. 107), 267.

113 Koskenniemi (n. 107), 266; see 'However difficult the project will be, international lawyers share an orientation to a past of sovereign states and a future of international law. The discipline looks forward, confident that we will arrive in the future with history at our side.', David Kennedy, 'When Renewal Repeats: Thinking Against the Box', N. Y. U. J. Int' l L. & Pol. 32 (2000), 335-500 (347).

114 For two other uses of progress in international law: Skouteris (n. 6), 6 f.

115 Skouteris (n. 6), 6.

116 Koskenniemi (n. 107), 267.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

> '[i]t is ultimately the duty of public international lawyers to educate the general public, especially the youth, and to do everything within their means to disseminate the new internationalist spirit that endorses the idea of a community of democratic states.'[117]

Self-evidently, the future of international law is linked to the fate of youth.[118] A progressing youth contributes to international law reaching its destination, finally. This is a one-sided, hierarchical, paternalistic relationship. In this story of youth as progress, youth will remain a tool, which needs to be educated, protected, sharpened, tamed, etc., by international law(-yers). To use Koskenniemi one last time, international law as Messiah has found in youth its disciple. This conception enables us to order the shared structural elements of youth and international law as well as their relationship: youth as progress furthers international law as progress.

IV. Conclusion

In the foregoing, I have presented four dimensions of the notion of youth as progress, which certainly overlap but may be divided in the following terms. First, on an analytical level, I have explored when and how youth was constructed as progress in international law. Second, on a normative level, I have argued that this construction is alarming as the content of progress is not defined by young people, but, for instance, the UN Security Council. Third, on a functional level, I have tried to show that constructing youth as progress serves as an instrument to conceal the role of States, to further their policies and to extend their reach over young people. In this sense, far from being an emancipatory tool, constructing youth as progress upholds or even fosters power-differentials. Fourth, on a structural level, I have suggested that the notion of 'youth as progress' was and is gladly employed by and (re-) produced in international law because youth and international law share certain structural commonalities. In this light, I have condensed their relationship to a simple formula, proposing that youth as progress furthers international law as progress.

---

117 Thomas Skouteris, 'The Vocabulary of Progress in Interwar International Law: An Intellectual Portrait of Stelios Seferiades', EJIL 16 (2005), 823-856 (836); similarly also: Skouteris (n. 117), 841; this idea or conviction has been mentioned before, see above, 'II. Between Progress and Decline: a Mini-History', 10.

118 In this context, the story of international law as progress serves an idea of democracy, Skouteris (n. 117), 833-838. However, Skouteris stresses that narratives of progress may serve various purposes (within the meaning of democracy and beyond), Skouteris (n. 6), 9-15.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity

Eliana Cusato*
Faculty of Law, University of Amsterdam, Amsterdam, The Netherlands
e. t.cusato@uva.nl

Abstract 865
Keywords 866
I. Introduction 866
II. A Brief History of Linear Time: From European Middle Ages to the Rest of the World 871
III. Progress in International Environmental Law: the Temporalities of Sustainability and Ambition Discourses 877
IV. International Law, Ecological Collapse, and Engagements with the Future 885
V. Conclusion 892

'A linear history will lead us to linear politics and neither will serve us well in an asymmetrical world.'

Elsa Barkley Brown, '"What Has Happened Here": The Politics of Difference in Women's History and Feminist Politics', Feminist Studies 18 (1992), 295.

'Once upon a time I too thought that the future was the only competent judge of our works and actions. Later on I understood that chasing after the future is the worse conformism of all, a craven flattery of the mighty.'

Milan Kundera, *Slowness* (Faber & Faber 1996), 19-20.

Abstract

This article takes off from the observation that the rhetoric of progress in international law is imbued with temporal assumptions. Through its promise

* Assistant Professor at the Amsterdam Law School (UvA) and member of the Amsterdam Center for International Law (ACIL). I wish to express my gratitude to the convenors of this Symposium, the two anonymous reviewers, and the editors of the journal for their generous engagement with my work. This article also befitted from comments and exchanges with Philipp Dann, Emily Jones, and Anna Saunders, as well as my colleagues at the Amsterdam Center for International Law. Errors and omissions remain my own.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

of human progress, international law presumes a linear trajectory of time, which includes a break from an inferior past and embracing of futurity. While the narrative of progress has been analysed and criticised from multiple angles, its temporal dimensions have remained understudied. This article focuses on the distributive effects of the alliance between progress and linear time in the context of the slow ecological emergency. Drawing upon debates in different disciplines, it shows how international law and discourses are involved in upholding temporal assumptions that may reinforce existing inequalities and run against contemporary ecological imperatives. Through the examples of sustainable development, the concept of ambition, and debates around intergenerational justice, I argue that the field's forward-moving temporality fails to adequately account for the uneven distribution of futurity engendered by climate change and environmental devastation. Understanding how certain ideas about time are made, unmade, and remade in/through international law is central to think about the present and future of life on this planet. It also offers a novel perspective to explore the possibilities for contestation and change within and beyond the legal order.

Keywords

progress – linear time – ecological emergency – futurity – intergenerational justice

I. Introduction

Given major power rivalries, anthropogenic climate disruptions, and ordinary and extraordinary acts of violence against oppressed people, speaking today of progress and international law would seem ridiculous, if not obscene. In the last decade or so, the notion that international legalisation is a force for progress, or even a form of progress in itself, has been problematised by a number of scholars.[1] Yet, has the progressive vision of international law been entirely abandoned? Or has the progress discourse simply become less

[1] See e. g. Thomas Skouteris, *The Notion of Progress in International Law Discourse* (T. M. C. Acer Press 2010); Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?', EJIL 25 (2014), 425-444. In addition to the literature specifically on progress and international law, one must refer also to the work of legal scholars questioning the teleological orientation of the field and the associated civilising narrative. See e. g. Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

cruelly optimistic,[2] and is still underwriting legal norms, debates, and practices? If so, what is it that makes the teleology of progress so inescapable? This article takes off from the observation that the rhetoric of progress in international law is imbued with temporal assumptions.Through its promise of human progress, international law presumes a linear trajectory of time, which includes a break from an inferior past and embracing of futurity.[3] While the narrative of progress in international law has been analysed from multiple angles, the distributive effects of its linear temporality have remained understudied. This contribution explores how, by incorporating temporalities that are primarily (though not exclusively) oriented towards the future, international legal norms and discourses place human and non-humans along an imagined line.[4] In this process, the allocation of life chances, material resources, privileges, and vulnerabilities is not done equally. An analysis of the temporal dimensions of the progress discourse enables to cast the role of international law in legitimising certain distributive outcomes in a new light.

This analysis seems especially needed in the context of contemporary ecological precarities. Scholars from different disciplines and intellectual traditions have shown how the temporalities of industrial capitalism and neoliberal markets are involved in the current environmental catastrophe.[5] Ideas and practices of speed and acceleration, for instance, have been central building blocks of modernity and of a globalised economy.[6] Yet, the timescales of the natural world exist in tension with the abstract and accelerating temporal dynamics of modernity and capitalism.[7] Given the way climate change and ecological collapse are amplifying the existing inequalities and marginalisations that are produced by the global capitalist economy, the future possibilities open to differently situated individuals and communities are radically unequal.[8]

---

2 Lauren Berlant, *Cruel Optimism* (Duke University Press 2011).

3 Geoff Gordon, 'The Time of Contingency in International Law' in: Ingo Venzke and Kevin J. Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), 162-174.

4 Fleur Johns, 'The Temporal Rivalries of Human Rights', Ind. J. Global Legal Stud. 23 (2016), 39-60 (43).

5 See e. g. Barbara Adam, Timescapes of Modernity: The Environment and Invisible Hazards (Routledge 1998); Paul Huebener, Nature's Broken Clocks: Reimagining Time in the Face of the Environmental Crisis (University of Regina Press 2020).

6 Hartmut Rosa, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2013); for an analysis of the role of international law, see Nicolas Perrone, 'Speed, Law and the Global Economy: How Economic Acceleration Contributes to Inequality and Precarity', LJIL 33 (2020), 557-576.

7 See e. g. Adam (n. 5).

8 Kevin Grove et al., 'The Uneven Distribution of Futurity: Slow Emergencies and the Event of COVID -19',Geographical Research 60 (2022), 6-17.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Although often assumed rather than problematised, time is crucial to the ordinary and extraordinary operation of law, to its legitimacy and authority.[9] When it comes to the field of international environmental law, temporal concepts, and orientations are embedded in legal norms addressing a variety of environmental concerns.[10] Examples include the principles of prevention,[11] precaution,[12] intergenerational equity,[13] and the invocation of rights of future generations in climate litigation.[14] While the topic of time has gathered recent interest in international legal scholarship,[15] when reflecting on the distributive outcomes of the alliance of time and progress there is still a lot to unpack and learn from other fields of study. The question of law's ambivalent, yet constitutive role, in temporal governance has been the object of a prolific debate in socio-legal studies.[16] Scholars working on the interrelation of law and time have built upon a variety of intellectual traditions showing, notably, how the conceptualisation of time as a linear, unidirectional, and measurable entity emerged in a specific historical moment, under the pressure of modern capitalist and imperialist forces.[17] In so doing, this literature has illustrated how modern temporal structures are deeply embedded in Western ideas and epistemologies,

9 Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers', UC Irvine Law Review 4 (2014), 65-96.

10 Benjamin Richardson, *Time and Environmental Law: Telling Nature's Time* (Cambridge University Press 2017); Julia Dehm, 'The Temporalities of Environmental Human Rights' in: Kathryn McNeilly and Ben Warwick (eds), *The Times and Temporalities of International Human Rights Law* (Bloomsbury 2022), 33.

11 Nicolas de Sadeleer, *Environmental Principles: From Political Slogan to Legal Rules* (Oxford University Press 2020).

12 Jaqueline Peel, The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty (The Federation Press 2005).

13 Richard P. Hiskes, Human Rights to a Green Future: Environmental Rights and Intergenerational Justice (Cambridge University Press 2009).

14 Larissa Parker et al., 'When the Kids Put Climate Change on Trial Youth Focused Rights-Based Climate Litigation around the World', Journal of Human Rights and Environment 13 (2022), 64-89.

15 Most recent contributions include Klara Polackova Van der Ploeg, Luca Pasquet, León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer 2022); Kathryn McNeilly and Ben Warwick (eds) *The Times and Temporalities of International Human Rights Law* (Bloomsbury 2022); Michelle Staggs Kelsall, 'Disordering International Law', EJIL 33 (2022), 729-759.

16 See e. g. Martijn Stronks, *Grasping Legal Time: Temporality and European Migration Law* (Cambridge University Press 2022); Linette J. Chua, 'Interregna: Time, Law, and Resistance', Law and Social Inquiry 46 (2021), 268-291; Tanzil Chowdhury, *Time, Temporality and Legal Judgment* (Routledge 2020); Sian Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019); Emily Grabham, *Brewing Legal Times: Things, Form and the Enactment of Law* (University of Toronto Press 2016).

17 See e. g. Vanessa Ogle, 'Time, Temporality and the History of Capitalism', Past and Present 243 (2019), 312-327; Vanessa Ogle, *The Global Transformation of Time 1870-1950* (Harvard University Press 2015).

 DOI 10.17104/0044-2348-2024-4-865

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

and mobilised to legitimise the existing unequal structures.[18] Moreover, through an analysis of different domestic and transnational legal regimes, this scholarship has drawn attention to the asymmetrical effects of the temporalities entrenched *within* the law – how temporalities are not just aesthetic qualities of the law, but they determine who is recognised as a legal subject, who has rights, who has access to remedies, and who not.[19] Thus, even at a more granular level, time operates as a legal technique of inclusion and exclusion.[20]

In this article I build upon an interdisciplinary literature to explore what is at stakes when a future oriented imaginary of time becomes the reference to enact legal responses to ecological collapse and its uneven impacts. While this piece is primarily concerned with the alliance of progress and linear time in the context of the unfolding ecological crisis, it is important to note that notions of spatiality and temporality often operate together to legitimise and reinforce existing patters of exclusions.[21] However, a central aim here is to contribute to recent debates on the relationship between law and time by exploring how notions of temporal linearity are imbued in our field and shape the spectrum of legal approaches to what we may call the ecological slow emergency. The concept of slow emergency, like that of slow violence,[22] invites to pay particular attention to the temporal dimensions of governance responses to environmental disruptions that often unfold in non-linear, fluid, and discontinuous ways.[23] Furthermore, it illuminates the distinctive racialised and gendered

18 Kimberly Hutchings, Time and World Politics: Thinking the Present (Manchester University Press 2008); Dipesh Chakrabarty, Provincializing Europe: Postcolonial Thought and Historical Difference (1st edn, Princeton University Press 2000).

19 The notion of 'temporalities within the law' is taken from Keebet von Benda-Beckmann, 'Trust and the Temporalities of Law', Journal of Legal Pluralism & Unofficial Law 46 (2014), 1-17, observing that '[t]emporalities within law affect the specific ways in which rights, obligations, and prohibitions entailed in legal relationships, institutions, and procedures are positioned in time, and the differential ways in which these temporalities affect the outcome of legal procedures and decisions'.

20 See Stronks, (n. 16), 2, showing in his book how it is by 'means of time' that migration law makes distinctions between different categories of people, distinctions that have fundamental consequences for migrants' residence entitlements and rights. See also Chowdhury (n. 16).

21 The concept of the 'chronotope' elaborated by Mariana Valverde acknowledges those interactions, see Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015). See also Gavin Sullivan, 'Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List', Transnational Legal Theory 5 (2014), 81-127.

22 Rob Nixon, Slow Violence and the Environmentalism of the Poor (Harvard University Press 2011). See also Eliana Cusato, The Ecology of War and Peace: Marginalising Slow and Structural Violence in International Law (Cambridge University Press 2021).

23 Adam (n. 5), 9, calling attention to how the effects of environmentally harmful conduct are often spatially and temporally dispersed, for instance, diseases have long periods of latency and may 'work invisibly below the surface until they materialized as symptoms'.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

politics involved in the management of interrelated social, economic, political, and ecological emergencies. The dominant linear imaginary of emergency management, which assumes a transition from disruption, to response, and eventually recovery, does not apply equally to all subjects affected by ecological collapse.[24] As international law is so central to governing the slow ecological emergency, its temporal orientations deserve a closer scrutiny. How do conceptions of chronological linearity and progress interpenetrate and work together in international environmental law? How are they encoded in/through legal concepts and discourses? What are their broader normative and distributive outcomes in terms of constituting (unequal) legal relationships?

The article proceeds in three parts. Section 2 takes a step back and deals with the preliminary question of international law's temporal assumptions by considering how (Western) notions of linear time emerged and became dominant across the globe through colonial domination, and the role of law in that process. It revisits Carol Greenhouse's socio-legal history of linear time in Middle Age Europe[25] to illustrate how conceptions of linear time were from the outset associated with ideas of redemption, modernity, and progress, as well as how those ideas sustained political economic projects that resulted in the commodification of the natural world. Section 3 examines the role of progress narratives within the field of international environmental law. Through a few examples (sustainable development, environmental human rights, and the concept of ambition), I illustrate the embeddedness of progress within the field, as well as the normative and material issues at stake in the relationship between progress and forward moving temporality. Section 4 develops this line of arguments by beginning a reflection – that certainly deserves to be continued – on the distributive implications of legal engagements with the future in the context of recent debates on climate justice and the rights of future generations.[26] I contend that dominant disciplinary commitments to the future are problematic for two reasons: first, because, as other have convincingly argued,[27] the assumption about the openness of the

24 Ben Anderson, Kevin Grove, Lauren Rickards and Matthew Kearnes, 'Slow Emergencies: Temporality and the Racialized Biopolitics of Emergency Governance', Progress in Human Geography 44 (4) (2020), 621-639.

25 Carol Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law', Yale Law Journal 98 (1989), 1631-1651.

26 See e. g. Stephen Humphreys, 'Against Future Generations', EJIL 33 (2022), 1061. But see Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla, 'In Defence of Future Generations: A Reply to Stephen Humphreys', EJIL 34 (2023), 651-668; Peter Lawrence, 'International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys', EJIL 34 (2023), 669-682.

27 See e. g. Julia Dehm, 'International Law, Temporalities, and Narratives of the Climate Crisis', London Review of International Law 4 (2016), 167-193.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

future fails to account for structural constrains and the burdens inherited from the past; second, because the liberal imaginary of an open future operates to dismiss the uneven distribution of futurity. The latter concept signals how 'the modern experience of an anticipatory orientation to the future as potential for change, growth, development, and becoming-otherwise to oneself has been conditioned by historically specific de-futuring practices that violently deny these same possibilities to the racialised Others of the modern Self'.[28] To put it differently, legally framing the future as an open horizon erases the many foreclosed futurities of living downwind and through ecological devastations.

The overall argument is that ideas of progress in and through law, and their associated temporality, operate to mask the unequal effects of the political economic order and thus legitimise the perpetuation of socio-ecological exclusions. By investigating the alliances of international law and specific notions of linear time, this article shows 'how the vocabularies created through these alliances became generalised and thereby difficult to escape'.[29] Yet, by reflecting the distributive outcomes of linear time, this article also offers a novel perspective to explore the possibilities for contestation and change within and beyond the legal order. If ideas of chronological linearity and progress are implicated in the making of the current (unequal) political, economic, and legal ordering, any proposal to devise more-liveable presents and futures needs to reckon with international law's temporal foundations.

II. A Brief History of Linear Time: From European Middle Ages to the Rest of the World

While concepts of time vary widely around the world, and different societies engage different temporal logics to organise themselves, the idea of time as a directional line that moves from past to present, towards the future has pervaded modern understandings of the law.[30] Although chronological linearity is not the only temporal notion that underwrites juridical concepts, legal discourses, and practices,[31] Renisa Mawani, among others, has argued that modern law exhibits a common temporal disposition: its pasts are

28 Grove et al. (n. 8), 7.

29 Anna Saunders, 'Law after Dominium: Thinking with Martti Koskenniemi on Property, Sovereignty and Transformation', Transnational Legal Theory 13 (2023), 475-492.

30 Beynon-Jones and Grabham (n. 16), 19.

31 Johns (n. 4), 44, referring for instance to limitations periods, which interrupt law's forward moving temporality, and the doctrine of intertemporal law, which requires to go back in time to appreciate 'judicial facts' in light of 'the law contemporary with [them]'.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

teleological in orientation, reflecting both a continuity and a rupture with what came before.[32] Through its promise of human betterment and progress, law creates a temporal trajectory and overarching telos that seeks to (but cannot entirely) absorb 'Other', often conflicting, experiences and ideas of time.[33]

A useful starting point to explore how notions of linear time have become dominant and influenced legal forms and discourses is the fundamental work of Carol Greenhouse.[34] Greenhouse's historical analysis of the emergence of linear time in the Western tradition is instructive to, then, interrogate the role of law in the management of multiple temporalities and the institutionalisation of a specific future-oriented temporality.

The idea of linear time that now we take for granted in the West came to Europe with Christianity.[35] The concept of linear time, as the segment between creation and judgment day, was initially a theological concern and became laicised in a long process. This process included institutional and social changes in public life and thought, as well as the invention of the mechanical clock in the XIV century.[36] The expansion of Christianity into Europe brought two ideas about time that had roots in the Jewish tradition: first, the origins of time in the Creation and, second, the end of time in a Day of Judgment. Early theologians wrote about time as a 'segment of eternity' and eternity as 'endless time'. While late medieval Christianity was not a single entity, historians point out the persistence of ideas of time and eternity: time as history of salvation.[37] Linear time became associated with the idea of incomplete nature of humanity and individual's life. The advancement of time toward a Judgment Day thus represented the advancement of human perfectibility – between a struggle for perfection and the impossibility of achieving it.[38]

Although concerned about the judgment day, ordinary medieval Europeans were not keeping or recording time. The idea of life as a measurable entity received impetus from the invention of the mechanical clock and its widespread diffusion was key to the laicisation of time, becoming one of the

32 Mawani (n. 9), 71.

33 Mawani (n. 9), 72; see also Dan Edelstein, Stefanos Geroulanos and Natasha Wheatley, 'Chronocenosis: An Introduction to Power and Time' in: Dan Edelstein, Stefanos Geroulanos and Natasha Wheatley (eds), *Power and Time: Temporalities in Conflict and the Making of History* (University of Chicago Press 2020), 1-51.

34 Greenhouse (n. 25).

35 See, generally, Jacque Le Goff, 'Au Moyen Âge: Temps de l'Église et Temps du Marchand', Annales 15 (1960), 417-433.

36 Pereira Salas Eugenio, translated by P. X. Despilho, 'L'Evolution de la Notion du Temps et Les Horlogers à l'époque Coloniale au Chili, Annales 21 (1966), 141-158.

37 See, generally, Jacque Le Goff, *La Civilisation de l'Occident Médiéval* (Arthaud 1964).

38 Greenhouse (n. 25), 1635.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

symbols of secular power and dominion.[39] As put by Greenhouse, '[t]he ticking clock was not only a *memento mori*, but a reminder of the ownership of time'.[40] In this process, linear time becomes a 'time with a purpose': the linearity of time reproduced both the call for redemption and the assumption that the individual can find meaning only by participating in a cosmic order – through 'institutions that await the end of time'.[41] This observation provides us with a fundamental insight: linear time's most persuasive claim is that of its own redemptive power in relation to individual and collective life. The promise of redemption associated with religious and then secular notions of linear time is crucial to understand international law's evolutionary ethos and orientation towards the future which play such an important role in the management of the current ecological predicaments, a point to which I shall return later.

Initially, linear time did not displace indigenous time concepts in Europe, but rather it became an addition to them. People's temporalities were cyclical (four seasons) and binary (day/night).[42] With the development of new institutional forms (the industrial workshops, the centralised state, and the courts) different forms of social time multiplied, often creating tensions. At the same time, the fact that linear time became, and still is, the dominant form of temporality organising public life derives from its popularisation in the West by the church, monarchs, and other elites who found in the image of 'time's unidirectional progress' the symbol of their legitimacy.[43] Indeed, as Greenhouse puts it, 'linear time provides a reservoir of symbols with which the legitimacy of hierarchies can be defended and reproduced', similarly to the symbols of the law and how they serve to its authority, power, and legitimacy.[44]

Three historical and social developments resulted in the dominance of conceptions of linear time within Europe (and, later, beyond it). The first is the secularisation of linear time, which happened when the clock was moved 'from the church to the palace'.[45] Second, secular monarchies resolved the

39 Jacque Le Goff, Pour un Autre Moyen Age: Temps, Travail et Culture en Occident, 18 Essais (Gallimard 1991).

40 Greenhouse (n. 25), 1636. See also Ogle (n. 17); Edward P. Thompson, 'Time, Work-Discipline and Industrial Capitalism', Past and Present 38 (1967), 56-97.

41 Greenhouse (n. 25), 1636.

42 See, generally, Johannes Fabian, *Time and the Other: How Anthropology Makes Its Object* (Columbia University Press 2014).

43 Greenhouse (n. 25), 1637.

44 Greenhouse (n. 25), 1636.

45 Greenhouse (n. 25), 1638. See Fabian (n. 42), 2, arguing that 'decisive steps toward modernity […] must be sought not in the invention of a linear conception, but in the succession of attempts to secularize Judeo-Christian time by generalizing and universalizing it'.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

contradictions between an enduring kingship and a mortal king with the notion of the 'two kings two bodies' – the separation of the monarch from the state. Third, by the time the modern period began, law had become the dominant instrument of conflict resolution in lieu of violence and the use of force. This fact, together with changes in the structure of the economy and social life, led to the emergence of the common law, the law of contracts, juries, and legal academia.[46] These developments were fundamental in reinforcing what Greenhouse calls 'the totalizing ambition of the law': the idea of law as a complete system, which however does not preclude change; law as a human product, but not identifiable as the product of a particular individual or group.[47] In being both in time (i. e. being a human product) and out of time (i. e. where does the law begin or end?), law exhibits a mythical dimension. This myth is a temporal one.[48]

Ultimately, this brief excursus illustrates that linear time ended up dominating institutional settings and public life due to its 'transcendent qualities' that allow it to absorb all other temporal idioms, which were potentially its rivals. In Europe, the belief in the transcendent qualities of linear time emerged in a specific historical moment (the Middle Ages) when linear time moved from the sacred domain to the domain of the everyday, and it was thereafter reproduced in the modern world.[49]

After being institutionalised in Europe, the concept of linear time was 'exported' and imposed upon indigenous and non-European people in parallel with the colonisation of space. By 1884, at the height of British imperialism, the institutionalisation of Greenwich Mean Time (GMT) universalised Western time and made Britain the temporal centre of the world.[50] The governance of time became, thus, the ultimate expression of rationality, imperial authority and supremacy, enabling the centre to rule on the peripheries from afar.[51] As observed by Dipesh Chakrabarty, the authority of Western time has been essential to support global histories of capitalism, as well as prevailing conceptions of the modern political sub-

46 Fabian (n. 42), 1639.

47 Fabian (n. 42), 1640.

48 Fabian (n. 42), 1640.

49 Fabian (n. 42), 1650. See also generally Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (translated by Keith Tribe, Columbia University Press 2004) on how modernity in the late 18th century, and its promises of freedom, progress, and infinite human improvement, transformed European experience of time and produced a world accelerating toward an unknown and unknowable future.

50 Kevin Birth, 'Standards in the Shadows for Everyone to See: The Supranational Regulation of Time and the Concern Over Temporal Pluralism' in: Sian Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019), 202-211.

51 Mawani (n. 9), 75. See also Ogle (n. 17).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ject.[52] To be modern, one had to embrace a Western approach to time.[53] Therefore, Western time was also self-imposed by a number of non-European societies, like Russia and Japan, that saw it as a precondition to becoming civilised, industrial, and modern nations.[54] The universalisation of 'Western time' has been associated with acts of temporal 'Othering'.[55] By constructing the 'Other', as archaic and backward the West was able to define itself as modern and progressive.[56] Of course, it is important to highlight that the Western evolutionist perspective on temporality was forcefully opposed and, while it became dominant, was never entirely successful at displacing 'Other' conceptions of time.[57]

International and transnational law were part of the project of making European time the standard across the globe. As Jennifer Beard and others have noted, the contribution of Judeo-Christian values and the teleology associated with them fulfilled a crucial function in determining the manner in which international normative frameworks supported Europe's imperial expansion.[58] These values and this particular teleology rendered indigenous populations as 'redeemable sons of God', while constructing their territories as 'areas that had to be brought into the political economy of Christendom'.[59] As put by Antony Anghie, in this 'linear, evolutionary scheme […] the non-European world is the past and the European world the future,' and 'by examining the primitive […] the [white, 'European'] modern acquires a better, clearer sense of itself'.[60] Moreover, Geoff Gordon has shown how global standardised time was encoded in and by transnational law in 19th century to advance particular political economic interests, namely the ends of trade, liberalisation, and commodification of the natural world. He argues that 'the scientific interest in globally standardised time served to affirm the

52 Chakrabarty, *Provincializing Europe* (n. 18). See also Achille Mbembe, *On the Postcolony* (University of California Press 2001).

53 Timothy Mitchell, 'The Stage of Modernity' in: Timothy Mitchell (ed.), *Questions of Modernity* (University of Minnesota Press 2000), 7-34.

54 Barbara Adam, 'The Gendered Time Politics of Globalisation: Of Shadowlands and Elusive Justice', Globalization 70 (2002), 3-29 (16 f.).

55 Fabian (n. 42). For a good overview of these debates, see Katharina Hunfeld, 'The Coloniality of Time in the Global Justice Debate: De-Centering Western Linear Temporality', Journal of Global Ethics 18 (2022), 100-117.

56 Annibal Quijano and Michael Ennis, 'Coloniality of Power, Eurocentrism, and Latin America', Nepantla: Views from the South 1 (2000), 533-580.

57 Rahul Rao, 'One Time, Many Times', Millenium 47 (2019), 299-308.

58 Jennifer Beard, *The Political Economy of Desire* (Routledge-Cavendish 2007).

59 Luis Eslava, 'Istanbul Vignettes: Observing the Everyday Operation of International Law', London Review of International Law 2 (2014), 3-47 (28).

60 Anghie (n. 1), 106.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ideology of western progress that supports the colonial project of international law'.[61]

From its sacred origins to the secular dimensions, linear conceptions of time became associated with ideas of redemption, modernity, and progress.[62] Given that, from the onset, progress and linearity were deeply intertwined with Western imaginary and social practices, they also worked to affirm the superiority a certain worldview and legal ordering.[63] As eloquently put by Greenhouse,

> '"We" moderns are supposed to know that time is "really" linear and infinitely so. We are supposed to know that *time is about motion, change, mortality, and progress*. We are supposed to know that linear time rationalized the periodicity of cyclical time and lifted the veils of timelessness from the now-visible face of human experience, and that the clock is the essential technology of modern life.'[64]

The next section turns to an analysis of the idea of progress within the field of international environmental law to illustrate, through a few examples, the mutual reinforcing relationship between law, progress, and linear time. The overarching narrative of progress through international law is challenged by the fact that most ecological problems (climate change, species extinction, ocean acidification, air pollution) are admittedly getting worse rather than better, despite decades of law-making and judiciary decisions.[65] Yet, this has not resulted in abandoning the idea of progress in/through law.[66] On the contrary the urgency to tackle those problems at the global level, and the perceived lack of political will to do so, have resulted in even more calls for legal interventions, which reinforce (rather than undermine) the progressive promise of international law to contribute to more sustainable futures.

---

61 Geoff Gordon, 'Imperial Standard Time', EJIL 29 (2019), 1197-1222 (1218).

62 As decolonial scholars have argued, the rhetoric of modernity (with the associated ideas of progress, development, growth) and the logic of coloniality are strongly interlinked. See e. g. Annibal Quijano, 'Coloniality and Modernity/Rationality', Cultural Studies 21 (2007), 168-178; Gurminder Bhambra, *Rethinking Modernity: Postcolonialism and the Sociological Imagination* (1st edn, Palgrave Macmillan 2007); Walter Mignolo, 'Delinking: The Rhetoric of Modernity, the Logic of Coloniality, and the Grammar of De-Coloniality', Cultural Studies 21 (2007), 449-514.

63 See also Altwicker and Diggelmann (n. 1), 431, pointing out that ideas of progress are closely tied to Western modernist thinking and that law was crucial in the development of the progress narrative (for instance, through Kant's view of progress in history as legal progress).

64 Greenhouse (n. 25), 1633-1634.

65 Ingo Venzke, 'Tragedy and Farce in Climate Commentary', European Review of Books, 19 April 2023, <https://europeanreviewofbooks.com/tragedy-farce-in-climate-commentary/>, last access 26 November 2024.

66 Gordon (n. 3); Julia Dehm, 'Reflections on Paris: Thoughts Towards a Critical Approach to Climate Law', Revue Québécoise de Droit International (2018), 61-91.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

III. Progress in International Environmental Law: the Temporalities of Sustainability and Ambition Discourses

In his important work on the idea of progress within the theory of international law, Skouteris explains that there are two genres or usages of the term 'progress' in international legal discourses. First, in the uppercase, 'Progress' is associated with the belief in the possibilities of improvement and betterment of human condition over space and time through international law. This understanding is embedded into Western history of thought and the role of 'Progress' in the grand, overarching narrative describing the evolutionary course of humankind through history, as noted in the previous section. As such, it assumes a 'unified human race, a unified timeframe, and a unified material space, a single telos, and a single greater good'.[67] Second, Skouteris contends that in the lowercase, the idea of 'progress' works through specific doctrines, institutions, policy initiatives to declare measurable advances in the 'everyday' practice of international law.

While the meta-narrative of Progress has been forcefully criticised over the past few decades, and for that reason is less openly invoked in contemporary legal debates (although still, arguably, present in the background and occasionally resurfacing), notions of progress in the lowercase maintain a significance within the discipline and practice of international law. As observed by Skouteris, the failure to prevent humanitarian atrocities, persistent poverty and inequalities, and the climate crisis, have all made the belief in the continuous, somehow 'natural' improvement of human condition hard to defend. This, together with the work of postcolonial, feminist, queer, and Marxist legal scholars exposing the structural biases and complicities of the field,[68] makes it harder to defend the view that international law is *per se* an instrument of progress. Yet, the two accounts of progress that Skouteris identifies, namely international legality as progress (i. e. the idea that international legal norms are a desirable and even necessary means to address global challenges) and progress within international law (i. e. the idea that the field is developing

67 Thomas Skouteris, 'The Idea of Progress' in: Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 939-952 (941).

68 See e. g. Anghie (n. 1); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011), Dianne Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018); Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press 2019); Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar 2020); Ntina Tzouvala, *Capitalism as Civilisation*: *A History of International Law* (Cambridge University Press 2021).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

and becoming 'better' in terms of rules, institutions, practices, judicial decisions) occasionally resurface, especially within distinct sub-disciplinary debates, an example being human rights law.[69]

In international environmental law the narrative of a slow, but incremental progressive development from the 1972 United Nations Stockholm Conference is constantly re-enacted.[70] Paradoxically, this has happened despite (or perhaps against the background of) warnings of ecological collapse. Environmental politics often rely upon and are structured by narratives of catastrophe, disaster, or extinction.[71] Youth movements invoke apocalyptic imaginaries of the future to call for more ambitious climate action in the present. On the one side, such accounts challenge the premise of the progressive linear temporality that sustains international environmental law. On the other, as Hasan Khan has argued, disaster imaginaries (of overpopulation in the case he examines) are often used to reinforce the teleology of the field and its associate promises of improvement. As he puts it 'catastrophic futural visions [that] have always been entangled with the developmental promise'.[72] Whereas there may be a tension between these temporal tropes (apocalyptic and progressive), this tension is managed in international environmental law to reinforce a forward-moving temporality that justifies progressive change through law, as the following examples clarify.[73]

While there are different instances to appreciate the interrelation of progress and linear time, perhaps one of the most illustrative examples is offered by the principle of sustainable development. The latter has been defined the 'Grundnorm' of global environmental governance.[74] As revealed by Jacobus Du Pisani, progress was not only the antecedent to the notion

69 See e. g. Kathryn McNeilly, 'Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change', Social and Legal Studies 28 (2019), 817-838.

70 De Lucia, for instance, argues that approaches like 'ecologism' rely on a linear narrative that international environmental law is inadequate – because it is anthropocentric – and that this problem is and ought to be solved by an ecocentric re-orientation. See Vito De Lucia, 'Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law', Journal of Human Rights and the Environment 8 (2017), 181-202. See also Dehm, 'Temporalities of Environmental Human Rights' (n. 10).

71 Dehm, 'Temporalities of Environmental Human Rights' (n. 10), 38.

72 Adil Hasan Khan, 'The "Bihar Famine" and the Authorisation of the Green Revolution in India: Developmental Futures and Disaster Imaginaries' in: Matthew Crave, Sundhya Pahuja and Gerry Simpson (eds), *International Law and the Cold War (*Cambridge University Press 2019), 414-446 (415).

73 I am indebted to one of the reviewers for drawing attention to this aspect.

74 Rakhyun E. Kim and Klaus Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements,' Transnational Environmental Law 2 (2013), 285-309.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

of development, but it also brought into existence the whole concept of sustainability.[75] By the early 1970s the idea of continuous 'Progress' of humankind was losing its appeals, with scholars increasingly calling it an illusion or a myth. During the same period, information on the negative impact of economic development and technological advancements upon the natural environment became available to the larger public; ecological disasters received much media attention; the green movement took off in the West and environmental Non-Governmental Organisations were established. Environmental concerns became a matter of general concern, as fear and anxiety grew on whether unrestricted economic growth could endanger the survival of humanity and, to a certain extent, the planet. The well-known report of the Club of Rome *The Limits to Growth* published in 1972 started a broader discussion in academic and policy circles over the need to balance economic development with the conservation of nature. Against discourses of ecological catastrophe, the concept of sustainable development surfaced as a compromise between the two logics (economic growth and preservation of the natural environment) and was indirectly acknowledged in the 1972 Stockholm Declaration[76] and defined in the 1987 Brundtland Report.[77]

Sustainable development, however, emerged not much as an alternative to previous approaches focused on pure economic growth, but as the 'heir' to the concepts of progress and development, inheriting the temporal assumptions implicit in the latter.[78] While it was framed as a compromise between growth and conservation, sustainable development was not ideologically neutral, as it was intended as an alternative to the zero-growth option and was thus inclined towards modernisation theories.[79] Similarly to the mainstream, Western idea of development being defended by its proponents as a form of progress through modernisation, and as the primary mean to achieve

75 Jacob Du Pisani, 'Sustainable Development – Historical Roots of the Concepts', Environmental Sciences 3 (2006), 83-96.

76 See notably Principles 12-14 of the Stockholm Declaration (1972), 'Report of the United Nations Conference on the Human Environment Stockholm, 5-16 June 1972', A/CONF.48/14/Rev.

77 Report of the World Commission on Environment and Development: Our Common Future (1987), A/42/427.

78 See Du Pisani (n. 75); Hasan Khan (n.71); Pahuja (n. 67).

79 For a recent critique of sustainable development in international law, see Louis Kotzé and Sam Adelman, 'Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope, Law and Critique 34 (2023), 227-248; see also Philipp Dann, 'The Law of International Development' in: Ruth Buchanan, Luis Eslava and Sundhya Pahuja (eds), *Oxford Handbook of International Law and Development* (Oxford University Press 2023), 35-60.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

human wellbeing,[80] sustainable development thus promotes a forward-moving temporality. The mainstream approach of global environmental governance institutions sees green capitalism and sustainable development as a combination of 'environmental and sustainability discourses with industrial and economic policy ones, in search of "win-win" solutions and virtuous cycles of progress and prosperity'.[81]

Historical discussions of sustainable development illustrate how environmental concerns had to become part of the development discourse in order to rescue the latter from increasing discontent and save the idea that, despite the challenges, 'humanity' (in the singular form) was still moving and will keep moving in a desirable direction. The language of sustainable development is, therefore, associated with a distinct temporal imaginary that implies a seamless continuity from the present and into the future, without much radical changes.[82] It is interesting to note that, although sustainable development emerged in a moment characterised by increasing anxiety about future ecological possibilities, it operated as a re-legitimation of narratives of progress in and through law. And yet, by reproducing a linear trajectory and timeline, sustainable development, as the heir of development discourses, also contributes to a temporal division; the 'underdeveloped' is imagined as inhabiting a backward and traditional past, while the 'developed' is imagined as 'the' future.[83]

A second, less familiar example is the usage of the term 'ambition' in international environmental law. Ambition has been invoked by different actors in the context of climate negotiations[84] and found its way into the 2015 Paris Agreement,[85] as well as in other legal documents dealing with a

80 Eduardo Gudynas, 'Debates on Development and Its Alternatives in Latin America: A Brief Heterodox Guide' in: Miriam Lang and Dunia Mokrani (eds), *Beyond Development: Alternative Visions from Latin America* (Transnational Institute 2013), 15-40. See also Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995).

81 Olivia Bina, 'The Green Economy and Sustainable Development: An Uneasy Balance?', Environment and Planning C: Politics and Space 31 (2013), 1023-1047 (1024).

82 Kyrre Kverndokk and Anne Eriksen, 'Climate Change Temporalities: Narratives, Genres, and Tropes' in: Kyrre Kverndokk, Marit Ruge Bjærke and Anne Eriksen (eds), *Climate Change Temporalities: Explorations in Vernacular, Popular, and Scientific Discourse* (Routledge 2021), 8-14.

83 Uma Kothari, 'History, Time and Temporality in Development Discourse' in: Christopher A. Bayly, Vijayendra Rao, Simon Szreter and Michael Woolcock (eds), *History, Historians and Development Policy: A Necessary Dialogue* (Manchester University Press 2011), 65-70.

84 During the negotiations of the Paris Agreement, the Marshall Islands set up a 'High Ambition Coalition' (HAC) to bring together like-minded states around the demands considered necessary to design a progressive climate treaty. On this point, Farhana Yamin, 'The High Ambition Coalition' in: Henrik Jepsen, Magnus Lundgren, Kai Monheim and Hayley Walker (eds), *Negotiating the Paris Agreement: The Insider Stories* (Cambridge University Press 2021), 216-244.

85 See references to 'ambitious efforts' in Article 3 and to 'highest possible ambition' and 'progression' in Article 4(3) dealing with Nationally Determined Contributions (NDCs) which

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

variety of environmental issues.[86] As Leslie-Anne Duvic-Paoli has recently argued, an ambition-centred international legal system presents the world through two stories, 'one that relies on international law to constrain the selfish ambitions of states that can threaten its very ideals; another that portrays the international legal landscape to be reliant on a process of constant betterment, whereby ambition motivates states to tackle complex global challenges'.[87] In opposing the ambition discourse to the crisis narrative, the author associates the former with more positive attributes, while acknowledging the limitations of the discourse. First, she stresses ambition's commitment to 'structural transformation'. In Duvic-Paoli's words, 'unlike the crisis narrative that stresses the inadequacies of the system without disturbing the status quo, ambition is a forward-looking concept: it is not interested in the shortcomings of the past or the imperfections of the present, but rather in how to design a better future'.[88] Second, ambition would play a fundamental role in motivating states to take actions to address far-reaching objectives, particularly helpful in the climate and environmental fields, through a 'process of continuous improvement'. Lastly, an ambition discourse assumes a distinct forward-moving temporality, by adopting a long-term perspective that favours incremental change (notably, in the progressive realisation of the Sustainable Development Goals).

One could see echoes of the ambition discourse in the field's enthusiastic attitude towards climate litigation and, more recently, the rendering of advisory opinions by the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, and the International Court of Justice. Indeed, most legal scholars and advocates see advisory proceedings as part of 'an epic battle to save planet Earth', often glossing over the possible drawbacks of such proceedings.[89] Here the traditional view that an increasing

represent a 'progression over time', Paris Agreement of 12 December 2015, 3156 UNTS 79. For a discussion, see Lavanya Rajamani and Emmanuel Guerin, 'Central Concepts in the Paris Agreement and How They Evolved' in: Daniel Klein et al. (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017), 74-90.

86 See e. g. the 2030 Agenda for Sustainable Development, UNGA Res 70/1 of 21 October 2015, 'Transforming Our World: the 2030 Agenda for Sustainable Development', A/RES/70/1, Preamble and para. 39.

87 Leslie-Anne Duvic-Paoli, 'International Law: A Discipline of Ambition', LJIL 36 (2023), 233-249.

88 Duvic-Paoli (n. 87), 242.

89 For a more skeptical assessment of the desirability of an advisory opinion on climate change, see Benoit Mayer, 'International Advisory Proceedings on Climate Change', Mich. J. Int'l L. 44 (2023), 41-115. See also Daniel Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions', Review of European, Comparative & International Environmental Law 32 (2023), 185-192.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

judicialisation of international affairs is a sign of disciplinary progress meets the argument that international courts should be ambitious, take a leading role to address one of the most urgent challenges facing humanity, and become actors of progressive legal developments.[90]

Similarly, the recent recognition of the universal right to a safe, clean and healthy environment by the Human Rights Council,[91] first, and the General Assembly,[92] later, has been presented as a historic achievement in legal debates. Julia Dehm, however, has shown the problems with a celebratory teleological account of environmental human right.[93] First, environmental human rights stabilise a linear temporality, which assumes that a progression from the present conditions can lead to a more sustainable future. Second, environmental human rights embrace the idea of an open future, full of possibilities, which will be enabled by rights. Yet, both legal engagements with the future present shortcomings. Even if the 'utopian' human rights discourse creates a sense of opening, hence frames human rights as indispensable in the transition towards an ecologically just future, it is equally marked by the problem of 'false contingency', as it ignores how past decisions (and historical GHG emissions) have already constrained future possibilities.[94] This approach glosses over the role of capitalism, with its patterns of exploitation and domination, in shaping dominant understandings of time and narrowing down the possibilities of enacting better futures.[95] Ultimately, the

90 Juan Auz and Thalia Viveros-Uehara, 'Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights', EJIL:Talk!, 2 March 2023, <https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/>, last accessed 26 November 2024.

91 UNHRC Res 48/13 of 18 October 2021, 'The Human Right to a Clean, Healthy and Sustainable Environment', A/HRC/RES/48/13.

92 UNGA Res 76/300 of 28 July 2022, 'The Human Right to a Clean, Healthy and Sustainable Environment', A/RES/76/300.

93 Dehm, 'Temporalities of Environmental Human Rights' (n. 10), 52-55.

94 Dehm, 'Temporalities of Environmental Human Rights' (n. 10), 55. This point is also made by O' Connell, who suggests that, in exploring the possibilities of emancipatory human rights, one has to be aware of the material limits, and that 'in framing and constructing them [those alternative temporalities] we do not operate with an entirely free hand, under conditions of our own choosing', see Paul O' Connell, 'Human Rights Futures' in: Kathryn McNeilly and Ben Warwick (eds), *The Times and Temporalities of International Human Rights Law* (Bloomsbury 2022), 211-228 (214).

95 O' Connell (n. 94), 214, arguing that 'the capitalist mode of production, which prevails at a global level, instantiates a particular temporality of its own. This, in turn, shapes our understandings of time and temporality, and, importantly, sets firm limits on alternative accounts' [read futures]. See also Ben Golden, 'Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought', London Review of International Law 2 (2014), 77-114.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

usage of the term ambition in international environmental law is problematic precisely because of the strong connection between the 'new' ambition discourse and the more familiar trope of progress in international law.[96] While Duvic-Paoli recognises that an 'ambition discourse encourages continuous progress and leaves little space to question this logic',[97] she concludes that references to ambition look as a 'powerful motor for change to maintain trust in the international legal system and to avoid backsliding'.[98] However, the legal language of ambition and progressive future improvement works to excuse and possibly legitimate the persistent failures in dealing with climate change in the present, which are amply documented.[99]

It is by questioning the continuities between progress and ambition, I contend, that it becomes possible to make sense of the enduring logic of progress in the field, its underlying temporal assumptions, and distributive implications. To do so, it is helpful to recall two elements that, according to Skouteris, characterise the progress argument in international law – and that bring to centre stage the question of legal temporalities. The first is the 'directionality' implicit in the idea of progress.[100] Progress is about moving forward and a specific temporal orientation in human history, from a place or condition or status, to another place, condition, or status.[101] A theory of causality becomes thus crucial to establish a cause-effect relationship that results in movement, in stepping forward, in advancing. While narratives of progress always imply an interpretation and engagement with the past, they also link distinct (often selective) views of the past to the present and the future.[102] The second is the idea of 'betterment'. Progress requires 'an evaluation that the new state of affairs is somehow superior to the previous one and

96 See discussion of the narrative of progress and ambition in the Paris Agreement in Dehm, 'Reflections on Paris' (n. 66), 71.

