ATHENA

Critical Inquiries in Law, Philosophy and Globalization

VOLUME 2.1 /2022

Global Justice: Current Situation and New Challenges

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ISSN 2724-6299 (ONLINE) https://doi.org/10.6092/issn.2724-6299/v2-n1-2022

Publisher

CIRSIFD – AI
Alma Mater Studiorum
University of Bologna
Via Galliera, 3 40121
Bologna (Italy)

Publication Service

AlmaDLJournals
Open Access Scientific Journals
by AlmaDL University of Bologna Digital Library

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

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Foreword

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At the moment we are writing this foreword Russia has militarily invaded Ukraine and the spectre of a nuclear war hovers over all of us. If one thinks of the concept of '*justice*' in the international legal order in this particular historical time, it might seem pointless even to deal with the matter from a theoretic point of view. But it is even more necessary at times like these to continue to support rational and critical thinking, because only as rational animals humans can be distinguished from other sentient beings, and the proper of humanity, as Arendt would say, is to innovate, to create something new.

In this sense, the concept of justice represents one of the strongest arguments based on which throughout the centuries, and at least starting from the just war theory, theologians, philosophers and jurists have tried to call for the regulation of the action of States in the international domain. Therefore, it is not surprising that the concept of 'justice' in the international legal order

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/14647

take different forms depending on the philosophical thought one wishes to follow or the scientific approach one wishes to apply.

For international theorists, international justice refers to the power of an international court or tribunal, chosen by the parties, to evaluate the legal arguments put forward by both of them and decide on the submitted case.[1] Therefore, the idea of international justice is purely *adjudicative*; or there can be *retributive justice* when the responsibilities associated with the violation of an obligation arise and entail the consequent duty to repair the caused damage.[2]

The modern international legal methodologies, however, are undergoing significant transformations that are now orienting the idea of justice to a broader context. We are, therefore, faced with a *global* configuration of justice, where not only the classical theories of international jurisdiction are composing the idea of a *forum*, but different methodological, theoretical, disciplinary, and cultural issues are influencing this configuration and progressively leading to its evolution. The global perspective, therefore, allows the concept of 'justice' to leave the traditional legal positivist groove and to broaden its theoretical and methodological horizons. By this broad openness, the taken applications and theoretical shaping are also different. The form of global justice is not only that which is practised before international courts and tribunals but is resolved in the application of common principles that are fair, reasonable, and giving a "sense of justice" to the international order (Onuma, 2010, 252).

Global justice, therefore, also becomes *distributive*. In this sense, there are not only distributions of rights, but also of legal goods, especially those natural resources that are fundamental in a sustainable development approach and that are derived from the International Community (Sen, 1999;

[1] This is generally derived from the general principle of peaceful settlement of international disputes, which has its explication in Article 33 of the UN Charter and in those provisions relating to the prohibition of the use of force, the possibility to legally settle international disputes between States and the combination of different means of dispute settlement.
[2] See Article 31 of the 2001 Draft Articles on International Wrongful Acts.

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/14647

Nussbaum, 2011, 113). Indeed, the International Community has repeatedly expressed a general interest in their protection and common enjoyment (Risse, 2013). This generated a sort of liberalist movement on global justice, by recognizing the necessary sustainment of principles of tolerance, cohesion, and realism in the global justice idea which might be at the core of the international legal order, as John Rawls expressed in his *The Law of Peoples* (Rawls, 1999; Kuper, 2000). Furthermore, can a 'pluralist' approach be conceived in international law and global justice *per se*? If we look beyond the structure of the international legal system, the philosophy behind it begins to reveal relevant questions about the cultural and political hegemony here present. A global society must also be a *pluralist* society, thus leading to a *transcivilizational* concept of international law (Onuma, 2010). This perspective also considers civilizational, cultural, and religious differences as relevant. It is only in this sense that the adjective "*global*" takes on a complete and functional physiognomy that accounts for the different perspectives and exigencies which are present in a pluricultural society.

It is within the above described interdisciplinary and pluralist framework that the Athena call for papers on 'Global justice: the current situation and the new challenges' was conceived, including researchers outside the pure international law field. For instance, the so-called processes of 'constitutionalization' of international law and 'conventionalization' of constitutional law (Reposo 2012, 28-30; Chang, Yeh 2019; Sagüés 2011) have contributed, since the second half of the past century, to a reciprocal enrichment of both disciplines, regarding in particular the guarantee of human rights. Besides, from a comparatist critical perspective, the adjective 'global' – ascribed both to 'law' or 'justice' – evokes suspicions of ethnocentrism and neo-colonialism, that can be overcome through the comparative methodology (Pegoraro 2014). Comparative law is based on a broader idea of what the 'law' is (Tamanaha 2016), on the analysis of legal formants instead of the sources of law (Sacco 1991), on the recognition of legal pluralism as a physiological manifestation of cultural diversity, and on the need to nurture

ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/14647

legal sciences with methods and contributions from other sciences. So, in this sense, it is not properly the law that is global, but instead the lawyer, who must approach the study and the practice of law with a global (comparative) perspective (Bagni 2017).