97 Duvic-Paoli (n. 87), 248.

98 Duvic-Paoli (n. 87), 248.

99 See e. g. Intergovernmental Panel on Climate Change (IPCC), 2023: 'Summary for Policymakers' in: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, IPCC, Geneva, Switzerland, 1-34.

100 Skouteris (n. 67), 946.

101 On this point, see also Altwicker and Diggleman (n. 1), 432, arguing that one of 'techniques' through which progress narratives are constructed in international legal is 'ascending periodization', meaning that progress narratives can be created by cutting the history of international law into two or more periods and giving the most recent period the most favourable label.

102 Altwicker and Diggleman (n. 1), 428.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

an axiological criterion on the basis of which the evaluation will be conducted'.[103]

It follows from the above that the notion of progress has not only a descriptive function, indicating a certain directionality, but must be treated as 'normative mode of speaking the world'.[104] In that, progress has both discursive and distributive effects. It creates values, meanings; it includes and excludes; it legitimises and de-legitimises. Furthermore, the relationship between progress and international law is one of mutual co-constitution. Progress is strongly embedded in legal narratives operating at the macro or micro levels, through specific environmental norms, principles, and procedures.[105] Conversely, legality is constituted and emerges from ideas of progress which, as noted, possess an inherent normative dimension.

Temporalities have similar characteristics. Mawani has suggested understanding 'law as temporality', meaning critically exploring the role of law in the production of time as past, present, and future; law's imposition of time on legal subjects, and the tensions between law's overarching time and the multiplicity of lived times.[106] Similarly, Gordon has showed that law and time work together as a 'technology' to advance a specific worldview with material outcomes. International law's temporal orientations, linked to the ideology of progress, contribute to the 'sustained expansion of the humanist project', while supporting the political economic interests that underpin the global order, namely free trade and competitive markets.[107]

The next section considers how foregrounding the alliance between progress and linear time may help us better understand the field's engagement with futurity and its distributive effects. Environmental law has been described as 'one of the most future-oriented legal disciplines that, without

103 Skouteris (n. 67), 947.

104 Skouteris (n. 67), 939. See also Sheila Jasanoff, 'The Idiom of Co-Production' in: Sheila Jasanoff (ed.), *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge 2004), 2 f., on the co-production of knowledge practices and normative ordering of society.

105 In addition to the examples discussed above, see the emergence of the so-called principle of 'non-regression' in international environmental law. For a discussion, see Andrew D. Mitchell and James Munro, 'An International Law Principle of Non-Regression from Environmental Protections', ICLQ 72 (2023), 35-71. Another example concerns the recent proposal to codify 'ecocide' as an international crime in the Statute of the International Criminal Court, where the proposed article 8ter is presented as part of a progress narrative that, however, erases the material interests underpinning the criminalisation of ecological harm. See Eliana Cusato and Emily Jones, 'The "Imbroglio" of Ecocide: A Political Economic Analysis', LJIL 37 (2024), 42-61.

106 Mawani (n. 9), 69.

107 Gordon (n. 3).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

much conscious effort, involves everyday acts of imagination, anticipation, projection, prediction and promise'.[108] The law on climate change is particularly emblematic of the 'multiple futures at play at any one time', as it deals with carbon budgets, emissions targets, transitional economies, precaution, and sustainability.[109] Futurity plays also a central role in legal debates on the Anthropocene thesis and how to enact just responses to the unfolding ecological catastrophe, including by upholding the rights of future generations. This makes it a productive angle to delve deeper into the distributive outcomes of international environmental law's temporal orientations.

IV. International Law, Ecological Collapse, and Engagements with the Future

The role of law in regulating, framing and producing distinct 'futures' has assumed central stage within debates on the Anthropocene thesis. Without entering into the controversies surrounding the definition of this 'new' geological epoch,[110] legal scholars have pointed out how the Anthropocene demands a remaking of dominant temporal accounts, as well as spatial abstractions.[111] Building on Donna Haraway's work, Anna Grear argues the Anthropocene reflects the imposition of European chronologies on the rest of the world through colonial practices and that the unfolding climate crisis is precisely the material outcome of such imposition and the construction of the 'global'.[112]

108 Elen Stokes and Ben Pontin, 'Historical Futures and Future Futures in Environmental Law Pedagogy: Exploring "Futures Literacy"', International Journal of Law in Context 18 (2022), 440-449 (440). Of course, while this article is concerned with the field's engagement with linear temporality and the future, the past is also a very important entry point to question the distributive outcomes of legal times. One example is the recent shift to consider the past via the policies and laws on ecosystem restoration. On this point, see Richardson (n. 10), especially Chapter 5, where the author considers the traditional lack of attention to 'past time' in environmental law, and then recent efforts to correct this in international (and domestic) environmental law.

109 Stokes and Pontin (n. 108), 440.

110 For an overview of the debate surrounding the Anthropocene thesis or nomenclature, see Kathleen Birrell and Julia Dehm, 'International Law and the Humanities in the Anthropocene' in: Shane Chalmers and Sundhya Pahuja (eds), *The Routledge Handbook of International Law and the Humanities* (Routledge 2021), 407-421. See also Dipesh Chakrabarty, 'Anthropocene Time', History and Theory 57 (2018), 5-32; Kathryn Yusoff, *A Billion Black Anthropocenes or None* (University of Minnesota Press 2019).

111 Birrell and Dehm (n. 110).

112 Anna Grear, '"Anthropocene Time"? A Reflection on Temporalities in the New Age of the Human' in: Andreas Philippopoulos-Mihalopoulos (ed.), *Routledge Handbook of Law and Theory* (Routledge 2019), 297-315 (302).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

The concept of the 'Capitalocene',[113] in outlining the role of capitalism in the genesis of the ecological catastrophe, illuminates also the Eurocentric and market-based temporalities that define the Anthropocene.[114] This, in turn, demands to take seriously the temporalities that organise our political economic and legal systems, that are involved in the making of the current ecological breakdown, and that may restrict the possibilities of devising more liveable worlds.[115]

In this section, I continue to interrogate the temporal imaginaries, and specifically the orientation towards the future, that permeates debates in international environmental law. The argument I want to make is twofold: first, the presumed openness of the future is a doble-edged sword, which both enables and constrains the legal imagination and the capacity to enact structural responses to the ecological slow emergency; second, international law's forward-moving temporality (the result of the alliance between progress, modernity, and chronological linearity) masks the uneven distribution of futurity which underpin the global political economic order. Hence, the field's dominant engagement with the 'future' (often, in the singular form) operates to dismiss, or better postpone, distributive questions – questions that may be better answered by turning to the past,[116] or at least to the present. This ends up legitimising the current global distribution of life chances and possibilities.

In investigating the relationship between international environmental law and futurity, a helpful starting point concerns the unknown character of the future and its multiplicity.[117] The idea of future as being 'unattainable and unknowable in the present', in Elisabeth Grosz's words,[118] is often invoked by international lawyers and policy-makers as opening new possibilities,

113 Jason Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (Verso 2015); Donna Haraway, 'Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin', Environmental Humanities 6 (2015), 159-165.

114 Grear (n. 112), 307.

115 Dehm, 'International Law' (n. 27), 167.

116 Stephen Humphreys, 'Climate Justice: The Claim of the Past', Journal of Human Rights and the Environment 5 (2014), 134; Julia Dehm and Sarah Mason-Case, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in: Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021), 170-205; Olúfémi O. Táíwò, *Reconsidering Reparations* (Oxford University Press 2021).

117 Edelstein, Geroulanos and Wheatley (n. 33), 21.

118 Elizabeth Grosz, *Time Travels: Feminism, Nature, Power* (Duke University Press 2005), 75 urging that 'we must act in the present, with the light the past sheds on that present, but we must, by virtue of the difference that inhabits the present, cede any control of our present act to a future that we cannot foresee or understand'. See generally also Koselleck (n. 49), referring to the 'unknown quality' of the future, which emerged with modernity and its promises of freedom, progress, and infinite human improvement.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

including for more emancipatory agendas. Because of their utopian dimension, human rights discourses are the best example of the transformative potential associated with open futures.[119] Kathryn McNeilly has argued, for instance, that the future of human rights is 'unsettled and unknowable, capable of moving forwards, backwards or in another direction in response to contingent contexts' and this openness offers 'hopeful possibility'.[120] While this may be true on an abstract level the openness of the future is not only associated with opportunities when it comes to confronting the unequal effects of rising temperatures, mass extinction and biodiversity loss, toxic pollution, ocean acidification, and land degradation.

On the one side, 'openness' implies uncertainty. Such uncertainty about the future impacts of present actions can be opportunistically invoked by some actors to postpone much-needed climate mitigation measures and to deny responsibility.[121] Benjamin Richardson notes that, among the many legal temporalities at play in environmental law, 'the pull of the future is a mirage […] with the present exerting far greater rein over environmental decisions and habits'.[122] This implies that decision makers may be more reluctant to take action now in the interest of future benefits or to remedy historical harms, thus creating 'a mismatch […] between awareness and action, and between who incurs the costs and who received the benefits of action'.[123] Sheila Jasanoff also points out that '"future" is an open-ended concept, stretching to infinity, whereas the scope of moral [and, I would add, legal] thinking is ordinarily confined to the immediate past and near-term future'.[124]

On the other side, the presumed 'openness' of the future – a horizon of opportunities for change, action, and improvement – has been contested by critical race scholars showing how it is based upon a temporal imaginary of the modern, liberal subject, which ignores that non-white, non-male subjects are denied the same futurity.[125] Global warming's disproportionate impacts upon the most vulnerable across space and time exposes some of the prevail-

119 See e. g. Kathryn McNeilly (n. 69).

120 Kathryn McNeilly (n. 69), 828-830.

121 See Chris Hilson, 'Framing Time in Climate Change Litigation', Oñati Socio-Legal Series 9 (2017), 361-379. See also Phillip Paiement, 'Urgent Agenda: How Climate Litigation Builds Transnational Narratives', Transnational Legal Theory 11 (2020), 121-143, discussing the arguments put forwards by the Dutch, Irish, and Norway to postpone the adoption of measures to reduce their GHG emissions.

122 Richardson (n. 10), 123.

123 Richardson (n. 10), 47.

124 Jasanoff (n. 104), 242.

125 See Grove et al. (n. 8). See also Katherine McKittrick, 'Plantation Futures', Small Axe 17 (2013), 1-15; Andrew Baldwin, 'Whiteness and Futurity: Towards a Research Agenda', Progress in Human Geography 36 (2011), 172-187.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ing and highly 'uneven distributions of futurity' that condition forms of life in modern societies.[126] Furthermore, such 'openness' has been questioned also on a material level. Andreas Folkers aptly observes that given the excessive accumulation of fossil residuals in air, water, and earth, the future is not just an 'open horizon of infinite options'.[127] Since modern societies are confronted with the persistence of residuals of fossil capitalism in the air, soil, water, they cannot fully emancipate from the past to seize an open future of progress and possibilities.[128]

These arguments have important implications for legal thought and practice. How does the field navigate the tension between an open future, the burdens of past, and the constraints of the present? Are international legal engagements with futurity too optimistic[129] or hopeful?[130] And how does international law relate to the political economic and ecological conditions that fundamentally shape these temporalities? What are the possibilities to challenge and disrupt the dominant temporal orientations, so as to recover alternative readings of the past and present, as well as more emancipatory visions of the future?[131] These are big, perhaps too big questions, that I can only begin to unpack here. One way to begin this conversation is to consider ongoing legal debates on intergenerational justice and the rights of future generations.

The concept of intergenerational justice, supported by the principle of intergenerational equity,[132] is meant to express a sense of responsibility for environmental harms against 'future generations'. The Maastricht Principles on the Human Rights of Future Generations, adopted in July 2023, represent a recent attempt by civil society and academics to codify the 'rights of future generations'.[133] Intergenerational justice is explicitly at the core of the re-

126 Grove et al. (n. 8).

127 Andreas Folkers, 'Fossil Modernity: The Materiality of Acceleration, Slow Violence and Ecological Futures', Time and Society 30 (2021), 223-246 (238). Many thanks to Julia Dehm for suggesting this reading.

128 Folkers (n. 127), 225.

129 On the role of optimism in dealing with ecological limits, see Venzke (n. 65).

130 On international law and hope, see Karin Mickelson, 'Hope in a TWAIL Register', TWAIL Review 1 (2020), 14-27, drawing a distinction between optimism, hope, and faith.

131 See e. g. Nicolas Guilhot, 'The Lull: Our Age of Catastrophic Uneventfulness', The Point Magazine 28 (18 October 2022), <https://thepointmag.com/politics/the-lull/>, last access 3 December 2024; Anna Agathangelou and Kyle Killian (eds), *Time, Temporality and Violence in International Relations: (De)fatalizing the Present, Forging Radical Alternatives* (Routledge 2016).

132 See e. g. references in Art. 3 No. 1 UN Framework Convention on Climate Change of 9 May 1992, 1771 UNTS 107, and the Preamble of the Paris Agreement on Climate Change (n. 85).

133 The Maastricht Principles on the Human Rights of Future Generations, available online at <https://www.rightsoffuturegenerations.org/the-principles>, last access 3 December 2024.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

quests for advisory opinions from the Interamerican Court of Human Rights and the International Court of Justice and has also been raised in the context of the advisory proceedings before the International Tribunal on the Law of the Sea.[134] As observed by Stephen Humphreys, the invocation of responsibility towards future generations is, at first sight, a successful discursive strategy.[135] The future generations framing is based upon an assumption of intra-generation solidarity and thus it defuses the conflicting positions that have come to characterise climate negotiations over the past few decades. Further, it is empowering, it gives agency to those alive in the present to take action to the benefits of our children and grandchildren (often, the imagined future generations).[136] Humphreys argues, however, that the turn to future generations in legal responses to climate change generates an 'epistemological fog' that obscures, distracts from what is already well understood in terms of equitable climate action in the present – notably, mitigation, adaptation, and loss and damage.[137] As such, the invocation of responsibility vis-à-vis- future generations abjures responsibility towards those who are alive today – those who for historical and economic reasons already bear the burden of climate change.[138] While Humphrey's does not argue against an 'imaginative engagement with the future', he contends that any appraisal of the futurity would need to go beyond the ambiguity of the future generations discourse. As he puts it:

'"We" – but really a (sizeable) minority of us – are, in effect, shaping, even colonizing, future lives and lifestyles, just as past generations colonized the lives of (many) of us alive today. My concern is that "our"

134 Intergenerational justice and equity are also at the very centre of strategic youth climate litigation at the regional and domestic levels, see the *Duarte Agostinho et al. v. Portugal et al.* case before the European Court of Human Rights (ECtHR (Grand Chamber), *Duarte Agostinho et al. v. Portugal et al*., decision of 9 April 2024, no. 39371/20); the 2021 *Neubauer* decision of the German Constitutional Court (Germany, BVerfG, order of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20); the 2018 decision of the Colombian Supreme Court in the case of *Demanda Generaciones Futuras v. Minambiente* (Colombia, Corte Suprema de Justicia, decision of 5 April 2018, STC4360-2018, no. 11001-22-03-000-2018-00319-01). For a review of recent case-law, see Wewerinke-Singh, Garg and Agarwalla (n. 26). See also Elizabeth Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights Through Legal Argument and Legal Mobilization', Transnational Environmental Law 11 (2022), 263-289.

135 Humphreys, 'Against Future Generations' (n. 26), 1062.

136 Marie C. Petersmann, 'Response-abilities of Care in More-than-human Worlds', Journal of Human Rights and the Environment 12 (2021), 102-124 (114), drawing attention to the disjunction between this image of near time underpinning future generations discourse and deep time concerns.

137 Humphreys (n. 26), 1064.

138 Humphreys (n. 26),1063. See also Hilson (n. 121), 361.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

mode of interpolating "them", as the nominal beneficiaries of an imagined munificence repeatedly postponed, merely repeats this ancient gesture again.'[139]

A central component of the legal rhetoric of future generations is the invocation of sacrifice, although it remains unclear upon whom this sacrifice should fall.[140] Indeed, climate change is already associated with sacrifice – deaths, displacements, species extinction, loss of livelihoods and culture. While it is undeniable that actions to combat climate change require sacrifice, the latter is currently distributed in unequal terms. For some people mitigation may be relatively costless, for other it may entrench endemic poverty; for some, the effects of climate change are lethal, for other, there may be even economic opportunities associated with it.[141] While the legal register of future generations suggests some form of solidarity,[142] it seems built upon different premises than those advocated by the Global South: rather than on reciprocity and responsibility, the discourse is more akin to a parent/child relationship.[143]

Although temporalities are not a specific concern of Humphrey's analysis, a focus on time may offer a distinct angle to consider the problems of dominant intergenerational justice discourses.[144] Time is an implicit, though crucial, component of the concept of intergenerational justice. Political philosopher Christine Winter has noted that mainstream theories and policies on future generations tend to reproduce Western assumptions about unilinear

139 Humphreys (n. 26), 1063. Equally problematic is, according to Humphreys, the reference to 'we'. While the emphasis on 'we' (the present generation) assumes the existence of a collective entity, a community, a communion, it also obscures the divide and thorny issues that have characterised climate negotiations for the past 30 years, notably issues of equity, common but differentiated responsibility, and environmental justice. Humphreys (n. 26), 1073.

140 Humphreys (n. 26), 1068.

141 Humphreys (n. 26), 1083.

142 See e. g. the reference to international solidarity in Principle 10 of the Maastricht Principles on the Human Rights of Future Generations (n. 133). Principle 10 is framed in a very general and vague language with references to the human right to a clean environment and rights of nature.

143 The invocation of future generations in climate change debates is part of a long-standing literature and imagery casting humankind as stewards of the natural world 'for posterity', or in colonial language, as 'trustees' of humanity. On this point, see Stephen Humphreys and Yoriko Otomo, 'Theorising International Environmental Law' in: Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 797-819.

144 When referring to dominant conceptualisations of intergenerational justice, I am aware that those are contested by indigenous communities and subaltern groups. On this point, see Wewerinke-Singh, Garg and Agarwalla (n. 26). It is also important to clarify that not all indigenous peoples and non-Western societies lack a sense of linear time.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

time, 'the present fleeting, the past disengaged'.[145] In other words, the institutional politics of intergenerational justice exist in the now and look at the future. What may happen, asks Winter if, drawing upon Māori epistemology, we think of generations living not in competitive temporal sequences, but synchronically?[146] Would that change our understanding of our obligations to the 'future'? Would that alter how we imagine intergenerational justice – and perhaps also address some of the concerns raised by Humphrey above? Winter's reflections call for a new legal conceptualisation of intergenerational justice that not only speaks of a better future but inherits a complicated past that will not go away any time soon.[147]

A timid attempt in that direction is made in the Maastricht Principles on the Human Rights of Future Generations through the recognition that 'States must also redress the *continuing impacts of past injustices* in order to ensure that present and future generations are not subject to similar abuses'.[148] However, tellingly, this is the only reference to 'past injustices' in the Maastricht Principles and the relevant obligation to 'redress' is framed only in the context of the General Provisions. The sections on 'State Obligations' and 'Accountability and Remedies', interestingly, contain no references to past injustices. Ongoing debates and efforts to codify the rights of future generations underscore the necessity to expand our understanding of the work of time as a legal technique of inclusion and exclusion in the context of the ecological slow emergency. On the one side, they confirm the problems with the field's liberal trajectory of futurity that I raised above: how international law's linear, forward-moving temporality operates to postpone actions and overestimates the possibilities of an 'open' future, while entrenching divisions across lives and obscuring the 'uneven distribution of futurity' in governance responses to ecological collapse. If the legal language of future generations is a 'language of redemption',[149] this language may also be found in Middle Age conceptions of linear time, subsequently laicised and institutionalised through legal developments. Yet, the promise of redemption is accompanied by the constant deferral of political emancipation and redistribution.[150]

145 Christine J. Winter, 'Does Time Colonise Intergenerational Environmental Justice Theory?', Environmental Politics 29 (2020), 278-296 (290), drawing upon Māori epistemology and ontology of time to decolonise intergenerational justice theory. As Winter put it 'rather than a notion of time as forward movement through space, it becomes instead spirally bound and emplaced/embodied. I am concurrently future generations, living, and ancestor. My being and knowledge oscillate between ancient and modern, current and future', Winter (n. 145), 283.

146 Winter (n. 145), 279.

147 Folkers (n. 127), 240.

148 Maastricht Principles (n. 133), see Principle 6(d). Emphasis added.

149 Humphreys (n. 26), 14.

150 Gordon (n. 3).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

On the other side, because time is so ingrained into law's operation, and essential to its legitimacy and authority, thinking through time allows to ask more foundational questions about the nature of international law and explore the possibilities for contestation within and beyond the legal order.[151] One example is offered by the efforts of environmental justice movements to slow down (or even interrupt) Western time's forward motion. Youth mobilisation to disrupt extractivist imaginaries,[152] as well as Global South demands to redress historical Greenhouse gases emissions emanating from affluent countries and their corporations[153] are illustrative of how both the past and future are emerging as sites for political and, often, legal struggles. In demanding a more just distribution of carbon liabilities in the present, climate justice movement seek to come to term with a past that has never ended, but that 'materially insists, persists, and thus occupies the horizon of expectations'.[154] Studying law's temporalities can offer a distinct contribution to understand ongoing processes of contestation and transformation, and what is required for those changes to take place. It can sharpen our appreciation of the stakes involved in projects aimed at coming to terms with intersecting injustices, and of the work of law in both embracing and repudiating 'Other' timescales, rhythms, tempos.

V. Conclusion

Despite compelling evidence of planetary limits and mass extinctions, most international lawyers seem to remain attached to the idea of progressive development of the field and law's capacity to adapt to most urgent global

151 Chua (n. 16), 268; Vasuki Nesiah, 'A Double Take on Debt: Reparations Claims and Regimes of Visibility in a Politics of Refusal', Osgoode Hall Law Journal 59 (2022), 153-187.

152 See e. g. Anna Friberg, 'Disrupting the Present and Opening the Future: Extinction Rebellion, Fridays for Future, and the Disruptive Utopian Method', Utopian Studies 33 (2022), 1-17.

153 Sarah Riley-Case, 'Looking at the Horizon: The Meaning of Reparations for Unbearable Crises', AJIL Unbound 117 (2023), 49-54, referring to the speech delivered by the Prime Minister of Barbados, World Leaders Summit, 27th Conference of the Parties to the UNFCCC, 7 November 2022. See also E. Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance of 25 October 2022, 'Ecological Crisis, Climate Justice and Racial Justice', A/77/2990); Report of the Working Group of Experts on People of African Descent, 'Environmental Justice, the Climate Crisis and People of African Descent' of 21 September 2021, A/HRC/48/78, para. 42; International Climate Justice Network, 'Bali Principles of Climate Justice', presented at the United Nations World Summit on Sustainable Development, Johannesburg, South Africa, 29 August 2002, online at <http://www.ejnet.org/ej/bali.pdf>, last access 3 December 2024.

154 Folkers (n. 127), 239.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

challenges. Yet, while international lawyers are 'addicted to progress', they are often ambivalent about the distributive implications for their discipline.[155] This article explored how Western ideas of chronological linearity and progress work together in international environmental law to advance a specific worldview with normative and material effects. I started by considering the emergence of the notion of linear time in Middle Age Europe, and the role of law in its institutionalisation and subsequent global dominance through the alliance with discourses of progress and modernity. Then I showed how future-directed notion of progress underpin key legal concepts and discourses that are relevant to address the present ecological predicaments, notably sustainable development, environmental human rights, and ambition. Further, I argued that analysing the interplay of linear time and the rhetoric of progress can reveal important insights about the way in which the field deals with the unequal impacts of ecological collapse. Law's progressive promise and orientation towards an open future, I suggested, obscures the uneven distribution of futurity engendered by climate change and environmental devastation, thereby contributing to the legitimation of the existing status quo. While one cannot discard the idea of other possible and more ecologically just worlds, in order to envision and act towards them international lawyers need to reckon with the unequal temporalities of the (colonial) past and the (extractive) present – temporalities that are deeply entrenched in the field[156] and that may restrict our legal imagination. In arguing for a critical reflection on the distributive outcome of the temporalities encoded *within* international (environmental) law, it is helpful to conceive of the future as a set of contested legal relationships embedded in the present and emerging from the past, as illustrated by ongoing debates on intergenerational justice.

Far from being a comprehensive study of the role of temporalities in shaping legal norms and discourses (and vice versa), my contention is that international legal scholarship may benefit by attending to the ways in which our discipline and profession are infused with specific notions of time that may entrench, rather than challenge, intersecting exclusions and inequalities. Any conversation on the role of law in working towards more sustainable futures needs to account for the field's temporal foundations and orientations, its foreclosed promises and possibilities.

155 Fleur Johns, 'Disastrous Law: International Law and the Shock-Absorption of Disaster', AJIL 117 (2023), 151-171 (168).

156 Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', EJIL 30 (2019), 573-600.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Visions of International Law in the Nineteenth Century: The Experience of the French Intervention in Mexico

Tania Atilano*
University of Zurich, Zurich, Switzerland
tania.atilano@gmail.com

Abstract 896
Keywords 896
I. Introduction 896
II. The French Intervention: Historical Background 898
III. Liberal Republicanism and International Law 902
IV. Visions of International Law Founded on Knowledge 904
1. Learning and Teaching International Law 904
2. International Law and Language 908
V. Concrete Visions of International Law 909
1. The Law of 1862 that Criminalised Acts Against the Nation, the Law of Nations and Individual Rights 909
a) The Right to Independence 909
b) Content of the Law 910
2. The Military Trial Against Maximilian of Habsburg 913
a) Trial Proceedings 913
b) 'The Theatre of Sovereignty' Played Out in a Theatre 916
c) The Trial of Maximilian in the Arts 919
3. The Criminal Code of 1871 920
VI. Conclusion 922

'No creo que la naturaleza haya formado diferentes cuerpos de leyes para cada pueblo o para cada familia de pueblos llamadas razas. En mi opinión, es más natural suponer que la providencia rige al género humano por el mismo código de leyes, igualmente aplicable a la raza anglosajona, que a la latina, a los indios que a los africanos.'

[I don't think nature has formed different bodies of laws for each people or for each family of peoples called races. In my opinion, it is more natural to suppose that providence governs the human race by the same code of laws,

* Post Doctoral researcher Zurich University. The author would like to thank Prof. Christian Tams, Rebecca Kruse, Alexander Holzer and the anonymous reviewers for their invaluable feedback and comments, as well as Jorge González Galdamez for his guidance at the Fray Francisco de Burgoa Library in Oaxaca, Mexico.

DOI 10.17104/0044-2348-2024-4-895 ZaöRV 84 (2024), 895-924

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

equally applicable to the Anglo-Saxon race, as to the Latin, to the Indians, and to the Africans.][1]

Matías Romero, 1867[2]

Abstract

The history of international law dedicated to the period of the nineteenth century is still very much concentrated on Europe and the US. However, by the mid-nineteenth century Mexican liberal republicans engaged creatively with international law. In the midst of war and foreign intervention a 'vision of international law' emerged in which the right of independence and the principles of 'equal sovereignty' and 'non-intervention' were enforced through domestic law. The creative ways in which international law was deployed will be explored and will illustrate its emancipatory potential.

Keywords

principle of non-intervention – equal sovereignty – history of international law – self-determination – laws of war – military trials

I. Introduction

In the spirit of broadening the scope of places and actors that have contributed to the development of international legal thought and practice, this article puts the spotlight on a case in which the language and concepts of international law were employed to challenge European hegemony during what is known as the *French Intervention in Mexico* (1862-1867). This case illustrates the challenge of turning formal sovereignty into reality through legal norms and practices while overturning hierarchical visions of sovereign rights.[3] The con-

1 Translation by the author. Unless stated otherwise, all translations are the author's.

2 Extract of a speech given by Matías Romero at a banquet given in his honour to celebrate the defeat of Maximilian's Empire. The banquet was given in New York on 2 October 1867. Matías Romero was a special envoy of the Mexican Republic to the United States and an important figure in the Mexican liberal movement. See *Banquete dado en obsequio del Señor Don Matías Romero, enviado extraordinario y plenipotenciario de México en los Estados Unidos por ciudadanos de Nueva York, el 2 de octubre de 1867* (Imprenta del Gobierno en Palacio 1868), 56.

3 Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004).

 DOI 10.17104/0044-2348-2024-4-895

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

testations made to Napoleon III's imperial project were not only discursive but also legal in nature. The arguments and normative frameworks put forward by Mexican liberal republicans challenged the arbitrariness and selectivity of the application of international law by European powers. The interpretation and practice of international law during the French Intervention constituted a 'vision of international law' that was supported by the idea that all states, regardless of their influence or power, should abide by the law and that nations should respect each other's rights.[4] This is perfectly illustrated by the analogy between individuals and states, drawn in 1867 by Benito Juárez, Mexico's first Indigenous president and leader of the liberal republicans:

> 'Among individuals, as among nations, respect for the rights of others is peace.'[5]

This vision of international law sharply contrasts with how international relations among European states were at the time governed by the 'balance of power',[6] while the expansion of international law beyond Europe was under debate and often shaped by racial and cultural biases.[7]

Another characteristic which I think influenced the interpretation and practice of international law more broadly in the Americas and particularly in Mexico is that its starting point was the question of how to separate from Spain, how to obtain sovereignty, maintain it and be recognised by the European powers. The most important issue, however, was how this sovereignty would be acknowledged in everyday interactions and affairs, such as the recurrent theme of the protection of European subjects.[8] In a sense, the interpretation and practice of 'international law', or the law of nations,[9] began

4 Scholars Tom Long and Carsten-Andreas Schulz also call it 'Juarista liberal internationalism', which they define as '[…] an anti-imperial liberal alternative, based on popular sovereignty, equality, non-intervention and fraternity'. Tom Long and Carsten-Andreas Schulz, 'A Turn Against Empire: Benito Juárez's Liberal Rejoinder to the French Intervention in Mexico', Am. Polit. Sci. Rev. (2024), 1-15 (12).

5 'Entre los individuos, como entre las naciones, el respeto al derecho ajeno es la paz', Manifiesto a la nación expedido en la Ciudad de México con motivo del triunfo de la República sobre la intervención francesa, 15 de julio de 1867, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 286-290.

6 Glenda Sluga, *The Invention of International Order: Remaking Europe after Napoleon* (Princeton University Press 2021), 253-282; Milos Vec, 'De-Juridifying "Balance of Power" – A Principle in 19th Century International Legal Doctrine', ESIL 2011 4th Research Forum, 5 December 2011, available at SSRN: https://ssrn.com/abstract=1968667, last access 16 December 2024.

7 Andrew Fitzmaurice, 'Equality of Non-European Nations in International Law' in: Inge Van Hulle und Randall C. H. Lesaffer (eds), *International Law in the Long Nineteenth Century (1776-1914)* (Brill/Nijhoff 2019), 75-104 (95-102); Simpson (n. 3).

8 Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (Cambridge University Press 2021).

9 The term 'international law' is used here, as by the 1860s it was common in Mexican discourse. See section IV.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

with a practical problem, whereas in Europe the study of and reflections on international law were based on a state of affairs derived from the Congress of Vienna.[10] In the following, I present three concrete examples of the 'vision of international law' that emerged during the French Intervention in Mexico:

1) The law of 1862 that criminalised acts against the nation, the law of nations and individual rights.

2) The military trial of Maximilian of Habsburg in 1867 for violating the law of nations and the laws of war.

3) The crime of *violations of the duties of humanity* in the Mexican Criminal Code of 1871.

My work builds on Arnulf Becker Lorca's *Mestizo International Law*[11] and Liliana Obregón's *Creole Legal Consciousness*.[12] However, I would argue that the three above-mentioned examples go beyond 'appropriating' international law, as they proposed alternative ways of enforcing international law through domestic law. That is also why this article is entitled 'Visions of International Law',[13] as the legal measures adopted by liberal republicans not only aimed at enforcing international law but also at projecting a future in which the community of states would uphold the principles of equal sovereignty, non-intervention and self-determination.

The following sections examine the historical background of the French Intervention and how knowledge of international law was constructed, laying the foundation for the innovative ways in which the Mexican republicans thought about and applied international law.

II. The French Intervention: Historical Background

The building of a new political community after independence in 1821 led to struggles around the question of what form of government the new

10 David W. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', Nord. J. Int'l L. 65 (1996), 385-420.

11 Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge University Press 2014).

12 Liliana Obregón, 'Between Civilization and Barbarism: Creole Interventions in International Law', TWQ 27 (2006), 815-832. Also, Liliana Obregón, 'Regionalism Constructed: A Short History of "Latin American International Law"', European Society of International Law 2 (2012), Conference Paper No. 5/2012.

13 The author was also inspired by the following phrase by Julia Eichenberg, 'Das Recht ist der Modus, in dem sich moderne Gesellschaften ihre Existenz erträumen', cited in: Arvid Schors and Fabian Klose (eds), *Wie schreibt man Internationale Geschichte? Empirische Vermessungen zum 19. und 20. Jahrhundert* (Campus Verlag 2023), 29.

 DOI 10.17104/0044-2348-2024-4-895

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

independent state ought to adopt.[14] Eventually, this struggle developed into a clash between liberals and conservatives. While liberals '[…] centered on the rights, freedoms, and autonomy of individuals'[15] as well as complete separation from Spain, conservatives were not in favour of a radical change and sympathized with the church and the 'Spanish Motherland'. Further, while liberals were for federalism, conservatives were for centralism.[16] According to historian Alan Knight, the Mexican-American war and the loss of half the territory as a result of Mexico's defeat left the population with greater nationalistic consciousness and led to more radical views among liberals, ultimately leading to the Constitution of 1857.[17]

The Constitution was promulgated by a 'second generation' of Mexican liberals (the first being the one that ignited the wars of independence) who were convinced that radical measures were needed to remove all vestiges of colonial rule. Accordingly, Articles 1 to 29 of section I of the Constitution granted individual rights such as equality before the law, the abolition of slavery, freedom to exercise a profession, freedom of expression, the prohibition of peonage, the abolition of all *fueros*, or special jurisdictions, to which the church and military were entitled. Article 27, a controversial provision, declared corporate property illegal. The provision was mostly directed at the church and aimed to free up land and turn it into privately owned property.[18] The liberals took the view that this was a way to raise a new class of proprietors.[19]

Article 33 of the Constitution granted foreign subjects the protection of their individual rights and obliged them to '[…] obey and respect the institutions, laws, and authorities of the country, subjecting themselves to the rulings and judgments of the courts, without being able to pursue other remedies than those granted to Mexicans by law'.[20] In this provision we can already see reflected what Argentinian jurist Carlos Calvo would argue much

14 See Hilda Sabato, *Republics of the New World: The Revolutionary Political Experiment in Nineteenth-Century Latin America* (Princeton University Press 2018).

15 Alan Knight, *Bandits and Liberals, Rebels and Saints. Latin America since Independence* (Nebraska University Press 2022), 51.

16 Knight, *Bandits and Liberals* (n. 15), 79-84.

17 Alan Knight, 'El liberalismo mexicano de la reforma hasta la intervención (una interpretación)', *Revista de Historia Mexicana* 35 (1985), 59-91 (73-80).

18 Constitución Federal de los Estados Unidos Mexicanos, 1857, available at: <https://memoricamexico.gob.mx/swb/memorica/Cedula?oId=rS8-q28BTLysp6JamQ7i>, last access 16 December 2024.

19 Knight, 'El liberalismo mexicano' (no. 17), 78-79.

20 Constitución Federal de los Estados Unidos Mexicanos, sancionada por el Congreso general constituyente el 4 de octubre de 1824. Also available at <https://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf>, last access 16 December 2024.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

later regarding equal treatment of foreign subjects, who could not demand special protection from their governments, and should rely solely to domestic jurisdiction.[21] In addition, Article 15 prohibited the extradition of political prisoners.[22] Finally, Article 29 set a fundamental limit on power during a state of emergency: the preservation of human life.

The provisions of the Constitution went hand in hand with what are known as the 'laws of reform', which aimed to establish a secular state, to grant freedom of religion and to remove those functions that were previously performed by the clergy such as issuing birth certificates and celebrating marriage.[23] Another objective of the reform was to abolish military and ecclesiastical *fueros* and to carry out the disentailment of church property and that of other corporations.[24]

Conservatives who claimed that Catholicism should be the only religion of the Mexican nation did not agree either with the secular character of the Constitution or with the banning of ecclesiastical privileges and corporations. In December 1857, troops marched into Mexico City led by the conservative faction, who refused to recognise the Constitution and called for a new constituent congress. This was the beginning of a three-year war known as the Reform War at the end of which the liberals were the victors.[25]

After the Reform War, the liberals gained even more popular sympathies, as the conservatives had proved to be brutal in their retaliation and commission of massacres.[26] This, of course, did not stop conservatives from continuing with or insisting on their project of reestablishing the powers of the church and establishing a monarchy. After the Reform War, conservatives even went a step further, as they sought the backing of Napoleon III's French Empire.

---

21 Charles Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, Vol. 3 (6th edn, M. Guillaumin 1887), 138-146.

22 This provision advanced the ideas of Robert von Mohl as described by Martti Koskenniemi, *The Gentle Civilizer of Nation: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001), 49-70.

23 Ley del matrimonio civil (23 de julio 1859); Ley sobre el estado civil de las personas (28 de julio de 1859); Ley sobre libertad de cultos (4 de diciembre 1860); Se extinguen en toda la república las comunidades religiosas (26 de febrero 1863).

24 On the 'laws of reform', see Richard N. Sinkin, *The Mexican Reform, 1855-1976* (University of Texas Press 1979) and Martín Luis Guzmán, *Necesidad de cumplir las leyes de reforma* (UNAM 2007), 255-293.

25 According to the historian William Fowler, 200,000 people were killed in battle. See William Fowler, *The Grammar of Civil War. A Mexican Case Study, 1857-61* (University of Nebraska Press 2022), 43-44.

26 Fowler (n. 25), 182-184.

 DOI 10.17104/0044-2348-2024-4-895

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

In July 1861, shortly after the liberals' victory over the conservatives, the President of Mexico, Benito Juárez, declared the suspension of foreign debt.[27] Juárez's idea was to postpone the debt, as financial resources were needed to implement the liberal law reform that consisted, *inter alia*, of instituting a secular state, male universal suffrage, as well as achieving social equality.[28] Spain, Britain, and France, however, were not in favour of the suspension of payments, and they formed an alliance (the so-called Triple Alliance). In October 1861, the three allies signed the London Convention, in which they agreed to send combined military forces to the coast of Mexico.[29] When the military forces arrived in the port of Veracruz, negotiations began between the three powers' proxies and the Mexican government, which ultimately ended with the signing of the *La Soledad Convention* in February 1862. Under the Convention, the three European powers were obliged not to interfere in the national sovereignty and internal affairs of the Mexican state.[30] Nonetheless, in April, French forces started advancing on Mexican territory. Known as the French Intervention in Mexico and as the *Expedition du Mexique* in France, the armed conflict lasted five years.[31] In the course of these five years a monarchical government was established headed by the Austrian Archduke Maximilian of Habsburg (1864-1867).[32]

The advance of French forces on Mexican territory presented Mexican republicans with the reality that France was violating a treaty that had been signed only one month earlier, which stated that no violent force would be used to secure the payment of reparations claims and foreign debt.[33] Not only was France violating a treaty, it was also resorting to the use of armed

27 *Ley de Suspensión de Pagos de 1861* in: Discurso de Juárez en la apertura de sesiones del Congreso de la Unión, Documentos para la historia de México (Colección Lafragua, Vol. 1519, 1889), 857.

28 See Faviola Rivera Castro, 'El liberalismo decimonónico en México' in: Gerardo Esquivel et al. (eds), *Cien ensayos para el centenario, Constitución de los Estados Unidos Mexicanos* (UNAM 2017).

29 Tripartite Treaty of London (Tratado de Londres), 31 de octubre de 1861, ratificado por SS. MM. la reina Doña Isabel II, el emperador de los franceses y la reina de la Gran Bretaña, canjeándose las ratificaciones en Londres el día 15 de noviembre.

30 Convenio de la Soledad, por el que potencias extranjeras no atentarán contra la soberanía nacional, 19 de febrero de 1862, in: *Derechos del pueblo mexicano. México a través de sus constituciones* (sección segunda, UNAM 2016), 408-409.

31 For a fresh account of the history of the French Intervention, see Héctor Strobel, *Resistir es vencer. Historia militar de la intervención francesa 1862-1867* (Grano de Sal editores 2024); Josefina Zoraida Vasquez, 'De la independencia a la consolidación republicana', in: *Historia mínima de México* (Colegio de México 2008), 245-336.

32 Johann Lubiensky, 'Una monarquía liberal en 1863', in: Patricia Galeana (ed.), *La definición del Estado Mexicano 1857-1967* (Archivo General de la Nación 1999), 57-73.

33 Convenio de la Soledad (n. 30), 408-409.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

forces on Mexican territory without formally declaring war.[34] For the Mexican republicans, especially President Juárez, this meant an open violation of the principle of sovereignty, as the Mexican Republic was a duly constituted state supported by popular will. The invasion was also a violation of the principle of self-determination, as it was the will of the Mexican people to organise as a republic and not as a monarchy.

III. Liberal Republicanism and International Law

In his various writings, decrees and personal letters,[35] Benito Juárez envisioned a community composed of equal sovereign states in which all states would in future become republics, as he wrote to Karl Blind in 1868:

> 'I believe that progress is a condition of humanity, I hope that the future will necessarily be one of democracy, and I have more and more faith that the republican institutions of the American world will be extended to the unfortunate peoples of Europe who still retain, in spite of themselves, monarchs and aristocracy.'[36]

In this line of thought, liberal republicanism was seen as a condition for the realisation of international law. This approach was also deemed a collaborative effort among the republics of the Americas, as expressed by President Juárez to United States (US) plenipotentiary Marcos Otterbourg in August 1867:

> 'The United States has given the strength of its moral support to the cause of republicanism everywhere, and to its free preservation in Mexico, upholding the just principles of international law.'[37]

---

34 Jorge Magallón Ibarra, *Proceso y ejecución vs. Fernando Maximiliano de Habsburgo* (UNAM 2005), 567.

35 Juárez, Romero and Pola (n. 5).

36 'Como creo que el progreso es una condición de la humanidad, espero que el porvenir será, necesariamente, de la democracia y tengo cada día más fe en que las instituciones republicanas del mundo americano se harán extensivas a los pueblos infortunados de Europa que aún conservan, a pesar suyo, monarcas y aristocracia.' Letter from Benito Juárez to Karl Blind, London, March 9, 1868, in: Jorge L. Tamayo, *Benito Juárez Documentos, Discursos y Correspondencia,* Vol. 13, Chapter CCLV, Doc. 6. As regards Juárez's statement, in 1858, that democracy was the fate of humanity, see José M. Vigil, *México á través de los siglos, La Reforma, Vol. V.* (Ballesca y Com. Editores 1889), 297.

37 'Los Estados Unidos han dado la fuerza de su apoyo moral a la causa del republicanismo en todas partes, y a su libre conservación en México, sosteniendo los principios justos del derecho internacional.' Benito Juárez in his acceptance speech to the US plenipotentiary Marcos Otterbourg in 1867, *El Siglo Diez y Nueve*, Miércoles 21 de Agosto de 1867.

 DOI 10.17104/0044-2348-2024-4-895

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Juárez and his liberal companions formed what scholars Tom Long and Carsten-Andreas Schulz categorise as 'Juarista Liberal Internationalism', in which international law sets rights and duties for all states, not only powerful states.[38] The vision of the Mexican republicans was truly novel if we consider that by the mid-nineteenth century the assumption that all states were equal legal subjects was by no means settled.[39] I would argue that international law in this sense is an expression of 'liberal internationalism' or a tool for instituting liberal internationalism. In the view of Juárez and his followers, if states were liberal republics, they would comply with and enact international law. Non-liberal, or tyrannical, governments were not compatible with international law, they believed, as these would not respect the rights of other states but simply impose their own will.[40] This idea went hand in hand with the principle of non-intervention, which for Juárez entailed the obligation '[…] to respect the liberties of the people and the rights of nations'.[41] However, what the French Intervention crudely showed the republican liberals is that no matter how proficient they were in the language of international law they also had to enforce it. This might explain why all three examples discussed in this article share a central feature: they are methods of enforcing international law through domestic law. What the republican government could not achieve through diplomacy it would attempt to accomplish through the law.

The different legal measures republican liberals came up with also went hand in hand with a critical attitude towards the Janus-faced discourse of civilisation.[42] This critique can be found in statements made at the time, such as by Carlos de Gagner, a liberal German and nationalised Mexican who studied law:[43]

---

38 Tom Long and Carsten-Andreas Schulz, 'Benito Juárez Against the World: France, Mexico, and the Clash of Nineteenth-Century Liberal Internationalisms'. Presented at the Rethinking the Past and Present of Liberal Internationalism conference, City, University of London, 11-13 May 2023, and Long and Schulz (n. 4).

39 Simpson (n. 3). See also Milos Vec, 'Das Theater der Souveränität. Performative Dimensionen souveränen Handelns im Völkerrecht des 19. Jahrhunderts verstehen' in: Thomas Maissen, Niels F. May and Rainer Maria Kiesow (eds), *Souveränität im Wandel. Frankreich und Deutschland, 14.-21. Jahrhundert* (Wallstein Verlag 2023), 203-223.

40 Benito Juárez, *Manifiesto justificativo de los castigos nacionales en Querétaro* (Tipografía del Gobierno, en Palacio 1887), 43.

41 Contestación del C. presidente Benito Juárez al discurso del Ministro Marcos Otterbourg al presentar sus credenciales, *El Siglo Diez y Nueve*, Miércoles 21 de Agosto de 1867.