In a time of peace (unfortunately, a very unwanted consequence in wartime is that long-lasting crucial substantial issues are overshadowed by the immediate conflict drama), as the contributions to this issue very clearly highlight, there are in particular two justice issues that are intrinsically 'global', in the sense that they impact and affect the entire humanity, and would necessarily ask for common and coordinated policies from the international community to be effectively tackled and finally solved: the environmental crisis, on one hand, as recently re-stated by the IPCC, in the 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change', released on the 28th of February 2022; and the 'social' crisis, on the other, which corresponds to n. 1 Sustainable Development Goal 'No poverty', and urgently asks for the realization of an inclusive society and a Caring State, able to take care of all vulnerable living subjects (Bagni 2021).

In this context too, approaches to thinking about international law also make it possible to advance precise points of legal and political reform. Examples of this are *Third World Approaches to International Law* (TWAIL; see Eslava and Pahuja, 2011). This conception considers relevant the third-world perspective as different from the mere post-colonialist and late-imperialist conception of international law. These are approaches that can go beyond a hegemonic political imposition, but without distorting the function of international law as a regulator of relations between the actors of the International Community (Anghie, 2005). Global justice, therefore, also follows this course and becomes *cognitive* of the differences between cultures, but especially between the North and South of the world (Santos da Sousa, 2007; Barreto, 2014). This also implies the creation of a universe that

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is a *unicum*, but "pluralist", complex and not singularly addressed, and by this is even closer to a transcendental ideal of the *universal* (Anghie, 2005). From the epistemology of the South perspective, a transcultural approach to this issue has generated the idea of 'Pluriverse', as opposed to 'Universe', that can be defined as 'a world in which many worlds fit' (Kothari et al. 2019).

In this context of the renewal of the conception of global justice, this issue offers some theoretical and doctrinal perspectives that can provide a comprehensive examination of the related problems and solutions in international law. The authors who have engaged in these discussions have provided their visions of global justice and the challenges that are characterizing it:

Elisa Piras attempts to critically evaluate the consequences of the recent pandemic situation on global justice for both human beings (as for the enjoyment of fundamental freedoms) and environmental capabilities, arguing the need for a conceptualization of rights and duties from a multidimensional perspective.

Anthi Koskina and Konstantina Aggelopoulou attempt to explain the increasing importance of space sustainability, proposing it as a paradigm for the contrast to climate change with a global effort to preserve this capability.

Matheus Gobbato Leichtweis seeks to frame the problems arising from the implementation of the 2030 Agenda within the framework of philosophical theories of international law, emphasizing the historical and materialist fundaments of International Law and the role of international lawyers as promoters of addresses of the political and philosophical changes of the international legal order.

Ozlem Ulgen deals with the application of the utilitarianist theories of global justice to a particular aspect of the law of armed conflict, focusing on different cultural perceptions and perspectives on the "no-harm" duty in warfare.

Juan Pablo Goméz-Moreno goes at the very heart of international justice and tries to explain the interactions between investment arbitrations and political transition through a global justice perspective.

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Finally, *Kurtul Aytekin Kaan* explains how recourse to unilateral measures has gone beyond their mere qualification as measures of *extrema ratio* and have been used to impose the hegemonic power of certain states, heavily shifting the balance.

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ISSN 2724-6299 (Online)
https://doi.org//10.6092/issn.2724-6299/14647

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CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Post-Pandemic Frontiers of Global Justice. A Preliminary Analysis

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ABSTRACT

The socio-political effects of the current pandemic crisis tend to reproduce and reinforce inequalities within societies and at the global level. Moreover, the ongoing situation has provided the occasion for increasing awareness on the risks associated with the current ecological crisis. This article presents and discusses the challenges that the pandemic crisis poses to theories of global justice, relying on Martha Nussbaum's work on the frontiers of justice and expanding its scope to include a fourth frontier. Within the context of growing inequalities in the individuals' endowment of resources and opportunities and of stricter restrictions on freedoms, a liberal conception of global justice should focus on conceptualizing rights and duties of justice from a multidimensional perspective. The increase in inequalities in a global scenario characterised by vulnerability and interdependence requires comprehensive solutions, both redistributive (towards people and peoples) and regenerative (towards the ecosystem).