42 In this regard, see also Long and Schulz (n. 4).

43 Martha Celis de la Cruz, 'Presencia de la masonería alemana en México: Carlos de Gagnern (1826-1885)', Revista de estudios históricos de la masonería latinoamericana y caribeña 2 (2011), 152-159, available at <https://revistas.ucr.ac.cr/index.php/rehmlac/article/view/6601/6292>, last access 16 December 2024.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

> 'The ancient continent boasts much of the advances of civilization; we do not want to investigate now if this civilization is as complete, as real, and true as they want to present it to us. Suffice it to state here a fact, which does not cease to be curious, and that is that in almost all parts of the world where this much praised European civilization has placed its plant, its immediate effects have been rather harmful than beneficial.'[44]

In the same vein, the lawyer and journalist Manuel Payno said the following in the same year, 1862:

> 'Even if we have revolutions, if our roads are unsafe, if we are uncivilized barbarians, we say, leave us alone!'[45]

In addition, liberalism enjoyed wide acceptance among the population, as it resonated with people's concerns and advocated for the abolition or reform of conditions that restricted their liberties or limited major participation in their everyday lives,[46] such as a hierarchical organisation of society, limitations on the exercise of professions and limited access to education.[47]

To understand how the ideas about and attitudes to international law emerged and were disseminated among the wider population, the next section examines the development of theoretical knowledge of international law among Mexican republican liberals.

IV. Visions of International Law Founded on Knowledge

1. Learning and Teaching International Law

The visions of international law held by Latin American republicans were founded in both theoretical and practical knowledge. Scholar Nicola Miller

---

44 He further draws attention to examples of the negative effects of 'civilization' in China and Japan. See Carlos de Gagern, *Apelación de mexicanos a la Europa bien informada de la Europa mal informada* (imprenta de I. Cumplido 1862), IX-X.

45 Quoted in Sinkin (n. 24), 158.

46 Knight, *Bandits and Liberals* (n. 15), 71-75; Guy P. C. Thomson, 'Popular Aspects of Liberalism in Mexico, 1848-1888', Bulletin of Latin American Research 10 (1991), 265-292. On liberalism and popular participation in the state of Oaxaca, see Peter Guardino, *The Time of Liberty: Popular Political Culture in Oaxaca, 1750-1850* (Duke University Press 2005), 288-291.

47 François Chevalier, 'Conservateurs et libéraux au Mexique. Essai de sociologie et géographie politiques de l'indepéndance a l'intervention Française', Journal of World History 8 (1964), 457-474.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

argues that, after gaining independence, 'the liberators' realised they needed knowledge to put the project of building a nation-state into practice. Additionally, she argues that acquiring and producing knowledge belonged to the overall project of creating new epistemologies in the new nation-states.[48] Fields on which a particular focus was placed included political philosophy, economy, engineering, and law.

It could be argued that Latin-American republicans first gained their knowledge of the law of nations through formal education. In a second stage, their knowledge of the topic was broadened by practice. The combination of the two enabled them to imagine political projects, of which the law was a part.[49] The vision republicans had differed from the European view, which held that the application of international law depended on the level of 'cultural' and material accomplishments.[50]

Another crucial element in the formation of liberal thought in post-colonial Spanish America was the foundation of 'institutes of science'. For example, the *Instituto de Ciencias y Artes del Estado de Oaxaca* (Institute of Arts and Sciences of the State of Oaxaca, Mexico),[51] founded after independence in 1827, was a secular institution the main aim of which was to educate individuals in liberalism and in all other scientific endeavours regardless of their class or race. Students were trained in political philosophy, political economy, and law. Prominent figures of the liberal movement studied law at the Institute of Oaxaca, including Benito Juárez (who was part of the first generation of law graduates), Porfirio Díaz, and Matías Romero. Benito Juárez also taught natural law at the institute and even became its director in 1848.[52] When the Institute was founded in 1827, the law of nations (*derecho de gentes*) was taught alongside constitutional law; by 1835, it was taught alongside natural law.[53]

48 See Nicola Miller, *Republics of Knowledge* (Princeton University Press 2020), 124-127.

49 See Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (Cambridge University Press 2021).

50 There is a vast literature on the European view. For an overview, see Koskenniemi, *Gentle Civilizer of Nations* (n. 22); Andrew Fitzmaurice, 'Scepticism of the Civilizing Mission in International Law' in: Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press 2017), 359-384.

51 On the overall importance of the institute in forming liberal elites in nineteenth-century Mexico, see Joaquín Santana, *Entre catédras, hombres de letras, clérigos y libros. Los primeros años del Instituto de Ciencias y Artes del Estado de Oaxaca.* Tesis de Licenciatura (UNAM 2020), 65-70, 99-131; Annick Lempériere, 'Formación de las elites liberales, en el México del Siglo XIX: Instituto de Ciencias y Artes del estado de Oaxaca', Revista Secuencia 30 (1994), 57-94.

52 Santana (n. 51), 119; Lempériere (n. 51), 57-94.

53 Santana (n. 51), 101-102, 114-115.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

It could be argued that the European view of various stages of civilisation depending on race made little sense to those like Juárez, a Zapotec born to a poor family in a small village in Oaxaca who rose to become President of the Republic. Many students at the *Instituto de Ciencias y Artes* came from a similar background, and they formed the next generation of lawyers who would fight alongside Juárez in the Reform War and the French Intervention.[54] It was easy for Mexican liberals to recognise that 'civilizational' arguments were only deployed to take advantage of non-European states – as Juárez put it in a speech to the nation in 1861.[55] Their personal experiences contradicted the notion that achieving a certain level of civilization – such as becoming a fully sovereign state – was reserved solely for Europeans and US Americans. They had witnessed their own personal transitions, moving from being part of a class with no access to education under colonial rule to becoming lawyers and more broadly observing the transformation from a colony to being an independent nation-state.

That the law of nations, or international law (a term that was already in use in Mexico by the 1860s), was an important subject of study is evident from the library book catalogue of the Institute of Sciences and Arts of Oaxaca.[56] Published in 1887, the catalogue lists classical works such as that of Hugo Grotius (ed. 1651) and Emmer de Vattel (ed. 1834), as well as Johann Klüber (ed. 1831), Henri Wheaton, and Caspar Bluntschli. The Mexican edition of Henry Wheaton's *Elements of International Law* was published in 1854 and translated into Spanish by José Mariano de la Vega. This edition included a separate volume, designed as an annex, titled *Sources of Mexican International Law*. The annex encompassed all the treaties that had been signed by Mexico with foreign powers between 1821 and 1854.[57] This demonstrates that positive law was considered the primary source of international law, marking a departure from natural law traditions. It also explains the liberals' preference for codifying international law in domestic law, and their insistence on treaties being complied with, as was the case during the military trial against Maximilian of Habsburg.

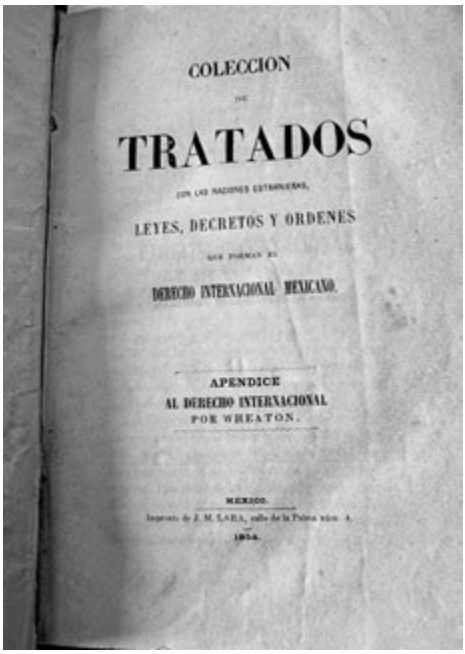
54 Lempériere (n. 51), 68; Chevalier, (n. 47), 469-470.

55 Manifiesto del presidente constitucional de la república a la nación, 18 de diciembre de 1861, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 257-262.

56 *Catalogo alfabético de la Biblioteca del Estado, Oaxaca* (Imprenta del Estado en la Escuela de Artes y Oficios a cargo de Ignacio Candinal 1887).

57 José Mariano Lara, *Elementos del derecho internacional* / por Henry Wheaton, exministro de los Estados-Unidos de América cerca de la corte de Prusia, miembro honorario de la Academia Real de Ciencias de Berlin, y miembro corresponsal de la Academia de Ciencias Morales y Políticas en el Instituto de Francia; traducción hecha por el Lic. José María Barros (Imprenta de J. M. Lara 1854).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -


COLECCION

DE

TRATADOS

CON LAS NACIONES ESTRANGERAS,

LEYES, DECRETOS Y ORDENES

QUE FORMAN EL

DERECHO INTERNACIONAL MEXICANO.

APENDICE

AL DERECHO INTERNACIONAL

POR WHEATON.

MEXICO.

1854.

Appendix to Elementos del derecho internacional / por Henry Wheaton, Imprenta de J. M. Lara, calle de la Palma núm. 4, 1854-1855 (Photo by Tania Atilano)

Another example of the reception of the international law doctrine is José Díaz Covarrubias's 1871 translation from French into Spanish of Johann Caspar Bluntschli's treatise on international law.[58] Covarrubias included own comments on the treatise as he thought necessary and wrote in the introduction that it was the most didactic source to teach in the classroom. Indeed, as his students would later report, his translation of Bluntschli's treatise was used as a manual for learning international law at the School of Jurisprudence in Mexico City, where, according to these reports, there was already a Chair in International Law by 1871.[59]

As we can see, to the liberal republicans, proficiency in legal knowledge was necessary to achieve their aim of becoming an independent and sovereign nation. Such knowledge also enabled them to identify breaches of international law, such as that of the French Intervention in Mexico.

58 José Díaz Covarrubias, *El derecho internacional codificado* / por M. Bluntschli, Doctor en derecho, profesor ordinario en la Universidad de Heidelberg; traducción, adiciones y notas de José Díaz Covarrubias (imprenta dirigida por José Batiza 1871).

59 Manuel Cruzado, *Memoria para la bibliografía jurídica mexicana* (Antigua imprenta de E. Murguía 1894), 62-66.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

It could also be added that liberal jurists who held important positions after independence emerged from a *mestizo* class that did not enjoy the privileges of the white class during colonial times.[60] In contrast to figures like Andrés Bello or Carlos Calvo, those from the legal profession were taught at Mexican universities or in the post-independence institutes of science. The most prominent example is Benito Juárez.[61] In addition, the leading representatives of liberalism were jurists who not only practised law but also held public office, taught at universities and worked as journalists, literary critics, and writers.[62] Consequently, their legal knowledge was both theoretical and practical. The political engagement of the liberal jurists might also explain why their visions of international law went hand in hand with a political project, namely liberal republicanism.

2. International Law and Language

Language and the establishment of a common grammar became particularly important during the period of 'state building', which in my view influenced how Mexican republicans conceptualised the enforcement of international law. As Liliana Obregón has shown, Andrés Bello not only wrote a treatise on international law but also on the grammar of Spanish language.[63] When Nicola Miller writes of the Latin American republics' decision to adopt Castillian Spanish instead of local variants, she quotes a passage by Andrés Bello, in which he stressed how important it was for the new nations to follow the rules and grammar of the 'Real Academia Española' (RAE, the last authority in matters of the correct use of the Spanish language) to continue communicating with Europe.[64] In this sense, Andrés Bello's position on a common language was consistent with his view on the law of

60 Luis Villoro, *El proceso ideológico de la revolución de independencia* (UNAM 1977), 1431.

61 Brian Hamnett, 'Juárez, Early Liberalism, and the Regional Politics of Oaxaca, 1828-1853', Bulletin of Latin American Research 10 (1991), 3-21. For an authoritative biography of Juárez, see Ralph Roeder, *Juarez and His Mexico* (Viking Press 1947); see also Patricia Galeana, *Benito Juárez: El hombre y el símbolo* (Crítica México 2023).

62 A biographical review of the major figures of the Mexican liberal reform can be found in Sinkin (n. 24), 3154.

63 Liliana Obregón, 'The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America', Wisconsin Journal of International Law 23 (2005), 145-172 (148-150); Liliana Obregón, 'Construyendo la región americana: Andrés Bello y el derecho internacional' in: Beatriz González-Stephan and Juan Poblete (eds), *Andrés Bello y los estudios latinoamericanos* (Serie Criticas Universidad de Pittsburgh: Instituto Internacional, de Literatura Iberoamericana 2009).

64 See Miller (n. 48), 124-127.

 DOI 10.17104/0044-2348-2024-4-895

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

nations.[65] The new nations of the Americas had to adopt the law of nations – just as they had to adopt Castillian Spanish and abide by the rules of the RAE – in order to communicate and argue in the language that was intended to govern interactions between states.

The choice of Castillian Spanish as the common language in the region as well as the choice of the law of nations to communicate with the transatlantic 'other' entailed a rejection of regional legal epistemologies as well as of Mexican Spanish, Chilean Spanish, and Argentinian Spanish. However, far from being a failure to consider or create local legal knowledge, these choices enabled Latin American republics and their leading figures '[…] to situate themselves and their potentially sovereign states within international circuits of recognition, both diplomatic and cultural.'[66] In this respect, the adoption of a common language did not prevent the hybridisation of international law in the Americas (or '*Mestizo* international law' in the words of Arnulf Becker Lorca).[67] This hybridisation gave way to new visions of international law, as we will see in the following sections.

V. Concrete Visions of International Law

1. The Law of 1862 that Criminalised Acts Against the Nation, the Law of Nations and Individual Rights

a) The Right to Independence

Jörg Fisch has argued in his book on the right to self-determination that Hispanic America was a pioneer when it came to articulating a right to independence, based on which colonies had an absolute right to found an independent state. In this regard, Mexico's Declaration of Independence of 1821 states that the Mexican people had the '[…] freedom to concentrate on the achievement of their happiness in the way that best appealed to them.'[68] In addition, Article 1 of the 1824 Mexican Constitution stated that 'The Mexican nation is forever free and independent from the Spanish government

65 On Andrés Bello, see Nina Keller-Kemmerer, *Die Mimikry des Völkerrechts: Andrés Bellos 'Principios de Derecho Internacional'* (Nomos 2018), especially as regards how education was seen as the cornerstone of nation-building, 138-141.

66 Miller (n. 48), 219.

67 Becker Lorca (n. 11).

68 Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion*, translated by Anita Mage (Cambridge University Press 2015), 74-75.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

and any other foreign power.'[69] It can be deduced from this that the right of independence entailed separation from the 'Motherland' through which the Mexican people could pursue happiness by the means they deemed best. More specifically, by 1857 the Mexican people had decided to organise as a liberal republic. After a three-year war between the conservatives and liberals over the 1857 Constitution (from which the liberals emerged victorious), the will of the people to constitute as a liberal republic was reaffirmed.

The peace following the civil war did not, however, bring the stability the liberals had hoped for. When combined military forces from Spain, Britain, and France arrived at the port of Veracruz in October 1861, Juárez recognised the threat to the right of independence, territorial integrity and 'nationality'. In response to this threat, Juárez issued a law by executive decree that criminalised acts against the nation, the order, public peace, and individual rights (*Ley para castigar los delitos contra la nación, contra el órden, la paz pública y las garantías individuales* 1862).[70] The law consists of thirty-one articles and is divided into four categories of crimes: a) crimes against the independence and security of the nation (Article 1); b) crimes against the law of nations (Article 2); c) crimes against public peace and order (Article 3); and d) crimes against individual rights (Article 4).

As we can see from the categories of crimes, the aim was not only to protect sovereign rights but also to impose obligations established by the law of nations and individual rights.

b) Content of the Law

The law of 1862 defined any armed invasion executed by foreigners[71] as a crime against the independence and security of the Mexican nation if no declaration of war preceded the 'invading power'.[72] Any invitation by Mexicans or foreign residents in Mexico to subjects of another power that

69 'La nación Mexicana es para siempre libre e independiente del gobierno español y de cualquier otra potencia', cited in: Fisch (n. 68), 75.

70 Ley para castigar los delitos contra la nación, contra el órden, la paz pública y las garantías individuales, espedida por el Supremo Gobierno de la Nación, C. Victoria de Tamaulipas, año de 1862, impresa por Ascención Pizaña.

71 According to the law of 1862, Mexican citizens who aided the foreign power in the armed invasion would also be prosecuted.

72 According to the customs and usages of war at that time, war was permitted as a means to pursue a political aim but formalities had to be respected, such as declaring war. See Geoffrey Best, *Humanity in Warfare* (Weinfeld and Nicolson 1980), 31-74; Oona Hathaway, Scott Shapiro, *The Internationalists, How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2018), 31-55.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

encouraged the invasion of Mexican territory or the alteration of its form of government was also made a punishable offence. Further, in the event of the invasion actually taking place, it would also be considered a crime against the right of independence to contribute in any way to the organisation of the invasion by attending meetings, taking minutes, or accepting employment or commissions.

Article 2 defines crimes 'against the law of nations' as piracy and the slave trade in Mexican waters (providing for extraterritorial jurisdiction in case the 'prisoners' were Mexican). This provision plausibly relates to the abduction and selling of Yucatán prisoners of war to Spanish slave traders and owners in Cuba.[73] Juárez probably believed that in case of open war with Spain the slave trade from Yucatán to Cuba would increase. As early as May 6, 1861, Juárez prohibited by decree the extraction of Indigenous people from Yucatán to foreign countries.[74]

Paragraphs IV and V of Article 2 also made '[…] engaging nationals to serve foreign powers to invade the nation' a punishable offence. The Mexican provision was, thus, ahead of international law, as it was not until 1874 that the Brussels Declaration – and not until 1899 that the Hague Convention – prohibited '[…] any compulsion of the population of occupied territory to take part in military operations against its own country'.[75]

Additionally, Article 4 defined crimes against individual guarantees (individual rights) and made violence against individuals or against their property a punishable offence. This provision gave protection to all individuals, regardless of their nationality. This could also be interpreted as a reflection of 'cosmopolitan humanity' in the same sense as Kant's *Weltbürgerrecht*.[76] In a manifesto dated December 18, 1861, Juárez already gave the assurance that 'non-combatant' enemies would be given hospitality and that they would be protected by national law. Juárez further animated the population to abide by the laws and usages established 'for the benefit of humanity', in order to

73 Javier Rodríguez Piña, *La guerra de Castas. La venta de indios maya a Cuba*, 1848-1861 (CONACULTA 1990).

74 Decreto del gobierno que prohíbe la extracción para el extranjero de los indígenas de Yucatán, mayo 6 de 1861, in: Manuel Dublan and José Maria Lozano, *Legislación mexicana, colección completa de las disposiciones legislativas expedidas desde la independencia de la República* (Imprenta del comercio de Dublan y Chavez 1878), 203-202.

75 Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, Art. 36; Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Art. 44. Andres Bello, in his Treaty on International Law, also comments on the 'injustice' of forcing a prisoner of war to serve the hostile enemy, see Andres Bello, *Principios de Derecho Internacional* (3rd edn, Imprenta de la Patria 1864), 184.

76 Phillip Hölzing, *Republikanismus und Kosmopolitanismus* (Campus Verlag 2011), 181-186.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

prove the nation's capability of being independent.[77] This was further stressed in April of 1862, when Juárez declared in a manifesto that '[…] once hostilities broke out, all peaceful foreign residents in the country would be protected by Mexican law' and gave the assurance that '[…] during the war the rules of the law of nations would be abided by the military and authorities of the republic.'[78]

Since the law of 1862 criminalising acts against the nation, the law of nations and individual rights was enacted to cover the eventuality of a foreign invasion, it can be concluded that crimes against individual rights were set within the context of an armed conflict. This was ahead of later proposals put forward by Gustave Moynier.[79] It is also likely that the reason for the provision 'crimes against individual rights' is the reparations claims made by the United States, Spain, France, and Britain due to the harm caused to their nationals during the American intervention (1846-1848) and the civil war between the liberals and conservatives (1858-1861).[80] In this regard, Juárez constantly argued that foreign citizens were not entitled to privileges, as all were equal before the law and that foreigners were subject to domestic jurisdiction.[81]

Procedural guarantees were included in the 1862 law, giving jurisdiction to the military authority. Accordingly, 'citizens of the republic' had the right to report the commission of such crimes, military courts would then be instituted and composed of seven military judges and defendants were given 60 hours to present their arguments. The punishments ranged from the death penalty for committing 'crimes against the independence of the nation' to eight years' imprisonment for spying for the enemy (Articles 12 to 28). The punishment for the commission of crimes by persons 'caught in flagranti

77 Manifiesto del C. Presidente de la Republica a la Nación, Diciembre 18 de 1861, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 261-262.

78 Manifiesto del C. Presidente Juárez llamando a la defensa de independencia nacional frente a la intervención francesa, 12 Abril 1862 in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 264-265.

79 Daniel Marc Segesser, 'Forgotten, but Nevertheless Relevant! Gustave Moynier's Attempts to Punish Violations of the Laws of War 1870-1916' in: Mats Deland, Mark Klamberg and Pål Wrange (eds), *International Humanitarian Law and Justice: Historical and Sociological Perspectives* (1st edn, Routledge 2018), 197-211.

80 See José M., Vigil, *México á tráves de los siglos. La Reforma*, Vol. V. (México, Ballescá y Compañía; Barcelona Espasa y Compañía, 1882), 391-405.

81 He further argued that the reparations claims made by Spain were unjustified as her subjects were no more injured than any other person regardless of nationality due to a '[…] social revolution held by own right to abolish abuses', Juárez, Manifiesto del C. presidente de la República a la Nación, Diciembre 18, 1861. On the reclamations made by Spain, see Josefina Zoraida Vázquez, 'La deuda española en México. Diplomacia y política en torno a un problema financiero, 1821-1890 de Antonia Pi-Suñer Llorens', Historia Mexicana 56 (2007), 1448-1455.

 DOI 10.17104/0044-2348-2024-4-895

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

during an act of war' was immediate execution, as it was for those caught committing crimes against individual rights.

Through the law of 1862, President Benito Juárez proposed a model in which the right to independence and the right to self-determination would be protected under domestic law. As regards the right of self-determination of peoples, even though it was not strictly formulated as such by Juárez, in his speech to Congress in April 1862 he said that nations have the right '[…] to exist by themselves and to be governed by themselves' (*derecho de existir por sí mismas y de regirse por voluntad propia*).[82] To put this into perspective, Jörg Fisch traces the expression of 'self-determination' in Europe firstly to the German *Selbstbestimmungsrecht* (1865) and the French *droit des peuples de disposer d'eux-mêmes* (1860s).[83]

Finally, it can be concluded that Juárez aimed to enforce the right to self-determination through criminal justice, foreshadowing the hypothesis drawn in Article 8 *bis* paragraph 2 of the Rome Statute, where an act of aggression is defined as '[…] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.'[84]

2. The Military Trial Against Maximilian of Habsburg

a) Trial Proceedings

In 1867, after the French had retired their forces from Mexican territory, the Mexican imperial army – under Archduke Maximilian's command – was defeated by the Republican forces.[85] When Maximilian was captured along with his associates, Miguel Miramón and Tomás Mejía, President Juárez ordered a military trial under the above-mentioned law of January 1862.[86] Once again, reading Juárez's discourses provides further insight into the logic

82 El Sr. Juárez, al abrir el segundo período de sesiones del Congreso, Abril 15 1862, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 62.

83 Fisch (n. 68), 117-119.

84 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

85 Iván Segura Muñoz, 'La participación guerrillera republicana en la intervención francesa', in: José Luis Soberanes Fernández et al. (eds) *Derecho, guerra de reforma, intervención francesa y segundo imperio. personajes e instituciones* (UNAM 2022), 227-253.

86 A more in-depth analysis of the trial can be found in Tania Atilano, 'The Search for Truth in the Trial Against Maximilian of Habsburg (1867)', in: Luca von Bogdandy, Dr. Julius Schumann and Christoph Resch (eds), *Konflikte um Wahrheit* (Nomos 2024), 181-206.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

behind the trial: In 1862, when French military forces were advancing on Mexican territory, he stated the following:

> 'The responsibility for all ensuing disasters shall be borne only by those who, without reason or excuse, have violated the faith of international conventions.'[87]

The trial was held in a theatre (Teatro Itúrbide) with a capacity of 600 people.[88] Maximilian was charged with violating the sovereignty of the Mexican Republic and the law of nations.[89] The jury was composed of seven military judges and one counsel, all members of the Republican army.[90] The jury and public prosecutor established a narrative of the French Intervention that was actually labelled by the public prosecutor as a 'historical account'.[91] In it, they established that the French Empire had engaged in hostilities without declaring war on the Mexican state. As part of the accusation, the prosecutor quoted Napoleon III's justification for his non-declaration of war, in which Napoleon declared that ordering the withdrawal of the French troops would mean 'being an accomplice to the moral oppression under which the Mexican people were suffering'.[92] According to the republican government, Mexico's sovereignty was violated by the French imposition of a monarchical regime, which was legitimised through the collection of votes in territories occupied by French forces. The prosecutor argued that the votes that had been collected could not be considered in the trial as a legitimate

87 La responsabilidad de todos los desastres que sobrevengan, recaerá sólo sobre los que, sin motivo ni pretexto, han violado la fe de las convenciones internacionales, Manifiesto del C. Presidente Juárez llamando a la defensa de independencia nacional frente a la intervención francesa, 12 Abril 1862, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 264.

88 Kathleen Ibsen, *Maximilian, Mexico, and the Invention of Empire* (Vanderbilt University Press 2010), 51-83.

89 Magallón, *Proceso y ejecución* (n. 34), 564.

90 Ivan Tejeda Vallejo, *El fusilamiento de Maximiliano de Habsburgo* (Porrúa 2010), 20.

91 See *Alegato no. 10*, in: Magallón, *Proceso y ejecución* (n. 34), 558. That military trials judging war crimes provide historical narratives is an argument that has similarities to what today is said about international tribunals. See Barrie Sander, 'Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice', International Journal of Transitional Justice 12 (2018), 334-355.

92 Magallón, *Proceso y ejecución* (n. 34), 560. It recalls contemporary arguments justifying interventions for the sake of protecting human rights or of 'humanitarian interventions'. See Anne Orford, 'Muscular Humanitarianism. Reading the Narratives of New Interventions', EJIL 10 (1999), 679-711 (696-699). From a historical perspective, see Fabian Klose's work on interventions in the name of humanitarianism, Fabian Klose, *In the Cause of Humanity: Eine Geschichte der humanitären Intervention im langen 19. Jahrhundert* (Vandenhoeck & Ruprecht 2019).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

basis of power, as the occupation of territories amounted to the subjugation of the civilian population.[93]

Maximilian was charged with acting as an instrument of the French Intervention and waging war against the legitimate Republic of Mexico without declaring it or performing the formalities established by the law of nations. The prosecutor cited Hugo Grotius and Emmer de Vattel to make his point.[94] Other charges included a) usurpation of a sovereign people's rights, disposing of people's interests, rights, and life with violence; b) excesses done to civilians and with them, violating the laws of war; but above all c) issuing a decree that violated the law of nations and the laws of war, since the decree ordered the execution of those who rebelled against the imperial government and those who aided the rebels within 24 hours.[95] Other violations against the law of nations included plunder, murder, and the burning of villages.[96]

As regards the competence of the Mexican jurisdiction, the prosecutor invoked Vattel, adding that

> '[…] according to international law, the laws of a state bind all of its subjects, with the exception of foreigners. However, if a foreigner disrupts the order and peace of a nation, they will be subject to the criminal laws of the country whose rights were violated […].'[97]

Besides punishing the three main figures of the French Intervention and subsuming facts of an armed conflict to legal doctrine and legal categories, the trial served other practical purposes, such as officially ending the war. This was particularly important, as the liberal Jesús Terán proposed to Juárez that after the end of the war and defeating the Empire, new treaties should be signed with the European powers as they did not recognise the legitimate national government and, by extension, the treaties signed with it. This was later known as the 'Juárez doctrine'.[98] Accordingly, in December 1867, when he opened the session in Congress Juárez remarked that during the 'European monarchic intervention' friendly relations were only maintained with the American republics due to their 'common democratic and liberal institutions', thereby stressing the moral support given by the United States of America. However, Spain and Britain had supported the government imposed by France, and the rest of the European nations that had diplomatic

93 Magallón, *Proceso y ejecución* (n. 34), 562.

94 See Alegato no. 37, Magallón, *Proceso y ejecución* (n. 34), 567.

95 See Public Prosecutor citing Vattel, Alegato no. 43, Magallón, *Proceso y ejecución* (n. 34), 571. The prosecutor also cited Wheaton, who stated that it was only justified to execute prisoners of war when they rebelled.

96 See n. 95.

97 Alegato no. 48, Magallón, *Proceso y ejecución* (n. 34), 572.

98 Patricia Galeana, 'La doctrina Juárez', Revista Decires 8 (2021), 117-124.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

relations with the Mexican Republic had not remained neutral, as they backed the imperial government. As a result, they had broken all those treaties that had been signed with the Republic, and new ones would only be established under equal and fair conditions, particularly regarding 'interest rates'.[99] The relevance of treaties as a source of obligations was also expressed during the trial, as one of the major violations of international law was argued to be the breach of the Treaty of La Soledad, in which France was obliged not to advance on Mexican territory.[100] For Mexican liberals the fact that sovereigns were obliged by treaties was an essential element of the peaceful coexistence between nations, as treaties were the major source of international law (as we have seen in section IV.). The trial was thus also a way of demonstrating that treaties were enforceable under domestic jurisdiction and that it was possible to create a uniform body of law that would be predictable and that would respect the principle of equality among nations.

b) 'The Theatre of Sovereignty' Played Out in a Theatre

The trial against Maximilian of Habsburg was staged as an embodiment of progress, as a monarch was being accused of acts of war and of violating the law of nations. It was also a display of how both parties – the defendant and public prosecutor – applied European legal scholarship. As previously mentioned, records of the trial include numerous references to the works of Emmer de Vattel, Hugo Grotius, and Henry Wheaton.[101]

In this regard and drawing upon Milos Vec's article on the performative dimensions of exercising sovereignty in the nineteenth century,[102] republican liberals enacted and performed international law, quite literally, as the trial took place in an actual theatre. As in any play, many people were involved, the most important being the director, the actors, and the audience. In this case, we could say that Juárez was the director and the actors were Maximilian of Habsburg, Miguel Miramón, Tomas Mejía, Manuel Aspiroz (the public prosecutor), and the military judges. As for the audience, this was composed of a domestic audience and an international audience. The trial sent a message to the Mexican conservative party and to the European powers. This was indeed a very innovative way of using the trial as a medium for communicating the

99 El Sr. Juárez, al abrirse el primer periodo de sesiones, diciembre 8 de 1867, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 86-94.

100 Magallón, *Proceso y ejecución* (n. 34), 584-585.

101 Magallón, *Proceso y ejecución* (n. 34), 567. See also n. 86.

102 Vec, 'Das Theater der Souveranität' (n. 39).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

law and the practice of the law to a domestic and international audience. We would become more accustomed to this kind of communication in the twentieth century, for example in the Nuremberg and Eichmann Trials.[103]

The trial against Maximilian of Habsburg also shows the interplay between domestic law, international law, legal scholarship and legal practice. In this sense it became a platform that enabled this interplay in real time as well as a trialogue between the different ideological stances, i. e. republican liberals, conservatives, and imperialists. As in a heroic play, there is a triumphant victor, in this case the rule of law, personified by the public prosecutor and the judges.

On a more general note, the trial of Maximilian of Habsburg could also be seen as a metaphor of the real world contest of sovereignty and further illustrates what Milos Vec refers to as 'the international theatre of sovereignty'.[104] The trial shows how there was a plurality of actors contesting the definitions, limitations, and practical consequences of 'sovereignty' during the nineteenth century. As we can see from the trial of Maximilian, these actors were not only European, and they had highly creative and innovative ways of claiming sovereignty and contesting imperial visions of international law that were based on power and not on the law. The fact that, in the specific Mexican case, the role that the different actors played in the overall 'theatre of sovereignty' was less constrained and more varied compared to their European counterparts should also be highlighted. A special envoy like Matías Romero in New York was a diplomat as well as an activist who organised conferences and meetings between members of the anti-slavery movement, US pacifists, and Mexican exiles.[105] Guillermo Prieto, a lawyer, historian, poet, and journalist, started a satirical journal during the French Intervention that also served to share views of international law.[106] José Luis Covarrubias, who translated Caspar Bluntschli's treatise, was also a liberal member of congress, professor of international law and maritime law at the School of Jurisprudence in Mexico City in 1871, and was mostly remembered for his work as Minister of Education in 1875.[107]

---

103 See Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (Yale University Press 2000); Gerry Simpson, *The Sentimental Life of International Law, Literature, Language, and Longing in World Politics* (Oxford University Press 2021).

104 Vec, 'Das Theater der Souveranität' (n. 39).

105 Mareite Thomas, 'Mexico and Transnational Antislavery Connections in Nineteenth-Century North America', in: Lawrence Aje and Claudine Raynaud (eds), *Ending Slavery* (Presses universitaires de la Méditerranée 2022); Thomas D. Schoonover (ed.), *Mexican Lobby: Matías Romero in Washington 1861-1867* (University Press of Kentucky 1986), XIII-XV.

106 Vicente Quirarte, *La Chinaca. Periódico escrito única y exclusivamente para el pueblo*, Edición facsimilar. Estudio introductorio (Siglo XXI Editores 2012).

107 Pablo Latapi, *Biografía de José Diaz Covarrubias*, Revista Latinoamericana de Estudios Educativos 13, 129-133.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Finally, the fact that the trial took place in a theatre not only illustrates the pedagogical character that war trials are often meant to have,[108] it also adheres to the democratic concept that the performance of justice should be accessible to all kinds of people. Mexican republicans were very well versed in the doctrine, practice, and interpretation of the law of nations and, in their view, the implementation of that law was to be seen by all people. This is understandable when we consider Juárez's personal correspondence and speeches, in which he inspires the population to '[…] prove that we are capable, and worthy of the freedom and independence inherited from our parents'.[109] In his speech to Congress in 1862 he further remarked that '[…] the nation is capable of gaining respect from other governments and gaining sympathies from all men befriended with liberty'.[110]

The military trial against Maximilian of Habsburg was certainly an improvement on the law of nations, as up to that point acts of war were considered acts of state and, as such, could not be prosecuted.[111]

Riva Palacios Martínez de la Torre, drawing of the military trial against Maximilian of Habsburg, Queretáro, 1867. Source: Mediateca Instituto Nacional de Antropología e Historia, Lugares INAH <https://mediateca.inah.gob.mx/repositorio/islandora/object/objetohistorico%3A2650>

108 See Douglas (n. 103); Simpson (n. 103), and Barrie Sander (n. 91).

109 Benito Juárez, Manifiesto del C. presidente de la República a la Nación, diciembre 18 de 1861 (n. 77).

110 El Sr. Benito Juárez en la apertura de las sesiones ordinarias del nuevo Congreso, octubre 20 de 1862, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 75.

111 See Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872-1945* (Ferdinand Schöningh 2010), 49-128 and Best (n. 72), 128-215.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

c) The Trial of Maximilian in the Arts

Overall, we could say that the trial against Maximilian was both symbolic and instrumental. Intriguingly, despite the trial's relevance for the development of international law, it had no impact on Carlos Calvo's treatise on international law. Notwithstanding that, Juárez's correspondence includes a letter from Carlos Calvo from the year 1868 in which he sent Juárez a copy of his treatise and asked for materials and documents on the French Intervention that he could include in his work.[112] Calvo's treatise, published in 1887, includes a long section on the French Intervention[113] and a brief comment on Maximilian, though without any reference to the trial.[114]

Although Maximilian's trial had no echo in treatises on international law, the painter Edouard Manet did a whole series entitled *The Execution of Emperor Maximilian*.[115] It might be no coincidence that Manet was interested in the event, as Pierre Bourdieu, in his study on Manet, concludes that Manet undertook a symbolic revolution in painting not only in terms of its forms but also in his chosen topics, which include, among others, a naked woman in a park (*The Luncheon on the Grass*, 1863), A dead Toreador (1865) and the execution of Maximilian (1868).[116]*The Execution of Emperor Maximilian* is organised as a happening on a stage, and we can identify three actors (as in the trial): the executioners, the executed, and the audience (behind a fence). The audience is witnessing the execution of a European monarch by a non-European republican firing squad. The dichotomies are hard to miss, as the painting is also organised in two horizontal and vertical planes, which also build a rupture of hierarchies.[117] For the Mexican liberals, Manet would have understood very well the symbolic message of the trial, as for them it signified a clear rupture with the past giving way to a new stable order and a consolidated state underpinned by the law.[118]

112 'Envío al Sr. Mariano Riva Palacio con dos ejemplares de la obra 'Derecho Internacional […]' por el Sr. Carlos Calvo', 31 Diciembre 31 1868, Gabinete de manuscritos de la Biblioteca Nacional de México, Biblioteca Nacional de México-UNAM, Fondo Reservado, Archivo Juárez, Documento 6657.

113 Charles Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, Tome 1 (Guillaumin 1887), 337-352.

114 Calvo (n. 113), 347-348.

115 For more on this topic, see Tania Atilano, 'The Execution of Emperor Maximilian by Édouard Manet: Intervention, Sovereignty and the Laws of War', in: Giovanni Rossi and Pietro Schiró (eds), *Law and Art in the 19th Century* (Pacini editore 2024), 193-218.

116 Pierre Bourdieu, *Manet. Eine symbolische Revolution* (Suhrkamp 2015), 73-120.

117 Bourdieu (n. 116), 616-618, 840.

118 Regarding the transitional phases and challenges of acquiring independence, see Tamar Herzog, 'Independence(s): What Is a Revolutionary Law?', in: Thomas Duve and Tamar Herzog (eds), *The Cambridge History of Latin American Law in Global Perspective* (Cambridge University Press 2024), 258-265.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Other artistic representations of the trial can be found in the play *Juárez*, performed at the Chateau d'Eau in Paris in 1886.[119] The hero of the play was President Juárez and, according to one reviewer, it vividly showed that Mexico had never been in enmity with France but with the Empire. The play was positively reviewed in French republican journals.[120]

3. The Criminal Code of 1871

The Mexican Criminal Code was commissioned in 1861 by Benito Juárez and drafted by a team of notable jurists, including Chief Commissioner Arturo Martínez de Castro. The work took 10 years to complete as it was interrupted by the armed invasion. Finished in 1871, Mexican legislators adopted a criminal enforcement model to penalise violations against what they regarded as legal interests protected by the law of nations. As a result, the drafters created the category of 'crimes against the law of nations'. It encompassed five crimes: piracy, violations of the immunity of diplomats, slavery, the slave trade, and *violations of the duties of humanity*.[121] The catalogue of crimes also serves as a diagnostic of what was considered at the time to be most valuable by 'civilized nations'.

The most novel of all the above-mentioned crimes, and relevant to the French Intervention, was the crime of *violations of the duties of humanity* under Article 1139 of the Mexican Criminal Code. Little is known about the exact legal reasoning behind the provision. However, according to the Explanatory Memorandum, the overall goal of the Criminal Code was to express a certain republican character; it was to be a 'modern criminal code' that would also contribute to achieving peace.[122]

The designation given to the crime – *violations of the duties of humanity* – may sound slightly odd to modern ears. However, after reading various documents of the time, it can be concluded that 'duties of humanity' was conceived of as conduct by which combatants would not inflict unnecessary suffering. It is, though, important to note that, as Raphael Schäfer has argued,

119 *La Petite Presse: Journal Quotidien Illustré,* 14 October 1886, available at <https://gallica.bnf.fr/>, last access 16 December 2024.

120 *Le Petit Parisien: Journal Quotidien du Soir,* 7 October 1886; *Le Petit Colon Algérien,* 13 October 1886, available at <https://gallica.bnf.fr/>, last access 16 December 2024.

121 For a more in-depth analysis of this provision, see Tania Atilano, 'The 1871 Mexican Criminal Code as the Missing Piece in the History of Criminalizing Violations of the Laws of War', Int' l Rev. of the Red Cross 104 (2022), 1650-1683.

122 See Martínez de Castro, 'Explanatory Memorandum', in: Código Penal para el Distrito Federal y Territorio de la Baja California sobre delitos del fuero común y para toda la República Mexicana sobre delitos contra la federación (Librería de Donato Miramontes 1883), 7-8.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the word 'humanity' has been used as a vehicle to justify multiple actions.[123] The meaning of the word thus varies depending on who is mobilising it. I would also add that, at least in the context of the French Intervention, 'humanity' was seen as being on a par with 'barbarism'. These two terms were mobilised in relation to each other and gave meaning to one another. For the French, for instance, the state of the Mexican republican government equated to barbarism,[124] while 'humanity' was invoked to justify their own actions. An example of this is Emperor Maximilian's justification in his decree of October 1865, in which he ordered the execution of all those who opposed the Empire:

> 'The government, confident in its power, will henceforth be inflexible in its pursuit of punishment, as demanded by the privileges of civilization, the rights of humanity, and the imperatives of morality.'[125]

As for the Mexican side, by surveying an authoritative compilation of official Mexican documents from the nineteenth century, the term 'humanity' can be traced back to as early as 1828.[126] The term is then related to the good treatment of prisoners or the maintenance of hospitals.[127] The terms 'lack of humanity' and 'against humanity' can also be found, and were related to massacres, acts of vandalism, excessive reprisals, and when no quarter was given.[128] As a result of this brief survey, it could be then concluded that 'duties of humanity' was, in the Mexican context, related to certain conduct during war. These 'duties of humanity' restrained hostilities. The different types of conduct in the above relate to warfare and explain why the wording '*violations of the duties of humanity*' was chosen and how it defined the persons and objects to be protected, namely the wounded, prisoners of war, hostages, and field hospitals. Most importantly, by incorporating 'duties of humanity' into domestic criminal law, the Mexican provision transformed 'humanity' into a legal interest that was to be protected. This was a major

123 Raphael Schäfer, 'Humanität als Vehikel – Der Diskurs um die Kodifikation des Kriegsrechts im Gleichgewichtssystem des europäischen Völkerrechts in den formgebenden Jahren von 1815 bis 1874', Dissertation, Zusammenfassung, Universität Heidelberg, 2022.

124 Ellie Frédéric Forey, *Forey insiste en Orizaba, que la bandera invasora es protectora*, 3 de noviembre de 1862, in: *Memoria Política de México,* online repository curated by historian Doralicia Carmona Dávila, <https://www.memoriapoliticademexico.org/Textos/4IntFrancesa/1862-F-BFP.html>, last access 16 December 2024).

125 Maximiliano, 'El gobierno, fuerte en su poder, será desde hoy inflexible para el castigo, puesto que así lo demandan los fueros de la civilización, los derechos de la humanidad y las exigencias de la moral', octubre 2 de 1865, in: José M. Vigil, *México a través de los siglos,* Vol. V (Ballesca y Com. Editores 1889), 725.

126 Enrique Olavarria y Fernández, *México a través de los siglos,* Vol. IV (Ballesca y Com. Editores 1889), 173-184.

127 Olavarria y Fernández (n. 126), 247.

128 Olavarria y Fernández (n. 126), 369, 623, 657, 714.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

milestone in the history of international law and the laws of war, as the Mexican legislators chose to protect the principle of 'humanity' over the principle of necessity.[129]

Overall, it is important to note that the goal behind the vision of regulating war through law was not to maintain a balance of power (as was the case in Europe) but to limit the actions of hegemonic powers through the predictability, homogeneity, and specificity of legal norms. Just as criminal law aims to limit the arbitrariness and partiality of authorities through specific norms, it could be argued that the same objective was sought between states in the conduct of warfare.

The crime of *violations of the duties of humanity* in the Mexican Criminal Code does not derive from the calm study of legal doctrine but rather is the result of legal practice and of the concrete need to achieve independence from imperial powers. It is, again, a proposition, an option on the table – like the trial against Maximilian – for enforcing international law.

It is also important to highlight that this project of limiting the conduct of warfare through criminal law was not at odds with the recognition of 'irregular combatants'. Following the republican tradition, citizens had the right to oppose tyranny, and according to Article 31 of the Constitution the duty to defend the independence, territory and the rights of the fatherland (*patria*). In this regard, Article 1113 of the Mexican Criminal Code granted combatant immunity to those who rebelled, who were defined as 'those who rise up and in open hostility in order to change the form of government of the nation, to reform or abolish the constitution or to remove from office the president of the republic' (Article 1095 of the Mexican Criminal Code). This, again, was an interesting proposal in which those involved in a rebellion were also bound by the law and would then benefit from the status of 'combatant immunity'.

Finally, if the provision is interpreted against the historical background, the crime of *violations of the duties of humanity* also served as a preparation for and protection against future interventions.[130]

VI. Conclusion

New visions of international law flourished in the 1860s among Mexican republicans. These 'visions of international law' were thought of as emanci-

129 On the history of the principle of necessity, see Best (n. 72), 166-179.

130 As to the need to define the principle of non-intervention to avoid war, see Milos Vec, 'Intervention/Nichtintervention. Verrechtlichung der Politik und Politisierung des Völkerrechts im 19. Jahrhundert' in: Ulrich Lappenküper and Reiner Marcowicz (eds), *Macht und Recht. Völkerrecht in den internationalen Beziehungen* (Schöningh Verlag 2010), 135-160.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

patory tools and did not emerge spontaneously or contingently but were based on formal legal education and on intensive practice. The reception, study and practice of international legal doctrine not only permitted its adaptation to concrete circumstances (hybridisation), it also paved the way for improving international law in the sense that it would be enforceable and instrumental in protecting the sovereignty of non-European states.