Keywords: global justice, inequality, Nussbaum, covid19, environmental justice

ATHENA
Volume 2.1/2022, pp.1-28
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14242

1. Did the Virus Make us More Equal?

In the first weeks when Covid-19 hit the scene, an idea went the rounds that the virus was a democratic leveller – it could strike whomever it liked, when it liked.[1] Many hoped the calamity would breed inclusive, transformative reactions/relations of solidarity. But all too soon, in fact, social isolation and pressure on health services showed the virus-leveller image to be an illusion: under the health emergency, inequalities persisted or increased among individuals both across different societies and within one and the same. The pandemic revealed that, in terms of age, gender, profession, prior state of health and place of residence, certain categories of people were more prone than others to catching the virus and having serious or potentially lethal complications. Especially in the first weeks after the start of the pandemic emergency, some scholars advanced the idea that the perception of a common unprecedented risk making us vulnerable in our own bodies could generate a new sense of shared responsibility and care, stimulating institutions to search policies based on egalitarian principles (Loretoni 2020) or appealing to citizens' capacity to adapt their understanding of liberty and autonomy upholding solidaristic practices towards vulnerable people (Henry 2020).

However, when whole nations were forced into restrictions like social/physical distancing and confinement, differences of income, living or working conditions and access to primary care[2] came starkly to the fore and affected people's quality of life, aggravating the inequalities caused by the

[1] This idea is in line with that of certain historians who see traumas striking society as a whole – wars, revolutions, state failure and epidemics – as inequality-reducing 'forces' (Scheidel 2017). Recently, slightly more nuanced interpretations have been proposed, looking at the unequal impacts produced by these phenomena on different groups (Breccia and Frediani 2020). Phillips (2020) has published a comparative study producing evidence that, over the last two centuries, different pandemics have produced different impacts on societies.

[2] To survive the pandemic at all well one needs to be able to work, study and socialize from home: hence to have a good Internet connection. During the emergency the debate over the human right to an Internet connection has returned to the fore. One supporter of that right is the former European Parliament President David Sassoli: https://www.europarl.europa.eu/the-president/en/newsroom/sassoli-access-to-the-internet-must-be-recognised-as-a-new-human-right

ISSN 2724-6299 (Online)
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natural and social lottery, i.e., the contingency of being born in a certain place and social context rather than another and with a certain endowment (or absence) of talents and abilities.

In recent years, there has been much talk of worldwide mounting socioeconomic inequalities. Influential economists have revealed a trend over the decades towards greater inequality within nations and across the globe (Piketty 2013, 2020; Milanovic 2018; Stiglitz 2016; Atkinson 2015); it has recently been debated whether the economic crisis that set in with 2008 may have reduced the gap worldwide (Milanovic 2020). But even if were such an inversion of trend is to be confirmed by further studies, it would only amount to a minimal reduction in world inequalities. According to data from the United Nations Development Programme (UNDP), in 2020 the percentage of income going to the poorest 20% of the population had remained less than 2%, while the quota enjoyed by the richest 1% (the threshold for membership of which is around 32,000 dollars) had risen from 18% (1990) to 22% (2016). In a recent analysis, Nobel laureate Joseph Stiglitz looks at the mid-term trend of the phenomenon, offering a cross-country comparative reading of the widening gap between the well-off and the worst-off in developed countries: "In the past twenty-five to thirty years the Gini index—the widely used measure of income inequality—has increased by roughly 29 per cent in the United States, 17 per cent in Germany, 9 per cent in Canada, 14 per cent in UK, 12 per cent in Italy and 11 per cent in Japan" (Stiglitz 2016, 137). In his analysis, Stiglitz agrees with Piketty and other economists in rejecting solutions based on so-called "trickle down" economic models: during the last four decades, contrary to the expectations of the supporters of trickle-down models, the income and wealth achieved by the best-off did not reverberate on the worst-off but turned into increased land rents, intellectual property rents and monopoly power (*Ibidem*, 143).

Of late the issue of global inequality has been aptly summarized by UN Secretary General, António Guterres, during a lecture that he delivered for the 2020 Nelson Mandela International Day:

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https://doi.org/10.6092/issn.2724-6299/14242

> Even before COVID-19, people everywhere were raising their voices against inequality. Between 1980 and 2016, the world's richest 1 per cent captured 27 per cent of the total cumulative growth in income. But income is not the only measure of inequality. People's chances in life depend on their gender, family and ethnic background, race, whether or not they have a disability, and other factors. Multiple inequalities intersect and reinforce each other across the generations, defining the lives and expectations of millions of people before they are even born.[3]

According to Guterres, to improve on the current situation we need to draw up a *new social contract* and a *new global compact*: the former should aim at fair income and property taxation as well as social protection policies to safeguard the weakest categories; the latter at fair globalization, human rights and dignity for all, living in harmony with nature, respecting the rights of future generations and success measured in human rather than economic terms.