Mexican republicans interacted with a number of international actors while developing their concepts and negotiated a variety of different issues, including reparations claims with the Spanish crown, foreign debt with Britain and the French Intervention. For Mexican republicans, the Intervention was seen as an attack on individual liberties and rights, and they sensed it was a serious threat because it would enable monarchists to restore the old social and racial hierarchies and revoke popular sovereignty.[131]

The three examples presented in this article can be viewed as an expression of how international law was envisioned and set in motion in terms of protecting the rights of independence and sovereignty while also safeguarding individuals regardless of their nationality, including prisoners of war, civilians, and civilian property in times of war. The law of 1862 that made acts against the nation and the law of nations a punishable offence shows how sovereignty was not incompatible with international law. Quite the contrary, sovereignty was a principle of international law that had to be protected. Equally, sovereignty entailed other rights and obligations regarding the use of force and the conduct of hostilities. In the trial against Maximilian of Habsburg we see how this idea was put into practice, resulting in the adjudication of individual criminal responsibility for a breach of the Treaty of La Soledad, conducting war without declaring it and, finally, for violating individual rights during hostilities. By invoking European doctrines of international law and juxtaposing them with the stark realities of the Intervention, the trial functioned as a mirror, reflecting the inconsistency of European powers in their application of international law. While the trial found no echo in Carlos Calvo's treatise, the innovative ways of communicating the law and putting international legal doctrine into action did find resonance in the cultural field. This speaks to how truly innovative the measures were, as they attracted other realms of society beyond legal scholarship. The crime of *violations of the duties of humanity* can then be considered as a synthesis of

131 The 'office of colonization' was a concrete expression of the restoration of the old order. It was ordered by Maximilian of Habsburg. It aimed to attract 'white colonizers that would occupy the vast lands of the north of Mexico'. But, most importantly, it forged alliances with US confederates who could settle and were allowed to keep their slaves. See *Decreto de Colonización*, decretado por el emperador Maximiliano de Habsburgo, 5 de septiembre 1865, Diario del Imperio, 9 Septiembre 1865.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the law of 1862 and of Maximilian's trial. Through the 'codification technique', the conduct of war would become a set of uniform and foreseeable norms. Codifying and criminalising conduct in war could also be held to be a means to prevent more violence in the form of reprisals. Beyond war, the incorporation of principles and practices of international law can also be interpreted as a proposal for states to interact with one another in a uniform and predictable manner.

From all of the above it can also be concluded that the interactions between law and politics were seen as natural and were not demonised. No objection was raised to the fact that law was influenced by a political ideology, as liberal republicans conceived the law as part and parcel of the broader political project of being an independent nation-state.

The above also shows how Juárez mobilised and brought into relationship the principles of sovereignty, equal sovereignty, independence, non-intervention, and self-determination. These principles were not only mobilised discursively but also legally: They were protected by the law of 1862 and invoked during Maximilian of Habsburg's trial. The case at hand testifies to the fact that the multiplication of norms and the 'juridification' of international relations and war did not only happen in Europe but also beyond.[132] Further, it demonstrates that international law is not inherently an obstacle to achieving emancipatory goals. Facing the challenges of war and foreign intervention, the 'vision of international law' held by Mexican republicans exemplifies its potential for contesting hegemony on multiple levels: as a language, as a strategy, as an instrument and symbolically.[133]

132 For the European case, see Vec, 'Intervention/Nichtintervention' (n. 130).

133 On the 'strategic use of current technical legal means', see Walter Rech, 'The Death of God, Systemic Evolution, and the Event: On the Temporality of International Law', Telos 185 (2018), 165-185 (19-21).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Progress Through Preservation of the Legal *Status Quo*: Paradox or Prerequisite?

Janina Barkholdt*
International Court of Justice, The Hague, Netherlands
j.barkholdt@gmail.com

Abstract 926
Keywords 926
I. Introduction: *Quieta Non Movere* as an Outdated Principle? 926
II. Progress and International Law 929
III. Progress Through the Interplay of Transformative and Preservative Rules 931
1. Transformative Rules: Changing the Law as a Prerequisite of Progress? 932
2. Preservative Rules: Progress Despite International Law? 933
IV. The Case Law of Courts and Tribunals: Progress Despite or Through Preservation? 935
1. Preservation of the Stability of Boundaries: *Uti Possidetis* 936
a) *Uti possidetis:* Mission Creep of a Roman Concept? 936
b) Progress and *Uti Possidetis*: the Right to Self-Determination 938
c) Progress After Preservation: Limits to *Uti Possidetis* 941
2. Protection of Transboundary Rights of Non-State Actors 943
a) Transboundary Rights of Non-State Actors: Between Private Rights and Rights of the State? 943
b) Progress and the Protection of Rights of Non-State Actors: the EEZ 945
c) Progress Alongside Preservation: Risks of Fragmentation and Circumvention 947
3. Entrenchment of the Legal *Acquis* Through Unwritten International Law 948
a) Unwritten International Law: Irreconcilability of 'Generality' and 'Trailblazing'? 949
b) Entrenchment of Progress Through Unwritten International Law: Treaty Withdrawal 950
c) Progress Despite Preservation: Outlasting State Consent? 953
V. Conclusion: Progress Through an Equilibrium of Transformative and Preservative Rules 954

* Associate Legal Officer at the International Court of Justice (ICJ) until December 2024. PhD Humboldt University Berlin (2022). This article is based on a presentation given at the conference 'Progress and International Law: A Cursed Relationship,' hosted by the Arbeitskreis junge VölkerrechtswissenschaftlerInnen (AjV) and the Deutsche Gesellschaft für Internationales Recht (DGIR) at the University of Cologne (22-23 September 2023). The author would like to thank Yateesh Begoore, Thomas Kleinlein, Júlia Miklasová, Valentin Schatz, Robert Stendel, Christian Tams, Sara Wissmann, the anonymous reviewers, and the conference participants for their comments on earlier drafts. Any remaining inaccuracies and errors are the author's sole responsibility. The views expressed in this article are personal to the author and do not reflect those of the ICJ.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Abstract

In 1909, an arbitral tribunal famously stated in the *Grisbådarna* case that 'it is a well established principle of the law of nations that the state of things that actually exists and has existed for a long time should be changed as little as possible'. What was considered 'well established' in 1909 seems to be irreconcilable with the idea of progress today. However, dismissing this 'principle' as outdated risks missing an important element for understanding the role of – and for – progress in international law. Rather, the conditions under which progress can be achieved in and through international law can only be understood if we take a closer look at those rules which ostensibly aim to achieve the exact opposite of progress, that is the preservation of the legal *status quo*.

To this end, this contribution analyses three examples of 'preservative' rules in international law. First, it examines the principle of *uti possidetis*, which mediates between change and stability in light of phenomena such as decolonisation and the dissolution of States. The second example concerns 'unwritten' rules arising from a long-standing practice of non-State actors which have been considered by judicial bodies as limiting the application of the United Nations Convention on the Law of the Sea (UNCLOS). Thirdly, it discusses the extent to which the withdrawal from human rights treaties leaves intact rules and obligations enshrined therein that reflect or have evolved into 'unwritten' international law.

The contribution concludes that the equilibrium between preservative and transformative rules ensures a constructive relationship between progress and international law.

Keywords

legal certainty – change in international law – stability of boundaries – UNCLOS – unwritten regional international law – human rights treaties

I. Introduction: *Quieta Non Movere* as an Outdated Principle?

In 1909, the arbitral tribunal in the *Grisbådarna* case famously stated that 'it is a well established principle of the law of nations that the state of things

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

that actually exists and has existed for a long time should be changed as little as possible'.[1] Despite being allegedly 'well established' at the time, this principle, usually associated with the maxim *quieta non movere* ('Do not move settled things.'),[2] has never been explicitly endorsed by the Permanent Court of International Justice (PCIJ) or its successor, the International Court of Justice (ICJ).[3] It is thus tempting to discard it as a relic of bygone times.

However, the idea of *quieta non movere* continues to permeate international law reasoning. Parties in boundary disputes still invoke *quieta non movere* before international courts and tribunals.[4] Judges writing separately have repeatedly suggested that *quieta non movere* informed the decisions of the Court.[5] In 2023, the Institut de Droit International (IDI) even declared it to be a 'principe très général de droit' applicable beyond the context of boundary disputes.[6]

This persistence of *quieta non movere* may well be understood as a reflection – maybe even as a renaissance – of international law's '*status quo* bias' and, as such, as an obstacle to its adaptation to new challenges.[7] Indeed, the very idea of 'not moving settled things' seems to be irreconcilable with the idea of progress in international law.

However, dismissing the idea behind *quieta non movere* as outdated risks missing an important element for understanding the role of international law in the pursuit of progress. This article argues that the conditions under which progress can be achieved in and through international law can only be understood if we take a closer look at rules which ostensibly aim to achieve the

---

1 PCA, *The Grisbådarna Case* (Norway v. Sweden), Award, 23 October 1909, PCA Case No. 1908-01, 161.

2 See e. g. Institut de Droit International, 'Jurisprudence et précédents en droit international' (Rapporteurs: Mohamend Bennouna and Alain Pellet), *Rapport de la 2 e Commission* (Editions A. Pedone 2023), 69; Separate Opinion of Judge Ammoun, *North Sea Continental Shelf,* judgment of 20 February 1969, ICJ Reports 1969, 3 (para. 12, footnote 4).

3 See Dissenting Opinion of Judge Torres-Bernádez, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrein)*,* merits*,* judgment of 16 March 2001, ICJ Reports 2001, 40 (269, para. 19).

4 See e. g. Slovenia in PCA, *Arbitration Between the Republic of Croatia and the Republic of Slovenia,* PCA Case No. 2012-04, final Award of 29 June 2017, para. 816; Nigeria in ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), judgment of 10 October 2002, ICJ Reports 2002, 303 (para. 65).

5 See e. g. Judge Torres-Bernádez (n. 3), paras 13-21; Judge Ammoun (n. 2), para. 12.

6 See Institut de Droit International (n. 2), 69.

7 See for a criticism of the '*status quo* bias' in international law: Michal Saliternik and Sivan Shlomo Agon, 'Proactive International Law', UC Law Journal 75 (2024), 661-712 (682-683).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

exact opposite of progress, that is the preservation, protection, and entrenchment of the *status quo* (which I will call 'preservative rules'). The central claim of this article is that these preservative rules play an essential role in creating and cultivating the necessary trust that enables the 'leap of faith' required for any progress. It is hoped that the analysis underlying this claim will encourage a more nuanced understanding of the ways in which international institutions contribute to the pursuit of progress through law. This article seeks to show that what may seem reactionary at first glance – the protection of 'the edifice of law carefully constructed by mankind' through such preservative rules – may in fact be vital to ensure 'ordered progress' in the relations between States.[8]

Such an analysis of these preservative rules and their role as an integral element of progress in international law fills a *lacuna* in scholarship. Doctrinal scholarship has so far mainly focused on the rules and institutions that allow the existing legal framework to be changed and thus to be adapted to novel challenges and societal needs, rather than preserved.[9] Meanwhile, preservative rules have been looked at from specific angles, that is either from a procedural perspective, in particular the role of 'precedent' or estoppel in international adjudication,[10] in specific fields of international law, notably in boundary disputes,[11] or by focusing on the way in which they generally contribute to stability and legal certainty in international law.[12] Their integral role for ensuring progress in international law has thus not been analysed to date, which this article aims to do in three steps.

After briefly situating the present article within the current scholarship on progress in international law and developing a definition of the notion of 'progress' (II.), the following section juxtaposes transformative rules and preservative rules and their respective characteristics, function, and role for progress in international law (III.). It shows that doctrinal scholarship has focused on how international law achieves progress by overcoming seem-

8 ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), judgment of 24 May 1980, ICJ Reports 1980, 3, para. 92.

9 See e. g. Nico Krisch and Ezgi Yildiz, *The Many Paths of Change in International Law* (Oxford University Press 2023); Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau and Clément Marquet (eds), *Evolutionary Interpretation and International Law* (Hart 2019).

10 See Institut de Droit International (note 2); James G. Devaney, 'The Role of Precedent in the Jurisprudence of the International Court of Justice: A Constructive Interpretation', LJIL 34 (2022), 641-659.

11 See e. g. Yehuda Zvi Blum, *Historic Titles in International Law* (Martinus Nijhoff 1965).

12 See e. g. Jörg Müller, *Vertrauensschutz im Völkerrecht* (Carl Heymanns 1971); Daniel Costelloe, 'Compatibility in the Law of Treaties and Stability in International Law', BYIL (2022).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ingly outdated social structures, on the 'Grotian moments'.[13] Yet, less attention has been devoted to preservative rules that serve to maintain, protect, and entrench the *status quo*. This neglect is even more remarkable because preservative rules often appear in the jurisprudence of international courts and tribunals. The article takes a closer look at three examples of preservative rules in the case law of international courts and tribunals (IV.). First, it examines the principle of *uti possidetis*, which mediates between change and stability in the face of phenomena such as decolonisation and the dissolution of States. The second example concerns rules arising from long-standing practices of non-State actors, in particular indigenous people, which have been considered by judicial bodies as limiting the application of the United Nations Convention on the Law of the Sea (UNCLOS). Thirdly, it discusses the extent to which the withdrawal from human rights treaties leaves intact those rules and obligations enshrined therein that reflect or have evolved into 'unwritten' international law. The article concludes that a careful maintaining of an equilibrium between preservative and transformative rules is indispensable for ensuring progress in international law (V.).

II. Progress and International Law

The relationship between progress and international law has traditionally been examined from four perspectives. From a normative perspective, some scholars have argued that international law as such represents a form of progress.[14] Others have taken an analytical perspective examining to what extent we find progress in certain fields or in international law generally.[15] More recently, critical scholars have pointed to the discursive power of progress narratives and the indeterminacy of the term.[16] A fourth group focuses on the role that the methods and institutions provided by interna-

13 See on the trajectory of this concept which was prominently coined by Richard Falk in 1985 and further developed by Michael Scharf: Contributions in the Special Issue: Dossier on Grotian Moments, by Tom Sparks and Mark Somos, Grotiana 42 (2021), 179-372.

14 See e. g., Daniel Thürer, *Völkerrecht als Fortschritt und Chance* (Nomos 2009).

15 See e. g., Manley O. Hudson, *Progress in International Organisation* (Stanford University Press 1932); Bruno Simma, 'From Bilateralism to Community Interests' RdC 250 (1994), 221-384.

16 See e. g., Thomas Skouteris, 'The Idea of Progress' in: Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 941; see also Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' EJIL 25 (2014), 425-444 for further references regarding critical approaches to the concept of 'progress'.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tional law play in achieving progress.[17] The present, primarily doctrinal article forms part of this fourth group.

And yet, no contribution on the topic – not even one that seeks to approach the topic from a positivist angle – can avoid a brief account of its own understanding of 'progress'.

Progress is mostly defined as a 'change for the better'.[18] But who defines what constitutes a 'betterment' in international law? It is not difficult to imagine that these questions lead to different answers depending on the addressee. In the inter-war period, Kunz, for example, argued that 'the only 'common international good' already sufficiently felt is the preservation of peace'.[19] A point of departure for what is commonly understood as 'betterment' in the post-World War II international legal system can be found in the Preamble and Article 1 of the United Nations Charter (UNCH).[20] Article 1 refers to the 'purposes' of the United Nations which largely correspond to the aspirations listed in the Preamble.[21] These purposes and preambular objectives include the maintenance of international peace and security, sovereign equality of States, the self-determination of peoples, and respect for human rights.[22]

17 See e. g., Josef L. Kunz, 'Problem of Revision in International Law-Peaceful Change', AJIL 33 (1939), 33-55; Charles de Visscher and Percy Ellwood Corbett (tr), *Theory and Reality in Public International Law* (Princeton University Press 1968), 333-349; Hisashi Owada, 'Peaceful Change' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2007); Arnold N. Pronto, 'Change in International Law' in: Vesselin Popovski and Ankit Malhotra (eds), *Reimagining the International Legal Order* (Routledge 2023), 42-52, (49); see also on the role of progressive development by the International Law Commission: Arthur Watts, Michael Wood and Omri Sender, 'Codification and Progressive Development of International Law' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2021), paras 19-24.

18 See e. g., the Cambridge English Dictionary: 'movement to an improved or more developed state'; Oxford English Dictionary: 'To go or move forward or onward in space; to proceed, advance'. See also for a very similar understanding of the term 'reform': Thilo Rensmann, 'Reform' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary, Volume I* (4th edn, Oxford University Press 2024), 43, para. 1.

19 Kunz 'Problem of Revision' (n. 17), 54.

20 Daniel-Erasmus Khan, 'Preamble' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds), *The Charter of the United Nations: A Commentary, Volume I* (4th edn, Oxford University Press 2024), 160, para. 29: 'what is announced here is nothing less than the bedrock of the ideological basis on which the post-World War II reorganization of the international community is built.'

21 See on the close interrelationship between preamble, purpose and principles: Thomas Kleinlein, 'Article 1' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds), *The Charter of the United Nations: A Commentary, Volume I* (4th edn, Oxford University Press 2024), 169, para. 9.

22 See on Article 1 as setting out the 'goals' of the UN: ICJ, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151, (167-168).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

With respect to these preambular objectives and purposes, Article 1 adopts a 'future-oriented perspective'.[23] In particular, Article 1(4) of the UNCH, which speaks about the 'attainment of these common ends', clarifies that these preambular objectives and purposes are intended to guide the conduct of member States in achieving 'betterment' in their international relations. This article therefore proposes that their attainment represents the common denominator of what constitutes progress in the relations between member States.[24]

Alongside domestic law, political initiatives, and diplomatic means, international law plays a modest but important role in promoting progress in international relations as defined in this sense. For example, States and international organisations have been creating new rules and mechanisms of international law to specify these 'common ends', including by prioritising between the objectives set out in the Preamble and in Article 1. Such progress through new law is illustrated by the substantive and institutional rules following the Preamble and Article 1 in the UNCH. However, international law also provides legal techniques to advance and, importantly, to protect the 'betterment' as defined in the Preamble and Article 1 of the UNCH when interpreting and applying the existing legal framework over time. The way in which progress is furthered in international relations through these legal techniques, in a more subtle manner than the 'Grotian moments', is the focus of the next sections.

III. Progress Through the Interplay of Transformative and Preservative Rules

Given that progress is traditionally associated with 'change',[25] it is unsurprising that much scholarly attention has been devoted to those legal rules that change the existing legal framework ('transformative' rules) towards common goals (1.). Legal rules which aim to preserve the legal *status quo*

23 Kleinlein (n. 21), 166, para. 3.

24 See also the recent reaffirmation of the UNCH as a basis for 'a better future for people and planet': 'The Pact for the Future', UNGA Res 79/1 of 22 September 2024, A/RES/79/1, paras 8, 12, 32, 82.

25 See e. g. Kunz 'Problem of Revision' (n. 17), 45: '"Change" is Often Identified with "Progress"'; Visscher and Corbett (n. 17), 333: 'the future of peaceful change is indissolubly linked with the progress of international organization'; Pronto (n. 17), 49: 'the progress made over the last century in the human condition […] has led to much change to international law, sometimes precisely because such changes were effected through international law'.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

('preservative' rules) are often seen as an antipode to progress.[26] Whether this is an exhaustive or even accurate description of their function is, however, doubtful (2.).

1. Transformative Rules: Changing the Law as a Prerequisite of Progress?

The imperative need for international courts to account for changes in international law has been emphasised by the ICJ in its 1971 *Namibia* Advisory Opinion. Formulating the ostensible antithesis to *quieta non movere*, the Court stated that it 'must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law'.[27]

Yet, the question of how to take these changes into account in the absence of a universal legislator has puzzled generations of international lawyers.[28] Thus, it does not come as a surprise that much scholarly attention has been devoted to identifying those rules of international law that allow for adapting the existing legal framework.[29] These are often found in the international law equivalents of what H. L. A. Hart has termed 'secondary rules' of law,[30] notably including the rules of treaty interpretation, e. g., recourse to rules allowing for 'evolutionary interpretation',[31] and the doctrine of sources of international law, e. g., by lowering the criteria for identifying customary international law ('modern custom')[32] and by expanding the catalogue of sources enumerated in Article 38(1) of the ICJ Statute.[33]

---

26 See Saliternik and Agon (n. 7), 682-683.

27 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.

28 See notably Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933, reprinted in Oxford University Press 2011), 256-267.

29 See notably Sotirios-Ioannis Lekkas and Panos Merkouris, 'Change in International Law: Rules of Change or Changing Rules', ESIL Reflections 13 (15 April 2024), available at: <https://esil-sedi.eu/esil-reflection-change-in-international-law-rules-of-change-or-changing-rules-series-concluding-note/>, last access 10 December 2024, with further references to contributions on the topic of change in international law.

30 Herbert L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012), 81.

31 See on this: Abi-Saab, Keith, Marceau and Marquet (n. 9).

32 See e. g., Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' AJIL 95 (2001), 757-791.

33 Christine M Chinkin 'The Challenge of Soft Law: Development and Change in International Law', ICLQ 28 (1989), 850-866.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

While this may appear to be a random collection of examples, they have three characteristics in common. First, they have the methodological potential to change the legal rule, as it is understood at a certain moment, by lowering the threshold for such change or by either widening or narrowing the scope of application of an existing rule. Second, this methodological approach is justified by equating progressive aims and the common interest. Third, these rules are 'forward-looking' in the sense that they distance themselves from, and sometimes even condemn, the past. Based on these three characteristics, transformative rules have a distinct potential in generating progress as they channel political momentum and translate it into the legal framework. In other words, these rules enable the 'leap of faith' that progress needs for breaking with, overcoming, and moving beyond the existing legal and social structures.

Two important clarifications should be made regarding these transformative rules. Firstly, transformative rules are different from those 'revolutionary' substantive legal rules that prescribe change in the conduct of States, for example, the prohibition of the threat or use of force, the principle of self-determination, or international human rights obligations, which are often cited as examples for progress *in* international law. Transformative rules allow for structural change within the legal system itself and thus for progress *through* international law. Secondly, transformative rules are not inherently 'progressive' rules. Rather, they may also be used to change the existing legal framework in a way that many commentators would consider to be 'regressive', e. g., by withdrawing from international institutions which serve the maintenance of peace and security, or by lowering the standard of human rights protection. Bearing these two considerations in mind, the way in which progress is ensured in international law depends on a balance between transformative rules on the one hand, and another, often neglected category of rules, which may be termed 'preservative rules'.

2. Preservative Rules: Progress Despite International Law?

It often seems that the vast majority of rules in international law do not enable, but rather inhibit change. Indeed, in its decision in the *Grisbådarna* case, the arbitral tribunal even implied – as the IDI recently affirmed[34] – the existence of a general principle of *quieta non movere*. Despite this sweeping statement, the arbitral tribunal neither substantiated this *dictum* any further nor did the alleged principle gain much traction in later decisions by interna-

34 See Institut de Droit International (n. 2).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tional courts and tribunals despite being occasionally relied upon by parties in territorial or maritime boundary disputes.[35]

Indeed, the extent to which the preservation of the *status quo* translates into one or more binding rules of international law is unclear. Twenty-five years after the *Grisbådarna* case, Kunz observed that '[t]here have been attempts to base this preservation of the *status quo* upon principles; but these principles were never more than maxims for political action; they were never rules of international law'.[36] Similarly, while attesting international law a '*status quo* orientation',[37] Wasum-Rainer and Wasielewski argue that the preservation of the *status quo* 'embodies neither a general principle of law […], nor an autonomous rule or principle of international law for the government of international relations […]'.[38] Indeed, on a literal reading of the *Grisbådarna* award, *quieta non movere* has often been understood – and criticised – as conferring legal protection to any *status quo* 'that actually exists and has existed for a long time', not limited to the *status quo* arising from legal facts ('legal *status quo*'). However, even critics of the maxim have pointed to a narrower understanding arguing that '*Quieta* implies the existence of a peaceful and generally accepted situation created without real or possible infringements of the international legal order contemporaneous with its establishment'.[39] One may add, as an additional requirement, that the 'generally accepted situation' must have been capable of instilling a belief or expectation that the existence of the *status quo* arises from an existing right or obligation (as was the case in the *Grisbådarna* case, where Sweden had performed various acts in the Grisbådarna region, especially of late, owing to her conviction that these regions were Swedish without meeting any protest of Norway).

Understood in this narrower sense, the idea of *quieta non movere* underlies or is closely related to various rules in international law, such as the important quasi-precedential role of judicial decisions in the identification of international law,[40] the power of international courts and tribunals to indicate

35 See also Dissenting Opinion of Judge Torres Bernádez (n. 3), para. 19.

36 Josef L Kunz, 'The Law of Nations, Static and Dynamic', AJIL 27 (1933), 628-650 (631).

37 Susanne Wasum-Rainer and Lukas Wasielewski, 'Status quo' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2021), para. 4.

38 Wasum-Rainer and Wasielewski (n. 37), para. 1.

39 See Judge Torres Bernádez (n. 3), para. 21.

40 See also Institut de Droit International (n. 2), 69; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), preliminary objections, judgment of 18 November 2008, ICJ Reports 2008, 412, para. 53: 'To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.'

 DOI 10.17104/0044-2348-2024-4-925

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

provisional measures to preserve the *status quo pendente lite* of the rights of the Parties before the rendering of the final decision, the principles of *res judicata* and *estoppel*, and the concept of acquiescence. Mirroring the three characteristics of transformative rules, these preservative rules share three features. First, they have the methodological potential or claim to identify, protect, or entrench the legal *status quo*. Second, they justify any such claim or effect based on the important role of predictability and legal certainty. Third, these rules do not distance themselves from the past, but rather associate themselves with and build on it.

In contrast to transformative rules, the rules that aim at preserving the legal *status quo* do not fit squarely with the definition of progress as 'change for the better'. Rather, they appear to be progress' natural archenemy. This may be an important reason why this type of rules has so far received only little attention in scholarship on progress in international law. However, given their function of maintaining legal certainty and predictability in the international legal order, they play an essential role in creating the necessary trust inherent in the 'leap of faith' required for any progress.

It is thus through the interaction of transformative and preservative rules that international law allows for changes in the legal framework towards the 'common ends' set out in Article 1 and the Preamble of the UNCH without losing the regulatory function of the law (which would usually be the case in situations of a revolution).[41] The precise nature of this interaction and, in particular, the role of the still largely underexplored preservative rules therefore deserves special attention. This will be analysed using three examples from the case law of international courts and tribunals.

IV. The Case Law of Courts and Tribunals: Progress Despite or Through Preservation?

Rules that identify, protect, and entrench the legal *status quo* play a central role in the jurisprudence of international courts and tribunals. To ensure a high degree of representativeness, the following three case studies have been carefully selected so as to cover different types of preservative rules in a wide range of subject-matters (boundary disputes, conflicts about the equal distribution of natural resources, and international human rights law), different

41 See also Kunz 'The Law of Nations' (n. 36), 631: 'The change here will not be the outcome of a revolution, but of an evolution, brought about in [sic!] virtue of the juridical order itself.'

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

geographic regions, and against the background of different historical contexts. The three examples illustrate that, at closer inspection, it is not easy to tell whether such preservative rules inhibit or rather enable progress, i. e., a 'change for the better'.

1. Preservation of the Stability of Boundaries: *Uti Possidetis*

The first example concerns the concept of '*uti possidetis juris*' which has been described as '[t]he most visible and explicit emanation of *status quo*' in international law.[42] It is resorted to in order to preserve the stability of existing territorial and maritime boundaries facing pressure for change arising from decolonisation, from the dissolution of States, secession, and, more recently, from sea-level rise. After setting out the normative content and development of *uti possidetis* that justify its qualification as a preservative rule (a), this section explains how *uti possidetis* contributes to progress in the context of decolonisation (b) and addresses the limits of *uti possidetis*'s progressive potential (c).

a) *Uti Possidetis*: Mission Creep of a Roman Concept?

The concept of *uti possidetis* originates in Roman property law (*uti possidetis, ita possideatis*: 'as you possess, so shall you possess').[43] As broad as this maxim may sound, its original use in Roman law was much more limited than what the development of *uti possidetis* in international law suggests.[44]

In international law, the concept of *uti possidetis* 'provides that states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of their independence'.[45] In other words, *uti possidetis* preserves pre-existing boundaries. It does so, as the ICJ Chamber vividly pointed out in its 1986 judgment in the

42 Wasum-Rainer and Wasielewski (n. 37), para. 5.

43 Giuseppe Nesi, 'Uti Possidetis Doctrine' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2018), para. 1.

44 In Roman law, *uti possidetis* did not denote a definitive status, but rather provided for a procedural and provisional shift of the burden of proof or a mechanism of standing in property disputes (see Anne Peters, 'The Principle of *Uti Possidetis Juris*: How Relevant is it for Issues of Secession?' in: Christian Walter and Antje von Ungern-Sternberg (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014), 95-137 (97 et seq.).

45 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019), 224.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Frontier Dispute case (Burkina Faso/Mali), by 'freez[ing] the territorial title; it stops the clock […]' upon their independence.[46] Such 'freezing' of the territorial title serves to preserve 'the territorial heritage of new States at the moment of independence'.[47] In this sense, '*uti possidetis juris* is essentially a retrospective principle'.[48]

Over the past decades, the scope of *uti possidetis* has undergone a significant expansion. In a first expansion of its territorial scope, the ICJ declared the applicability of *uti possidetis*, which until then had been associated with territorial disputes arising from decolonisation in Latin America in the 19th century, to the African continent in its 1986 Judgment in the *Frontier Dispute (Burkina Faso/Mali)* case. The Court justified the transposition of that principle by its nature as 'a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'.[49]

The transposition of the concept from Latin America to Africa was followed by several expansions of its original scope *ratione materiae*. For one, it was eventually considered to be relevant in the context of maritime disputes between former colonies.[50] Moreover, the concept of *uti possidetis* was resorted to outside the context of decolonisation in the European region, notably with respect to dissolutions and secessions of States following the fall of the Iron Curtain.[51] The substantial expansion has been recently confirmed by the ILC Study Group on Sea-level rise, where the principle of the intangibility of boundaries is 'derived' from and 'developed' by the 'well-established principle' of *uti possidetis*[52] and used in support of preserving the baselines of States whose territory recedes due to sea-level rise.[53]

---

46 ICJ, *Frontier Dispute* (Burkina Faso/Mali), judgment of 22 December 1986, ICJ Reports 1986, 554, para. 30. See also ICJ, *Frontier Dispute* (Benin/Niger), judgment of 12 July 2005, ICJ Reports 2005, 90, para. 25.

47 Malcolm N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', BYIL 67 (1996), 75-154 (75 et seq).

48 ICJ, *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), judgement of 11 September 1992, ICJ Reports 1992, 351, para. 43.

49 ICJ, *Land, Island and Maritime Frontier Dispute* (n. 48).

50 ICJ, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean* Sea (Nicaragua v. Honduras), judgment of 8 October 2007, ICJ Reports 2007, 659, paras 232 and 234.

51 Badinter Commission Opinion No. 3 (11 January 1992), para. 3, third principle, ILM 31 (1992), 1488-1526 (1500); PCA, *Croatia* v. *Slovenia*, final Award of 29 July 2017, case no. 2012-04, para. 256.

52 ILC, 'Sea Level Rise in Relation to International Law Additional Paper to the First Issues Paper (2020)', Bogdan Aurescu and Nilüfer Oral (2023), A/CN.4/761, para. 101.

53 ILC, 'Sea Level Rise (n. 52), para. 111.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

b) Progress and *Uti Possidetis*: the Right to Self-Determination

Paradoxically, *uti possidetis*' effect of 'stop[ping] the clock' can be understood as contributing to progress in international law. Taking the origin of *uti possidetis* in Latin America, for example, recourse to *uti possidetis* served to overcome the *terra nullius* doctrine and to protect the sovereignty and territorial integrity of the new republics from territorial claims by European colonial powers.[54] Outside the context of decolonisation, *uti possidetis* contributes to protecting newly established States from territorial claims based on abusive invocations of the principle of self-determination by powerful neighbours.[55] Moreover, the way in which *uti possidetis* has been used to support novel legal approaches, notably in response to sea-level rise could be seen as enabling progress in international law.[56]

This is not to deny the tension between conserving and progressive potential inherent in *uti possidetis*. What is being preserved here is, after all, the legal *status quo* as derived from 'colonial-era legal instruments'.[57] That *uti possidetis* may represent an obstacle to 'progress' in international law has been recognised by the ICJ in its judgment in the *Burkina Faso/Mali* case, in which the Court

> 'wondered how the time-hallowed principle [of *uti possidetis*] has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle conflicts outright with another one, the right of peoples to self-determination.'[58]

In order to avoid a conflict between these two principles, the Court rather interpreted the principle of self-determination in harmony with – i. e., as not deviating from – the principle of *uti possidetis*:

---

54 *Affaire des frontières Colombo-vénézuéliennes* (Colombie c. Vénézuela), Award of 24 March 1922, RIAA, vol. I, 223-298, (228).

55 Júlia Miklasová, 'Dissolution of the Soviet Union Thirty Years On: Re-Appraisal of the Relevance of the Principle of Uti Possidetis Iuris' in: Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes and Mamadou Hébié (eds), *The International Legal Order in the XXIst Century: Essays in Honour of Professor Marcelo Gustavo Kohen* (Brill 2023), 105-124 (124); Giuseppe Nesi, 'A Few Reflections About uti possidetis iuris and Self-Determination Between the Twentieth and the Twenty-First Centuries' in: Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes and Mamadou Hébié (eds), *The International Legal Order in the XXIst Century: Essays in Honour of Professor Marcelo Gustavo Kohen* (Brill 2023), 197-209 (209).

56 See on this Frances Anggadi, 'What States Say and Do About Legal Stability and Maritime Zones, and Why It Matters', ICLQ 71 (2022), 767-798 (771-772).

57 David Hongler, 'The International Court of Justice and Territorial Disputes: an Updated Systematization', Max Planck UNYB 26 (2023), 250-281 (265).

58 ICJ, *Frontier Dispute* (Burkina Faso/Mali) (n. 46), para. 25.

 DOI 10.17104/0044-2348-2024-4-925

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

> 'The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples. Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms implied.'

According to the Court's understanding, a conflict between these two legal principles simply does not arise. Instead, the Court basically understood the right to self-determination, the 'new norm' and the preservative rule of *uti possidetis*, as two sides of the same coin for achieving progress in the form of independence from colonial rule. In other words, *uti possidetis* has been seen as a prerequisite for progress; as a rule, that enables rather than hinders progress.

However, the relationship between *uti possidetis* and other rules under international law remains controversial. At the core of these controversies lies the question whether its substantive and territorial expansion has led to a symbiotic or antagonistic relationship of *uti possidetis* and the right to self-determination. Commenting on the Court's approach in the 1986 *Frontier Dispute* case, Tomuschat concluded that '*[u]ti possidetis* has thus become the leading maxim for the territorial delimitation of Africa, relegating self-determination in that respect to an insignificant, inferior place'.[59] While this assessment seems to be somewhat harsh with respect to the harmonious interpretation of the two principles by the Court in 1986, Tomuschat's remark is more understandable when considering the hierarchical approach taken by the Badinter Commission.[60] Stating that 'whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise',[61] the statement raises the question to what extent the principle of *uti possidetis* affects the legality of State-creation. While the Badinter Commission's approach seems to suggest that *uti possidetis* prohibits non-consensual State creation, the Court's 1986 Judgment rather indicates that *uti possidetis* simply does not regulate the legality of State creation. As succinctly put by Kohen, '[s]elf-determination addresses the right to create a State (or to freely choose a specific connection with an

59 Christian Tomuschat, 'Secession and Self-Determination' in: Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press 2006), 23-45 (27).

60 Peters (n. 44), 126.

61 Badinter Commission, Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia, ILR 92 (1993), 167-169 (168).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

existing one), while *uti possidetis juris* defines the territorial extension of the new entity'.[62]

However, uncertainties about the scope and effect of *uti possidetis* and its relationship with the principle of self-determination persist. They became apparent in the proceedings leading to the ICJ's *Chagos* Advisory Opinion of 2019, in which several States invoked the principle of *uti possidetis* in support of either the legality of the detachment of the Chagos Archipelago from Mauritius[63] or its illegality.[64] The Court did not make any explicit reference to *uti possidetis*. However, it stated that 'the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory' and that 'any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination'.[65] According to Nesi, the Court's statements imply that '*uti possidetis* creates a link between the right to self-determination of people under colonial domination and the respect for territorial integrity of a State arising out of decolonization'.[66] Hilpold even interprets the Court's approach as the application of a 'special, qualified *uti possidetis* principle'.[67]

However, it seems that this understanding comes close to conflating two related, but distinct legal principles. The difference between the two has been made clear by Judge Sebutinde in her separate opinion distinguishing '*uti possidetis* […] as one means of identifying the self-determination unit in the context of decolonization […] from the territorial integrity component of self-determination'.[68] *Uti possidetis* thus neither limits nor strengthens any territorial claims arising from the right of self-determination, but rather

62 See also Marcelo G. Kohen, 'Self-Determination' in: Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50 An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020), 133-165 (155).

63 ICJ, *Legal Consequences of the Seperation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95: Written Statement of the UK, 15 February 2018, paras 8.29 and 8.30. See also the statement made by the UK during the oral proceedings: Verbatim Record CR 2018/21, 42-43, para. 7, 47, para. 20, 52, para. 32 (Webb).

64 ICJ, *Legal Consequences of the Seperation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius, 1 March 2018, para. 6.58, 699; statement during oral proceedings by Nigeria CR 2018/25, 54-55, paras 17-19 (Apata); Statement of South Africa, StZA, paras 70-75; statement during oral proceedings by South Africa CR 2018/22, 14, para. 23.3. (de Wet).

65 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95, para. 160.

66 Nesi (n. 55), 202-203.

67 Peter Hilpold, '"Humanizing" the Law of Self-Determination – the Chagos Island Case', Nord. J. Int'l L. 91 (2022), 189-215 (202).

68 Separate Opinion of Judge Sebutinde, ICJ, *Chagos Advisory Opinion* (n. 65), para. 36.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

provides a method for the identification of their scope. In some cases, as in the *Chagos* case, the colonial boundaries preserved by *uti possidetis* might coincide with the claim articulated by the self-determination unit. In these situations, *uti possidetis* and the principle of self-determination might indeed go hand in hand in furthering the territorial claim. In other cases, however, where the territorial claim by the self-determination unit goes beyond the colonial boundaries, *uti possidetis* may even constrain such a claim.

c) Progress After Preservation: Limits to *Uti Possidetis*

Over the last four decades, the concept of *uti possidetis* has been elevated from a method to draw the boundaries of newly independent States in Latin America to a variant of the ostensible principle of the intangibility of boundaries, arguably reflecting both customary international law as well as a general principle of law (GPL).[69] Its development suggests that it has developed from a default method to a universally binding *panacea* for disputes arising from pressure on boundary regimes. However, the 'progressive' potential of *uti possidetis* is not to be taken for granted, and might be better preserved if the following four aspects were considered.

First, the legal nature of *uti possidetis* under international law remains unclear. In all cases before the ICJ in which recourse was made to *uti possidetis*, the Parties had explicitly referred and thus consented to its application.[70] To the extent that such consent is absent, its application would need to be based on a more careful assessment by the international court or tribunal of its binding character and its precise content under general international law. This concerns particularly situations outside the context of decolonisation and where it is used – rather creatively – to respond to Sea-level rise.[71]

Second, it is unclear whether different regional understandings of *uti possidetis* exist.[72] The way in which the Latin American concept of *uti*

69 ILC, 'Sea Level Rise (n. 52), para. 111.

70 See ICJ *Frontier Dispute* (Burkina Faso/Mali) (n. 46), para. 20; ICJ, *Land, Island and Maritime Frontier Dispute* (n. 48), para. 40; ICJ *Frontier Dispute* (Benin/Niger) (n. 46), paras 23 and 45; ICJ *Territorial and Maritime Dispute* (Nicaragua v. Honduras) (n. 50), para. 145; ICJ, *Frontier Dispute* (Burkina Faso/Niger), judgment of 16 April 2013, ICJ Reports 2013, 44, para. 63.

71 See, for example, Report of the International Law Commission (ILC) (2024), UN doc A/78/10, Chapter VIII, Sea-level rise in relations to international law, paras 166-169 on the application of *uti possidetis* to maritime boundaries in the context of sea-level rise.

72 Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis* (Cambridge University Press 2015), 47-74; Vanshaj R. Jain, 'Broken Boundaries: Border and Identity Formation in Postcolonial Punjab', Asian Journal of International Law 10 (2020), 261-292.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

possidetis has been transposed to the African continent and used synonymously with the alleged 'principle of intangibility of frontiers' and 'principle of respect of borders existing on achievement of independence' has been severely criticised.[73] Thus, the application of this concept must be applied in accordance with any potential regional modification.

In the absence of a more specific regional variant of *uti possidetis*, thirdly, a narrow understanding of *uti possidetis* seems preferable. This entails that *uti possidetis* should not be conflated with substantive principles of international law. Contrary to some suggestions, *uti possidetis* should not be understood as establishing title to territory, but rather as presupposing such title and regulating its extension.[74]

Fourthly, in certain circumstances, the course of the boundary indicated by *uti possidetis* should not be considered to be a definitive settlement, but rather as a provisional arrangement or 'holding pattern',[75] until a more equitable and final settlement of the course of the boundary has been found by recourse to peaceful dispute settlement. This understanding would not only re-align the concept of *uti possidetis* with its Roman law roots, according to which the concept merely provided for a provisional shift of the burden of proof or a mechanism of standing – and not a definitive settlement – in property disputes.[76] It would also respond to the criticism of those who have argued that too rigid an application of *uti possidetis* perpetuates infringements of the rights of minorities and indigenous peoples stemming from arbitrarily drawn boundaries.[77]

As a concept that meets the characteristics of a preservative rule, *uti possidetis* has thus contributed to the realisation of self-determination in the context of decolonisation. At the same time, the preceding analysis also demonstrated the tension between the conservative and progressive potential inherent in *uti possidetis.* The realisation of its progressive potential depends on a limited and restrained application of *uti possidetis*.

73 Dissenting Opinion of Judge Yusuf, ICJ *Frontier Dispute* (Burkina Faso/Niger) (n. 70), 134-147.

74 See also Peters (n. 44), 101-102.

75 Dissenting Opinion of Judge Yusuf, ICJ *Frontier Dispute* (Burkina Faso/Niger) (n. 70), 139 and 143.

76 See n. 44.

77 See Steven R. Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States', AJIL 90 (1996), 590-624 (691); Daniel Luker, 'On the Borders of Justice: An Examination and Possible Solution to the Doctrine of Uti Possidetis', in: Russell A. Miller and Rebecca M. Bratspies (eds), *Progress in International Law* (Brill 2008), 151-170 (168-169).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

2. Protection of Transboundary Rights of Non-State Actors

While *uti possidetis* may represent the 'most visible and explicit emanation of *status quo*' in international law,[78] it was the protection of transboundary rights of non-State actors that motivated the tribunal in the *Grisbådarna* case to articulate the principle of *quieta non movere*.[79]

The second category of preservative rules examined in this article thus concerns those rules which protect transboundary rights of non-State actors from being superseded and extinguished by multilateral agreements that pursue a community interest through regulatory harmonisation, such as UNCLOS.[80] This section begins by describing the wide range of concepts that serve to protect legitimate expectations arising from a long-standing practice of non-State actors qualifying these concepts as preservative rules (a). It then describes how these preservative rules interact with treaties that seek to achieve progress in the equal distribution of natural resources (b) before describing three possible ways forward on how to strike a balance between the recognition of these rights and progress in the form of a harmonious legal regime of the law of the sea (c).

a) Transboundary Rights of Non-State Actors: Between Private Rights and Rights of the State?

The customary principle of permanent sovereignty over natural resources entails that a State is generally free to dispose over its territory and the natural resources located therein, including by entering into agreements with other States.[81] At the same time, international law knows of a wide range of concepts that serve to protect transboundary rights of non-State actors from being affected by such agreements, such as rights of passage, rights to fish, and rights of access to certain culturally significant sites.

Some of these concepts protect legitimate expectations of States ('rights of the State') which are invoked by the respective State as their own right, such

78 Wasum-Rainer and Wasielewski (n. 37), para. 5.

79 PCA, *Grisbådarna* (n. 1), 161.

80 United Nations Convention on the Law of the Sea of 16 November 1994, 1833 UNTS 3.

81 ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), merits, judgment of 19 December 2005, ICJ. Reports 2005, 168, para. 244.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

as local customary international law,[82] historic rights[83] and – either separately or as a component of the concept of historic rights – acquiescence[84]. Others protect legitimate expectations of non-States actors ('private rights') which may be invoked by a State on behalf of its nationals, such as the concept of vested or acquired rights,[85] traditional or artisanal rights,[86] and the rights of indigenous peoples.[87]

These concepts all share characteristics that qualify them as preservative rules: they serve to identify, protect, or entrench the *status quo* based on the respect for legitimate expectations arising from a long-standing practice of non-State actors. Their normative commonalities may be the reason why parties often invoke these concepts in parallel emphasising that a distinction between them 'matters little'[88] or 'is of little consequence'.[89]

However, for the present debate this distinction appears relevant. In contrast to transboundary rights invoked by the State in its own right, the

82 ICJ, *Right of Passage over Indian Territory* (Portugal v. India), merits, judgement of 12 April 1960, ICJ Reports 1960, 6, 40; ICJ, *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), judgment of 13 July 2009, ICJ Reports 2009, 213, para. 141.

83 *Territorial Sovereignty and Scope of the Dispute* (Eritrea/Yemen), Award of 9 October 1998, RIAA, Vol. XXII, para. 126; PCA, *South China Sea Arbitration*, Award of 12 July 2016, PCA Case No. 2013-19, para. 265.

84 PCA, *South China Sea Award* (n. 83), para. 265 describing 'historic fishing rights' as being based on 'the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States'.

85 Already the Permanent Court had determined that 'the principle of respect for vested rights' is 'a principle which […] forms part of generally accepted international law' (PCIJ, *Certain German Interests in Polish Upper Silesia*, merits, judgment no. 7, 1926, PCIJ, Series A, No. 7, 42).

86 Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea. A Modern Reappraisal* (2nd edn, Brill 2019), 27: 'rather than belonging to a State (as do historic rights *stricto sensu*), traditional rights belong to individuals.', 1063; See also: *Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award of 22 July 2009, UNRIAA, Vol. XXX, para. 753 ('the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources)'; ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), declaration of Judge Xue, judgment of 21 April 2022, para. 2: 'Traditional fishing rights are acquired from a long process of historical consolidation of socio-economic conditions and conduct, which reflects certain cultural patterns, local customs and traditions.' and para. 10: 'such rights are derived from long, continuous and peaceful exercise of certain practices.'

87 See e. g., Article 8 of the *Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United Kingdom v United States), award of 15 August 1893, RIAA, Vol. XXVIII, 271.

88 Colombia in ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), judgment of 21 April 2022, para. 202.

89 Costa Rica in *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) (CR 2009/3, 62, para. 41 (Kohen)).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

protection of rights of the individual, as indicated by the Preamble and Article 1(3) of the UNCH, is often associated with 'progress' in international law. This means that in situations where the preservation of a 'private right' collides with the pursuit of a 'progressive' aim, it is less clear whether such preservation indeed inhibits progress. A concrete example for this dilemma is illustrated by the conflict between such transboundary rights and multilateral agreements aimed at legal harmonisation.

b) Progress and the Protection of Rights of Non-State Actors: the EEZ

The conflict between these two sets of legal rules, both of which are commonly considered to be progressive achievements in international law, is illustrated by the controversy over the continued existence of transboundary rights of non-state actors in the Exclusive Economic Zone (EEZ) of States as enshrined in UNCLOS. UNLCOS 'represents a monumental achievement of the international community, second only to the charter of the United Nations.'[90] One of its major successes and 'real inventions'[91] is the development of the EEZ. This '*sui generis*' maritime zone 'confers exclusively on the coastal State the sovereign rights of exploration, exploitation, conservation and management of natural resources within 200 nautical miles of its coast'.[92] Yet, to what extent does this regime, widely hailed as progress in the law of the sea, extinguish the rights of nationals of other States to exploit natural resources therein?

In contrast to other maritime zones,[93] UNCLOS neither mentions nor seems to leave any room for 'traditional rights' in relation to the EEZ. Rather, Article 62(3) UNCLOS, which requires the coastal State to 'take into account […] the need to minimize economic dislocation in States whose nationals have habitually fished in the zone', can be understood as supporting an extinction of the rights of nationals of third States as this provision would otherwise be superfluous.[94]

---

90 Tommy Koh, 'A Constitution for the Oceans' in: *The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations 1983), xxxiii.

91 Alexander Proelss, 'Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited', Ocean Yearbook 26 (2012), 87-112 (87).

92 ICJ, Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), merits, judgment of 13 July 2023, ICJ Reports 2023, para. 69.

93 See Article 2(3) UNCLOS regarding the territorial sea and Article 47(6) and 51 UNCLOS regarding archipelagic waters.

94 See also Valentin Schatz, 'The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union', Int'l J. Marine & Coastal L. 35 (2020), 133-162 (150 f.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Being confronted with the question as to whether traditional fishing rights of nationals of one State survive in the territorial sea and in the EEZ of another State, the arbitral tribunal in its 2016 Award on *The South China Sea Arbitration* carefully distinguished between 'historic rights' of the State (China)[95] and 'traditional fishing rights' as 'private rights'[96]. With respect to the alleged 'historic rights' of China, the Tribunal firmly rejected the claim that these survived upon adoption of UNCLOS. It pointed out that

> '[t]hrough the Convention, China gained additional rights in the areas adjacent to its coasts that became part of its exclusive economic zone […] It necessarily follows, however, that China also relinquished the rights it may have held in the waters allocated by the Convention to the exclusive economic zones of other States.'[97]

Regarding 'traditional fishing rights', the Tribunal recognised that 'traditional livelihoods and cultural patterns are fragile in the face of development and modern ideas of interstate relations and warrant particular protection'.[98] However, while it concluded that within the territorial sea 'established traditional fishing rights remain protected by international law',[99] it did 'not consider it possible that the drafters of the Convention intended for traditional or artisanal fishing rights to survive the introduction of the exclusive economic zone'.[100]

The Tribunal's reasoning met with criticism both regarding its treatment of 'historic rights' of States as well as 'traditional fishing rights'. This criticism concerned the way in which the Tribunal dealt with case law (notably the *Eritrea/Yemen* Award of 1999) recognising the survival of transboundary rights of non-State actors facing the adoption of bilateral and multilateral agreements, the somewhat counter-intuitive distinction between the territorial sea and the EEZ regarding 'traditional fishing rights', and its interpretation of UNCLOS.[101] Notably, one commentator referred to the *quieta non movere* principle contained in the *Grisbådarna* case noting that 'the Tribunal failed to consider the nature and rationale of historic rights that are linked to

95 PCA, *South China Sea Arbitration* (n. 83), paras 235-262.
96 PCA, *South China Sea Arbitration* (n. 83), para. 798.
97 PCA, *South China Sea Arbitration* (n. 83), para. 257.
98 PCA, *South China Sea Arbitration* (n. 83), para. 794.
99 PCA, *South China Sea Arbitration* (n. 83), para. 803.
100 PCA, *South China Sea Arbitration* (n. 83), para. 803.
101 See e. g., Sophia Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Aarbitration', Ocean Development & International Law 48 (2017), 181-207.

 DOI 10.17104/0044-2348-2024-4-925

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the nondisturbance and preservation of a continuous, long-established, and accepted situation with the view to providing stability'.[102]

Indeed, it is unclear to what extent the *South China Sea* Award categorically excluded once and for all the recognition of the existence of transboundary rights of non-State actors in the EEZ of another State.[103] The 2016 Award does not preclude considering transboundary rights of non-State actors if these are based on legal developments after the adoption of UNCLOS, notably the increased recognition of rights of indigenous peoples[104] or on specific conduct involving the States concerned after the adoption of UNCLOS giving rise to legitimate expectations that such rights would persist, i. e., by way of local custom, acquiescence or by way of a unilateral act.

Finally, it remains to be seen to what extent the Tribunal's approach is shared by other international courts and tribunals. In its 2022 Judgment in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* case – six years after the arbitral award – the ICJ left this question open. Dismissing Colombia's claim to traditional fishing rights for lack of evidence, the Court rather stated that it 'need not examine the Parties' arguments in respect of whether or in which circumstances the traditional fishing rights of a particular community can survive the establishment of the exclusive economic zone of another State'.[105]

c) Progress Alongside Preservation: Risks of Fragmentation and Circumvention

It is not difficult to see that the carefully negotiated compromise reflected in the EEZ regime of UNCLOS could be undermined by overly permissive respect for the transboundary rights of non-State actors. These risks include circumvention by States invoking the rights of non-State actors as a pretext for encroaching on the sovereign rights of other States. Recognition of local variations may also lead to fragmentation of a regime that was explicitly intended to be comprehensive.

Thus, in order to strike a balance between the recognition of these rights and progress in the form of a harmonious regime of the law of the sea, three

102 Kopela (n. 101), 185.

103 But see Symmons (n. 86), 52-55: 'In this writer's view, […], the clear aim (as the legislative history of this provision evidences) was to eliminate all historically-claimed rights per se in what is now another State's EEZ.'.

104 See PCA, *South China Sea Arbitration* (n. 83), paras 273-275. See on this: Dissenting Opinion of Judge *ad hoc* McRae, ICJ, *Sovereign Rights and Maritime Spaces* (n. 88), paras 50-70.

105 ICJ, *Sovereign Rights and Maritime Spaces* (n. 88), para. 231.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

options could be considered. First, recognition of these transboundary rights could be conditioned on the object and purpose of the EEZ regime, i. e., the allocation of exclusive sovereign rights to the coastal State. To the extent that the rights of non-State actors qualify as 'private rights' whose scope is narrowly defined (i. e., limited to 'artisanal' or 'traditional' fishing as opposed to industrial fishing), it could be argued that they do not infringe on – and thus can coexist with – the sovereign rights of the coastal State. Second, recognition of these rights could be based on subsequent legal developments, in light of which the provisions regarding the EEZ regime would need to be interpreted. However, both options require parties to define the legal basis of their claims with respect to transboundary rights of non-State actors more precisely than they have in the past. Third, States should consider negotiating agreements regarding the access of traditional communities to natural resources located in another State's EEZ as was suggested by the ICJ in the 2022 Judgment.[106]

The preceding section demonstrated that concepts that protect legitimate expectations arising from the transboundary conduct of non-State actors qualify as preservative rules. Where the preservation of a private right collides with the pursuit of a progressive aim by way of a treaty, it is less clear whether such preservation inhibits or promotes progress in the just distribution of natural resources. To realise their progressive potential, a precise distinction between the different preservative rules protecting the rights of non-State actors is crucial.

3. Entrenchment of the Legal *Acquis* Through Unwritten International Law

The third example concerns the extent to which unwritten international law, which includes both customary international law and GPL,[107] helps to preserve the progress originally achieved in the form of treaty obligations

106 ICJ, *Sovereign Rights and Maritime Spaces* (n. 88), para. 232.

107 See for this understanding of unwritten international law: Statement of H. E. Abdulqawi Ahmed Yusuf, President of the International Court of Justice before the 6th Committee of the UN General Assembly, New York, 1 November 2019, available at: <https://icj-cij.org/sites/default/files/press-releases/0/000-20191101-STA-01-00-EN.pdf>, last access 17 January 2025, para. 5; *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, UNRIAA, vol. XX, 119-213, at 149, para. 79. See on the related and equally important role of jus cogens the work of the ILC (Draft conclusions on 'Peremptory norms of general international law (*jus cogens*)' (ILC Report 2022, Chapter IV, UN doc A/77/10) and Dire Tladi, 'Between Stability and Responsiveness in International Law – The Example of Jus Cogens', ESIL Reflection 13 (2024).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

over time. After introducing the term 'unwritten international law' as an umbrella category for customary international law and GPL and explaining the characteristics that qualify them as preservative rules (a), this section demonstrates how those rules serve to entrench respect for human rights by ensuring their validity independently of the continued existence of the treaties that established them at the international level (b). It then addresses the challenges for their progressive potential arising from unclear criteria for the identification of their regional variants (c).

a) Unwritten International Law: Irreconcilability of 'Generality' and 'Trailblazing'?

Be it the adoption of the Covenant of the League of Nations,[108] the United Nations Charter, the human rights covenants,[109] UNCLOS, the Rome Statute[110] and, more recently, the BBNJ Agreement[111]: many of the 'great leaps' in international law have taken the form of a treaty or were 'defin[ed]'[112] by the adoption of United Nations General Assembly (UNGA) resolutions.

In contrast, unwritten international law is not the means of first choice to respond to novel challenges in international law. Rather, it is often seen as lagging behind any 'progress'. This is because, according to the traditional rules for determining custom and general principles of law, its formation is slow, gradual and cumbersome. Indeed, the rules for identifying unwritten international law meet all three criteria of preservative rules: they serve to identify, protect, or entrench the legal *status quo* based on the respect for legitimate expectations building on the past conduct of States.

Modern approaches for identifying unwritten law, notably 'instant' custom, remain controversial and were largely rejected by International Law Commission (ILC) members and States in the 6th Committee in the debates leading to the adoption of the ILC's conclusions on the 'Identification of

108 Covenant of the League of Nations of 28 June 1919.

109 E. g., International Covenant on Civil and Political Rights of 19 December 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 UNTS 3.

110 Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3854.

111 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction of 19 June 2023.

112 See ICJ, *Chagos Advisory Opinion* (n. 65), para. 150: 'The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization.'

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

customary international law' in 2018.[113] While it is too early to tell, the ILC's current work on 'General principles of law' and the Commission's interplay with States in the 6th Committee do not suggest that this third category of law will find acceptance as a means to circumvent the requirements for custom, i. e. as 'custom lite'.[114]

Yet, even if what the ICJ in its *North Sea Continental Shelf* cases called 'time element'[115] is interpreted liberally, both forms of unwritten international law are defined by their 'generality', i. e., by an 'extensive and virtually uniform' State practice (customary international law)[116] and 'wide and representative' recognition (GPL)[117]. However, the requirement of 'generality' barely permits 'trailblazing' rules, which are defined by their unprecedented and – at least at first – isolated nature. The only exception to this might be regional customary international law and GPL with a regional scope of application. However, State practice applying these regional variants of unwritten law is rather sparse. Yet, this may change in light of multiple withdrawals from regional treaties.

b) Entrenchment of Progress Through Unwritten International Law: Treaty Withdrawal

One of the most common associations with progress in and through international law is the expansion of human rights guarantees at the international level. Prominently reflected in Article 1(3) UNCH ('respect for human rights') as one of the purposes of the United Nations, more and more regional treaties have been concluded to ensure the recognition and protection of international human rights since 1945. Still, many of these treaties expressly provide for the possibility of denunciation or withdrawal.[118] How-

113 See on this: Omri Sender and Michael Wood, 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law', Grotiana 42 (2021), 229-251 (240).

114 Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' ICLR 21 (2019), 307-324 (321) citing Jan Klabbers, *International Law* (Cambridge University Press 2017), 38.

115 ICJ, *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark), judgment of 20 February 1969, ICJ Reports 1969, para. 74.

116 ICJ, *North Sea Continental Shelf* (n. 114).

117 See Draft Conclusion 5(2) of the provisionally adopted ILC draft conclusions on 'General Principles of Law' (2023), UN doc A/CN.4/L.982.

118 See e. g., Art 58 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 2889 (ECHR); Article 78 of the American Convention on Human Rights 'Pact of San José, Costa Rica' of 22 November 1969; Article 50 of the Treaty on European Union as amended by the Treaty of Lisbon of 13 December 2007.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ever, some commentators take the view that even in those cases the possibility of withdrawal from such treaties 'is by no means self-evident' due to their special legal nature.[119]

Yet, recent practice shows that international law does not know a general 'eternity clause' protecting human rights treaties from termination or denunciation. Over the last decades, we have witnessed the exit and withdrawal of States from regional human rights treaties. Examples include Russia (ECHR and related protocols), Turkey (Istanbul Convention), the United Kingdom (European Union Charter of Fundamental Rights) and Venezuela (American Convention on Human Rights). These developments shift the focus from the 'if' and 'how' of such a withdrawal from human rights treaties to its consequences. It is at this point where preservative rules come into place as a means for entrenching the legal *acquis*.

To the extent that States comply with the procedure set out in the respective regional human rights treaty and/or the general rules reflected in the Vienna Convention on the Law of Treaties (VCLT), they are released from any obligation further to perform the treaty (Article 70(1)(a)(2) VCLT). However, the customary rule reflected in Article 43 of the 1969 VCLT provides that the denunciation of a treaty does not affect a State's parallel obligations under international law. These include rules of customary international law that are identical in content to the provisions contained in the treaty. As confirmed forty years ago by the ICJ in its 1984 Judgment on Preliminary Objections in the *Military and Paramilitary Activities (Nicaragua* v. *United States of America)* case

> 'The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions […] even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty law and on that of customary international law, these norms retain a separate existence.'[120]

This parallelism of sources in the context of treaty withdrawal has recently been confirmed by the Inter-American Court of Human Rights (IACtHR) in an Advisory Opinion issued in 2020 responding to the request by Colombia about the consequences of a denunciation of the American Convention on

119 Eckhart Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 477-487 (483).

120 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), jurisdiction and admissibility, judgment, ICJ Reports 1984, 392 (para. 73).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Human Rights and the Charter of the Organization of American States. The IACtHR stated that

> 'customary norms, those derived from general principles of law and those pertaining to *jus cogens*, as independent sources of general international law, continue to bind a State that has denounced the American Convention'.[121]

At the same time, the Court remained very vague regarding the scope of the rules encompassed by this statement.[122] It is clear that human rights obligations under general international law continue to bind the withdrawing State. Yet, the question is to what extent the more specific regional human rights guarantees enshrined in the instruments reflect regional customary international law and/or GPL with a regional scope of application. Such regionally limited human rights guarantees might include, for example, the prohibition of the death penalty, which is not universally shared.

The ICJ has recognised that regional customary international law may develop alongside general customary international law.[123] According to Conclusion 16(2) of the ILC's conclusions on 'Identification of customary international law', it would need to be shown that the treaty provision in question reflects 'a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves'. However, this raises many follow-up questions which were not explored in-depth in the commentaries of the ILC, such as the identification of 'the States concerned' and whether the 'general practice' requirement allows for regional outliers. Moreover, given the high standard applied in the *Asylum* case[124] for identifying regional custom and the fact that the legal nature of regional custom has often been compared to treaties raises the question whether the denunciation would equally affect the identification or binding character of a rule under regional custom.

---

121 IACtHR, Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations, Advisory Opinion OC-26/20, IACtHR Series A No. 26, 9 November 2020, para. 155, see also paras 94-97 and 100-110 (for the American Convention on Human Rights) and paras 155-157 (for the OAS Charter).

122 See also Philippe Frumer, '"Je suis venu te dire que je m'en vais …" La dénonciation des traités régionaux de protection des droits de l'homme', RGDIP (2021), 253-287 (261, fn. 40).

123 See ICJ, *Right of Passage* (n. 82), 39, 44; *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America), merits, judgment, ICJ Reports 1986, para. 199; ICJ, *Dispute regarding Navigational and Related Rights* (n. 82), paras 34 and 36.

124 ICJ, *Colombian Peruvian Asylum Case*, judgment of 20 November 1950, ICJ Reports 1950, 266, 276-278.

 DOI 10.17104/0044-2348-2024-4-925

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

In contrast to regional customary international law, the ICJ has never recognised that general principles of law with a regional scope of application fall within the scope of Article 38(1)(c) ICJ-Statute. States in the 6th Committee, ILC members and scholars have taken opposing positions in this regard.[125] The role played by regional general principle of law subsequent to the withdrawal from a human rights treaty thus remains open for the time being.

c) Progress Despite Preservation: Outlasting State Consent?

To the extent that provisions in regional human rights treaties reflect (regional or general) customary international law or GPL, their substance remains unaffected by the withdrawal of States.

However, considering the regional differences in human rights treaties, the question arises how regional customary international law is identified and whether GPL with a regional scope of application fall within the scope of Article 38(1)(c) ICJ-Statute. These unresolved issues make the application of the rule enshrined in Article 43 of the 1969 VCLT to regional human rights treaties a tightrope walk. Any 'automatism' that bases the identification of regional custom primarily on a regional treaty risks doing a disservice to progress in the area of human rights. A State that cannot be certain that it will be able to withdraw from a regional treaty regime, will think twice about joining such a regime in the first place. Moreover, the criteria for identifying unwritten regional international law would also need to be consistently applied, that is in a way that does not unduly favour the interests and preferences of regional hegemons. Thus, the desire to prevent regress in the area of human rights must not lead to selectively lowering the threshold for identifying unwritten international law. If this were the case, the principle of sovereign equality and the principle of consent – which are by themselves progressive achievements – would be undermined.

This section showed that rules that guide the identification and determination of unwritten rules of international law qualify as preservative rules and serve to entrench progress, for example in the form of human rights guarantees, in international law. However, the extent to which those preservative rules realise their progressive potential – instead of undermining other progressive aims in international law – depends on their consistent application.

125 Mariana De Andrade, 'Regional Principles of Law in the Works of the International Law Commission', Quest. Int'l. L., Zoom-in 86 (2021), 23-46.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

V. Conclusion: Progress Through an Equilibrium of Transformative and Preservative Rules

The principle of *quieta non movere* with its various emanations is only at first glance irreconcilable with the attainment of progress in international law. Rather, respect for legitimate expectations arising from the *status quo* is itself at the heart of progress. Based on the experiences of two World Wars which revealed the fragility of the international legal order, the Preamble of the UNCH, our point of departure of what amounts to a 'betterment' in international law, also seeks 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. Progress through international law thus rests on a balance between preservative and transformative rules. The crucial question is how to maintain an equilibrium between the two types of rules. The three examples discussed demonstrate that this balance depends on a limited (*uti possidetis*), precise (transboundary rights of non-State actors), and consistent (unwritten regional international law) invocation and application of preservative rules.

 DOI 10.17104/0044-2348-2024-4-925

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

A Feminist Reinterpretation of Access to Abortion Under the European Convention on Human Rights

Spyridoula (Sissy) Katsoni*
Ruhr-University Bochum, Bochum, Germany
Spyridoula.Katsoni@ruhr-uni-bochum.de

Abstract 955
Keywords 956
I. Introduction 956
II. Overview of the Court's Jurisprudence on Access to Abortion 957
III. Unveiling the Court's Interpretative Technique for a Restrictive Interpretation of the Provisions of the Convention on Access to Abortion 965
IV. Utilising the Court's Interpretative Technique to Reach a Feminism-Informed Interpretation of the Convention 970
V. Concluding Remarks 976

Abstract

This article outlines the jurisprudence of the European Court of Human Rights on access to abortion and underlines the points of criticism that feminist scholars have raised in this regard. Against this background, the article explores whether the customary interpretative rules enable a feminist interpretation of the relevant provisions of the European Convention on Human Rights, i. e. whether the customary interpretative tools can lead to an interpretation that addresses the points of feminist criticism and meets the standards that feminist scholars have argued for. The article contends that such a feminist interpretation of the provisions of the European Convention on Human Rights on access to abortion can be realised through the same interpretative technique that the Court has already used in its abortion-

* The author is a PhD Candidate and Research Associate at Ruhr-University's Institute for International Law of Peace and Armed Conflict.
Acknowledgements: The author is deeply grateful to Judge Hilary Charlesworth and Alexander Holzer for their invaluable feedback on an earlier version of this article. Moreover, the author would like to thank the rest of the organisers of the AjV-DGIR Conference 2023 for facilitating a broad discussion on this article, as well as Jack Provan and the reviewers and editors of the *Heidelberg Journal of International Law* for their additional constructive remarks on earlier drafts. Any remaining mistakes are the author's.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

related jurisprudence. However, in doing so, the Court will need to aim at a feminist rather than a restrictive interpretative outcome.

Keywords

feminist approaches to international law – treaty interpretation – access to abortion – European Court of Human Rights

I. Introduction

Considering the dire and even deadly impact of restrictive abortion policies,[1] it comes as no surprise that abortion as a human rights issue is garnering considerable attention worldwide.[2] Following the introduction of strict legislative abortion policies in various countries[3] and the overturning of acknowledgements of the right to access abortion,[4] reports on the matter have attracted widespread media coverage.[5] In academic circles, these developments were preceded by analyses of abortion, as even earlier decisions by human rights fora had drawn academic attention to the impact of abortion legislation on human rights.[6] This academic attention remains steadfast, as the impacts of restrictive abortion policies are affecting an increasing number of people[7] and have led to a large number of disputes pending before human rights fora.[8]

1 Weronika Strzyżyńska, 'Polish State Has "Blood on Its Hands" After Death of Woman Refused an Abortion', The Guardian, 26 January 2022.

2 Rebecca Smyth, 'Abortion in International Human Rights Law at a Crossroads: Some Thoughts on Beatriz v El Salvador', Katsoni, 29 May 2023, doi: 10.17176/20230529-110940-0.

3 Michael Goodier, 'How Many Countries Have Tightened Abortion Laws? The US is One of Only Four Countries to Impose Stricter Abortion Laws Since the 1990s', The New Statesman, 27 June 2022.

4 Nina Totenberg and Sarah McCammon, 'Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades', National Public Radio (NPR), 24 June 2022.

5 Mira Ptacin, 'After Poland Issued a Near-Total Ban on Abortions, Marta Lempart Has Been on the Front Line of the Protests', Vogue, 11 February 2021.

6 Gregor Puppinck, 'Abortion on Demand and the European Convention on Human Rights', EJIL:Talk!, 23 February 2013; Rumyana Panepinto, Alice Grozdanova and Konstantina Tzouvala, 'In Defence of a More Sophisticated and Nuanced Approach to Abortion: A Response to Gregor Puppinck', EJIL:Talk!, 22 March 2013.

7 Patrick Adams, 'Why Poland's Restrictive Abortion Laws Could be Problematic for Ukrainian Refugees', National Public Radio (NPR), 17 March 2022.

8 There are approximately 1,000 applications relating to Poland's restrictive abortion policy pending before the Court. See Spyridoula (Sissy) Katsoni, '"Dangerous" Abortion Cases and the Dangers of Misportraying ECtHR's Inadmissibility Decisions', EJIL:Talk!, 20 June 2023.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Against this background, this article explores the potential for the feministisation of the jurisprudence of the European Court of Human Rights ('the Court') by exploring how the European Convention on Human Rights ('the Convention')[9] could be interpreted in a fashion that both addresses the criticisms and meets the standards that feminist scholars have set. Such an interpretation will here be referred to as a feminist interpretation of the Convention. To that end, the article first provides a brief overview of the Court's jurisprudence on access to abortion. Subsequently, it reveals the interpretative technique the Court has employed to reach a restrictive interpretation of the provisions of the Convention concerning access to abortion and underlines the main points of feminist criticism directed towards the Court's jurisprudence.

Against this backdrop, the analysis then asks whether the customary rules on treaty interpretation enshrined in the Vienna Convention on the Law of Treaties ('the VCLT')[10] can lead to a feminist interpretative outcome. The article concludes that these customary interpretative tools could allow the Court to interpret the Convention in a feminist fashion, requiring the Court to utilise an interpretative technique it is already familiar with and to pay more attention to those tools that enable a preferrable conclusion. To reach a feminist conclusion, the Court will have to place more emphasis on the tools that can lead to a feminist instead of a conservative conclusion. Rather than leading the Court to adopt a more subjective interpretative methodology (i. e. one that relies more heavily on the judges' wish to refrain from addressing the morally and politically sensitive issue of access to abortion rather than on objective criteria established in the VCLT and the customary rules on treaty interpretation), this means the Court will simply need to replace its restrictive interpretative objective with a feminist one.

II. Overview of the Court's Jurisprudence on Access to Abortion

This section outlines the Court's jurisprudence on access to abortion and highlights the Court's hesitancy to explicitly acknowledge the obligation the State Parties to the Convention are under to grant access to abortion in certain circumstances. In doing so, this section provides the backdrop to the subsequent analyses on the interpretative method employed by the Court in

9 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 221.

10 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

its judgments on access to abortion, the feminist criticism these judgments have attracted and the potential as regards the feministisation of the Court's jurisprudence on the matter.

The Convention does not include any explicit provisions on access to abortion. Nonetheless, since its early jurisprudence, the Court has accepted that access to abortion falls within the scope of Art. 8 of the Convention (Right to respect for private and family life),[11] which includes the right to personal autonomy and physical and psychological integrity.[12] The Court has further clarified that Art. 8 'cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother'.[13] Instead, 'the issue [is] determined by weighing up various, and sometimes conflicting rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child',[14] in line with the limitations clause in Art. 8 (2) of the Convention.

The Court has been called upon to assess whether States have managed to properly weigh up these competing interests in various cases. In this context, it has emphasised that national legislation strikes a fair balance if it authorises abortion within the first twelve weeks of pregnancy where there is a risk to the woman's physical or mental health and beyond that point if the pregnancy or childbirth puts the woman's life at risk, or if the child would be born with a condition of such gravity as to endanger the woman's physical or mental health.[15] Against this background, the Court has indicated – as the European Commission on Human Rights has previously done[16] – that when the life or physical or mental health of the person bearing the child is at risk, national laws enabling access to abortion do not 'go beyond' the States' discretion in regulating access to abortion and strike a fair balance with the foetus's interests.[17] In this vein, the Court has never found a violation of Art. 2 of the Convention (Right to life) in cases where it was argued that a State failed to protect the foetus by granting the person bearing it access to an abortion, and it has never acknowledged a right of the foetus's 'father' or

11 ECtHR, *Brüggemann and Scheuten v. Germany*, judgment of 19 May 1976, no. 6959/75, para. 61; ECtHR (Grand Chamber), *Vo v. France*, judgment of 8 July 2004, no. 53924/00, para. 80.

12 ECtHR (Grand Chamber), *A, B and C v. Ireland*, judgment of 16 December 2010, no. 25579/05, paras 216-218.

13 ECtHR, *Brüggemann and Scheuten* (n. 11), para. 61; ECtHR, *Vo* (n. 11), para. 80.

14 ECtHR, *Vo* (n. 11), para. 80.

15 ECtHR, *Boso v. Italy*, judgment of 5 September 2002, no. 50490/99, para. 1.

16 16 ECommHR, *H. v Norway*, Decision of 19 May 1992, no. 17004/90, 155.

17 ECtHR, *Boso* (n. 15), para. 1. See also Panepinto, Grozdanova and Tzouvala (n. 6).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

'relatives' to be consulted before a pregnant person pursues and accesses abortion.[18]

The Grand Chamber of the Court further clarified its stance on when a State strikes a fair balance between the competing interests in *A, B and C v. Ireland*.[19] The case concerned three applicants who during their first trimester of pregnancy travelled from Ireland to England to receive an abortion as they believed they were not entitled to receive one under Ireland's domestic law. At the time, the Irish Constitution acknowledged the right to life of the unborn and allowed abortions only when there was a real and substantial risk to the life of the pregnant person that could only be avoided by terminating the pregnancy.[20] Regarding the first and second applicants' complaint that the domestic law did not allow abortion for reasons of health and/or well-being,[21] the Court acknowledged an interference with the applicants' right to privacy and with the negative obligations under Art. 8 of the Convention.[22] Furthermore, it found that this interference was in accordance with a foreseeable and accessible law[23] and that it pursued the legitimate aim of the protection of morals in Ireland, of which the foetus's right to life was one aspect.[24]

Assessing the necessity of this interference in a democratic society,[25] the Court emphasised that due to the acute sensitivity of the moral and ethical issues raised by the question of abortion, a broad margin of appreciation was to be accorded to the State.[26] This broad margin could be narrowed by the existence of a European consensus on the matter, which could enable a dynamic interpretation of the Convention.[27] Indeed, as the Court underlined, such a consensus had arisen among the substantial majority of the State Parties, which allowed abortion on broader grounds than Ireland did.[28] Nevertheless, given the absence of an additional consensus on when the right to life begins,[29] the Court concluded that the State's broad margin of appreciation was not narrowed, notwithstanding the evolutive interpretation of the

18 ECtHR, *Boso* (n. 15), para. 2. See also Katsoni, 'Dangerous Abortion Cases' (n. 8).
19 ECtHR, *A, B and C* (n. 12).
20 ECtHR, *A, B and C* (n. 12), paras 39-44.
21 ECtHR, *A, B and C* (n. 12), para. 139.
22 ECtHR, *A, B and C* (n. 12), paras 216-218.
23 ECtHR, *A, B and C* (n. 12), paras 219-221.
24 ECtHR, *A, B and C* (n. 12), para. 227.
25 ECtHR, *A, B and C* (n. 12), para. 230.
26 ECtHR, *A, B and C* (n. 12), para. 233.
27 ECtHR, *A, B and C* (n. 12), para. 234.
28 ECtHR, *A, B and C* (n. 12), para. 235.
29 ECtHR, *A, B and C* (n. 12), para. 237.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Convention.[30] To further support its conclusion, the Court referred to the lengthy, complex and sensitive debate in Ireland regarding its abortion laws and highlighted the fact that persons who wished to have an abortion that was not accessible in Ireland had the alternative of abortion travelling, which was not prohibited.[31] Hence, it concluded that there had been no violation of Art. 8 of the Convention.[32]

In other words, although the Court has acknowledged that access to abortion for reasons of protecting the pregnant person's life, health, or well-being strikes a fair balance with any competing interests of the pregnant person's partner or any safeguards that may be extended to the foetus, the prohibition of access to abortion for reasons of the pregnant person's health and well-being is also justifiable in order to protect conflicting moral perceptions in a given State. Contrary to this restrictive and rather confusing interpretative conclusion, the Court has been more eloquent when it comes to acknowledging procedural abortion-related obligations on the basis of the positive obligations under Art. 8 of the Convention.

Specifically, the third applicant in the *A, B and C v. Ireland* case complained that there was no procedure through which she could have established that the pregnancy posed a risk to her health.[33] The Grand Chamber assessed this claim from the angle of the positive obligations under Art. 8 of the Convention[34] and found that no criteria or procedures were laid down in Irish law for verifying whether a person qualifies for lawful access to an abortion.[35] The uncertainty caused by this omission and the criminal provisions on the prohibition of abortion, which were a significant chilling factor for both pregnant persons and doctors in the medical consultation process, had resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland and the reality of its practical implementation.[36] Thus, the Court concluded that there had been a violation of the State's positive obligations under Art. 8 of the Convention.

The Court had already adopted this interpretative conclusion in *Tysiąc v. Poland*, where it found that there had been a failure to comply with the positive obligations under Art. 8 of the Convention owing to the lack of a procedure whereby pregnant persons could verify whether they are eligible for lawful access to abortion under domestic law and whereby any disagree-

30 ECtHR, *A, B and C* (n. 12), paras 236-237.
31 ECtHR, *A, B and C* (n. 12), paras 239-240.
32 ECtHR, *A, B and C* (n. 12), para. 241.
33 ECtHR, *A, B and C* (n. 12), para. 140.
34 ECtHR, *A, B and C* (n. 12), paras 244-246.
35 ECtHR, *A, B and C* (n. 12), para. 253.
36 ECtHR, *A, B and C* (n. 12), paras 254-265.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ments on the matter between doctors could be resolved.[37] These procedures include diagnostic services regarding the foetus's abnormality, which may be decisive for a pregnant person's informed decision on whether to seek a legal abortion.[38] In the post-*A, B and C v. Ireland* era, the Court's analyses of States' procedural abortion-related obligations further indicated that, under the Convention, if a State has legalised abortion on certain grounds in its domestic legal system, it has to ensure that abortion on these grounds will be accessible in practice. If the relevant conditions for access to abortion are met but a health provider refuses to provide the abortion, then the patient's access to lawful services will be ensured if the health provider objecting on the grounds of conscience issues a written refusal indicating their refusal to provide abortion services and if the patient is referred to non-objecting providers.[39]

Finally, the Court has found violations of Art. 3 of the Convention (Prohibition of torture) in some of its abortion-related judgments. This was the case in its most recent cases concerning forced abortions[40] as well as in two cases that referred to infringements of access to legal abortion (according to domestic law). Specifically, in *R. R. v. Poland*, the applicant was deliberately refused prenatal genetic tests by doctors who suspected a severe genetic abnormality in the foetus but opposed abortions.[41] The applicant was only informed of the foetus's genetic abnormality after the timeframe for legal access to abortion had elapsed,[42] and she gave birth to a child affected with Turner syndrome.[43] In its judgment, the Court emphasised that due to the health professionals' procrastination regarding prenatal tests, the applicant had been very vulnerable, as she had to endure weeks of anguish and painful uncertainty about the foetus's health, her own and her family's future and the prospect of raising a child suffering from an incurable ailment.[44] Thus, the Court concluded that the applicant's suffering met the minimum threshold of severity under Art. 3 of the Convention.[45] Since the prohibition of inhuman and degrading treatment under Art. 3 is abso-

37 ECtHR, *Tysiąc v. Poland*, judgment of 20 March 2007, no. 5410/03, paras 128-129. See also ECtHR, *P. and S. v. Poland*, judgment of 30 October 2012, no. 57375/08, paras 111-112.

38 ECtHR, *Tysiąc* (n. 37), paras 119-124; ECtHR, *P. and S.* (n. 37), para. 100.

39 Johanna Westeson, 'P and S v. Poland: Adolescence, Vulnerability, and Reproductive Autonomy', Strasbourg Observers, 5 November 2012.

40 ECtHR, *S. F. K. v. Russia*, judgment of 11 October 2022, no. 5578/12; ECtHR, *G. M. and others v. The Republic of Moldova*, judgment of 22 November 2022, no. 44394/15.

41 ECtHR, *R. R. v. Poland*, judgment of 26 May 2011, no. 27617/04, paras 9-34.

42 ECtHR, *R. R. v. Poland* (n. 41), paras 35-36.

43 ECtHR, *R. R. v. Poland* (n. 41), para. 37.

44 ECtHR, *R. R. v. Poland* (n. 41), para. 159.

45 ECtHR, *R. R. v. Poland* (n. 41), para. 161.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

lute and thus cannot be restricted or derogated from, the Court did not have to balance any conflicting interests. Instead, it found that by causing such serious suffering to the applicant the State had breached Art. 3 of the Convention.[46]

The Court also found a violation of Art. 3 of the Convention in *P. and S. v. Poland*,[47] which concerned a fourteen-year-old Polish teenager, P., whose pregnancy was the result of rape.[48] Even though, at the time, abortion was legal in Poland when the pregnancy was the result of a criminal act[49] and although the applicant had obtained a certificate from the prosecutor certifying that her pregnancy had resulted from rape, she was repeatedly harassed and hindered by various actors (doctors, anti-abortion groups, and representatives of the Catholic Church)[50] from accessing one.[51] Assessing P.'s claim under Art. 3 of the Convention, the Court emphasised that it was of 'cardinal importance' that she was only fourteen years old and had suffered sexual abuse.[52] The Court further underlined the fact that while she was in a state of great vulnerability she was additionally subjected to pressure, coercion, and manipulation by health providers, was not protected from third parties that harassed her and had to witness her mother being verbally attacked and humiliated by doctors before being forcibly separated from her mother and detained.[53] Additionally, the Court was 'particularly struck' by the fact that a criminal investigation was initiated against the teenager for having engaged in unlawful intercourse when it was clear from the submitted documents that she was in fact the victim of sexual abuse.[54] Hence, the minimum threshold of severity under Art. 3 of the Convention had been met and its violation was acknowledged in the judgment.[55]

Most recently, the Court was required to assess the applicability of Art. 3 of the Convention to complaints regarding the inaccessibility of abortions in an application concerning the ban on access to abortion in Poland even in cases of foetal abnormalities following the legislative amendments occasioned by the Polish Constitutional Court's judgment of 22 October 2020.[56] In

46 ECtHR, *R. R. v. Poland* (n. 41), paras 157, 162.
47 ECtHR, *P. and S.* (n. 37).
48 ECtHR, *P. and S.* (n. 37), para. 6.
49 ECtHR, *P. and S.* (n. 37), para. 54.
50 ECtHR, *P. and S.* (n. 37), paras 23-24, 26.
51 ECtHR, *P. and S.* (n. 37), paras 7-10, 25-28.
52 ECtHR, *P. and S.* (n. 37), para. 161.
53 ECtHR, *P. and S.* (n. 37), paras 161-164.
54 ECtHR, *P. and S.* (n. 37), para. 165.
55 ECtHR, *P. and S.* (n. 37), paras 168-169.
56 Polish Constitutional Court (Constitutional Tribunal), judgment of 22 October 2020, case no. K1/20.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

M. L. v. Poland,[57] the applicant argued that she had been the victim of a breach of Art. 3 of the Convention, as the Constitutional Court's judgment had deprived her of the opportunity to terminate her pregnancy on the ground of foetal defects and had, thus, caused her serious and real emotional suffering and unimaginable fear and anguish.[58] She further alleged that there had been a breach of Art. 8 as, following the Constitutional Court's judgment, she was obliged either to maintain her pregnancy and give birth to a seriously ill child or to travel abroad to a private clinic at considerable financial and psychological expense.[59]

The Court accepted that travelling abroad for an abortion was psychologically arduous for the applicant but concluded that the emotional and mental pain she suffered did not reach the level of severity required under Art. 3 of the Convention and did not, thus, fall within its material scope.[60] In doing so, the Court showed once again that, when deciding on Art. 3-based claims in its abortion jurisprudence it pays primary attention to the applicant's vulnerability, which it identifies on the basis of a variety of qualities that are not explicitly established and coherently applied in its jurisprudence but which the Court identifies on a case-by-case basis and in a 'cryptic' fashion.[61]

In light of the above, the Court proceeded with an assessment of the applicant's claim under Art. 8 of the Convention and reiterated that the prohibition of abortion for reasons of health and well-being on the ground of foetal impairment amounts to an interference with the right to respect for private life.[62] It then examined whether this interference was 'in accordance with the law' and concluded that the irregularities in the election of the judges at the Polish Constitutional Court compromised the legitimacy of the court's bench, whose rulings thus fell short of what the rule of law required.[63] Hence, the Court did not find it necessary to examine in detail the remaining shortcomings alleged by the applicant.[64] In this sense, by focusing on the

57 ECtHR, *M. L. v. Poland*, judgment of 14 December 2023, application no. 40119/21.

58 ECtHR, *M. L. v. Poland* (n. 57), paras 73, 80.

59 ECtHR, *M. L. v. Poland* (n. 57), para. 73.

60 ECtHR, *M. L. v. Poland* (n. 57), paras 83-85.

61 For a thorough analysis of the Court's vulnerability assessment in its Art. 3-related case-law, see Corina Heri, *Responsive Human Rights* (Hart Publishing 2021), 36, 145. For an overview of the vulnerability assessment of Art. 3-based claims in the context of the Court's abortion case-law, see Spyridoula (Sissy) Katsoni, 'Access to Abortion Under the European Convention of Human Rights: Overcoming the Boundaries of Treaty Interpretation' in: Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak and Gerd Oberleitner, *European Yearbook on Human Rights 2023* (Intersentia 2023), 315-352 (325-328). For a feminist critique of this approach, see section IV. below.

62 ECtHR, *M. L. v. Poland* (n. 57), para. 154.

63 ECtHR, *M. L. v. Poland* (n. 57), para. 174.

64 ECtHR, *M. L. v. Poland* (n. 57), paras 174-176.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

rule-of-law crisis in Poland, the Court avoided carrying out an assessment of the State's obligation to grant access to abortion and missed the opportunity to develop its abortion-related jurisprudence and to grant stronger protection under the Convention.[65]

As the above analysis shows, the Court has so far avoided identifying a right to access abortion and has abstained from acknowledging the existence of a state obligation to grant access to abortion. This hesitant approach is in line with the Court's overall 'delineatory character' in cases concerning politically or morally sensitive issues.[66] The Court has drawn the line by stressing that if the pregnant person's life or physical or mental health is at risk, then access to abortion will strike a fair balance with the foetus's interests,[67] and by refusing to acknowledge any right of the pregnant person's partner to be consulted before that person receives an abortion.[68] However, it has not taken the step of identifying occasions when a person is to be granted access to an abortion under the Convention.[69]

This hesitant approach is complemented by the Court's tendency to view restrictions on access to abortion as procedural rather than substantive human rights violations.[70] The Court has been much more eloquent in this regard and has clarified that once a State has granted the right to abortion under its domestic law, it must ensure that the enjoyment of this right is not merely theoretical and that abortion is accessible in practice.[71] In fact, if a person meets the requirements for accessing abortion under domestic law but is still prevented from doing so, then this person's vulnerability might lead to suffering that meets the threshold of inhuman or degrading treatment under Art. 3 of the Convention. Other than that, the Court has only engaged in an

65 Spyridoula (Sissy) Katsoni, 'How to Maneuver Around Acknowledging the Right to Access Abortion: Some Thoughts on the ECtHR's Judgment in M. L. v. Poland', EJIL: Talk!, 11 January 2024.

66 Ezgi Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights', EJIL 31 (2020), 73-99 (86); See also Zoe L. Tongue and Lewis Graham, 'Y.P. v Russia: Sterilisation Without Consent, Article 3, and Weak Reproductive Rights at the ECtHR', Strasbourg Observers, 30 September 2022; Daniel Fenwick, 'Abortion Jurisprudence at Strasbourg: Deferential, Avoidant and Normatively Neutral?', LS 34 (2014) 34(2), 214-241 (239-241).

67 ECtHR, *Boso* (n. 15), para. 1. See also Panepinto, Grozdanova and Tzouvala (n. 6).

68 ECtHR, *Boso* (n. 15), para. 2. See also Katsoni, 'Dangerous Abortion Cases' (n. 8).

69 For a view that this step can be expected in the near future, see Chiara Cosentino, 'Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence', HRLR 15 (2015), 569-589 (586-589).

70 Joanna N. Erdman, 'The Procedural Turn: Abortion at the European Court of Human Rights' in: Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014), 121-142 (139-141).

71 ECtHR, *R. R. v. Poland* (n. 41), para. 210; ECtHR, *A, B and C* (n. 12), paras 254-265.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

analysis of whether a State has to broaden the grounds on which it grants access to abortion in *A, B and C v. Ireland*, where it acknowledged that allowing abortions only where there is a real and substantial risk to the pregnant person's life that can only be avoided by terminating the pregnancy is compatible with Art. 8 of the Convention.

III. Unveiling the Court's Interpretative Technique for a Restrictive Interpretation of the Provisions of the Convention on Access to Abortion

As an international treaty that was adopted before the VCLT, the Convention is to be interpreted in accordance with the customary rules on treaty interpretation.[72] These customary rules are broadly acknowledged as being identical in terms of content to Arts 31 to 33 of the VCLT.[73] This section zooms in on the interpretative approach the Court has adopted in its case-law on access to abortion and assesses whether it followed the interpretative guidance provided by the relevant customary rules. As this analysis emphasises, the Court has utilised the discretion the customary rules grant to those interpreting the law and has purposely employed a creative interpretative technique to reach a restrictive interpretation of the relevant provisions of the Convention even though it could have provided a much broader interpretation while still following the customary rules.

First, the Court's finding in *A, B and C v. Ireland* – according to which Member States enjoy a broad margin of appreciation with regard to the regulation of abortions – has raised vivid criticism.[74] This is because the Court explicitly disregarded the States' consensus in this field,[75] even though the State Parties' subsequent practice is a valuable interpretative tool according to Art. 31 (3) (b) of the VCLT. This subsequent practice evinces a trend among the State Parties to the Convention which have legalised access to abortion on broad grounds. Forty of the forty-seven State Parties have legalised access to abortion during at least the first ten to twenty-four weeks of pregnancy for reasons relating to the pregnant person's (physical or men-

72 Ulf Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties (Springer 2007), 7.

73 Linderfalk (n. 72).

74 Spyridoula (Sissy) Katsoni, 'The Right to Abortion and the European Convention on Human Rights: In Search of Consensus among Member-States', Völkerrechtsblog, 19 March 2021, doi: 10.17176/20210319-085654-0.

75 ECtHR, *A, B and C* (n. 12), para 237.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tal) health, rape or incest as the source of the pregnancy and for reasons relating to foetal impairment.[76]

This consensus could have sufficed for the Court to conclude that the States enjoy a narrow margin of appreciation regarding the grounds for which they can prohibit access to abortion.[77] However, as the subsequent practice of the remaining seven Member States demonstrates an intentionally differentiated and restrictive attitude towards abortion,[78] the Court's decision not to acknowledge a narrow margin of appreciation does not seem entirely unfounded. Indeed, this explicitly divergent practice precludes uniform subsequent state practice (or at least a convergent practice in the majority of State Parties, to which the other State Parties assent or that they do not oppose) as the one envisaged by the customary rule in Art. 31 (3) (b) of the VCLT.[79] Although the majority of the State Parties allows abortion on demand[80] in quite broad circumstances, a persistent minority retains prohibitions of abortion on demand. Admittedly, the practice of the persistent States that contradicts the Court's jurisprudence (i. e. Andorra and Malta, where abortion is illegal even if the pregnancy endangers the pregnant person's life) will not have an equal impact in the interpretative exercise as that which the State Parties' lawful practice would have. This considering that, according to the *ex injuria, jus non oritur* principle, unlawful practice is not to have an impact on the assessment of what is to be deemed as lawful.[81] Hence, even if the States' practice is not a coherent subsequent practice that would qualify as an interpretative tool under Art. 31 (3) (b) of the VCLT, if unlawful policies are neglected, the remaining ones indicate that access to lawful abortion is granted overall in

76 For an overview of this practice, see Katsoni, 'Access to Abortion' (n. 61), 330-333. See also Bríd Ní Ghráinne and Aisling McMahon, 'Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?', HRLR 19 (2019), 561-584 (581-583).