In early October 2020 the President of the World Bank, David Malpass, listed the measures urgently needed to emerge from the pandemic-related crisis: redouble the international community's efforts to alleviate poverty and inequality; set mechanisms in action to prevent loss of human capital due to the pandemic; bring concrete aid to the poorest countries to render their public debt more transparent and curb it permanently with a view to attracting investments; lastly, promote the changes needed to achieve an inclusive, resilient rebound.[4]

[3] The video and transcription of the lecture delivered online on 18 July 2020 are available at: https://www.un.org/en/coronavirus/tackling-inequality-new-social-contract-new-era
[4] This was a speech delivered to the Frankfurt School of Finance and Management on 5 October 2020, a transcription of which may be found online: https://www.worldbank.org/en/news/speech/2020/10/05/reversing-the-inequality-pandemic-speech-by-world-bank-group-president-david-malpass.

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In their speeches both Guterres and Malpass talked of global justice, although none of them did mention the concept explicitly; they both claim that, wherever people live, they must share the same rights and opportunities for leading a dignified life and they affirmed that it is unjust where this is not the case.[5] Besides mentioning the main issues of inequality and poverty, they put forward proposals for making the international system fairer. Moreover, especially in Guterres' speech, there is explicit reference to contractarian(ish) solutions to tackle persistent inequalities at both the domestic and global level. Maybe unwittingly, both Guterres and Malpass injected the public transnational debate with ideas aligned with the main positions on global justice, namely cosmopolitanism (Caney 2005; Brock 2009) and liberal internationalism (Rawls 1999; Blake 2013).[6]

Although a thorough reconstruction of the characteristics of these two opposing (yet intertwined) fields of the contemporary normative reflection about global politics is beyond the scope of this article, it might be helpful to briefly clarify what I mean with the term global justice here. Following Thomas Nagel's example, I am using the concept broadly to refer to socioeconomic and political justice, focusing "on the application to the world as a whole of two central issues of traditional political theory: the relation between justice and sovereignty, and the scope and limits of equality as a demand of justice" (Nagel 2005). To simplify a very long and complex debate for the sake of brevity, as far as those two fundamental questions are concerned, both cosmopolitan and liberal internationalist accounts of global justice share the assumption that human beings are fundamental and primary subjects for moral concern and respect and have equal moral worth, but they

[5] Guterres explicitly connected inequalities to the asymmetric enjoyment of human rights, and he addressed the intersectional nature of inequalities: "Discrimination, abuse and lack of access to justice define inequality for many, particularly indigenous people, migrants, refugees and minorities of all kinds. Such inequalities are a direct assault on human rights. Addressing inequality has therefore been a driving force throughout history for social justice, labour rights and gender equality".

[6] By liberal internationalism I mean *in primis* John Rawls's attempt to extend the scope of his theory of justice beyond State boundaries and other theoretical accounts of that ilk, claiming that states have different obligations of justice towards citizens and strangers.

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locate the main institutions and the scope of (redistributive) justice differently.[7] While cosmopolitan thinkers envisage global schemes of redistribution, liberal internationalists think that justice applies primarily to state institutions (it has a domestic scope) and they see only a limited yet stringent duty of assistance towards disadvantaged peoples; at the same time, they think that it is normatively desirable to foster interstate cooperation to regulate and reduce the use of war and to avoid the occurrence of the "great evils of human history" (Rawls 1999, 6-10).[8] To say it with other words, cosmopolitanism aims to realise global redistributive justice, whereas liberal internationalism focuses on global political justice (Macdonald and Ronzoni 2012).

2. Pandemic Times and the Frontiers of Global Justice

The subject of global inequality is closely bound up with some of the most urgent problems of international governance as analysed from a global justice angle. These include reducing extreme poverty, planning and conducting effective policies of development cooperation, managing international migration, achieving worldwide health justice and substantial gender parity, as well as equal sharing of the adverse consequences of climate change and the ecological crisis (Armstrong 2019). In her critique of Rawlsian contractarianism, Martha Nussbaum (2006) identified three "frontiers", i.e., problems unsolved by Rawls's seminal reflection on justice as fairness, which she deemed too abstract and unable to deal with the complexity of contemporary societies. Her critique pointed in particular to three frontiers – disability, nationality and species belonging – which highlighted critical

[7] Here my distinction differs from Nancy Fraser's three-way depiction of the debate over the "who" of justice, because I use the term "global justice" in a broader sense and I do not equate global justice with global egalitarian redistribution (Fraser 2009, 33-37).
[8] With the expression "great evils" Rawls referred to "unjust war and oppression, religious persecution and the denial of liberty of conscience, starvation and poverty, not to mention genocide and mass murder" and he argued that all these phenomena "follow from political injustice".

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https://doi.org/10.6092/issn.2724-6299/14242

issues making any liberal institution or policy aiming at substantive empowerment or self-realization infeasible if based on a (difference-blind) conception of justice as fairness. Even if Rawls himself summarized the existence of at least four questions "to be asked later" with respect to the depiction of a political theory of justice – he enlisted the possible extensions of the theory to address intergenerational relationships, the law of peoples, temporal and permanent disabilities and "what is owed to animals and the rest of nature" –, he doubted that justice could answer all of them (1993, 20-22).