77 ECtHR, *A, B and C* (n. 12), Dissenting Opinion, paras 8-9; Katsoni, 'Right to Abortion' (n. 74).

78 For an overview of the remaining seven States' practice, see Katsoni, 'Access to Abortion' (n. 61), 331-332.

79 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009), 431-432.

80 The terms 'abortion on demand' and 'elective abortion' are used in connection with policies that permit a pregnant person to request an abortion without justification within a certain period of the pregnancy and on certain grounds.

81 Katsoni, 'Right to Abortion' (n. 74). For the use of this principle in the process of interpretation, see Alain Pellet, 'Canons of Interpretation under the Vienna Convention' in: Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019), 1-12 (7-9).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the Convention States for reasons relating at least to the life or health of the person bearing the child and in situations where rape or incest was the cause of the pregnancy.

Leaving the States' subsequent practice aside and turning to the systemic interpretation as one of the remaining customary interpretative tools set out in Art. 31 (3) (c) of the VCLT, attention should be shifted to the relevant rules of international law and their interpretation in human rights fora.[82] The relevant rules of international law as interpreted in these human rights fora's jurisprudence is important for a *lege artis* holistic interpretation of the Convention in line with all the interpretative tools reflected in the VCLT. Moreover, it is essential for avoiding fragmentation in international (human rights) law.[83] Hence, it is particularly important to take into substantive consideration the relevant rules of other human rights treaties and the interpretation of these rules in wider human rights jurisprudence in the context of the Court's interpretation of the Convention.

In this regard, General Comment No. 2 of the African Commission on Human and Peoples' Rights has emphasised that pregnant persons should enjoy the right to make decisions about their fertility, whether to have children, the number of children, the spacing of children and methods of contraception without interference from the State or non-State actors.[84] While also recognising that the most significant barriers to access to reproductive services are traditions and cultural or religious practices,[85] said Commission proceeded with directing States to remove impediments to health services for women.[86] Similarly, the Inter-American Commission on Human Rights ('the IACHR') has urged States to safeguard reproductive rights,[87] while the IACHR's Rapporteur on the Rights of Women has invited States to legalise abortions at least where the pregnancy was a result of sexual assault, rape, and incest and where continuing the pregnancy endangers a person's

82 Art. 31 (3) (c) of the VCLT.

83 For an analysis of the significance of systemic interpretation and of judicial dialogue as a de-fragmentation technique, see Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', I.CON 15 (2017), 671-704 (692-698).

84 African Commission on Human and Peoples' Rights, 'General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' of 28 November 2014, paras 22-27.

85 African Commission on Human and Peoples' Rights (n. 84), para. 12.

86 African Commission on Human and Peoples' Rights (n. 84, paras 23-24.

87 Organization of American States, 'IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women's Sexual and Reproductive Rights', OAS Press Release No. 165/17, 23 October 2017.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

mental and physical health.[88] As the Court focuses on the thematic proximity of the conventions that it takes into consideration while interpreting the Convention, regardless of whether these have been ratified by the State Parties to the Convention, taking the above interpretations into consideration while interpreting the Convention is in line with the Court's standard interpretative practice.[89]

Furthermore, the decisions of the United Nations Human Rights Committee ('the HRC') could be of interpretative influence for Art. 3 of the Convention, as the HRC has repeatedly stressed that regulations restricting a person's access to abortion in cases of rape or incest or in cases of fatal foetal abnormality breach Art. 7 of the International Covenant on Civil and Political Rights (on the freedom from torture or cruel, inhuman or degrading treatment or punishment).[90] More specifically, the HRC has underlined that the alternative of abortion travelling in such cases does not absolve States from their responsibility for the breach.[91] Taking the HRC's jurisprudence into account may have allowed the Court to conclude that when a pregnancy has resulted from a criminal act, or in cases of foetal abnormality, infringements of access to abortion meet the minimum threshold of severity for a violation of Art. 3 of the Convention.[92] The Committee on the Rights of the Child's most recent decision, in which it explicitly acknowledged that the denial of access to therapeutic abortion is a form of gender-based violence against women and may constitute cruel, inhuman, or degrading treatment, additionally supports this conclusion.[93]

Moreover, the Court could draw valuable interpretative influence from the jurisprudence of the Committee on the Elimination of Discrimination

88 United Nations Human Rights Office of the High Commissioner, 'Joint Statement by UN Human Rights Experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights', OHCHR, 24 September 2015.

89 ECtHR (Grand Chamber), *Demir and Baykara v. Turkey*, judgment of 12 November 2008, no. 34503/97, paras 68, 78.

90 HRC, *Mellet v. Ireland*, views adopted on 17 November 2016, CCPR/C/116/D/2324/2013, paras 7.4-7.6; HRC, *Whelan v. Ireland*, views adopted on 12 June 2017, CCPR/C/119/D/2425/2014, paras 7.4-7.6. See also Alyson Zureick, '(En)Gendering Suffering: Denial of Abortion as A Form of Cruel, Inhuman, or Degrading Treatment', Fordham Int'l L.J. 38 (2015), 99-140 (125-130).

91 HRC, *Mellet* (n. 90), para. 9; HRC, *Whelan (n. 90),* para. 9.

92 For criticism of the Court's failure to substantively consider and meaningfully engage with the HRC's case-law while interpreting Art. 3 of the Convention in its recent judgment on *M. L. v. Poland*, see Katsoni, 'How To Maneuver' (n. 65).

93 Committee on the Rights of the Child, *Camila v.* Peru, views adopted on 13 June 2023, CRC/C/93/D/136/2021, para. 8.11.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Against Women ('the CEDAW Committee'), as it has done in the past in other contexts involving reproductive rights.[94] The CEDAW Committee has not only called on states to allow abortion beyond cases where pregnancy threatens a person's life,[95] it has further recognised that restricting access to reproductive health services (including abortion services) may amount to discrimination based on sex due to women's reproductive capabilities.[96] This is also the conclusion drawn by the Committee on Economic, Social and Cultural Rights ('the CESCR').[97] The Court could have reached the same conclusion if it had interpreted Art. 14 of the Convention taking into account the sexist, classist, and racist impacts of and reasons for the criminalisation of abortion.[98] Nonetheless, it missed the opportunity to engage in an analysis of the discriminatory impacts of and the background to restrictive abortion policies, although relevant cases have been brought before it.[99]

In line with the above analysis and the customary rules on treaty interpretation, it seems that the contextual and systemic interpretation of the Convention could and should have led the Court to a much broader interpretation of it. It is precisely the *lege artis* interpretation of Art. 8 of the Convention that would have led the Court to conclude that said provision requires States to grant pregnant persons access to abortion during at least the first twelve weeks of pregnancy for reasons relating to their health, or in cases of foetal abnormality, or in cases where the pregnancy was caused by rape or incest. Notably, a systemic interpretation of Art. 3 of the Convention further leads the Court to conclude that if access to abortion in the latter two cases is not granted, then the State will have also subjected the pregnant

94 As regards the influence the Court drew from the CEDAW Committee in the context of forced sterilisation, see ECtHR, *V. C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07, para. 148.

95 CEDAW, Concluding Observations on the Seventh Periodic Report of Chile, adopted on 21 February 2018, CEDAW/C/CHL/CO/7, para. 38.

96 CEDAW, *Alyne da Silva Pimentel v. Brazil*, views adopted on 10 August 2011, CEDAW/C/49/D/17/2008, para 7.7; CEDAW, *SFM v. Spain*, views adopted on 28 February 2020, CEDAW/C/75/D/138/2018, para 7.5; Eva Maria Bredler, 'A Womb of One's Own? How the ECtHR Fails Reproductive Justice by Treating Reproduction as a Strictly Private Matter', Völkerrechtsblog, 8 March 2022, doi: 10.17176/20220308-120935-0; Rebecca Smyth, 'S.F. K. v. Russia and G. M. and others v. Moldova: The Promise and Pitfalls of ECtHR Forced Abortion Jurisprudence', Strasbourg Observers, 17 February 2023.

97 CESCR, '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)', adopted on 2 May 2016, E/C.12/GC/22, paras 7-8.

98 Reva B. Siegel, 'Abortion as a Sex Equality Right: Its Basis in Feminist Theory' in: Martha Albertson Fineman and Isabel Karpin (eds), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (Columbia University Press 1995), 43-72 (45-59). These interpretative means constitute supplementary interpretative means under Art. 32 of the VCLT.

99 ECtHR, *Tysiąc* (n. 37), paras 136-144.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

person to inhuman or degrading treatment. Ultimately, a systemic interpretation of Art. 14 of the Convention could have also led the Court to conclude that prohibiting access to abortion may amount to discrimination on the basis of the pregnant person's reproductive capabilities. Nonetheless, the Court has refrained from reaching the above interpretative conclusions.

Although conclusions as to the precise reasons why it has done so would require thorough empirical research into the Court's jurisprudential approach, the Court's deviation from its standard approach to identifying the margin of appreciation in the implementation of Art. 8 of the Convention in *A, B and C v. Ireland* confirms that the dynamism the Court wishes to attribute to the Convention is selective. This dynamism does not extend to morally and politically sensitive issues, in relation to which the Court persistently abstains from taking an explicit stance.[100] To avoid narrowing the margin of appreciation enjoyed by Ireland, the Court placed the primary focus on some interpretative tools (i. e. the States' inconsistent practice regarding the beginning of life) while neglecting others (i. e. the relevant rules of international law and their interpretations in other fora's jurisprudence), even though a hierarchy among interpretative tools, at least the ones enshrined in Art. 31 of the VCLT, is not suggested in the customary rules of treaty interpretation.[101]

In other words, the Court has made use of the interpretative discretion the customary rules provide with regard to the emphasis they may place on each interpretative tool.[102] By placing more emphasis on those tools that enable a restrictive interpretation, the Court has managed to sidestep its standard approach to identifying the margin of appreciation and refrained from further addressing a matter that remains politically and morally sensitive. As the following section shows, the Court's interpretative approach can and has given rise to serious feminist criticism. Furthermore, this interpretative approach can enable it to reach conclusions that meet these feminist criticisms.

IV. Utilising the Court's Interpretative Technique to Reach a Feminism-Informed Interpretation of the Convention

Feminist legal scholars have repeatedly stressed the patriarchal bias in law and case-law, noting that sexuality, biology, and reproductivity have been

100 Yildiz (n. 66), 86; see also Tongue and Graham (n. 66).

101 Eleni Methymaki and Antonios Tzanakopoulos, 'Masters of Puppets? Reassertion of Control Through Joint-Investment Treaty Interpretation' in: Andreas Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2016), 155-181 (169).

102 Jingjing Wu, 'A Perspective of Objectivity in International Human Rights Treaties', International Journal for the Semiotics of Law 35 (2020), 369-390 (369-370).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

parameters that have affected the positioning of individuals in the eyes of the law.[103] As this section highlights, these parameters have similarly affected the Court's case-law on access to abortion. More specifically, this section highlights the main points of feminist criticism the Court has attracted with regard to its case-law on access to abortion. Moreover, it emphasises that the Court could primarily pay attention to certain interpretative tools that can lead to a feminism-informed interpretation of the Convention, i. e. one that addresses the points of feminist criticism the Court's case-law has raised. This technique of selecting and focusing on certain interpretative tools while performing the interpretative exercise has already been employed in the Court's abortion-related jurisprudence. However, the tools the Court chose to place more emphasis on were those that enabled it to reach a more restrictive interpretation of the provisions of the Convention related to abortion and, thus, not a feminism-informed conclusion. Using this technique to reach a feminist interpretation would not only allow the Court to address the concerns of feminist scholars, it would also strengthen the legitimacy of the Court's judgments, which would then be of a consistently progressive interpretative nature rather than inconsistently progressive, depending on whether a politically or morally sensitive matter is at issue.

First, from a socialist and intersectional feminist perspective, the emphasis the Court placed on abortion travelling in *A, B and C v. Ireland*[104] seems highly problematic. Indeed, although the Court has seen abortion travelling as an accessible alternative for those who cannot, for health-related reasons, have an abortion in their country of residence, accessibility to abortion travelling is limited for many. In other words, regarding abortion travelling as an accessible alternative to the inaccessibility of abortions ignores multiple intersecting forms of inequality and discrimination that prevent various pregnant persons from choosing this alternative. Specifically, pregnant persons lacking the socioeconomic means to travel abroad to receive an abortion are excluded from this 'alternative',[105] as are pregnant persons who face travel restrictions, such as those seeking protection.[106]

Although these socioeconomic factors exacerbate the fear pregnant persons experience when they wish to receive an abortion for health-related

103 Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', AJIL 85 (1991), 613-645 (613-615).

104 ECtHR, *A, B and C* (n. 12), paras 239-240.

105 Vanessa Sauls Avolio, 'Rewriting Reproductive Rights: Applying Feminist Methodology to the European Court of Human Rights' Abortion Jurisprudence', Feminists@Law 6 (2017), 1-32 (24-28).

106 Nicola Dannenbring and Chiara Rimkus, 'The Violation of Ukrainian Refugees' Right to Reproductive Self-Determination in Poland', Völkerrechtsblog, 28 November 2022, doi: 10.17176/20221128-121443-0.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

reasons but cannot do so in their country of residence, they are entirely neglected in the Court's assessment of the necessity of strict abortion policies in a democratic society. However, the Court could easily rebut this point of feminist criticism by paying attention to all the customary interpretative tools in a holistic fashion in line with the analysis in section III. above. Considering the inter-State consensus on the matter, this approach would allow the Court to conclude that the Convention requires Member States to not only grant access to abortion when there is a foetal impairment, a risk to the pregnant person's life or when the pregnancy was the result of a crime but also for reasons relating to the person's health or well-being during at least the first twelve weeks of pregnancy.[107] In such a scenario, all the State Parties would be required to grant access to abortion on these grounds and the enjoyment of pregnant persons' right to private life, and bodily autonomy would not be dependent on whether they are affected by socioeconomic factors exacerbating the sex-dependent restrictions imposed on them by the state. After all, the inaccessibility of abortions usually goes hand in hand with gender-related or racial discrimination.[108] Hence, the contextual interpretation of access to abortion under Art. 8 of the Convention against the backdrop of the prohibition of discrimination under Art. 14 of the Convention and considering the discriminatory impacts of strict abortion policies on the pregnant person could further support this broader interpretative outcome.

The Court's practice regarding the application of Art. 3 of the Convention to abortion cases is also problematic from a feminist perspective. To determine whether the required threshold of necessity is met for an Art. 3 violation to be acknowledged, the Court relies heavily on the applicant's vulnerability, which it determines on the basis of factors that are beyond the pregnant person's control (e. g. their age, the act giving rise to the pregnancy, or the foetus's disability).[109] This approach and abortion laws that allow abortions where a pregnancy is the result of a crime or on grounds of the foetus's abnormality essentially victimise pregnant persons, who are viewed as 'blameless' and, therefore, their will to receive an abortion is excused and respected by the legislature.[110] Conversely, if the pregnancy has resulted from personal sexual choices, then these same persons seem to be perceived as

107 See the analysis in section III. above. See also Katsoni, 'Right to Abortion' (n. 74).

108 Keeanga-Yamahtta Taylor, 'How Black Feminists Defined Abortion Rights', The New Yorker, 22 February 2022.

109 Avolio (n. 105), 15.

110 Christiane Ryan, 'The Margin of Appreciation in A, B and C v Ireland: A Disproportionate Response to The Violation of Women's Reproductive Freedom', UCL Journal of Law and Jurisprudence 3 (2014), 237-261 (251-253); Alison M. Jaggar, 'Regendering the U. S. Abortion Debate', in: Rickie Solinger (ed.), *Abortion Wars: A Half Century of Struggle, 1950-2000* (University of California Press 1998), 339-355 (354); Avolio (n. 105), 15.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

blameworthy and, thus, as not deserving access to abortion.[111] In other words, infringing a pregnant person's bodily autonomy for reasons that are exclusively related to their reproductive capability is not sufficient for the Court to acknowledge the inhuman or degrading treatment they suffer, unless additional intersectional factors exacerbate this treatment and render them 'blameless' enough for their access to abortion to be excused.

The Court could also avoid this criticism if it were to employ the customary interpretative tools in a holistic manner. By taking into substantive consideration the systemic interpretation of the Convention against the background of the relevant rules in international law, as interpreted in other human rights jurisprudence, it can avoid revictimising pregnant persons in its judgments. In fact, the Committee on the Rights of the Child has already paved the way for such a non-victimising interpretation of human rights provisions on the prohibition of inhuman or degrading treatment by holding that factors of vulnerability should not be taken into account as decisive factors of whether a pregnant person has been subjected to inhuman or degrading treatment but as factors that exacerbate that suffering.[112] In this vein, the denial of access to abortion is itself a form of gender-based violence against women that may amount to cruel, inhuman, or degrading treatment, and this suffering may be further heightened on account of vulnerability.[113]

This interpretative conclusion is additionally supported in the contextual interpretation of Art. 3 of the Convention against the background of Art. 14 (Prohibition of discrimination). Acknowledging a foetus's disability as a sufficient reason to justify an abortion perpetuates notions of stereotyping disability as incompatible with a good life, while focusing on the criminal acts giving rise to the abortion victimises pregnant persons.[114] Against this backdrop, interpreting the Convention such that it leads to these conclusions cannot be seen as compatible with the anti-discriminatory context of the Court or the evolutive interpretation of the Convention.[115] In this vein, these anti-discriminatory considerations also point to the need to focus on the impact requiring pregnant persons to continue their pregnancy to term has on them, even where there is foetal impairment, instead of making accessibility of abortion dependent on such foetal impairment. By following this approach, the Court would not only counter feminist criticisms of the need to avoid victimising pregnant persons seeking abortions, it would also avoid

111 Jaggar (n. 110), 354.

112 Committee on the Rights of the Child, *Camila v Peru* (n. 93), paras 8.11-8.12.

113 Committee on the Rights of the Child, *Camila v Peru* (n. 93), paras 8.11-8.12.

114 Nadine Grünhagen and Vanessa Bliecke, '"Genetic Cleansing" Under the Guise of Women's Rights?', Völkerrechtsblog, 16 July 2021, doi: 10.17176/20210716-135718-0.

115 Grünhagen and Bliecke (n. 114).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

making pronouncements that have been viewed as perpetuating the perception of disability as incompatible with a good life.

Ultimately, the very balancing exercise the Court engages in in its judgments while applying the limitations clause of Art. 8 of the Convention annihilates pregnant persons' selfhood.[116] In the context of this balancing exercise, a pregnant person's rights are weighed 'against other competing rights and freedoms invoked including those of the unborn child',[117] or even the freedoms of the foetus's 'father',[118] or 'grandparents'.[119] In her analysis, Vanessa Sauls Avolio rightly underlined the following paradox in this context: The foetus's – and even the father's or the grandparents' – interests are included in this balancing exercise only if domestic law and the State's morality standards acknowledge those interests as an element of the protection of morals.[120] If the State's domestic law protects and ensures an individual's access to abortion on broad terms, then no such balancing exercise is required. The Court's case-law has shown that liberal abortion laws themselves are compatible with the Convention and that it deems the regulation of abortion to be a matter that falls within the States' margin of appreciation.[121] As a result, pregnant persons' access to abortion is entirely dependent on the relevant domestic law, while the Court has become a fourth-instance court that assesses whether the domestic authorities have implemented that domestic legislation correctly.[122]

As the right to private life is not absolute under the Convention but may be limited pursuant to the limitations clause in Art. 8 (2), this weighing of competing interests cannot be easily avoided. Even Avolio, who embraced this point of criticism while rewriting some of the Court's judgments from a feminist perspective, could not help but engage in this balancing exercise and end by concluding that the scales tilt in favour of the pregnant person whenever the impacts of any denial of access to abortion are weighed against the protection of others' interests or the protection of morals.[123] To avoid having to conduct such a balancing of interests (which is annihilating overall),

116 Avolio (n. 105), 11; Rosemary Nossiff, 'Gendered Citizenship: Women, Equality, and Abortion Policy', New Political Science 29 (2007), 61-76 (62); Ryan (n. 110), 248-249.

117 ECtHR, *A. B. and C.* (n. 12), para. 213.

118 ECtHR, *Boso* (n. 15), para. 2; ECtHR, *Vo* (n. 11), para. 80.

119 Puppinck (n. 6).

120 Avolio (n. 105), 12. See also Helen Fenwick, Wendy Guns and Ben Warwick, 'A, B and C v Ireland' in: Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law,* (Hart Publishing 2019), 279-302.

121 See the analysis in section II. above. See, in particular, ECtHR, *Boso* (n. 15), para. 1; ECtHR, *A, B and C* (n. 12), para. 213.

122 Avolio (n. 105), 12-15.

123 Avolio (n. 105), 24.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

one would have to reach the conclusion that restrictive abortion policies do not pursue a legitimate aim. Hence, attention will now turn to the question of whether there is an interpretation of the saving clause in Art. 8 (2) of the Convention that could exclude from its scope perceptions of the foetus as a child whose 'rights' are to be protected, or the 'rights' of the foetus's 'father' or 'grandparents' to save it, or generally any predominant morals in a given State according to which abortion should be illegal.

At first glance, these aims may appear to be influenced by morality. Taking a closer look, however, reveals that the restrictions on access to abortion do not actually aim to preserve foetal viability. In fact, as Alison M. Jaggar has rightly noted, if the supporters of restrictive abortion policies were actually motivated by the belief that foetal life is sacrosanct, then it should not matter whether that foetal life has resulted from a criminal act or whether, once born, the child would be disabled.[124] Yet, most restrictive abortion policies provide for exceptions in such cases. This confirms the idea that the rationale behind such laws is actually the will to control individuals' sexual life,[125] the intention to ensure the systemic preservation of women's (particularly poor women's) oppression and the enforcement of traditional gender-biased roles on pregnant persons.[126] Thus, a historic interpretation of the 'protection of morals' or of 'the rights of others' limitations clauses that takes into thorough account the historical background, the true aims of these policies and the contextual interpretation of these clauses in line with Art. 14 of the Convention (Prohibition of discrimination), could lead to the conclusion that the actual aims of restrictive abortion policies should not be seen as falling within the ambit of Art. 8 (2) of the Convention.

As the above analysis shows, the customary interpretative tools could lead to an interpretation of the Convention that meets the standards that feminist scholars have called for. However, to this end, the Court would have to utilise the interpretative technique of paying nuanced attention to the customary interpretative tools. Specifically, to achieve this outcome, the Court would have to pay less attention to a textual interpretation of the Convention in which the term 'protection of morals' may be seen as encompassing any moral views that are predominant in a given State and to pay more attention

124 Jaggar (n. 110), 354. See also Kathryn McNeilly, 'From the Right to Life to the Right to Livability: Radically Reapproaching 'Life' in Human Rights Politics', Australian Feminist Law Journal 41 (2015), 141-159.

125 Jaggar (n. 110), 354. See also Spyridoula (Sissy) Katsoni, 'Is the Feministisation of the ECtHR's Abortion-Related Jurisprudence a Realistic Expectation? Putting the ECtHR's Interpretation of the "Right to Abortion" Under the Feminist Microscope', Völkerrechtsblog, 28 January 2022, doi: 10.17176/20220128-180054-0.

126 Siegel (n. 98), 64-65.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

to its contextual interpretation and to the actual purposes of restrictive abortion laws in light of their historical background. In fact, as this historical background constitutes an interpretative tool that falls under the supplementary interpretative means set out in Art. 32 of the VCLT, a feminist interpretation of the Convention would require the Court to interpret – and apply – the customary rule in Art. 32 of the VCLT as not having only determinative or confirmative function but a corrective one, too.[127]

This, however, is not as groundbreaking as it seems, not only because this interpretative technique has already been employed by other fora[128] but also because the Court itself has already paid more attention to certain means of treaty interpretation (those that could lead to a restrictive interpretation) in its abortion-related jurisprudence.[129] Hence, a feminist interpretation of the Convention would not require the Court to deviate from its practice; it would simply require it to depart from its conservative starting point (that is apparent in the intended restrictive interpretation of the Convention) and to utilise its interpretative technique to achieve a feminist interpretative outcome.

V. Concluding Remarks

This article highlighted the potential for the feministisation of the Court's jurisprudence on access to abortion by showing that the abortion-related provisions of the Convention could be interpreted in a manner that addresses those feminist criticisms that have been raised. It provided a brief overview of the Court's abortion-related jurisprudence and noted that the Court has left States a wide margin of appreciation with regard to the grounds on which they grant access to abortion in their domestic laws. However, the Court has required that the Member States grant access to abortion when the pregnant person's life is at risk and has stressed that, when a State has granted access to abortion on certain grounds under its domestic legal system, abortions on these grounds must be genuinely available in that State in practice.

127 Art. 32 of the VCLT provides that '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order *to confirm* the meaning resulting from the application of article 31, or to *determine* the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.' [emphasis added]

128 See Panos Merkouris, 'Interpreting the Customary Rules on Interpretation', International Community Law Review 19 (2017), 126-155 (153-154).

129 See section III. above.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

To reach such a restrictive interpretation of the Convention and to allow the States a wide margin of appreciation, the Court has employed an interpretative technique that prioritises the tools that afford the States broad discretion and it has paid less attention to interpretative tools that could have allowed it to require that Member States grant access to abortion on certain grounds. In this vein, emphasis was here placed on the persistence of a minority of States to restrictive abortion policies, on the moral perceptions in these States and on the accessibility of abortion travelling to those who cannot get access to an abortion in their country of residence.

The Court's jurisprudence on access to abortion can be and has been criticised on various grounds from a feminist perspective. More specifically, although abortion travelling is presented as an alternative in the Court's case-law, it is not in fact an effective solution for those who do not have the socioeconomic means to travel. Similarly, the Court's reasoning on the question of whether denial of access to abortion constitutes inhuman or degrading treatment can be seen as victimising pregnant persons, who need to be presented as victims in order to justify their access to abortion. Finally, the Court's test for assessing whether the infringement of a pregnant person's right to bodily autonomy is necessary to protect the interests and freedoms of others or to protect morals erases pregnant persons' selfhood. The deliberately restrictive interpretation reached by the Court – which on account of the interpretative technique applied has avoided addressing the politically and morally sensitive issue of when abortion is to be accessible – can justifiably be criticised as sexist.

The Court's avoidant attitude towards the politically and morally sensitive issue of when abortion is to be accessible is indicative of its conservative attitude towards morally and politically sensitive issues that are brought before it as well as of the selective dynamism it channels into its interpretation of the Convention.[130] In this vein, although the Court has dynamically interpreted the Convention and has criticised the paternalistic laws of States that have enabled forcible abortions, it has also restrictively interpreted the Convention and has allowed the States to decide themselves the circumstances under which they enable the forced continuation of a pregnancy.[131] Thus, depending on whether and how politically or morally sensitive the subject-matter of the dispute is, this nuanced attitude on the part of the Court in its abortion-related judgments not only provides a basis for feminist criticism, it further raises concerns about the legitimacy of the interpretative method applied by the Court.

130 Yildiz (n. 66), 86.

131 ECtHR, *G. M. and others* (n. 40), paras 123-125.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

The question is whether the customary rules on treaty interpretation can lead to an interpretative outcome that meets feminist standards. The Court can reach such a conclusion if it employs the same interpretative technique it has already employed while aiming to reach a restrictive interpretation of the Convention. It will simply need to use this interpretative technique with the aim of reaching a feminist conclusion rather than a restrictive one, as it has done so far. More specifically, the Court will be able to interpret the Convention in a manner that meets the standards of feminist criticism if it focuses on the customary interpretative tools that allow a broader interpretation of the Convention's abortion-related provisions (such as its systemic and contextual interpretation) and focuses less on the tools that hinder such an outcome (such as the Convention's textual interpretation or the subsequent practice of a minority of Member States that persist in their restrictive abortion policies). In other words, to achieve a feminist interpretation of the Convention, the Court would not have to adopt a more subjective interpretative approach than it previously has; it would simply have to replace its conservative starting point with a feminist one.

 DOI 10.17104/0044-2348-2024-4-955

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

The Responsibility *to* and *for* Progress in International Law

Martin Schwamborn*
Institute of Air Law, Space Law and Cyber Law, University of Cologne, Cologne, Germany
martin.schwamborn@uni-koeln.de

Abstract 979
Keywords 980
I. Introduction 980
II. Progress and (International) Law: A Challenging Relationship 981
1. The Ambivalence of Progress and Its Consequences 982
2. Challenges for the Regulation of Progress 983
3. Balancing (International) Law and Progress-Related Consequences: An Ambivalent Task of the State(s) 985
III. The Responsibility to and for Progress in International Law 987
1. Responsibility at the Core of International Law 987
2. Balancing (International) Law and Progress-Related Consequences as Common Global Interest 989
a) Sovereignty, Progress and Its (Transboundary) Consequences 989
b) Progress in the Long-Term Strategy of the United Nations 990
c) Human Rights as the Basis and Limit of Progress 992
3. The Responsibility to and for Progress 995
a) Two Sides of the Same Coin 995
b) Responsible Regulation and Mediation 996
IV. Conclusion and Outlook 998

Abstract

It is not a new insight that the rapid progress in science and technology poses a great challenge to the (international) law and its rather slow development. Given the risks and benefits of recent scientific developments and emerging technologies, especially in the field of Artificial Intelligence, this paper argues that the complex relationship between law, progress and its consequences is best addressed through the Responsibility *to* and *for* progress. Central sources of international law offer points of reference for understanding scientific-technical progress as a common global interest, which leads to a corresponding responsi-

* Postdoctoral researcher at the Institute of Air Law, Space Law and Cyber Law, University of Cologne.

DOI 10.17104/0044-2348-2024-4-979 ZaöRV 84 (2024), 979-998

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

bility of states. The ambiguity of progress calls for a consideration of responsibility, not only in terms of its consequences ('for progress'), but also in terms of its conditions ('to progress'). The interaction of these two dimensions makes the Responsibility *to* and *for* progress a decisive key to balancing progress and its far-reaching consequences at the international level.

Keywords

scientific, technical and technological progress – common global interest – responsibility – UN-Charter – positive and negative peace – Human Rights

I. Introduction

Today, in a globalised and in huge parts anthropogenically modified world, scientific-technical progress has reached a level and a speed that put the international order to a test.[1] This is particularly evident in the rapid development of Artificial Intelligence (AI), whose far-reaching and unpredictable consequences have led numerous experts to call for a moratorium on giant AI experiments, in order to allow sufficient time for appropriate regulation.[2] In fact, there is now not only a comprehensive European Union (EU)-regulation,[3] but also an increasing number of initiatives by companies and other private actors who seek to regulate AI.[4] At the same time, there is no

1 Kenneth W. Abbot, 'An International Framework Agreement on Scientific and Technological Innovation and Regulation' in: Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (Springer 2011), 127-156 (156); Silja Voeneky and Gerald L. Neuman, 'Introduction, Human Rights, Treaties, and International Legitimacy' in: Silja Voeneky and Gerald L. Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge University Press 2018), 1-22 (1).

2 Future of Life Institute (ed.), 'Pause Giant AI Experiments: An Open Letter', 22 March 2023, <https://futureoflife.org/open-letter/pause-giant-ai-experiments/>, last access 3 December 2024.

3 Regulation 2024/1689/EU of 13 June 2024 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) no. 300/2008, (EU) no. 167/2013, (EU) no. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJL, 2024/1689.

4 Thomas Burri, 'The New Regulation of the European Union on Artificial Intelligence' in: Silja Voeneky, Philipp Kellmeyer, Oliver Müller and Wolfram Burgard (eds), *The Cambridge Handbook of Responsible Artificial Intelligence: Interdisciplinary Perspectives* (Cambridge University Press 2022), 104-122 (108 et seqq.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

comparable regulation on the international level, at least in terms of one comprehensive treaty-based instrument. This is not only true for AI,[5] but also for the general handling of ground-breaking scientific developments or emerging technologies.[6] Given this lack of regulation, a closer look at the relationship between scientific-technical progress and international law is warranted.

In the following it will be argued that this complex relationship is best addressed through the lens of the Responsibility *to* and *for* progress. Given the ambivalence of progress, especially in terms of its far-reaching benefits and risks, it is necessary to consider responsibility from two equally important perspectives: The Responsibility *to* progress focuses on creating and maintaining the conditions that allow science and technology 'to progress' in the first place. This responsibility to enable progress goes hand in hand with the Responsibility *for* progress, which is about addressing and managing the consequences of progress. Even though progress and its ambivalence are big challenges for international law, states have in the past applied such a balancing approach and successfully *taken* responsibility (II.). Today, central sources of international law offer reference points for an implementation of the Responsibility *to* and *for* progress (III.), which would be crucial for balancing the promises of progress with its far-reaching consequences at the international level (IV.).

II. Progress and (International) Law: A Challenging Relationship

Dealing with scientific-technical progress is a complex task, not only conceptually (1.), but also for (international) law (2.). In the past, however, states have taken up the challenge and have played a crucial role in balancing progress and (international) law (3.).

5 Silja Voeneky, 'Human Rights and Legitimate Governance of Existential and Global Catastrophic Risks' in: Silja Voeneky and Gerald L. Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge University Press 2018), 139-162 (146 et seqq.).

6 Rosemary Rayfuse, 'Public International Law and the Regulation of Emerging Technologies' in: Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2016), 500-521 (503); Grant Wilson, 'Minimizing Global Catastrophic and Existential Risks from Emerging Technologies Through International Law', Va. Envtl. L. J. 31 (2013), 307-364 (310 et seqq.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

1. The Ambivalence of Progress and Its Consequences

Addressing progress in the context of international law is a challenge in several ways. First, the term itself is problematic. The word 'progress' implies a positive evaluation of a past development, which in the case of scientific-technical progress refers to an increase in knowledge.[7] However, the concept-inherent evaluation means that 'progress' is not just a relative or contextual term, but also constructs a narrative.[8] Moreover, this narrative is closely linked to a Western or Eurocentric approach to international law,[9] which calls for a critical[10] or at least cautious use of the term.[11] Especially in the context of scientific-technical progress, the (positive) notion of 'progress' could be challenged due to its negative consequences.[12] However, the term 'progress' remains crucial because it is used in the legal sources central to the issue at hand and thus characterises the debate.[13]

In fact, it is precisely the relative nature of progress, and especially its consequences, that is decisive for its legal handling. While emerging technologies and scientific progress can make a significant contribution to the development of humankind, they also carry considerable risks and may cause

7 Alexander Bird, 'What is Scientific Progress?', NOÛS 41 (2007), 64-89 (83 et seqq. and passim); Ilkka Niiniluoto, *Is Science Progressive?* (Springer 1984), 6, 75 et seqq.; regarding technical progress see John Black, Nigar Hashimzade and Gareth Myles (eds), *A Dictionary of Economics* (5th edn, Oxford University Press 2017), 517 et seq. On the close connection of science and technology see Armin Grunwald, *Technikfolgenabschätzung* (2nd edn, Nomos 2010), 19 et seq.; Joseph W. Dellapenna, 'Law in a Shrinking World, The Interaction of Science and Technology with International Law', Ky. L. J. 88 (2000), 809-883 (822 et seq.).

8 Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?', EJIL 25 (2014), 425-444 (428, 431 et seqq.); Thomas Skouteris, 'Progress' in: Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar 2019), 719-729 (720 et seqq.).

9 Altwicker and Diggelmann (n. 8), 429 et seqq.; Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005), 35, 62 et seq., 100 et seqq., 316 et seqq.

10 E. g. Leela Gandhi, *Postcolonial Theory, A Critical Introduction* (Edinburgh University Press 1998), 23 et. seqq., 37, 104 et seqq., 114 et seqq.; regarding technology e. g. Fleur Johns and Gregor Noll, 'Introduction to the Symposium on Critical International Law and Technology', AJIL Unbound 117 (2023), 128-133 (128 et seqq.) and the other contributions to the symposium.

11 See Samantha Besson, 'The "Human Right to Science" qua Right to Participate in Science', The International Journal of Human Rights 28 (2024), 497-528 (501); regarding the alternative term 'development' see Niiniluoto (n. 7), 76.

12 E. g. Jacques Ellul, *The Technological Society*, translated from the French by John Wilkinson (Vintage Books 1964), 190 et seqq. and passim; see also Theodore John Rivers, 'Progress and Technology: Their Interdependency', Technology in Society 24 (2000), 503-522 (504, 514 et seqq.).

13 See Besson (n. 11), 497 et seqq.; Yvonne Donders and Monika Plozza, 'Look Before You Leap: States' Prevention and Anticipation Duties Under the Right to Science', The International Journal of Human Rights 28 (2024), 354-379 (355 et seqq.); see also below III. 2.

 DOI 10.17104/0044-2348-2024-4-979

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

irreversible damage or even a global catastrophe.[14] In addition to biotechnology and geo-engineering, the field of AI has recently come to the fore.[15] Moreover, other current global challenges as (civil) wars, international terrorism, global refugee movements, famines, pandemics, resource scarcities, or social inequality are closely linked to progress as the latter may be both, a catalyst and an inhibitor for the solution of global problems.[16] Ultimately, whether progress is seen as a benefit or risk depends on how and by whom its consequences are evaluated.

2. Challenges for the Regulation of Progress

The need for evaluation reveals the central challenges of the (legal) treatment of scientific-technical progress. First, the long-term consequences of progress are, by their very nature, unpredictable – even for experts in the specific field. Second, any forecast of future benefits or risks is strongly subjective and can vary enormously between different states and even within the same state.[17] These difficulties of an evaluation become particularly evident in the context of current developments in the fields of AI, genetics, robotics, information technology, nanotechnology, and neuroscience: While the consequences of each individual field are complex and hardly predictable in themselves, the numerous – unpredictable – interactions between the mentioned fields make an evaluation almost impossible and thus jeopardise the common basis for legal regulation.[18] Finally, the challenge is amplified by

14 Wilson (n. 6), 311 et seqq., 326 et seqq., 364; see also Samantha Besson, 'Anticipation Under the Human Right to Science: Concepts, Stakes and Specification', The International Journal of Human Rights 28 (2024), 293-312 (293 et seq., 297); Donders and Plozza (n. 13), 354 et seq.; Len Fisher and Anders Sandberg, 'A Safe Governance Space for Humanity: Necessary Conditions for the Governance of Global Catastrophic Risks', Global Policy 13 (2022), 792-807 (793, 795 et seqq.).

15 Voeneky (n. 5), 140 et seqq.; Silja Voeneky, Philipp Kellmeyer, Oliver Müller and Wolfram Burgard, 'Introduction' in: Silja Voeneky, Philipp Kellmeyer, Oliver Müller and Wolfram Burgard (eds), *The Cambridge Handbook of Responsible Artificial Intelligence: Interdisciplinary Perspectives* (Cambridge University Press 2022), 1-8 (1).

16 Rayfuse (n. 6), 502 et seq.; however, Gerald L. Neuman, 'Human Rights, Treaties, and International Legitimacy' in: Silja Voeneky and Gerald L. Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (Cambridge University Press 2018), 51-72 (67) emphasises that progress cannot solve global problems alone.

17 Abbot (n. 1), 132 et seqq.; Wilson (n. 6), 352 et seqq. and passim.

18 Braden R. Allenby, 'Governance and Technology Systems: The Challenge of Emerging Technologies' in: Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (Springer 2011), 3-18 (7 et seqq. and 11 et seqq.); see also references in n. 15.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

the global scale of progress-related consequences[19] and the inherent dynamics of progress, which give it a 'speed advantage' in its 'race' with legal regulation.[20] This so-called 'pacing problem' circumscribes the situation of an increasingly rapid pace of progress on the one hand and the rather slow or even stagnant development of the law on the other hand.[21] This situation raises doubts about states' ability to regulate.[22] In addition to the question of whether and how to regulate appropriately, the law is especially faced with the dilemma of not being able to foresee its own consequences, which can lead to under- as well as over-regulation.[23]

Overall, the inherent dynamics of progress make its regulation a difficult or 'wicked'[24] task. Against this background, the question arises as to whether (legal) regulation is possible at all. This is reflected in the debate between instrumental and substantive views of progress and technology: While the former tends to view progress positively, emphasising the role of human agency in shaping it, the latter is more critical, pointing to the inherent dynamic and power of (technological) progress, which eludes human control.[25] Ultimately, a synthesis seems promising, according to which human-agency is not excluded, but must always be viewed critically and contextually.[26] While the asynchrony of law and progress is challenging, progress and its pace should not be viewed unilaterally. In fact, progress remains a social process that affects and is affected by many social actors, such as scientists, companies, social groups, and states.[27] Progress is therefore not detached from other areas of society, but rather embedded in a legal, political, economic, and cultural context. This allows for complex interactions between differ-

19 Besson (n. 14), 297.

20 Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep Up with Technological Change', *University of Illinois Journal of Law, Technology & Policy*, 2007, 239-285 (239 et seqq.); Christian Karl, 'Wettlauf von Technik und Recht' (Duncker & Humblot 2018), 17, 30, 76 et seqq.

21 Gary E. Marchant, 'The Growing Gap Between Emerging Technologies and the Law' in: Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (Springer 2011), 19-33 (22 et seq.); see also the references in n. 20.

22 Gary E. Marchant (n. 21), 20 et seqq., 25 et seqq. with further references.

23 Moses (n. 20), 247 et seqq.; Gregory N. Mandel, 'Legal Evolution in Response to Technological Change' in: Roger Brownsword (ed.), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2016), 225-245 (225 et seqq.).

24 Gary E. Marchant, 'Governance of Emerging Technologies as a Wicked Problem', Vand. L. Rev. 76 (2020), 1861-1877 (1861 et seqq.).

25 Arthur Cockfield and Jason Pridmore, 'A Synthetic Theory of Law and Technology', Minnesota Journal of Law Science & Technology 8 (2007), 475-513 (477 et seqq.).

26 Cockfield and Pridmore (n. 25), 494 et seqq.

27 Werner Rammert, *Technik aus soziologischer Perspektive,* Vol. 1 (Westdeutscher Verlag 1993), 151 et seqq.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

ent actors and their interests, with the law playing a central mediating role.[28] However, this is less about regulating progress per se than it is about adjusting the law to progress-related changes.[29]

3. Balancing (International) Law and Progress-Related Consequences: An Ambivalent Task of the State(s)

In the past, states have demonstrated that they are capable of dealing with progress-related legal questions.[30] This may be illustrated by the invention and spread of railway technology. While from today's perspective railway technology is quite common and legally regulated, its emergence was tantamount to a revolution. The expansion of the railway network and the associated spread of subsequent technologies, such as the telegraph, not only fundamentally changed the military, political, economic, and cultural landscape, but literally led to a new understanding of time and space.[31] Regarding the perspective of those days, progress seemed to have an unprecedented 'speed advantage' in the truest sense of the word. Nevertheless, states played a crucial role in shaping this development.

This applies firstly to the national level, where states on the one hand promoted progress by liberalising the economy. On the other hand, they limited progress by comprehensive regulations for steam engines, including insurance and liability issues.[32] Furthermore, states were well aware of the fact that progress in railway and telegraph connections as well as the associated increase in social exchange also took place across borders. For this reason, the industrialisation made possible by railways and other technologies was accompanied by the establishment or 'invention'[33] of numerous

28 Allenby (n. 18), 7, 16; Andrew Askland, 'Introduction: Why Law and Ethics Need to Keep Pace with Emerging Technologies' in: Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (Springer 2011), xiii-xxvii (xvii et seq.).

29 See Lyria Bennett Moses, 'Regulating in the Face of Sociotechnical Change' in: Roger Brownsword (ed.), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2016), 573-596 (574, 576 et seqq.).

30 Rayfuse (n. 6), 501 et seqq.; critical Marchant (n. 21), 27 et seq.

31 Allenby (n. 18), 3 et seqq.

32 In detail e. g. Karl (n. 20), 33 et seqq.; Miloš Vec, 'Kurze Geschichte des Technikrechts' in: Martin Schulte and Rainer Schröder (eds), *Handbuch des Technikrechts* (2nd edn, Springer 2011), 3-92 (24 et seqq.).

33 Oscar Schachter, 'Scientific Advances and International Law Making', Cal. L. Rev. 55 (1967), 423-430 (424); see also in Michael Wallace and J. David Singer, 'Intergovernmental Organization in the Global System, 1815-1964: A Quantitative Description', IO 24 (1970), 239-287 (250).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

international organisations for standardisation and cooperation, e. g. the International Union of Railways or the International Telegraph Union. Through the institutionalised exchange of information involving scientists and experts, these and other international organisations not only formed a legal framework for this progress, but at the same time decisively promoted it.[34] Despite all restraint, scientific-technical progress was thus accompanied by progress in international law itself.[35] More generally spoken, scientific-technical progress allowed states to expand their activities beyond national borders and even into previously undeveloped areas, such as the deep sea or outer space.[36] This raised numerous new legal issues in cross-border traffic, which depicts why progress can not only lead to an extension, but also to a modification in exercise of jurisdiction.[37]

Overall, balancing of (international) law and progress-related consequences was and is an ambivalent task of states, which includes limiting as well as promoting elements. In other words, states have taken responsibility in two ways. They assumed responsibility for the consequences ('for progress') as well as for the emergence ('to progress'). The ambivalent and balancing approach becomes evident when one considers the legal regulation of particularly dramatic consequences of progress in the field of international humanitarian law. The development of advanced – and thus usually more lethal – weapons was a major reason for the adoption of international conventions regulating and sometimes banning certain types of weapons.[38] Those conventions regularly contain two main pillars: While prohibiting the production, use or proliferation of certain weapons, they also emphasise the possibility of peaceful uses of the technologies concerned, or at least regulate scientific and technical exchanges on them.[39] Of course, these conventions do

34 Francis S. L. Lyons, *Internationalism in Europe: 1815-1914* (Sythoff 1963), 14 et seqq., 37 et seqq.; Craig N. Murphy, *International Organization and Industrial Change* (Polity Press 1994), 46 et seqq., 119 et seq.; Paul S. Reinsch, *Public International Unions, Their Work and Organization* (Ginn and Company 1911), 12 et seqq.

35 Robert Y. Jennings, 'The Progress of International Law', BYIL 34 (1958), 334-355 (336 et seqq., 346 et seqq.).

36 Charles Rousseau, 'Scientific Progress and the Evolution of International Law', IMPACT of Science on Sciety V (1954), 71-92 (72 et seqq.); see also Dellapenna (n. 7), 831 et seqq.

37 Rousseau (n. 36), 72 et seqq., 80 et seqq.

38 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (3rd edn, Cambridge University Press 2022), 34-105, especially 43 et seqq.; see also Rayfuse (n. 6), 502.

39 See e. g. Art. I et seqq., IV et seq. of the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, 729 UNTS 161; Arts 1, 2 and 10 of the Biological Weapons Convention of 10 April 1972, 1015 UNTS 163; Arts I, II no. 9, VI and VI of the Chemical Weapons Convention of 3 September 1992, 1975 UNTS 45; Art. 3 and seqq. and Art. 11 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Protocol II to the Convention on Certain Conventional Weapons of 3 May 1996, 2048 UNTS 93.

 DOI 10.17104/0044-2348-2024-4-979

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

not represent a comprehensive regulation of progress, especially not regarding advances in the field of AI.[40] Nevertheless, they underline the fact that states could take responsibility *for* as well as *to* progress, even when the potential consequences were particularly severe. It remains to be seen, whether this progress-related responsibility is only a question of legal history or also of legal doctrine.

III. The Responsibility *to* and *for* Progress in International Law

Responsibility is a central institution of international law, especially with regard to common global interests (1.). Central sources of international law provide points of reference for considering scientific-technical progress as an interest that goes hand in hand with responsibility (2.). In accordance with the ambivalence of progress, this can be framed as the Responsibility *to* and *for* progress (3.).

1. Responsibility at the Core of International Law

Responsibility is not only crucial to the binding character of international law, but also to its development. As a consequence, the idea of responsibility is no longer reduced to the question of liability and compensation, but rather covers various legal relationships.[41] Of particular interest here is the understanding of responsibility as an institution, that is, as a set of ideas that the law presupposes but also confirms. In this perspective responsibility is the 'essence' of any legal system, when it comes to the attribution of consequences and their control.[42] This attribution is usually determined by three vectors: Responsibility requires a competent actor, who is assigned responsibility concerning a specific (common) interest towards another actor. So, the

40 Silja Vöneky, 'Key Elements of Responsible Artificial Intelligence, Disruptive Technologies, Dynamic Law', Ordnung der Wissenschaft 2020, 9-22 (9, 15 et seq.); see also Rayfuse (n. 6), 502 et seqq.; Wilson (n. 6), 344 et seqq.

41 André Nollkaemper, 'Change in the Law of International Responsibility' in: Samantha Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press 2022), 43-69 (44 et seqq.); see also Samantha Besson, 'Theorizing International Responsibility Law, an Introduction' in: Samantha Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press 2022), 1-24 (3 et seq.) and the other chapters in the book.

42 Volker Roeben, 'Responsibility in International Law', Max Planck UNYB 16 (2012), 99-158 (104 et seqq.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

question is *who* is responsible for *what* towards *whom*.[43] For example, dealing with climate change or environmental harm ('what') may also be viewed from a perspective of a shared responsibility of states ('who') towards the global community ('to whom').[44] A similar perspective could be considered for scientific-technical progress.

The relevance of responsibility in this regard is already evident in the relative nature of progress. The necessary evaluation of progress and its consequences must inevitably be carried out by someone who is then responsible for possible misjudgements.[45] Moreover, the focus on responsibility or responsible progress stresses the need not only for reactive but also for proactive and future-orientated responses,[46] especially regarding the ambivalence of the consequences.[47] In national law, the regulation of progress is sometimes explicitly understood as a task of the state, leading to a responsibility for maintaining the conditions of progress as well as monitoring its consequences.[48] It is generally possible for a similar responsibility to emerge in international law through a process of concretisation. The actors, scope, and consequences will depend on the sources of law in which the responsibility is presupposed and affirmed.[49] In the following, the focus is primarily on the responsibility of states as primary subjects of international law. As will be shown, this does not exclude, but rather considers the responsibility or involvement of other actors. In line with the three vectors of responsibility, it is therefore necessary to determine whether international law entrusts states ('who') with the ambivalent task of handling scientific-technical progress and its consequences ('what') in the interests of the global community ('to whom').

43 For this and the following Roeben (n. 42), 106 et seqq.

44 Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', Mich. J. Int'l L. 34 (2013), 359-438 (366 et seqq.); Liam Murphy, 'International Responsibility for Global Environmental Harm, Collective and Individual' in: Samantha Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press 2022),165-186 (165 et seqq.); see also Patricia Birnie, Alan Boyle and Catherine Redgewell, *International Law and the Environment* (4th edn, Oxford University Press 2021), 107 et seqq., 142 et seqq.

45 See Hans Lenk, 'Progress, Values and Responsibility', Philosophy and Technology 2 (1997), 102-119 (103 et seqq.).

46 Jack Stilgoe, Richard Owen and Phil Macnaghten, 'Developing a Framework for Responsible Innovation', Research Policy 42 (2013), 1568-1580 (1569 et seqq.); in general, Roeben (n. 42), 107 et seq.

47 Besson (n. 14), 293 and passim.

48 For German law see Karl (n. 20), 32, 46 et seqq., 311 et seqq.; in general, Wolfgang Hoffmann-Riem, *Innovation und Recht, Recht und Innovation* (Mohr Siebeck 2016), 14 et seqq., 28 et seqq. and passim.

49 See Roeben (n. 42), 107 et seq., 110 et seqq.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

2. Balancing (International) Law and Progress-Related Consequences as Common Global Interest

Identifying a responsibility for scientific-technical progress presupposes that it is a recognised common interest of the international community. Indications of such an interpretation can already be found in the concept of sovereignty and other principles of international law (a). The same applies to the United Nations (UN)-Charter at the institutional level (b) and to treaty-based human rights provisions at the substantive level (c).

a) Sovereignty, Progress and Its (Transboundary) Consequences

Taking into account the *Lotus*-principle[50] and the statements of the International Court of Justice (ICJ) in its *Nuclear Weapons Advisory Opinion*,[51] one could argue that sovereign states are basically free to decide whether and how they deal with science and high-risk technologies.[52] The *Nuclear Weapons Advisory Opinion* at least indicates that dealing with progress in international law is not a question of permission, but of limits or conditions.[53] A first important condition is that states, despite their sovereignty, are always part of the global community and therefore bound by the (international) rule of law. Not solely sovereignty, but sovereign equality determines the legal handling of progress: While sovereign states are free to implement or promote progress in general, they may not harm the interests or rights of other – equally sovereign – states.

Thus, the sovereign decision on whether and how to regulate progress finds its limits in those principles addressing the transboundary consequences of state actions.[54] This is particularly evident in the cases *Trail Smelter*[55] and *Gabčíkovo-Nagymaros*[56] which dealt, among other things, with the trans-

50 PCIJ, *S. S. Lotus* (France v. Turkey), judgment of 7 September 1927, (Ser. A) case no. 10 (1927), para. 44.

51 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226, paras 21, 51 et seqq., 97.

52 See Rayfuse (n. 6), 506 et. seq.

53 See Christopher Greenwood, 'The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law, Int'l Rev. of the Red Cross 37 (1997), 65-75 (66 et seqq.).

54 Rayfuse (n. 6), 507 et. seqq.

55 Trail Smelter Arbitral Tribunal, *Trail Smelter* Case (U. S. v. Canada), award of 16 April 1938 and 11 March 1941, RIAA III, 1905 (1941).

56 ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), order of 5 February 1997, ICJ Reports 1997, 3.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

boundary (environmental) impacts that regularly accompany technological development. Therefore, the principles of due diligence[57] or precaution and prevention, also expressed in the Rio Declaration,[58] are a crucial cornerstone for identifying and further developing a responsibility concerning progress.[59] Even though those and other general principles of international law could provide a solution of progress related problems on a case-by-case basis, they remain ambivalent and controversial in their binding nature and interpretation.[60] Nevertheless, they are an expression of responsibility for the (transboundary) consequences of progress and thus a first point of reference for understanding the latter as a common global interest.

b) Progress in the Long-Term Strategy of the United Nations

The Charter of the United Nations (UN-Charter) forms a central source of law for the institutionalisation of the international community.[61] Therefore, it can play a crucial role in identifying a progress-related responsibility in international law. Considering the three vectors of responsibility, it is necessary to determine who is entrusted with the task of balancing progress under the UN-Charter and to whom this task is to be performed.

Already the Preamble of the UN-Charter mentions a promotion of 'social progress and better standards of life' as well as employing 'international machinery for the promotion of the economic and social advancement'. This wording was deliberately chosen to emphasise that the central task of the UN, the maintenance of peace and security, requires not only the absence of war, but also economic and social stability as fundamental conditions of

57 See Donders and Plozza (n. 13), 356 et seqq.

58 Report of the UN Conference on Environment and Development, Annex I, Rio Declaration on Environment and Development of 12 August 1992, A/CONF.151/26 (Vol. I), principles 2, 7, 9 and 15.

59 See Roeben (n. 42), 112 et seqq.; Philippe Cullet, 'Principle 7, Common but Differentiated Responsibilities' in: Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development, A Commentary* (Oxford University Press 2015), 229-244 (242 et seq. and passim); see also Andy Stirling, 'Precaution in the Governance of Technology' in: Roger Brownsword (ed.), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2016), 645-669 (645 et seqq.).

60 Gary E. Marchant, 'Addressing the Pacing Problem' in: Gary E. Marchant, Braden R. Allenby and Joseph R. Herkert (eds), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (Springer 2011), 199-205 (200 et seq.); Rayfuse (n. 6), 507 et. seq., 512 et seqq.; see already Schachter (n. 33), 424 et seq.

61 On this and the general concept see Christian J. Tams, 'International Community' in: Jean D'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar 2019), 505-523 (509, 511 and passim).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

peace.[62] Therefore, 'negative peace' and 'positive peace'[63] are equal purposes of the UN under Article 1 of its Charter.[64] In other words, the UN-Charter and its overarching goal rests on two pillars: While 'negative peace' constitutes the UN-Charters' short-term strategy, the long-term strategy aims for 'positive peace', i. e. cooperative promotion of social and economic progress.[65]

Although the UN-Charter does not explicitly mention scientific-technical progress, the latter is closely linked to the UN's long-term strategy. This applies both to the general association of progress and its regulation with increased productivity and economic prosperity,[66] and to the ambivalent assessment of progress and its consequences.[67] In any case, balancing is necessary. It is therefore not surprising that the central role of progress has been explicitly emphasised by the United Nations General Assembly (UNGA).[68] Moreover, the importance of progress is reflected in Articles 13 and 55, which further elaborate the long-term strategy of the UN-Charter.[69] The central idea of Article 13 is the progressive development of international law and the promotion of international cooperation by means of law. This idea is explained against the background of the constant interaction of progress and law which goes hand in hand with the already mentioned extension and modification in exercise of state jurisdiction.[70] Even though Article 13 addresses the General Assembly, it remains up to the member states to accept and implement the

62 Rüdiger Wolfrum, 'Preamble' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations* (3rd edn, Oxford University Press 2012, Vol. I), 105 para. 10; see also Christof Heyns, 'The Preamble of the United Nations Charter: The Contribution of Jan Smuts', AJICL 7 (1995), 329-348 (333 et seqq.).

63 Johann Galtung, 'Violence, Peace and Peace Research', Journal of Peace Research 6 (1969), 167-191 (183).

64 Rüdiger Wolfrum, 'Art. 1' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations* (3rd edn, Oxford: Oxford University Press 2012, Vol. I), paras 4 et seqq., 109 paras 8 et seqq.

65 Robert Kolb, International Law on the Maintenance of Peace (Edward Elgar Publishing 2019), 90 et seqq.; Ralf Bredel, Long-Term Conflict Prevention and Industrial Development (Martinus Nijhoff 2003), 75 et seqq.

66 See Jonathan B. Wiener, 'The Regulation of Technology, and the Technology of Regulation', Technology in Society 26 (2004), 483-500 (484).

67 See above II. 1.

68 E. g. UNGA, Declaration on the Use of Science and Technological Progress in the Interests of Peace and for the Benefit of Mankind of 10 November 1975, A/RES/3384 (XXX); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 24 October 1970, A/RES/2625 (XXV).

69 Bredel (n. 65), 81 et seqq.; Wolfrum (n. 64), paras 6, 26, 36 and 38.

70 See Carl-August Fleischhauer and Bruno Simma, 'Art. 13' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations* (3rd edn, Oxford University Press 2012, Vol. I), 525 paras 1, 59 et seqq.; see also the reference in n. 37.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

corresponding proposals as binding.[71] Therefore, Article 13 can be read as referring to a responsibility of states to monitor and develop the relationship between international law and progress. This is in line with those resolutions of the General Assembly, which address progress, such as the Declaration on Social Progress and Development or the Charter of Economic Rights and Duties of States. These and other resolutions do not only refer to the legal handling of the benefits and risks of progress as a *task* of states, but also explicitly speak of a 'responsibility' that each state must fulfil through international cooperation and in accordance with the principles of the UN-Charter.[72] The responsibility of states becomes even clearer when taking Article 55 and the following Articles within Chapter IX as the central norms for the UN's long-term strategy into consideration. The necessary 'promotion' of economic and social progress under Article 55, as well as the further foundations of (positive) peace, also includes the promotion of science and its progress.[73] Even though Article 55 speaks only of 'the United Nations' and is embedded in Chapter IX which creates a cooperative network of special agencies and UN organisations, Article 56 explicitly emphasises that also the Member States themselves are bound by the purposes of Article 55.[74]

So far, the UN-Charter offers some indications that progress can be considered as a common global interest. Balancing and regulating progress should be seen as an important part of the UN's long-term strategy. This includes the promotion of progress as a condition for peace as well as the prevention of progress-related threats to peace. As Member States are obliged to contribute to the long-term strategy, it is their responsibility to balance law, progress, and its consequences.

c) Human Rights as the Basis and Limit of Progress

In addition to the institutional side of a possible responsibility of states regarding progress, the individual side must also be considered. This is

71 Fleischhauer and Simma (n. 70), para. 4.

72 UNGA, Declaration on Social Progress and Development of 11 December 1969, A/RES/2542 (XXIV), Articles 3, 8, 13 and 24; Charter of Economic Rights and Duties of States of 12 December 1974, A/RES/3281 (XXIX), Articles 7, 9 and 11; see also the references in n. 68.

73 Peter Tobias Stoll, 'Art. 55 (a) and (b)' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations* (3rd edn, Oxford University Press 2012, Vol. II), 1535 paras 1, 19 et seqq., 26 and 100.

74 Otto Spijkers, 'Global Values in the United Nations Charter', NLIR LIX (2012), 361-397 (385 et seqq.); Peter Tobias Stoll, 'Art. 55 (a) and (b)' and 'Art. 56' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations* (3rd edn, Oxford University Press 2012, Vol. II), 1535 paras 8, 12, 17, 19 and 1603 para. 4 et seqq., 27 et seqq.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

because it is usually not states who drive progress. Rather, it is individual researchers or technicians who drive progress across borders, with consequences for the environment and the general population. Therefore, it seems consistent and legitimate to take a human-rights-based approach for the international handling of progress.[75] To put it differently, it is necessary to clarify whether a responsibility for progress as global common interest is also reflected in human rights obligations.

In principle, regardless of whether and to what extent they are enforceable, human rights are accompanied by clear state obligations. Although this may be disputed in part with regard to the legal nature of the Universal Declaration of Human Rights (UDHR), there is no doubt that the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) are binding for ratifying states.[76] While the extent of the obligation depends on the individual case, states must always respect, protec,t and fulfil human rights.[77] The aforementioned Articles 55 and 56 of the UN-Charter also provide a clear link between the UN's long-term strategy, the Member States' responsibility and human rights.[78] Therefore, the question of whether progress secures or endangers 'positive peace' in the long term must also be answered from the perspective of human rights.

The ambivalence of progress and its consequences allows for mutual influences of progress and human rights. While human rights can be both the basis and the limit of progress, conversely, progress can promote or jeopardise the realisation of human rights.[79] In particular, progress is protected by freedom of science, which does not bar state regulation completely, but requires a comprehensive risk assessment and a proportionality test.[80] The

75 Similar Voeneky (n. 5), 139, 149 et seqq., 153; Thorsten Schmidt and Silja Voeneky, 'Fostering the Common Good, An Adaptive Approach Regulating High-Risk AI-Driven Products and Services' in: Silja Voeneky, Philipp Kellmeyer, Oliver Mueller and Wolfram Burgard (eds), *The Cambridge Handbook of Responsible Artificial Intelligence: Interdisciplinary Perspectives* (Cambridge University Press 2022), 123-149.

76 Regarding this and the following Eibe H. Riedel and Jan-Michael Arend, 'Art 55 (c)' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations* (3rd edn, Oxford University Press 2012, Vol. II), 1565 paras 24, 30 et seqq., 43 et seq., 46 et seq.

77 Frédéric Mégret, 'Nature of Obligations' in: Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018), 86-109 (97 et seqq.).

78 Stoll (n. 73), paras 2, 15 et seqq.; Riedel and Arend (n. 76), paras 4, 8 et seq., 15 et seq.

79 Hiroko Yamane, 'Impacts of Scientific and Technological Progress on Human Rights: Normative Response of the International Community' in: Christopher G. Weeramantry (ed.), *Human Rights and Scientific Technological Development* (United Nations University 1990), 91-104 (92 et seqq.).

80 Voeneky (n. 5), 153 et seqq.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

latter is closely linked to the general principles of prevention and precaution.[81] States must find a balance since they have to protect not only the freedom of science, but also life, health, and ultimately human dignity of all people.[82] States' role in balancing different human rights positions becomes even clearer when one considers those human rights that explicitly deal with the consequences of progress. In fact, progress is not only addressed by the UN-Charter and the resolutions of the UNGA mentioned before, but also and above all by the right to enjoy the benefits of scientific progress and its applications under Article 15(1)(b) of the ICESCR.[83] The latter is closely linked to Articles 9 and 11 of the ICESCR as well as Articles 22, 25 and 27 of the UDHR.[84] A crucial factor is the recognition that prosperity or an adequate standard of living can be linked to scientific-technical progress.[85] Therefore, human rights stress the need for state regulation which ensures that progress does not harm, but benefits people.[86] More specifically, in line with general human rights obligations, Article 15(1)(b) of the ICESCR calls for the respect, protection and fulfilment of the right to science. This means that states have to guarantee the freedom of science and take measures to provide access to progress and its applications for the benefit of all. The latter includes the protection against those consequences of progress that threaten other human rights.[87] This anticipation of benefits and risks is inherent in the right to science.[88]

81 Donders and Plozza (n. 13), 362 et seqq.

82 Voeneky (n. 5), 148 et seq., 155 et seq.

83 Yvonne Donders, 'The Right to Enjoy the Benefits of Scientific Progress: In Search of State Obligations in Relation to Science', Medicine, Health Care and Philosophy 14 (2011), 371-381 (371 et seq., 375, 379); Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press 2014), 1175-1232 (1219); see also n. 68.

84 Audrey R. Chapmann, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications', Journal of Human Rights 8 (2009), 1-36 (1 et seqq.); Besson (n. 11), 498 et seqq.

85 Lea Shaver, 'The Right to Science: Ensuring that Everyone Benefits from Scientific and Technological Progress', European Journal of Human Rights (2014), 411-430 (414 et seq., 429); see also above II. 1 and the references in n. 84.

86 Ragnar Adalsteinsson and *Páll* Thórhallson, 'Art. 27' in: Gudmundur Alfredson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights* (Martinus Nijhoff 1999), 575-596 (582, 593); Asbjørn Eide, 'Adequate Standard of Living' in: Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018), 186-207 (186 et seqq., 201); Donders and Plozza (n. 13), 355 et seqq.; Shaver (n. 85), 418, 429.

87 Chapmann (n. 84), 18 et seqq.; Julie Ringelheim, 'Cultural Rights' in: Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018), 278-295 (279 et seq., 283, 288 et seqq.); Saul, Kinley and Mowbray (n. 83), 1176, 1213 et seqq.; see also Adalsteinsson and Thórhallson (n. 86), 593.

88 Besson (n. 14), 299.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Since the 'application' of scientific progress primarily relates to technical innovation,[89] Article 15 ICESCR could also serve as a link to a human right to grow through innovation.[90] This would help to ensure that the interests of entrepreneurs are considered. Finally, Article 15(1)(b) and (4) ICESCR also stress the need for cooperation and exchange of information at the international level, which is particularly relevant for developing countries.[91] It is true that the various facets of Article 15(1)(b) ICESCR will have to be further differentiated in the future.[92] Nevertheless, it is an important legal basis for the task of states to ensure that progress does not simply 'happen' but is to be implemented responsibly.[93] Therefore, human rights may also be interpreted as a reflection of a progress-related responsibility of states under international law.

3. The Responsibility *to* and *for* Progress

International law offers numerous reference points for an interpretation of progress as a common global interest. This would lead to a two-sided Responsibility *to* and *for* progress (a) which entrusts states to address progress and its consequences through national and international regulation (b).

a) Two Sides of the Same Coin

Based on general principles of international law, the UN-Charter and human rights, progress can be seen as a 'public good'[94] or common global

89 Chapmann (n. 84), 9 et seq.

90 Philipp Aerni, *Entrepreneurial Rights as Human Rights* (Banson 2015), 55 et seqq. and passim.

91 Saul, Kinley and Mowbray (n. 83), 1222 et seq.; Donders (n. 83), 376 et seq., 379.

92 See e. g. Besson (n. 11), 516 et seqq. and passim; Besson (n. 14), 294 et seqq.; Andrew Mazibrada, Monika Plozza and Sebastian Porsdam Mann, 'Innovating in Uncharted Terrain: On Interpretation and Normative Legitimacy in the CESCR's General Comment No. 25 on the Right to Science', The International Journal of Human Rights 28 (2024), 148-176 (156 et seqq.); Shaver (n. 85), 418 et seqq.

93 Andrea Boggio, 'The Right to Participate In and Enjoy the Benefits of Scientific Progress and Its Application: A Conceptual Map', New York International Law Review 34 (2021), 43-77 (50 et seqq., 55 et. seqq.); Donders (n. 83), 374 et seqq.

94 See Ringelheim (n. 87), 289 with further references; regarding science Shaver (n. 85), 413, 417 et seqq.; see also Besson (n. 11), 504 et seqq., 516 et seqq.; Besson (n. 14), 300; Farida Shaheed and Andrew Mazibrada, 'On the Right to Science as a Cultural Human Right' in: Helle Porsdam and Sebastian Porsdam Mann (eds), *The Right to Science* (Cambridge University Press 2022), 107-123 (107 et seq.).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

interest for which states bear responsibility. In terms of the three vectors of responsibility states ('who') are assigned responsibility concerning the balancing of progress-related consequences ('what'). In line with the roots of this responsibility, states must fulfil it in the common interest of the UN and its Member States as well as in the interest of the people ('to whom').

As dealing with progress is an ambivalent task that includes promoting and limiting elements, this responsibility may be described as Responsibility *to* and *for* progress. The significance of this two-sided responsibility is particularly evident in the context of climate change. On the one hand, human-caused climate change is a direct consequence of historical progress in the field of science and technology, or, more precisely, the largely uncontrolled emissions and environmental changes resulting from it. On the other hand, progress may lead to the development and use of more climate-friendly processes or instruments in the future, which would in turn facilitate the mitigation of climate change.[95] Dealing with the progress-related *consequences* concerns the Responsibility *for* progress. At the same time the Responsibility *to* progress addresses the need to guarantee and maintain the *conditions*, that allow science and technology 'to progress' in the first place. As the enabling of progress again raises the question of how to deal with possible consequences, both dimensions of the Responsibility *to* and *for* progress are interdependent or, in other words, two sides of the same coin. The Responsibility *to* and *for* progress thus reflects the need to balance and shape the ambivalent relationship between law and progress.

b) Responsible Regulation and Mediation

The Responsibility *to* and *for* progress not only addresses the question of whether an (international) regulation of progress is necessary, but also provides guidance on how this should be done. The latter affects the numerous proposals for solving the 'pacing problem', which focus either on slowing down progress by means of precaution or on improving the adaptability of law by using flexible and adaptive legal instruments.[96] It is true that regulating progress remains a 'wicked' problem that can only be solved by combining different perspectives (ex-post and ex-ante) and approaches (governing and governance).[97] The Responsibility *to* and *for* progress is no exception in

95 See German Federal Constitutional Court, order of 24 March 2021 – 1 BvR 2656/18, paras 18 et seqq., 32 et seqq., 121, 183, 186 and 248 et seqq.; see also Voeneky (n. 5), 141 et seqq.

96 Marchant (n. 60), 200 et seqq. with further references.

97 Marchant (n. 24), 1864 et seqq.; see also Abbot (n. 1), 134 et seq., 156.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

this respect and is therefore only one – albeit crucial – part of the solution. However, due to its roots in general principles, the UN-Charter and human rights, the Responsibility *to* and *for* progress provides a clear legal framework that has decisive advantages.

First, the Responsibility *to* and *for* progress ensures a strong link to the UN and its universal goals. The exchange of information between states and non-state actors, which is imperative in view of progress-related uncertainty,[98] should not happen within an organisation with only a few member states such as the Organisation for Economic Co-operation and Development (OECD),[99] but within the United Nations Educational, Scientific and Cultural Organization (UNESCO) or another organisation within the UN framework. This does not mean that other initiatives should be rejected. This is so especially because, to a certain extent, domestic measures may also be necessary and sufficient to fulfil the responsibility.[100] However, the UN's involvement ensures a broad exchange among all nations, which is essential when considering the global consequences of progress. The material basis for this international cooperation should be human rights and the general principles which address transboundary consequences of state actions.[101] Article 15 (1)(b) and (4) ICESCR are of particular relevance here. The norm reflects the ambivalent task of promoting and limiting scientific-technical progress, especially through international cooperation and mediation. In the future, Article 15 ICESCR, may also be used as a starting point for considering the responsibility of non-state actors (e. g. scientists and technicians) within this cooperation.[102] Nevertheless, the regulation of progress through the means of (international) law remains first and foremost the responsibility of states as primary subjects of international law. To meet this Responsibility *to* and *for* progress, states must guarantee the conditions of progress and take measures to ensure access to its applications for the benefit of all people. The latter includes the protection against those consequences that threaten other human rights.

For the sake of completeness, it should be noted that this responsibility must be strictly separated from the Responsibility to Protect. In fact, there is a debate whether the latter should also include socioeconomic and long-term

98 Yamane (n. 79), 102 et seq.; Abbot (n. 1), 129 et seq., 134 et seqq., 145 et seqq.

99 Different view Abbot (n. 1), 139 et seqq.

100 In general, Roeben (n. 42), 106, 156; see also II. 3.

101 Regarding AI see Vöneky (n. 40), 12, 16 et seqq., 19 et seq.; Schmidt and Voeneky (n. 75), 123, 133 et seq.; in general Voeneky (n. 5), 139, 149 et seqq.; regarding the principles see above III. 2. a).

102 Katja Achermann and Samantha Besson, 'International Cooperation Under the Human Right to Science: What and Whose Duties and Responsibilities?', Frontiers in Sociology 8 (2023), doi: 10.3389/fsoc.2023.1273984, 1-6 (2 et seqq.); Besson (n. 11), 510 et seqq., 516 et seqq.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

development issues.[103] However, regardless of whether one agrees with this and the Responsibility to Protect in general or not,[104] it has no influence on the Responsibility *to* and *for* progress. The latter is not about protecting a state's population from serious human rights violations or similar atrocities. Rather, the Responsibility *to* and *for* progress emphasises the need of balancing (international) law and progress-related consequences.

IV. Conclusion and Outlook

Altogether, central sources of international law offer numerous reference points for an understanding of scientific-technical progress as common global interest. The corresponding Responsibility *to* and *for* progress would be a decisive key for balancing progress-related consequences through means of (international) law. In the future, it will therefore be the task of states to further develop the legal framework in recognition of their own responsibility. As they would perform this task also in cooperation with the UN, but without being dependent on the – often blocked – Security Council, the Responsibility *to* and *for* progress ultimately offers an opportunity to revitalise international cooperation for a peaceful and sustainable future.

103 For this and the following see Adrian Gallagher, 'An International Responsibility to Develop in Order to Protect? A Responsibility Too Far', Journal of International Relations and Development 25 (2020), 1020 (1020 et seqq.).

104 Regarding the general debate see Janina Barkholdt and Ingo Winkelmann, 'Responsibility to Protect' in: Rüdiger Wolfrum (ed.), MPEPIL (online edn, Oxford University Press 2019) paras 5 et seqq.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Progress Renegotiated – Closing Remarks on a Remarkable Conference

Angelika Nußberger
University of Cologne, Cologne, Germany
akademie-menschenrechtsschutz@uni-koeln.de

'Progress and International Law' might seem a rather straightforward title for a conference of young lawyers. However, there is an expressive subtitle: 'A Cursed Relationship'. This makes it clear from the outset that 'progress' is not seen as a one-way street to legal paradise. At the same time, without the hope of doing 'something good' and contributing to a greater goal, there will be no inspiration to devote energy to international law. The answers to the questions posed by the Conference are therefore relevant in a double sense: personally, as a confirmation of the path chosen by young international lawyers, and fundamentally, as an understanding of the journey of international law through history and politics.

During the conference, the question of what 'progress' means was approached under many different angles. 19th century debates about visions of progress in Mexico would fit under this heading, as would the agonising question of the consequences of alleged European superiority, the scrutiny of new border control regimes, or the vision of what 'youth' is and whether it is necessarily linked to progress. The discussion included reflections on the differences between whataboutism, cynicism, and hypocrisy, the wonder that rituals of coming of age might in certain cultures occur only every 25 years, and the meaning of a fish asking its fellow fish how the water is.

What became clear in all the zigzags of the discussions was that there are basically three different understandings of progress: a linear one, a cyclical (and romantic) one, and a multi-perspective one. At the same time, there is a vision of progress that would prefer the state of things to change as little as possible, and a contrary vision that relies on constant and dynamic change.

If progress is understood as a linear movement, there must be a goal towards which the momentum is directed. This can be defined in material terms, such as the preservation of nature, equality or peace or, more remotely, the survival of mankind. The more abstract it is, the more likely it is to gain support. More concrete goals such as protection of or even promoting migration or balancing the interests of the global North and South will be more controversial.

DOI 10.17104/0044-2348-2024-4-999

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

As is often the case, solutions are sought in a procedural turn. In this context, conflict adjudication or access to justice could also be seen as goals. Of course, this second approach is more modest. Progress could be made in two stages, first in law and then in reality. However, there is no guarantee that the latter will come only with the former, nor that the former will necessarily reinforce the latter.

The most modest vision of progress in international law would be limited to a (better) understanding of the law, i. e. the further development of the systematicity of the law, or the 'unseeing' – the abandonment of doctrinal perceptions that are no longer up to date, or the discovery of hidden power constellations.

What is seen as progress can often turn out to be nothing more than an as-if formula. For example, the judgment of the European Court of Human Rights in the case of *Hirsi Jaama v. Italy*[1] was seen as an extension of state responsibility for violations of migrants' rights. However, the effect may have been to reduce the willingness of states to organise rescue operations on the High Sea. Security Council Resolution 1325,[2] the first landmark Security Council resolution on women, peace, and security, could be seen as entrenching the idea of women as vulnerable groups unable to stand up for themselves and trapping them in a perpetual role of victim.

History has shown that the zeitgeist not only shapes the understanding of progress, but also turns it on its head. While the International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment[3] was hailed as a great success at the beginning of the 20th century, a few decades later it was rejected as an expression of male paternalism and inequality.

Progress never comes without a price. The living instrument doctrine of the European Court of Human Rights may reflect the idea of permanent progress in human rights protection. However, the more rights are labelled 'human rights' and the more detailed and differentiated they are, the less likely they will be universally recognised. The question remains whether a good compromise that all can accept is better or worse than a potentially ideal solution that many reject.

With a view to all the uncertainties that characterise progress in and through international law the obvious lesson learnt during the conference was that progress must be constantly renegotiated.

---

1 ECtHR (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012, no. 27765/09.

2 UNSC Res 1325 of 31 October 2000, S/RES/1325.

3 International Convention respecting the Prohibition of Night Work for Women in Industrial Employment of 26 September 1906, Berne.

 DOI 10.17104/0044-2348-2024-4-999

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Buchbesprechungen

***Gaillet, Aurore*: La Cour constitutionnelle fédérale allemande. Reconstruire une démocracie par le droit (1945-1961).** Paris: Éditions La Mémoire du Droit, 1. Aufl. 2021. ISBN 978-2-84539-059-1. 549 S. € 64,-

Das hier zu besprechende Buch enthält im Kern eine Darstellung der Gründerjahre des Bundesverfassungsgerichts. Dass es dafür den Zeitraum von 1945 bis 1961 angibt, wird durch die Einbeziehung der Vorgeschichte zwar unmittelbar einsichtig; irritieren muss diese Bezugnahme auf die vorkonstitutionelle Zeit gleichwohl. Von Vorworten von Dieter Grimm und Michael Stolleis begeleitet, zeichnet Verf.in das erste Jahrzehnt des höchsten deutschen Gerichts detailliert nach und sichert diese Erzählung rechtshistorisch, rechtsdogmatisch, zeitgeschichtlich und rechtsvergleichend ab. Die Erzählung ist ebenso kenntnisreich wie durchdacht und wartet auch für den deutschen und mit der Materie vertrauten Leser mit einer Fülle neuer und überraschender Aspekte und Nuancen auf. Am Ende des Buches finden sich eine umfangreiche Bibliographie, ein Stichwortverzeichnis, eine chronologische Auflistung wichtiger Entscheidungen des Bundesverfassungsgerichts, ein Inhaltsverzeichnis sowie eine allgemeine Zeittafel, die die deutsche (Rechts-)Geschichte auf die Zeitspanne zwischen Konrad I. (911) und der Änderung des Bundesverfassungsgerichtsgesetzes (BVerfGG) im Jahre 2013 festlegt und damit zu Recht die Pfadabhängigkeit der heutigen Stellung des Bundesverfassungsgerichts unterstreicht sowie die Unterschiede zum Conseil Constitutionnel der V. Republik akzentuiert.

1. Der erste – einführende – Teil des Buches dient der Klärung des Forschungsanliegens und der Rechtfertigung, warum und mit welchem Erkenntnisinteresse die Autorin ein französisches, d. h. für fanzösische Leserinnen und Leser bestimmtes Buch über ein deutsches Gericht schreibt (S. 31 ff.).

Im 1. Kapitel werden dazu Besonderheit und Bedeutung des Bundesverfassungsgerichts vorgestellt – vom Sitz in Karlsruhe über seine in den Anfangsjahren bekanntlich wiederholt geänderte Zusammensetzung bis zu den Kompetenzen (S. 37 ff.). Dabei wird deutlich, dass seine Ausgestaltung nicht einem bestimmten Modell von Verfassungsgerichtsbarkeit folgt (S. 45 ff.). Dessen ungeachtet sei das Gericht zu einem zentralen Akteur im politischen, sozialen und juristischen Leben Deutschlands geworden (S. 48 ff.). An dieser Stelle geht *Verf.*in aber auch auf die – gerade in Frankreich mit seiner Angst vor einem *gouvernement des juges* geläufigen – unvermeidlichen Einwände gegen dieses Konzept ein: die Schwierigkeit, die Verfassungsgerichtsbarkeit im (strikt verstandenen) System der Gewaltenteilung zu verorten, das Spannungsverhältnis zur Demokratie und die mit der Selbstetikettierung als „Bür-

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

gergericht" verbundenen Herausforderungen. „*Mythe ou réalité*?" fragt sie insoweit herausfordernd (S. 68).

Das 2. Kapitel (S. 71 ff.) behandelt Perspektiven unterschiedlicher Disziplinen auf das Bundesverfassungsgericht. Nachdem durch die Neufassung von § 35b Abs. 5 Satz 2 BVerfGG im Jahre 2013 im Bundesarchiv vorhandene Entwürfe von Urteilen, Beschlüssen und Verfügungen, Arbeiten zu ihrer Vorbereitung und Dokumente, die Abstimmungen betreffen, nach 60 Jahren zugänglich gemacht worden sind, macht sie zudem ein neues Interesse an der Geschichte des Bundesverfassungsgerichts aus, was sie zu einer Periodisierung dieser Geschichte veranlasst. Diese lasse sich in eine „Phase der Formierung" zwischen 1945 und 1961 (S. 81) sowie die nachfolgenden Phasen einteilen und mit der Entwicklung in Frankreich und der völlig anders konzipierten Rolle des *Conseil Constitutionnel* kontrastieren, auf dass dieser Vergleich mit Karlsruhe französischen Juristen ein besseres Verständnis der eigenen Rechtsordnung ermögliche (S. 92 ff.). Der Vergleich lade geradezu dazu ein, Recht „im Plural" zu denken, als Vergleich zweier Rechtsordnungen und der ihnen zugrunde liegenden Kulturen.

Mit Blick auf die Formierungsphase des Bundesverfassungsgerichts seien letztlich vor allem drei Perspektiven von Bedeutung: die Anfänge, seine institutionelle Verankerung und deren Operationalisierung durch die Rechtsprechungstätigkeit als solche.

2. Der Erste Teil widmet sich daher den Anfängen, die *Verf*.in, wie gezeigt, auf die Zeit zwischen 1945 und 1951 datiert (S. 107 ff.). Das 1. Kapitel ist der Entstehung des Grundgesetzes im weiteren Sinne gewidmet und beschreibt die sog. Stunde Null, den mühsamen Wiederaufbau staatlicher Strukturen mit der Errichtung der Länder bzw. der Herstellung ihrer Handlungsfähigkeit als erstem Schritt eines Aufbaus von unten (S. 115 ff.) sowie die Rahmenbedingungen der Verfassungsgebung. Dass die Distanzierung vom Weimarer Erbe nach dem Motto „Bonn ist nicht Weimar" dabei zentrale Bedeutung hatte, wird anhand einer Reihe von Beispielen ebenso überzeugend dargelegt, wie der Umstand, dass 1945 keine Stunde Null gewesen ist – weder staatsrechtlich noch staatstheoretisch noch intellektuell, denn die Schatten des Weimarer Methodenstreits waren nach wie vor sehr präsent. Insbesondere die Ideen von einer in der Verfassung niedergelegten „objektiven Wertordnung" und der Integrationslehre Rudolf Smends hätten dem neu errichteten Bundesverfassungsgericht letztlich die Entwicklung einer methodisch differenzierten und für unterschiedlichste Einflüsse offenen Rechtsprechung ermöglicht.

Im 2. Kapitel wird die Errichtung des Bundesverfassungsgerichts als ein Akt zwischen Kontinuität und Ruptur verortet (S. 141 ff.). Einerseits stehe die Verfassungsgerichtsbarkeit in einer langen Traditionslinie, die bis zu den

 DOI 10.17104/0044-2348-2024-4-1001

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Reichsgerichten des Heiligen Römischen Reichs Deutscher Nation, zum Reichsgericht der Paulskirchenverfassung und dem Staatsgerichtshof der Weimarer Republik zurückreiche; andererseits habe die Errichtung des Bundesverfassungsgerichts auch eine Modifikation der Vorstellungen von Gewaltenteilung erforderlich gemacht. *Verf.*in gibt dabei nicht nur einen kurzen Überblick über die Gerichtsorganisation des Grundgesetzes im Allgemeinen, sondern auch über die auf dem Weg zur endgültigen Gestalt des Bundesverfassungsgerichts verworfenen Varianten und Modelle. Ausführungen über die Kompetenzen des Gerichts, seine Zusammensetzung und die Richterinnen und Richter der ersten Generation – zwischen Widerstandskämpfern und Alt-Nazis – vermitteln dabei ein ebenso anschauliches wie nüchternes Bild.

3. Der Zweite Teil des Buches (S. 199 ff.) widmet sich der institutionellen Geschichte des Bundesverfassungsgerichts. Im 1. Kapitel behandelt *Verf.*in dessen Emanzipation zum obersten Verfassungsorgan des Bundes auf der Grundlage der sog. Status-Denkschrift und zahlreicher Konflikte mit der Regierung Adenauer und ihrem Justizminister Thomas Dehler sowie – am Beispiel der Entscheidung zum *Deutschlandvertrag* (BVerfGE 1, 351 ff.), dem *Plenargutachten Heuss* (BVerfGE 2, 79 ff.) sowie der Entscheidung zum *EVG-Vertrag* (BVerfGE 2, 143 ff.) – die erfolgreiche Abwehr aller Versuche, sich auch von der Opposition politisch instrumentalisieren zu lassen. Das 2. Kapitel schildert demgegenüber, wie es dem Gericht gegen Widerstände einerseits vor allem von Seiten des Bundesgerichtshofs und seines Präsidenten Weinkauf und andererseits von der eine unmittelbare Drittwirkung der Grundrechte propagierenden Rechtsprechung des Bundesarbeitsgerichts unter Hans Carl Nipperdey gelungen ist, sich das letzte Wort in allen Fragen der Verfassung zu sichern. Die Funktion der Grundrechte als objektive Werteentscheidungen und ihre Ausstrahlungswirkung auf das einfache Recht – heute spricht man von ihren norminternen Direktiven – werden dabei ebenso kundig entwickelt wie die Konstruktion der mittelbaren Drittwirkung im *Lüth*-Urteil (BVerfGE 7, 198 ff.). Diese Entwicklung bilanzierend greift *Verf.*in auf ein Zitat aus dem Festvortrag Rudolf Smends zum 10-jährigen Bestehen des Bundesverfassungsgerichts 1961 zurück, in dem dieser unter Rückgriff auf die aus dem US-amerikanischen Verfassungsrecht bekannte Formel „*the constitution is what the Supreme Court says it is*" feststellt, dass das Grundgesetz nun praktisch so gelte, wie es vom Bundesverfassungsgericht interpretiert werde und dass das Schrifttum es auch in diesem Sinne kommentiere (S. 294).

4. Im Dritten Teil widmet sich *Verf.*in schließlich den juristischen Grundlagen im engeren Sinne (*assises jurisprudentielles*). Das 1. Kapitel (S. 303 ff.) behandelt die Konstitutionalisierung des politischen Lebens und verhandelt

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

unter den Stichworten Rechtsstaat, repräsentative Demokratie und Parteienstaat zunächst einen von der *Verf.*in ausgemachten Paradigmenwechsel zu einer modernen Demokratie und einem juristischen Konzept der Demokratie mit dem Bundesverfassungsgericht als wesentlichem Akteur (S. 310 f.), das diesen Paradigmenwechsel mit einer Nivellierung der Verfahrensanforderungen und unter Zuhilfenahme der Grundrechte vorangetrieben habe. Dies sei allgemein akzeptiert worden. Diese weite Vorstellung von „Demokratie" – im Grunde geht es um die wesentlichen Charakteristika des Staatsorganisationsrechts – vertieft *Verf.*in anhand von Leitentscheidungen zu außenpolitischen Fragen, dem Föderalismus, wobei vor allem dem 1. *Fernsehurteil* (BVerfGE 12, 205 ff.) breiter Raum eingeräumt wird, sowie zum Demokratieprinzip im engeren Sinne (S. 353 ff.). Für dessen Entfaltung werden wiederum das *Lüth*-Urteil (BVerfGE 7, 198 ff.), das Urteil zur *7,5 %-Sperrklausel in Schleswig-Holstein* (BVerfGE 1, 208 ff.), die Entscheidung zur *Bremer Personalvertretung* (BVerfGE 9, 268 ff.) und die *Parteiverbotsverfahren gegen die SRP* (BVerfGE 2, 1 ff.) und die *KPD* (BVerfGE 5, 45 ff.) herangezogen. Das ist zwar richtig, vernachlässigt jedoch, dass das Demokratieprinzip des Art. 20 Abs. 1 und 2 GG i. V. m. Art. 38 Abs. 1 Satz 1 GG erst nach der Wiedervereinigung und im Angesicht der demokratischen Herausforderungen der europäichen Integration seinen entscheidenen Schliff bekommen hat (vgl. Bauer/Huber/Sommermann (Hrsg.), Demokratie in Europa, 2005).

Das abschließende 2. Kapitel widmet sich der Konstitutionalisierung des juristischen, sozialen und wirtschaftlichen Lebens unter dem Grundgesetz (S. 385 ff.) und greift dabei auf die drei „großen" Entscheidungen der 1950er Jahre zur Grundrechtsdogmatik zurück: *Elfes* (BVerfGE 6, 32 ff.), *Lüth* (BVerfGE 7, 198 ff.) und das *Apotheken*-Urteil (BVerfGE 7, 377 ff.). Sie haben, so die *Verf.*in zu Recht, dem Bundesverfassungsgericht nach nicht einmal 10 Jahren seines Bestehens die Grundlage dafür geboten, seine „Macht" in der bzw. über die deutsche Rechtsordnung zu sichern (S. 397). Abschnitte zur Konsitutionalisierung des Privat- und des Strafrechts (S. 417 ff.) sowie des Verwaltungsrechts (S. 431 ff.) runden die Darstellung ab. Sie beschreiben zudem Rechtsgebiete, in denen die Konstitutionalisierung bis heute nach wie vor in den Kinderschuhen steckt. Das gilt für das Zivilrecht, das trotz der grundlegenden Arbeiten von Claus Wilhelm Canaris (*Claus Wiljhelm Canaris*, AcP 184 (1984), 201 ff.) noch immer an der *Bürgen*-Entscheidung (BVerfGE 89, 214 ff.) zu knabbern hat, erst recht aber für das Strafrecht. Wenn *Verf.*in die *Homosexuellen*-Entscheidung vom 10. Mai 1957 (BVerfGE 6, 389 ff.) kritisch bewertet und darin einen tendenziellen Widerspruch zum weiten, liberalen Verständnis der allgemeinen Handlungsfreiheit des *Elfes*-Urteils ausmacht, so darf dabei nicht übersehen werden, dass das Bundesverfassungsgericht erst am 26. Februar 2020 mit dem Urteil

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

zur Suizidhilfe (BVerfGE 153, 182 ff. – *Suizidhilfe*) erstmals eine Norm des Kernstrafrechts – § 217 StGB – für nichtig erklärt hat, weil es auch 75 Jahre nach Inkrafttreten des Grundgesetzes nicht gelungen ist, die Befugnis des Gesetzgebers zur Markierung sozialethischer Unwerturteile über bestimmte Handlungen und deren Pönalisierung am Grundsatz der Verhältnismäßigkeit zu messen.