The "omissions" in liberal contractarianist accounts are especially worrisome because they entail the exclusion of those "agents whose contribution to overall social well-being is likely to be dramatically lower than that of others" (*Ibidem*, 20): since the contract logic presupposes that the parties expect a mutual advantage, those who are considered unable to take part in the exchange are excluded by default from the choice of the principles of justice. The most problematic aspect of this exclusion is that the supposed inability to positively contribute to the scheme of social cooperation is, in the majority of those cases, the product of a long history of oppression, exclusion and marginalization. Hence, according to Nussbaum (2020, 13-39), unlike Grotian-inspired accounts of justice based on natural law, contract-based accounts of liberalism tend to reproduce long sedimented injustices. Contract-based liberal accounts of justice for the domestic and global contexts, then, expel from the political and moral realm the plurality of subjects who live in our societies, entrusting the choice of the principles of justice – as well as their implementation – to fictional human characters devoid of concrete interests, needs, desires and feelings (Young 1990, 96-121).

From a pandemic angle, I here see these frontiers persisting despite closer attention being accorded to non-ideal aspects of justice by liberal political theorists and a stronger commitment than in the past being held on the part of liberal politicians and organisations that support states in international governance to pursue coordinated policies and actions aimed at improving

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https://doi.org/10.6092/issn.2724-6299/14242

living conditions globally.[9] In protracting the emergency situation, the pandemic has worsened living conditions for billions of people and heightened awareness of the persisting frontiers of justice, though not to an equal degree for everybody (Nussbaum 2011). To say it in other terms, the ongoing pandemic is negatively affecting the functionings (individuals' ways of being and acting) and capabilities of people. Nussbaum has proposed a list of ten fundamental or central capabilities – life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; control over one's environment – which constitute the "social minimum" that individuals need in order to lead a minimally decent life in their societies.[10] Combining the risk of death and the limitations to mobility and social interactions, the pandemic has negatively impacted on the capabilities of the majority of people living on the planet, although in very unequal ways.

Here I will briefly analyse how the three frontiers of *disability*, *nationality* and *species belonging* identified by Nussbaum appear in the light of the current (protracted) pandemic situation, in order to shed light on the main criticalities that reveal the persistence and escalation of injustices within the context of a global health emergency. In line with Nussbaum's original

[9] I especially mean here attempts to create and maintain a shared global framework to solve critical problems and manage vexed issues of interdependency in a fair and coordinated way. This entails not just one single scheme, but a series of sectorial or issue-specific schemes run by a range of actors – notably the United Nations and regional organizations, sometimes States or groups of States – working together to implement and foster a notion of international governance tied to liberal principles. Examples of such schemes are: campaigns to achieve sustainable development goals (SDGs), high-level conferences on climate change (COPs), and promotion of multilateral agreements and coordination mechanisms designed to manage transnational phenomena (e.g., global or regional compacts on migration, illicit trafficking, etc.).

[10] Nussbaum's list is not identical, but similar to the list of "basic human rights" that decent social institutions ought to guarantee to their citizens in liberal internationalist accounts of global justice. Decent institutions are not just according to the liberal standards, but they deserve the international recognition of legitimacy insofar as they are peaceful and respect the basic human rights of their citizens. Aiming at developing a political conception of human rights, Rawls (1999, 65; 78 ff.) included in his list the right to life (that he understands as a right to individual subsistence and security), the right to freedom of conscience, to freedom from slavery, serfdom and forced labour, as well as the rights to private property and formal equality..

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intentions, I resort to the frontiers of justice in order to illustrate some pitfalls of theoretical accounts of global justice, examining them under the light of the pandemic situation. With respect to Nussbaum's account, I propose two innovations which I think might be helpful to adapt the analysis to the current context. Firstly, I think that the third frontier's scope should be enlarged – therefore, I label it *species belonging and ecological equilibria* – to look at the effects that injustices have not only on living beings, but also on the complex relation between humans and their ecosystems. Secondly, I would add a frontier to the traditional list, namely the frontier of *gender*, since the last months have shown that women are among the groups that have suffered more during the pandemics, revealing the gendered and intersectional implications of the persisting inequalities characterizing our societies. The current pandemic state of affairs constitutes an exceptional condition but its protracted character risks to undermine our ideas about social life in general; it is a natural *experimentum tremendum* which might offer insights to develop more realistic thought experiments and multidimensional philosophical reflections to articulate new conceptions of global justice or to revise the existing ones.[11]

2.1 Disability

Isolation and distancing have hugely complicated the lives of people with physical and mental disability or chronic pathology, often markedly cramping their ability to work, study or train on any regular basis, or to cultivate social relations outside the family circle. Moreover, people with disabilities have a higher risk of death from COVID-19 than people without disabilities and the difficulty of getting the vaccines in many parts of the world has prolonged the risk for months. The necessary reclusiveness and the emergency protocols have made it especially difficult for disabled people to get access to health services with the needed tempestivity and continuity and this has worsened

[11] Here I follow Adam Swift's suggestion that the pandemic provides political philosophy with valuable evidence to question the supposedly just character of democratic social arrangements, i.e., policies and institutions (Swift 2021).