Ähnlich verhält es sich mit dem Steuerrecht, bis heute das zweite „schwarze Loch" im Schutzbereich der Grundrechte (vgl. jüngst immerhin BVerfGE 164, 76 ff. – *Körperschaftssteuerminderungspotenzial II*; BVerfGE 164, 130 ff. – *Körperschaftssteuerminderungspotenzial III*; BVerfGE 164, 367 ff. – *Körperschaftssteuererhöhungspotenzial*).

Auch wenn Gegenstand des Buches das erste Jahrzehnt des Bundesverfassungsgerichts und seiner Rechtsprechung im weiteren Sinne ist, so bleibt die Darstellung nie allein auf diese „Formierungsphase" beschränkt. Es gehört zu den großen Vorzügen des Buches, dass die in der „Formierungsphase" angelegten Weichenstellungen und ihre Modifikationen bis in die Gegenwart immer im Blick behalten werden. Dadurch erfahren die französischen Leser nicht nur viel über die deutsche Verfassungsgeschichte der 1950er Jahre; sie erhalten zugleich eine Einführung in die aktuelle Ausgestaltung der deutschen Verfassungsordnung und in die Rechtsprechung des Bundesverfassungsgerichts bis heute. So wird etwa mit Blick auf die Grundrechtsdogmatik nicht nur die zunächst dominierende abwehrrechtliche Dimension erläutert und wie aus ihr das Verhältnismäßigkeitsprinzip hervorgegangen ist (dass *Peter Lerche* in diesem Zusammenhang keine Erwähnung findet, ist allerdings ein Schönheitsfehler), sondern auch die auf der Basis der Grundrechte als objektive Wertentscheidungen entwickelte Figur der Schutzpflichten und das Untermaßverbot. Mit Blick auf das Parteiverbot beschreibt die *Verf.*in auch den jüngsten Wandel der Rechtsprechung, so dass der Leser nicht nur etwas über das *SRP-Verbot* (BVerfGE 2, 1 ff.) und das *KPD-Verbot* (BVerfGE 5, 45 ff.) erfährt, sondern auch darüber, was sich in den folgenden 60 Jahren getan hat. Das 2017 abgelehnte *NPD-Verbot* (vgl. BVerfGE 144, 20 ff.) kommt dabei ebenso zur Sprache wie die in seiner Folge geschaffene Möglichkeit, einer verfassungsfeindlichen Partei die Beteiligung an der staatlichen Teilfinanzierung zu entziehen (Art. 21 Abs. 3 GG).

La Cour constitutionnelle fédérale allemande bietet einen historisch fundierten, akribisch recherchierten Schlüssel zum Verständnis des deutschen Verfassungsrechts, der deutschen Staatsrechtslehre, ihrer Wurzeln und der Etappen ihrer Entwicklung nicht nur nach 1949. Das Buch liefert dem ausländischen Leser eine verlässliche Bestandsaufnahme des deutschen Verfassungsrechts und ist auch hinsichtlich seines aktuellen Standes aussagekräftig. Knapp, aber aufschlussreich werden an geeigneter Stelle zudem immer wieder

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

die Unterschiede zu Frankreich markiert. *Verf.*in ist gleichwohl kein „*Groupie*" des Bundesverfassungsgerichts. Sie wahrt durchgängig die für eine Wissenschaftlerin gebotene nüchterne Distanz, was es ihr ermöglicht, auch über die Schwachstellen des Bundesverfassungsgerichts, seiner Rechtsprechung und die Defizite der deutschen Staatsrechtslehre zu sprechen.

Am wenigsten überzeugt in diesem Zusammenhang die Zusammenstellung der in den letzten Jahren gewachsenen Kritik: Das zum 60. Jubiläum des Bundesverfassungsgerichts 2011 erschienene Buch „Das entgrenzte Gericht" (*Matthias Jestaedt/Oliver Lepsius/Christoph Möllers/Christoph Schönberger*, Das entgrenzte Gericht, 2011) mag in einigen akademischen Zirkeln Aufmerksamkeit erregt haben; eine erkennbare Wirkung auf die deutsche Rechtsordnung oder die Rechtsprechung des Bundesverfassungsgerichts hat es jedenfalls bislang nicht entfaltet. Die Kritik am *PSPP*-Urteil vom 5. Mai 2020 (*Martha Cartabia*, *Vicarious Hegemony an the Anti-hegeminic Thrust of European Law*, VerfBlog Oktober 2020) unterschlägt nicht nur das offenkundige Interesse Italiens an einem anderen Ausgang des Verfahrens, sondern auch die parallel gelagerte Vorgehensweise der *Corte Costituzionale* in der Rs. Taricco II (*Corte Costituzionale*, No. 24/2017, 115/2018, 10.4.2018, ECLI:IT:COST:2018:115 – *Taricco II*) oder die Entscheidung des *Conseil d'Etat* in Sachen „*Data France*" (*Conseil d'Etat*, Dec. 393099 de 21 avril 2021, par. 5 – *Data France*).

Dies ändert jedoch nichts daran, dass es sich bei dem Buch von Aurore Gaillet um eine überragende wissenschaftliche Leistung handelt, die auch für Deutschland eine Lücke schließt. Eine deutsche Ausgabe wäre insoweit mehr als wünschenswert.

Peter M. Huber, München

 DOI 10.17104/0044-2348-2024-4-1001

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

***Rodriguez-Garavito, César* (Hrsg.): Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action.** Cambridge: Cambridge University Press 2022. ISBN 978-1-009-09877-9 (hardback), 304 pp. £ 85.00. ISBN 978-1-00910215-5 (paperback), 430 pp. £ 27.99. ISBN 978-1-00911637-4 (eBook), $ 41.99 USD

César Rodriguez-Garavito ist ein herausragender Wissenschaftler und eine bekannte Größe im Bereich des Klimaschutzrechts. Es verwundert daher nicht, dass es ihm gelungen ist, im Rahmen einer Veranstaltung zu Klimaklagen zahlreiche bekannte WissenschaftlerInnen und PraktikerInnen an der *NYU School of Law* zu versammeln, um gemeinsam über die Klimakrise und die Rolle von Menschenrechten in Klimaklagen zu diskutieren. Ein wesentliches Ergebnis dieser Veranstaltung ist das vorliegende Werk „*Litigating the Climate Emergency – How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*", erschienen im Cambridge University Press Verlag 2023.

Drei Jahre nach der Veranstaltung in New York reiht sich Rodriguez-Garavitos Band damit ein in die zunehmende Literatur zu Klimaklagen. Zugleich verfolgt er, wie bereits im Titel deutlich wird, stellenweise zur bisherigen Literatur abweichende Ansätze. Den Klimanotstand (*climate emergency*) als Faktum gebend, will Rodriguez-Garavito die Rolle von Menschenrechten, Gerichten, aber auch *legal mobilization* im Hinblick auf Klimaklagen oder der weiter gefassten *climate action* untersuchen. In Anerkennung abgeschlossener und erfolgreicher menschenrechtsbasierter Klimaklagen sowie einschlägiger Literatur drängt es Rodriguez-Garavito nicht zu untersuchen, ob Menschenrechte und Gerichte eine Rolle im Klimaschutz spielen. Vielmehr setzt er diese als Prämisse voraus und betrachtet die Frage des „Wie". Eine Besonderheit des Werkes sind dabei die Betrachtungen zur *legal mobilization* und damit die Einbeziehung von PraktikerInnen und nahezu rechtssoziologischen Elementen sowie die deutliche Fokussierung auf – in anderen Untersuchungen häufig geringer beachteten – Klimaklagen in Ländern des sog. Globalen Südens.

Nach eigenen Angaben versteht der Herausgeber das Werk als „first to offer systemic analysis of cases known as human rights and climate change cases (HRCC)." Dabei will das Werk sowohl theoretische Einblicke, empirische Dokumentation als auch strategische Debatten unter WissenschaftlerInnen und PraktikerInnen liefern, präsentieren und eröffnen. Die selbst gesetzten Ansprüche sind äußerst hoch. So gewähren doch bereits die theoretischen Fragen zu Klimaklagen, Menschenrechten und Gerichten hinreichend Material für ein Sammelwerk. Richtigerweise profitiert das vorliegende Werk von den angesprochenen strategischen Debatten und nicht zuletzt dem Blick auf *legal mobilization* und den Globalen Süden. Letztere verleihen dem Werk

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

wohl auch das gewisse besondere Profil und herausstechende Merkmal in der zwischenzeitlich umfangreichen Literatur im Zusammenhang mit Klimaklagen bzw. der sog. *climate change litigation*. Ebenso zutreffend erscheint jedoch die vom Herausgeber gerade ausdrücklich hervorgehobene „systemic analysis of human rights and climate change cases (HRCC)" als ein vom sonstigen Werk stellenweise abgelöster Annex.

Das Werk von Rodriguez-Garavito gliedert sich in vier Teile. Diese sind Teil 1 zum „rights turn in climate litigation"; Teil 2 zur „legal strategy in rights-based climate litigation"; Teil 3 „beyond the law: science and narratives in rights-based climate litigation" und abschließend Teil 4 „the climate emergency on trial: human rights and climate litigation around the world". Teil 1 liefert den empirischen und analytischen Hintergrund für den Rest des Bandes. Teil 2 befasst sich mit den Fragen der hinter den Klimaklagen stehenden rechtlichen Strategie, Teil 3 mit Wissen und Expertise und Teil 4 mit den konkreten Fällen.

Im ersten Teil trifft Rodriguez-Garavito selbst Aussagen zu den theoretischen Grundlagen der sog. *human rights and climate change cases (HRCC)*. Er betont die Notwendigkeit einer Betrachtung der Fälle im Lichte von internationalem Recht und nationaler Governance und spricht von HRCC als einem *bottom-up mechanism* insbesondere im Zusammenhang mit dem Übereinkommen von Paris. Wenngleich Klagen selbst nur eines von vielen Instrumenten sind und selbst vor Herausforderungen stehen und Grenzen haben, so geht es dennoch in einer Vielzahl der HRCC um nichts Geringeres als den Versuch, die Ziele des internationalen Klimaschutzrechts auf nationaler Ebene zu rechtlich verbindlichen Verpflichtungen zu übertragen. Rodriguez-Garavito identifiziert sodann drei wesentliche Schritte von HRCC: 1) Welche Normen und rechtlichen Maßstäbe sind anzuwenden? 2) Besteht eine einklagbare, justiziable Verpflichtung? 3) Sind die politischen Maßnahmen mit den Normen und Maßstäben vereinbar? Diese und weitere wurden anderenorts als Bestandteile der Kernfrage zur Justiziabilität von Klimaschutz hervorgehoben und untersucht. Hervorzuheben ist die Annahme von Rodriguez-Garavito, dass sog. „forward looking HRCC" die Zukunft der Klimaklagen bilden werde. Die Verbindung von Menschenrechten und Klimaschutz stelle gerade die rückwärtsgewandte und damit eingeschränkte Temporalität der Menschenrechte in Frage. Der Einschätzung von Rodriguez-Garavito ist durchaus zuzustimmen. Auch ohne vertiefte Kenntnisse von Klimaklagen und Menschenrechten leuchtet es ein, dass im Zeitalter des Anthropozäns, der planetaren Grenzen und drohenden Kipppunkten die Vorsorge, Vorbeugung und Risikominimierung, kurzum Formen und Aktivitäten der Antizipation, zum wesentlichen Instrumentarium der Governance zählen. Erkennt man in Klagen ein Instrument des Klimaschutzes, so drängt

 DOI 10.17104/0044-2348-2024-4-1007

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

sich auch hier eine in die Zukunft gerichtete Betrachtung auf. So einleuchtend die Annahme von Rodriguez-Garavito ist, so kurz bleiben die theoretischen Ausführungen zur Rolle der Menschenrechte und ihrer Temporalität insgesamt. Leider konnte der Band den insoweit wegweisenden Klimabeschluss des Bundesverfassungsgerichts nicht mehr berücksichtigen, wohl weil dieser nur wenige Monate vor Veröffentlichung des Bandes erging. Ebenso wenig fand die deutlich später verabschiedete Entscheidung des Europäischen Gerichtshofs für Menschenrechte (EGMR) in der Sache *KlimaSeniorinnen gegen die Schweiz* Eingang in das Werk. Beide Entscheidungen sind angesichts ihrer weitreichenden Ausführungen zum Thema Klimaschutz und Menschenrechte, sowohl im Hinblick auf die Temporalität als auch die Betroffenheit und Klagebefugnis der KlägerInnen, für eine wie von Rodriguez-Garavito dargebotene theoretische Aufbereitung von Klimaklagen zukünftig aufzunehmen.

Noch in Teil 1 des Werkes und damit prominent platziert folgen den theoretischen Ausführungen wesentliche Einblicke in das Phänomen der Klimaklagen aus rechtssoziologischer Sicht. *Vanhala* ergänzt die theoretischen Grundlagen der HRCC durch einen Blick auf Klimaklagen im Lichte der *legal mobilization*. Den „Erfolg" von Klimaklagen weiter fassend, etwa indem nie rechtshängig gewordene Fälle einbezogen werden, will dieser Teil die Fragen beantworten, wer das Recht wie, zu welchen Zweck und mit welchen Effekten nutzt. Damit geht das Kapitel nicht nur der Frage der empirischen oder sonstigen Effektivität bzw. Effizienz von Klimaklagen nach. Vielmehr schaffen die Ausführungen ein Verständnis für die demokratische und soziale Legitimation von Klimaklagen. Es sind gerade diese letztlich rechtssoziologischen Betrachtungen sowie die anschließenden Kapitel, welche den besonderen Reiz und Erkenntniswert des Werkes ausmachen.

Sodann blicken Batros und Khan auf das Phänomen strategischer Prozessführung im Allgemeinen und den möglichen Erkenntnisgewinnen für Klimaklagen. Wenngleich die Einordnung von Klimaklagen als strategische Klagen keineswegs neu ist, gewährt die hier gewählte Perspektive im Sinne einer Analyse von „mistakes made" und „lessons learned" nicht nur wesentliche Einblicke, wie strategische Klageführung funktioniert, sondern gibt gerade auch PraktikerInnen Beispiele für das Potenzial und die Gestaltung von HRCC. Ein ähnliches Vorgehen zeigt das Kapitel zum Vergleich von Klimaklagen und der sog. „equality litigation". Auch hieraus, so belegen die Ausführungen, können für Klimaklagen Erkenntnisse und Gestaltungsmöglichkeiten gewonnen werden. Lerneffekte wollen auch die AutorInnen letztlich angesprochen wissen, wenn sie im Zusammenhang mit Klimaklagen und sog. „low-profile"-Klagen von einem möglichen „butterfly-effect" der Klimaklagen sprechen. Ungeachtet der nationalen Dimension der Klimaklagen ergebe

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

demnach der „bottom-up mechanism“ unter dem Pariser Abkommen die Möglichkeit, Klimaklagen in ihrer Gesamtheit und damit als mehr als die bloße Summe einzelner Klagen auf nationaler und supranationaler Ebene zu betrachten. „High-profile cases“ gegen sog. „major carbon emitters“ widmet sich demgegenüber Setzer. Die Analyse der Effekte dieser „high-profile cases“ erweist sich nach Setzer keineswegs als einfache Aufgabe. Wenngleich Setzer die Notwendigkeit dieser Analyse dennoch erkennt, nicht zuletzt um die Kosten und Effekte von Klagen für PraktikerInnen abzuschätzen, kann an dieser Stelle keine abschließende Antwort geliefert werden. Nichtsdestotrotz sind es gerade diese durchaus auf eine gemischte Leserschaft, bestehend aus PraktikerInnen, ForscherInnen und Nicht-JuristInnen, gerichteten Kapitel des Werkes, die es insgesamt aus der Fülle der Literatur herausheben. Nicht minder bedeutsam, jedoch eher theoretischen Untersuchungen zuzuordnen sind die Kapitel von Marjanac, Jones sowie Khalfan, die sich der Frage des rechtlich und gerichtlich handhabbaren Maßstabs bzw. der Frage der Verantwortlichkeit individueller Staaten widmen.

In Teil 2 adressieren Auz sowie Lin und Peel Klimaklagen im Globalen Süden. Diese und weitere Kapitel mit Ausführungen zum Globalen Süden gewähren sonst wenig beachtete Einblicke. Auz etwa zeigt überzeugend, dass Gerichte im Globalen Süden nicht nur Klagen annehmen, sondern sogleich „remedies“ gewähren. Problematisch sei hierbei, dass sie die Klagen und damit auch die von den Gerichten ausgesprochenen Abhilfemaßnahmen an Länder des Globalen Südens richten, die wenig oder gar nichts mit dem Klimawandel zu tun haben. Die Verpflichtung der Staaten zur internationalen Zusammenarbeit könnte nach Auz ein geeignetes Mittel sein, dieses Problem anzugehen. Demnach müsse der traditionelle Menschenrechtsansatz zur Wiedergutmachung für Entwicklungsländer, die nicht in vollem Umfang für die Auswirkungen des Klimawandels verantwortlich sind, geändert werden. Lin und Peel bemühen sich um das Identifizieren spezifischer Charakteristiken von Klimaklagen im Globalen Süden und um eine Kategorisierung anhand von sog. Prototypen. Unter Einführung ebenso untechnischer wie überzeugender Prototypen (beispielsweise dem „grassroots activist“ und dem „hero litigator“) zeigen die Autorinnen, dass Klimaklagen im Globalen Süden keineswegs ein zeitlich verzögertes Phänomen zu vergleichbaren Verfahren im Globalen Norden darstellen. Vielmehr, so die Autorinnen, bestehe aufgrund der Spezifika und auch der aufgezeigten Prototypen Raum für gegenseitiges Lernen für zukünftige und laufende Klimaklagen.

Auch der dritte Teil des Werks liefert anhand wissenschaftlicher Untersuchungen zahlreiche Erkenntnisse nicht nur für die Wissenschaft, sondern gerade auch für die Praxis. Unter dem Teilabschnitt *„beyond law“*, finden sich Kapitel zur Rolle der Wissenschaft in Klimaklagen, zur Beweisführung

 DOI 10.17104/0044-2348-2024-4-1007

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

und strategischen Klimaklage. Letzteres betont die Potenziale kollaborativer und koordinierter Untersuchungen und Beweisführungen in Klimaklagen. Während das Aufgreifen rechtlicher Argumentationsmuster in (strategischen) Klimaklagen über nationale Jurisdiktionsgrenzen hinaus etabliert ist, so erscheint die organisierte Zusammenarbeit auch im Rahmen des Tatsachenmaterials keineswegs zur Norm zu gehören. In diesem Teilabschnitt folgen aber auch Kapitel zu in rechtswissenschaftlichen Untersuchungen wohl sonst kaum adressierten Fragen der Visualisierung von Inhalten im Zusammenhang mit Klimaklagen.

Der vierte und letzte Teilabschnitt des Werkes enthält fokussierte Untersuchungen einzelner Verfahren bzw. Länderberichte. Diese Länder- und Verfahrensberichte vermögen, entgegen dem Ansinnen des Herausgebers und der Untertitelung des Teilabschnitts (Human Rights and Climate Litigation around the World), zwar keinen systematisierenden Blick auf globale Klimaklagen zu gewähren. Hierfür wäre richtigerweise eine deutlich umfassendere und tatsächlich systematisierende Auswahl an Berichten erforderlich gewesen. Nichtsdestotrotz liefern die einzelnen Berichte auch ohne übergreifende Kategorisierung und Systematisierung wertvolle Einblicke.

„*Litigating the Climate Emergency*" von Rodriguez-Garavito ist ein gelungener Sammelband, der sich in die bestehende Literatur der Klimaklagen-Forschung komplementär einfügt, insbesondere aufgrund seiner rechtssoziologischen Kapitel sowie der zahlreichen Perspektiven von und für PraktikerInnen und die ausdrückliche Einbeziehung und Reflektion zu Klimaklagen im Globalen Süden. Seinem eigenen Anspruch, die erste systematische Analyse von HRCC darzustellen, wird das Werk sicherlich nicht vollständig gerecht. Ebenso hätte der Sammelband insgesamt durch eine noch weiterreichende Fokussierung auf inter- und transdisziplinäre Beiträge, insbesondere solche aus der Praxis, an Profil gewonnen. Doch auch so sind gerade diese bislang unbekannten und innovativen Blickwinkel auf das Phänomen der Klimaklagen ein großer Gewinn für eine hoffentlich breite Leserschaft aus Wissenschaft, Praxis und Gesellschaft.

Michael Kalis, Berlin

DOI 10.17104/0044-2348-2024-4-1007

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

***Mahlmann, Matthias*: Mind and Rights. The History, Ethics, Law and Psychology of Human Rights.** Cambridge: Cambridge University Press 2023. Open Access: DOI:10.1017/9781316875520, xiv, 500 pp. ISBN 978-1-107-18422-0 (hardback), 300 pp. £ 110.00. ISBN 978-1-31688015-9 (eBook), $ 44.99 USD

As I write these lines, the world in which we live is going through a complex moment of violence that is cruelly destroying life and threatening the peace and the international legality of human rights that have been built up since the second half of the 20th century. The human aspiration of non-repetition underpinning this system, which in some contexts came alive as a promise of "never again" in the face of atrocities during that century, seems to be disappearing.

For those of us who advocate for the Law as the antithesis of war, it is sometimes challenging in current times to justify and promote among the new generations, whether in classrooms or in texts, those mechanisms that are currently in a sort of *impasse*. While human rights have always been at stake, throughout history and across the globe, this is a particularly important moment. Perhaps, as never before, some of the most defining paradigms of Western societies are seriously questioned and become signifiers, prompting us to reimagine them: democracy, economic development, the Rule of Law, the common good […] it is then when a convincing notion of human rights becomes urgent.

I write from a place where it is impossible to think or speak about human rights without recalling the recent genocide of the Mayan people during the civil war (Guatemala, 1980 s). This terrible event took place in the same century that witnessed the genocides in Rwanda and Armenia, as well as the Jewish Holocaust. That is why, at this particular moment, I find it very encouraging that Matthias Mahlmann is devoting his talent to this extraordinary work, which will be central to human rights studies, not only from the perspective of international law, philosophy of law or legal theory, but also from an interdisciplinary point of view.

Mind and Rights presents an extraordinary synthesis of thought, drawing on disciplines such as history, philosophy, normative theory, political critique, and the new contributions of moral psychology, cognitive psychology, and neurosciences. It is a work that, from a broader and more complex perspective than that offered by legal theory, invites us to rethink and debate the concept and foundations of rights. From doubting the sufficiency of the epistemological validity of the moral foundations constitutive of the human rights project, Mahlmann embarks on a path of profound reflection through history, normative justification, and the psychological foundations of rights.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Along the way, he makes it clear that in order to take a broader view of the problems, it is important to move beyond closed compartments. He thus invites us to build bridges, both between the various fields of scientific knowledge and between them and the various epistemologies and fields of knowledge that have functional equivalents of human rights, even if they are not explicitly presented in the normative and legal framework we know from Western legal tradition. Mind and Rights is in itself a hermeneutic bridge. Its meta-text constantly reminds us of the importance of bridges for understanding among individuals and peoples.

The book is structured into three parts and eight chapters. The first part is devoted to debates on the concept of human rights and their global history. The second part addresses various reflections on the justification of rights. The third and final part introduces the relationship between rights and moral cognition. Three major segments with central lines of argumentation from which fundamental contributions to the theorisation of human rights in the 21st century can be drawn.

The first is that rights have deep roots in history. Mahlmann approaches this idea by problematising history as a linear trajectory of strictly normative achievements, while highlighting a reality of advances and setbacks, disputes, and long pauses in the recognition of rights. Thus, he validates struggles for human rights at different times and places around the world. The author asserts that the history of human rights: "must be the history of often very mixed achievements, of slow and discontinuous developments, of dead-end roads and noble ideas buried in tragedy. It must be a history of ideas, actions and institutions as imperfect as the beings who drove this project forward through time. The fact that there are many unsavory chapters in the history of human rights thus comes as no surprise." (p. 91).

This conception broadens the view of history by closely linking it to the struggles of individuals who have shaped rights over time, not always through declarations or legal instruments. One of the main contributions of the book is thus the invitation to consider within the debate normative ideas that are not necessarily human rights, but remain important for their history, because, as the author asserts: "they contributed to the formation of those building blocks that ultimately became the material for the explicit concept of human rights" (p. 462). These ideas to be considered by legal theory and historical perspectives can refer to different examples: from legal norms that do not explicitly mention a right but promote it, as in the case of a law that provides for the non-official establishment of any religion, to the content of what people thought and felt during the *Scramble for Africa*, which are ideas that should be taken into account through channels such as oral history, even if they are not formulated in the technical language of an Amnesty Interna-

 DOI 10.17104/0044-2348-2024-4-1013

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

tional report. In other words, the book invites us to look for the idea of rights in the social practices and struggles of ordinary people throughout history.

From this non-conventional perspective Mahlmann argues the status of human rights as products of history, beyond the significance of history in understanding the foundations of human rights. As a result, he comes to the central conclusion in the first part of the book that: "History is key to the study of human rights but necessarily leads beyond its own confines to the theory of justification and the structural (not just historical) analysis of the faculties of human understanding that open the epistemic door to the cognition of human rights" (p. 75).

In the second part of the text, the author critically analyses normative justifications for human rights. He considers the explanations offered by anthropology, political theory, and normative principles. He highlights the contributions of anthropology to understanding the concept of human goods claimed in the context of rights. From the perspective of political theory, he also discusses the conditions (which are not always sufficient) for the enjoyment of these rights. Finally, he addresses the normative principles of justice, solidarity, and intrinsic human value to support the justification for protecting these goods.

This second part provides an in-depth synthesis of the theoretical debates and empirical tensions surrounding concepts such as moral autonomy or political agency. It also identifies these debates and tensions in explanations of the function of rights from systems theory, the economic analysis of law, discourse and consensus theories, contractualist theories, theories of needs and interests, or capability (opportunity) theory. As he carries out this theoretical deepening, Mahlmann discusses questions to be answered as well as formulates arguments about the justified goods protected by human rights, their place in a political theory and their normative foundations, as he holds: "in order to stand the test of critical reflection" (p. 325).

The third line of argument engages with sceptical approaches from psychology, cognitive neuroscience, and evolutionary theory, to explore their implications for the justification of human rights. While acknowledging the importance of knowing and deepening these debates, Mahlmann introduces his analysis in the interesting discussion of the *mental gizmo thesis*, which describes as follows: moral cognition is part of the dual process of the mind ("thinking fast" and "thinking slow", to use popular terms). Deontological judgments, as human rights, are part of fast thinking, activated by the ventromedial prefrontal cortex (VMPFC), an area of the brain associated with the production of emotion. There is a mental "gizmo" that yields such judgments involuntarily, unconsciously, as a product of the fast, automatic, and emotional operations of the human mind. These judgments are useful in

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

certain respects but should be disregarded as general guides for moral judgments because they systematically skew human moral rationality. The mental gizmo thus causes "moral illusions" (in the same way that the Müller-Lyer illusion causes visual illusions). Human rights are seen as products of the mental gizmo, useful as rhetorical devices and exploitable for good causes but without any claim to rationality as such and often quite harmful in their effects. Instead, truly rational moral thinking requires utilitarianism, which is slow thinking, activated by the dorsolateral prefrontal cortex (DLPFC), the cognitive control centre of the brain, and which should ultimately govern human moral reasoning (pp. 336-337). Mahlmann identifies and discusses the internal contradictions of the thesis and thus argues against the critique of rights as *cognitive illusions*, concluding that it is no reason to abandon the projects of struggle for recognition and enforcement of human rights.

In this third part, he engages with a long tradition of reflection that is absent from the deepest contemporary theorisations of rights: that which concerns the psychological underpinnings of ethical ideas, that is, how people mentally legitimise the normative concepts we accept as valid. Deepening practical philosophy's concern with the mental means by which human beings acquire moral knowledge is one of his major contributions. His dialogue with the sceptical claims and critiques of rights from cognitive psychology, moral psychology, and neuroscience constitutes a novel and powerful angle of vision and discussion. It both nourishes and problematises traditional discussions of the concept and foundations of rights (think about the diverse debates around human "reason and conscience") because they question the sufficiency and genuineness of the cognitive structures that establish the criterion of the truth of the propositions perceived as true.

In this interesting journey, however, Mahlmann finds promising theoretical approaches to argue that the structure of human moral psychology supports the human rights project. He argues that a sound analytic theory of morality is crucial as a starting point for further theorising about the nature and origins of moral cognition. From there, he upholds, one can attempt to reconstruct the psychological mechanisms underlying human moral judgement. The author concludes that: "Principles of egalitarian justice, of human solidarity, care and respect for human dignity, together with a sufficiently rich concept of human existence and a political theory of the means for human flourishing embedded in a plausible theory of mind and its place in natural history provide good reasons to believe that the idea of human rights is as well justified as anything ever has been in the history of fallible human thinking about morality and law." (p. 467).

This book is a fruitful starting point for many of the discussions that will take place about human rights in the 21st century. I believe that the book

 DOI 10.17104/0044-2348-2024-4-1013

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

opens up a number of challenging debates for their substantiation, in addition to the invitation and challenge to "step out of the box" and think about rights beyond the law. One of these, which I find particularly important, is that of the foundations of rights in their collective dimension. The main thread of the book, while clearly acknowledging the centrality of social struggles and thus the existence of international instruments of collective rights (think about the case of indigenous peoples), is based predominantly on liberal notions of the concept and foundations of such a conception of rights.

Nonetheless, the book also offers a variety of ways in which the predominant individual dimension of rights can be discussed and complemented with the collective dimension that is so important for different groups, minorities and peoples all over the world. Firstly, the author defends the idea of human rights as universal, but from a diachronic universalism that opens up and is constructed from a concrete pluralism of rights. Secondly, avoiding the dissociation of human rights and self-determination (the right that underpins collective rights) is a strong idea from the very first pages of the book. Finally, the author defends the need to know the experiences of slavery, colonial invasion and oppression from the voices of the very subjects who are living them and who have lived them. On the basis of these powerful ideas, which the book clearly argues for, it would be interesting to broaden and deepen the debate on the foundations of collective rights, such as the case of the rights of indigenous and Afro-descendant peoples, or the case of cultural minorities, in territories that have lived (and are still living) colonial relations.

Written out of a clear commitment to the principle of common humanity that unites us as readers from around the world, this book deserves not only to be read, but studied and debated. It is both an invitation to dialogue and an invitation to listen carefully. The debates, the reflections and, above all, the arguments that it offers us are tools for the fearless defence of the most fundamental human principles that we share in terms of rights. They are also reasons to commit ourselves to the pursuit of the interesting lines of research that it opens up, as well as to the search for and debate on political solutions to the problems of our times.

Mónica Mazariegos Rodas, Guatemala City

DOI 10.17104/0044-2348-2024-4-1013

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

***Duve, Thomas* and *Herzog, Tamar* (eds.): The Cambridge History of Latin American Law in Global Perspective.** Cambridge: Cambridge University Press 2024. viii, 550 pp. ISBN 978-1-316-51804-5 (hardback), GBP 120.00; ISBN 978-1-009-05904-6 (eBook), US$ 155.00; and Open Access DOI: https://doi.org/10.1017/9781009049450.001.

I. Introduction

Law in Latin America, contrary to recurrent prejudices, has been a transformative force that has influenced not only the internal development of the nations of the region but also global legal discourse. The work offers a thorough and sophisticated exploration of this legal evolution. The publication is the product of one of the research projects of the Max Planck Institute for Legal History and Legal Theory (Frankfurt).[1]

The book uses an innovative approach to situate the history of Latin American law within a global framework. Duve and Herzog assembled a team of scholars from the Americas and Western Europe, who have contributed relevant analyses ranging from the pre-colonial period to contemporary challenges of the twenty-first century. Each section of the book draws on different perspectives to describe and analyse the region's historical developments. Likewise, the work's common thread describes how the law has interacted with social, political, and economic factors, and critically reflects on the changes in European influences and the rise of the United States as the region's hegemon.

The authors are aware of the Eurocentric prejudice and stigma and the preponderance of the dominant centres of thought with which the region has been treated and understood as the amphitheatre of failed legal transplants. If in previous centuries knowledge was defined by production and reception in a subjugated manner, the 21st century calls for a more collaborative approach on equal footing. A research book such as the one discussed here exemplifies how it is possible to reconfigure this toxic pattern of exchange. Therefore, this review describes the book's main strengths and weaknesses in relation to the legal history of Latin America, which, viewed from above, highlights its main contributions to the ideas of the colonial era and independence(s), as well as its contemporary projection.

1 Research Project, The Cambridge History of Latin American Law in a Global Perspective, <https://www.lhlt.mpg.de/joint-project/the-cambridge-history-of-latin-american-law-in-a-global-perspective>, last access 21 June 2024.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

II. The Size and Paradox of Studying Latin American History

Editing a book about a continent is not an easy task, especially when it deals with a region as paradoxical as Latin America. From a global perspective, it is the region with most similarities in the contemporary world despite the more than thirty countries that it comprises, whose similarities are ostensible: language, religion, and political and social structures, among others. Therefore, the risk of falling into imprecise generalisations, anachronisms or homogenisations is high.[2]

In *Storia dell'idea d'Europa*, Chabod reflects on the good and bad reasons why the idea of Europe is invoked and calls for careful thinking about what 'Europe' is: '[W]e immediately become conscious of the enormous confusion which reigns in the minds of those who talk about it […]'.[3] *Mutatis mutandis* happens with the idea of Latin America and the paradox that arises from so many similarities and such profound differences to create a work and a pan-Latin American reading inserted in a global perspective. Hence, the authors' method of emphasising questions more than answers is plausible, and it processes more than results. Generalisations in a work such as this are impossible to avoid, which is why their value lies in the approach – that is, the general overview rather than the detail.

As is the case when studying the past of a region colonised by Europe, it is difficult to escape the omnipotent and omnipresent Eurocentric perspective on institutions and methods of understanding history. More than being the authors' problem, it is everyone's problem. Consequently, the importance of the work is in reflecting on how to think in a decolonial way in a region whose European domination exceeded three hundred years and whose republican era has recently surpassed just two centuries.[4]

III. The Parts of the Book and Key Aspects of Its Contributions

The reader will notice accurate criticisms of the anachronism more common than can be expected in literature and the need for an evolution towards

2 John Charles Chasteen, *Born in Blood and Fire: A Concise History of Latin America* (W. W. Norton & Company 2011).

3 Federico Chabod, Ernesto Sestan and Armando Saitta, *Storia dell'idea d'Europa* (Laterza 1984), 8.

4 On this point, see: Walter D. Mignolo, 'The Geopolitics of Knowledge and the Colonial Difference', South Atlantic Quarterly 101 (2002), 57-96.

 DOI 10.17104/0044-2348-2024-4-1019

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

a more critical and decolonising historiography. At the same time, the authors address the question of how law is produced and how it relates to other ways of making history. To answer this question, the authors point out aspects of intersection with other historical disciplines and the relevance of understanding the history of law as communicative processes of interaction with diverse cultures and normative values. The authors describe the key to understanding the way in which legal norms and practices circulate in the region according to the periods addressed.

As for the question of history's scope and how its study can be improved in the region, parochialism is strongly attacked by closing the very borders within which history constantly moves. Thus, the importance of a legal history that transcends the fiefdoms of study and goes further as a block to insert itself into a global dialogue.[5]

In the first part of the book, Petit, Herzog, Duve, and Dias answer the question: What is the history of Latin American law in a global perspective? Therefore, the reader will find an analysis of how writing the history of Latin American law has changed over time along with the influences of historiographical currents such as positivism, Marxism, and postcolonial historiography.

Cunill examines the historiography of indigenous law and suggests keyways to approach it and addresses how difficult it is usually documented and studied. The author emphasises the important challenges and biases associated with working with historical records created by colonisers, which often reflect distorted and biased views. The chapter highlights the evolution of indigenous legal history through the involvement of multiple actors, global dynamics, and critiques of the Atlantic imperial influences. It emphasises the transformation of precolonial law via complex negotiations and indigenous participation in colonial structures, while acknowledging power asymmetries.

Zamora analyses how norms regulated life within the domestic unit in the colony and under the domination of the *pater familias* and reviews how European, indigenous, and Afro-descendents regulations interacted in everyday life. His approach demonstrates the complexity of domestic relations and power dynamics in the colonial context, showing how laws and norms attempted to control and structure family life.

On 'independences', with an emphasis on the plural, Herzog reflects on the characteristics of a revolutionary law, focusing on the laws and regulations that emerged during the independence processes in Latin America. His

5 See Tamar Herzog, 'Colonial Law and "Native Customs": Indigenous Land Rights in Colonial Spanish America', Am. J. Legal Hist. 43 (1999), 117-146.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

chapter discusses how these laws reflected revolutionary enthusiasm and sought to establish new power structures and how to regulate that power. In addition, Herzog reviews how law contributed to the social and political transformation of colonies into independent nations, highlighting its crucial role in the struggles for independence.

Regarding the formation of states in the nineteenth century, Portillo analyses the appearance of the first Latin American constitutions, highlighting the influences of the Creoles[6] and ideologies, as well as the impact of European hegemonic powers at the time of their creation. Parise discusses attempts to codify laws, highlighting European and local influences, and comparing them to processes in North America and Europe. Dantas and Saba focus on indigenous resistance and slavery in the formation of Latin American states.

Zimmerman addresses the omnipresence of the state in the twentieth century and examines the growth of the administrative state in Latin America, highlighting the expansion of bureaucracy and the centralisation of authority in response to economic and political changes. Paixão explores dictatorial regimes and their impacts on democratic institutions, and Teitel and Vegh discuss transitional justice and the role that the inter-american human rights system has played in the face of human rights violations.[7]

Finally, Bonilla ventures to ask whether state law will be able to survive in the twenty-first century. To do this, he examines how it has persisted and adapted to new situations. Through legal pluralism and interculturality, the author emphasises the coexistence and conflict between various normative systems and how state law interacts with community and indigenous norms.

Overall, *The Cambridge History of Latin American Law in Global Perspective* is an ambitious and necessary effort that undoubtedly represents a sophisticated reading of the history of law in Latin America from several points of view. As positive and negative aspects to highlight, it is a work written for academic peers, whose rigour may make it difficult, but not impossible, for a broader audience to understand. At the same time, from a visual point of view, there are no maps, archival images, illustrations, or timelines to help readers understand centuries of history.

The variety of methodological approaches proposed throughout the book can be overwhelming for readers and makes it difficult to harmonise and integrate different perspectives. In addition, the aim to offer a global vision

6 Matthew C. Mirow, Latin American Constitutionalism: The Constitution of Cádiz and Its Legacy in Spanish America (Cambridge University Press 2015).

7 Mauricio García Villegas, 'Law as Hope: Constitutions, Courts, and Social Change in Latin America', Fla. J. Int'l. L. J. 16 (2004), 133-154.

 DOI 10.17104/0044-2348-2024-4-1019

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

sometimes leads to an overgeneralisation of specific regional experiences, which dilutes the particularities and nuances of local contexts.

The persistence of Eurocentric approaches is palpable, despite efforts to adopt a postcolonial perspective. The appreciation of local innovations and adaptations in the history of Latin American law is limited by this bias, which, as already expressed above, is a latent problem when studying a continent.

In the Americas, there are multiple 'Americas': South, Central, and North, along with the Caribbean, each possessing distinct yet interconnected characteristics. In Europe, from a general or concrete perspective, can we similarly speak of multiple 'Europes' – Western, Central, and Eastern? Yet, these distinctions are frequently homogenised into a singular concept: 'Europe'. This Eurocentric tendency toward homogenisation despite significant internal disparity and nationalism, driven by a history marked by savage violence, introduces biases that are often replicated when studying other systems.

On the other hand, the excessive focus on political elites and their ideological influences offers a vivid reflection of Latin American history from above in a top-down perspective, relegating the popular classes and other marginalised groups (indigenous peoples, Afro-descendants, women, peasants, etc.) to the background.

Some chapters contemplate an optimistic attitude of institutions that underestimate the historical as well as contemporary obstacles and limitations of normative systems to understand the past from the present and the challenges of the future. Another important aspect to consider is the idealisation of legal pluralism without adequately resolving the tensions and practical conflicts between various regulatory systems, both at the national and supranational levels, in a region that from its constitutional sources and international treaties has promised Latin American integration in the economic, political, and social spheres. This aspect of regional integration and the relevance of the Latin American *ius commune*, which has been there since the independence processes, is perhaps the greatest omission of the book.[8]

According to Carozza, four fundamental elements highlight Latin America's contribution to global public law: (i) independence from Spanish colonisation; (ii) the discourse of rights in republican revolutions; (iii) the articulation of social and economic rights in the Mexican Constitution of 1917; and (iv) the contribution in the genesis of the Universal Declaration of Human

8 Among other works, see: Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017).

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

Rights.[9] A fifth element with the capacity to amalgamate these precedents has emerged during the second half of the twentieth century and lies precisely in the understanding that there is not only a *Latin American corpus iuris* but also a Latin American common law (ius commune latinoamericanum). This aspect is essential to understand Latin American law from local, national, regional and a global perspective.[10]

The publication of *The Cambridge History of Latin American Law in Global Perspective* is welcome, and I recommend the book for anyone who wants to understand the complexities and historical dynamics that have shaped the Latin American legal landscape. Translations into Latin American Spanish and Brazilian Portuguese would increase the work's impact and accessibility, allowing a wider audience in the region to benefit from its important contribution to the field of legal history.

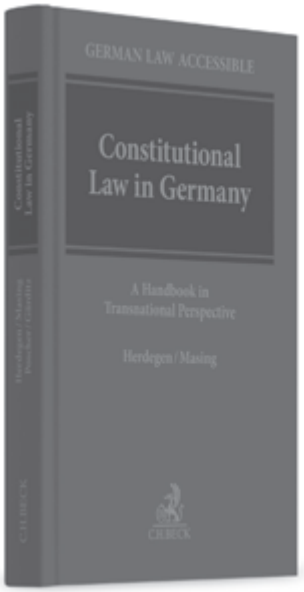
Juan C. Herrera, Bogotá, Colombia / South America

9 See Pablo G. Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', HRQ 25 (2003), 281-313.

10 Juan C. Herrera, 'The Idea of a Common Law in Latin America in Light of its Critiques', I CON 19 (2021), 1385-1416, https://doi.org/10.1093/icon/moab106.

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

German constitutional law
in Transnational Perspective



Herdegen/Masing/Poscher/Gärditz
Constitutional Law in Germany

2025. Approx. 2.000 pages.
Hardcover approx. € 249,–
ISBN 978-3-406-81608-6
New in November 2024

www.beck-shop.de/36523810

The Handbook

presents German constitutional law in a transnational, comparative perspective that will enable foreign jurists to gain, in the space of a chapter, a solid understanding of both the bases and nuances as well as some of the complexities of German constitutional law. Already published in German, the Handbook will also appear in an English version. The German version focusses on the international, supranational, and comparative influences on German constitutional law.

Advantages at a glance

- a new perspective on German Constitutional Law
- incorporates several legal methods, particularly doctrinal analysis, the interdisciplinary integration of empirical findings from the social sciences, and various sub-methodologies of comparative law and theoretical analysis
- integrated into an analysis of historical developments and experiences

A helpful book

for both German and foreign specialist audiences open to cross-border legal thinking.

Please order at your bookstore or at: **beck-shop.de** | Verlag C.H.Beck GmbH & Co. KG | 80791 München | Fax: +49 (0) 89/381 89-358 | orders@beck.de | 176851
Follow us More information: ch.beck.de/socialmedia

C.H.BECK

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -

beck-online
DIE DATENBANK

4 Wochen kostenlos testen!
bo.beck.de/0219310

Europarecht
Rechtssicheres Know-how garantiert

Schnell, sicher & smart – mit den Fachmodulen von beck-online gestalten Sie Ihre Fallbearbeitung noch rascher, effektiver und zuverlässiger. Einmal mit beck-online gearbeitet, wollen Sie nie mehr darauf verzichten – garantiert!

Europarecht PLUS

PLUS

Die ideale Grundausstattung für Ihre tägliche Arbeit: Führende aktuelle Kommentare zu den europäischen Verträgen, wie z.B. die große Sammlung von **Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union,** oder **Callies/Ruffert, EUV/AEUV,** maßgebende Kommentierungen zum Europäischen Sekundärrecht sowie zum Kartell- und Wettbewerbsrecht, zu Beihilfen, Grundrechten und Rechtsschutz, umfangreiche und aktuelle Rechtsprechung im Volltext, dazu EuZW, EuR, euvr und ZaöRV, aktuelle Vorschriften und vieles mehr, intelligent und komfortabel verlinkt.

€ 124,–/Monat* | Modulvergleich & Preise online: bo.beck.de/021931

Europarecht PREMIUM

PREMIUM

Für komplexe Herausforderungen und ein breiteres Meinungsspektrum: Dieses PREMIUM-Modul kombiniert die aktuellen Kommentierungen mit weiterführender Literatur zum europäischen Primärrecht und ausgewählten Bereichen des Sekundärrechts. Mit Highlights wie **Schwarze/Becker/Hatje/Schoo (Hrsg.) EU-Kommentar (Nomos), Geiger/Khan/Kotzur/Kirchmair, EUV/AEUV** oder **Ehlermann, Bieber, Haag, Handbuch des Europäischen Rechts – HER (Nomos)** u. a.m.

€ 194,–/Monat* | Modulvergleich & Preise online: bo.beck.de/109831

*Normalpreis für bis zu 3 Nutzer, Vorzugspreis verfügbar, zzgl. MwSt., 6-Monats-Abo

Verlag C.H.BECK oHG, Wilhelmstraße 9, 80801 München | 158688 | Folgen Sie uns auf Mehr Infos: ch.beck.de/socialmedia
Irrtümer, Preisänderungen und Druckfehler vorbehalten.

beck-online.DIE DATENBANK genügt.

C.H.BECK

https://doi.org/10.17104/0044-2348-2024-4 - am 02.02.2026, 22:47:06. https://www.inlibra.com/de/agb - Open Access -