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the experience of illness and disability. Also, being recluse and hardly visible to the rest of their societies for most of the time, disabled people living at home or in care institutions have been more exposed to violence and abuse during lockdown periods, with very few occasions of communicating their suffering and to be heard.

The lives of those involved in helping temporary and permanently disabled people – caregivers, family members or workers providing assistance in the home – have been thrown out by limitations to mobility and the difficulty of getting their assisted people access to primary health care; professional and family care workers' physical and mental stress has been amplified because of the increased workload in conditions of uncertainty. Another widespread problem for those looking after persons with a disability or chronic illness has been an increased difficulty in tapping social security resources. During the lockdown periods, many professional caregivers have lost their jobs because of the restrictions to mobility and of the reduced income of the households of people with disability caused by the economic consequences of the pandemics – this problem has disproportionally affected immigrant female caregivers within developed societies, many of which had been working without legal contracts and were at risk of being expelled from their host countries.

Such examples reveal the intersectional impact of pandemic inequalities and highlight the need to take into account the intersections between the different frontiers of justice. The inequality of starting conditions has been drastically exacerbated by the emergency situation. Although reliable and comparable data are lacking at the moment, if one looks at the condition of the disabled from a global standpoint, one fact becomes crystal clear: if the disabled in liberal societies have seen their quality of life drastically curtailed, their peers in developing countries have seen their very survival in jeopardy.[12]

[12] For instance, see the research and analysis report *The lived experience of disabled people during the COVID-19 pandemic* issued by the Disability Unit of the UK Cabinet Office with data collected from June to September 2020: https://www.gov.uk/government/publications/the-lived-experience-of-disabled-people-during-the-covid-19-pandemic/the-lived-experience-of-disabled-people-during-the-covid-19-pandemic. For a journalistic account, see the dossier coordinated by Ruth Clegg for

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https://doi.org/10.6092/issn.2724-6299/14242

The uncertainty over the timeline of the global health emergency management and the difficult eradication of the Covid-19 virus makes disabled people ever-more worried about their ability to hold out in the future. As effectively summarized in a recent article published on *The Lancet*:

> People with disabilities do not want a return to the pre-pandemic status quo, which was a world filled with complex barriers to inclusion, especially in low-income and middle-income countries. The COVID-19 pandemic has increased risks, compounded unmet health needs, and disproportionately affected the socioeconomic lives of people with disabilities around the world. As evidence evolves, strategic thinking is needed about how society, social inclusion, and public health can better reach the 15% of the global population who are disabled (Shakespeare, Ndagire and Q.E. Seketi 2021, 1332).

2.2 Nationality

The worsening health situation and the adoption of emergency measures to contain the spreading contagion have blighted the lot of peoples in developing countries and especially emerging countries[13] in terms of respect and protection of basic human rights and/or development of capabilities. Over and above the chronic shortcomings of welfare and crucial sectors of public services like education, transport, social security and communications, another problem has set in. In many countries, the availability of reliable, systematic and regularly updated data on the health situation is reduced; this limits the possibilities to effectively contrast the spread of the contagion, to reduce the number of deaths and to increase the number of vaccinated people, with negative effects for virtually all countries. The problem of the

BBC News published on 30 June 2021 on the impact of the pandemic for the lives of disabled people in the UK: https://www.bbc.com/news/uk-57652173

[13] By 'emerging countries' one means those whose economies have recently achieved growth rates close to those of more industrialized countries. They are often referred to under acronyms like BRICS (Brazil, Russia, India, China and South Africa) and MINT (Mexico, Indonesia, Nigeria and Turkey).

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international production and distribution of vaccines notably poses serious questions in terms of global justice, urging to publicly scrutinize policies based on "vaccine nationalism" (Saksena 2021; Herlitz et al. 2021).

People living in countries experiencing protracted conflicts (e.g., Afghanistan, Ethiopia, Libya, Pakistan) have been disproportionately affected by the pandemic, because of the weak state institutions' inability to inform and assist their populations to reduce the spread of the disease (Polo 2020). Throughout the emergency, many external aid and development cooperation funds and programmes have been downsized and temporarily halted because of the need for donors and NGOs to reduce the risks and protect the health of (Western) aid workers, sometimes worsening the living conditions of local aid workers who lost their income. Although there is some evidence that public support for development cooperation has not been substantially reduced (Schneider et al. 2021), the protracted stop or the downsizing of projects on the field risk to reduce the access to fundamental good and services of local populations. Moreover, as the tremendous earthquake which struck Haiti on August 2021 showed, people who live in natural disasters' affected areas suffer more because of the pandemic because of the inagibility of houses and health infrastructures, post-disaster precarious hygiene conditions and slow international humanitarian response to the disaster. Finally, internally displaced people and migrants *en route*, as well as *sans papiers* migrants in host countries, face disproportionally high risks of contracting the virus and of not receiving adequate health services.

In some countries throughout the world, we are witnessing an authoritarian turn, an indefinite protraction of the state of emergency and an expansion of governments' emergency powers. Although derogations to human rights due to the need of containing the Covid-19 virus' spread have been common in democratic countries, they have rasied justified concerns about the problematic effects that emergency measures could have with respect to the erosion of democratic liberties (Thomson and Ip 2020) as well as inappropriate attacks based on unfounded and misleading analogies and

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parallels between present measures to limit the spread of the disease and fascist and Nazi policies of discrimination, deportation and extermination or South African racial segregation (Levine 2020). In this present phase, some authoritarian governments – e.g., Belarus, China, Egypt, Iran, Russia, Turkey – have adopted measures curtailing civil and political freedom, sometimes using the need to contain the virus as a justification for stepping up control over individuals and groups suspected of working in opposition to the government in office. Those in opposition are charged with subversive and potentially destabilizing activity; the emergency backdrop is being used to free the government from its obligation for transparency, accountability and justification. In several cases the press and organisms monitoring the protection of human rights have been subjected to gross limitations in the name of anti-Covid policy. What is more, many governments of emerging/developing countries are tending not to give the World Health Organization any precise data on the course of the pandemic, sometimes because of objective problems in establishing them, but sometimes as a deliberate political decision for avoiding possible losses of consensus or blame from the international community. This further cramps the citizens' quality of life: the populations are unable to express dissent from their own government and find it especially difficult to migrate under emergency circumstances – the tightening and militarizing of control rules out any 'voice' or 'exit' options -, while certain individuals, those politically marginalised and socially and economically disadvantaged (children, women, minorities) are especially hard hit.

2.3 Species Belonging and Ecological Equilibria

SARS-CoV-2 has been called a virus produced by and symbolizing globalization. At present its geographical origin has been traced to Wuhan, in China. Since the beginning of 2020 the virus has spread to nearly all countries: the very few governments that report no cases of contagion in their territory include North Korea and Turkmenistan, but because of the extreme

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isolation of these countries, these data are impossible to verify.[14] According to a recent study (conducted by Hongru Wang, Lenore Pipes and Rasmus Nielsen) whose main results have been published in *Nature*, the biological origin of the virus stems from a recent mutation of a long-existent virus: SARS-CoV-2 has 96% of its genetic make-up in common with a virus found in a cave inhabited by bats in the Chinese province of Yunnan – though this virus seems not to have infected humans for over 140 years (Cyranoski 2020). As with other variants belonging to the Coronavirus family, a spillover occurred: a pathogen hopped from one species to another. Man may indeed be a steppingstone to other species.

The incidence of similar disease spillover phenomena has increased in the last fifty years, largely due to the environmental impact of intensive agriculture and stock-raising that lead to deforestation, soil sickness and wild fauna changing habitat, as well as to the stress undergone by animals in stock-breeding lots. The origin and evolution of the pandemic show that the relationship of the human species with other animal species does not reflect any notion of interspecies justice or sensitivity to the need for intergenerational justice preserving biodiversity worldwide; nor does it accord equal respect to all forms of sentient life or recognise non-human animals the right to lead a "decent life" (Zuolo 2018; Singer 1975). As occurs with the problems of pollution and climate change when closely connected to inter-species relations, the people that cause the ecological crisis are not the same people who prove most vulnerable to its adverse effects. This means that, although ecological crises such as those associated with climate change and pollution might have a planetary scope, they do not affect the quality of life of all the people on the planet equally (Nussbaum 2006, 325 ff.).

The current pandemic, especially during its first months, has produced a window of opportunity to raise awareness about issues of interspecies justice, not only with reference of the origin of the lethal disease, but also about the

[14] The data of recorded cases are published daily by the World Health Organization: https://covid19.who.int/.

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duties of caring and of providing decent living conditions or some well-being standards for domestic pets, breeding animals, work animals and wild animals even in times of health emergency. As a matter of fact, non-human animals' living conditions have been shaken up as a consequence to lockdowns and reduced (human) mobility: some of them have suffered – e.g., domestic pets left alone because of the prolonged illness and hospitalisation of their human companions – while others – e.g., wild animals – have experienced unprecedented opportunities of leaving the spaces where they are normally confined and making forays in (deserted) urban contexts, temporarily blurring the boundaries between the "city" and "nature" (Scott 2020). For the post-pandemic future, the reconfiguration of interspecies relationships needs to be grounded on a thorough study of the information and data regarding the interactions between human and non-human animals that have been collected during the last two years, in order to devise policies of work and mobility more mindful of the effects that human activities might have on other species' prospects of survival.

Recently, some scholars have considered the idea that the health crises such as the current pandemics is an instance of a larger, medium-term process of self-destruction unwittingly undertaken by humanity, which would eventually lead to its mass destruction both as a species and as civilization (Solinas 2020; Hailwood 2015).[15] Such a trend would reflect an attitude which is antithetical to Hans Jonas' *ethics of responsibility*, understood as an imperative to adopt a prudential approach to the use of potentially dangerous technology, in order to guarantee the survival of humanity across generations once the boundary between city and nature has been blurred. This account of ethics is based upon the new categorical imperative that there be a mankind [or humanity] in the future. This kind of responsibility does not apply only

[15] Some authors prefer to speak of *omnicide*, in order to shed light on the present trend of destruction not only from an anthropocentric perspective, but also from a non-antropocentric perspective (Pedersen 2021). Simon Hailwood (2015) elaborated a broader philosophical discussion on the evolving relationship between the human species and nature, presenting and discussing the main positions on this point.

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"to the future human individuals but to the *idea* of Man [human being], which is such that it demands the presence of its embodiment in the world" (Jonas 1984, 43).

Rather than producing the effect of grounding a new ethics of responsibility, the awareness of the ongoing macroscopical ecological crises and the perception of the inability – and perhaps myopic, nihilistic or self-distructive unwillingness – of the current generation to solve or at least to sensibly mitigate them has generated a diffused sense of despair which emerges from the discussion on the rather new concept of "Anthropocene" as the geological epoch during which the Earth's equilibria and structure are modified as a consequence of human activities (Cooke 2016; Raffnsøe 2016). Criticising optimistic conceptions of development which neglect the loss of non-human natural value associated to the dynamism of productive forces, Darrel Moellendorf (2017) stressed the need to take into account the destruction of the ecosystem produced as a collateral effect of human activities in terms of extinction of species, elimination of natural habitats and depletion of natural resources. As a matter of fact, destruction might be a non-anthropocentric interpretative lens to make sense of the Anthropocene, alternative or complementary to the anthropocentric interpretation of an epoch of increasing wealth inequalities and the worsening of living conditions for the global poor, especially for those living in ecologically fragile habitats. Looking for some hope that the Anthropocene's ultimate end is not necessarily the human species' extinction and/or the collapse of planet's natural equilibria, Moellendorf (2020; 2022) considers also the alternative, positive Promethean interpretation, which relies on the possibility that knowledge and technical innovation might serve to put in place effective measures to escape the Anthropocene's nightmares, achieving poverty reduction and creating prosperity for people, providing answers to ecological problems (e.g., climate engineering) and developing international cooperation for realising these goals.

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During the pandemics, some attention has been reserved by media, governments and international organizations to the need of escaping the present crisis through a comprehensive rethinking of our societies' models of production and consumption. The European Union – especially through the European Commission – has been especially vocal in stating its commitment to the realization of a climate-neutral Europe and to the funding of sustainable and "green" recovery policies and initiatives (Green and Mauger 2021). In a press conference held on 28 May 2020, the European Commission's Executive Vice-President Frans Timmermans, while making the case explicitly mentioned the urgency to "green mainstreaming" the investments for the recovery financed under the NextGenerationEU funding programme. This requires not only to support institutions and businesses which engage in green transition, but also to allocate the 25% of the EU's Multiannual Financial Framework to climate action and to set the "do no harm" principle as the norm for the interactions between EU citizens and the ecosystem.[16] Although the launch of similar plans of actions (re-)formulated during pandemic times[17] might be evidence of what Moellendorf (2022) calls "mobilizing hope", it is too soon to assess whether such policies will substantively correct or sooth the effects of the disruption of natural equilibria and of oppressive interspecies relations.

[16] During the press conference, Timmermans affirmed: "Protecting and restoring biodiversity and natural ecosystems is also key to our health and well-being. It can help boost our resilience and prevent the emergence and spread of future virus outbreaks". Thus, he recognises that preventing the outburst of future pandemic crises is an urgent priority; however, this is not the only goal of the European Green Deal. He affirms that the EU needs to adopt a broader and future-oriented perspective, aiming at transforming the tenets of member states' systems of production and consumption through a clean energy transition, and making sure that recovery investments are directed towards "renewable energy and storage, clean hydrogen, batteries, carbon capture and storage, and sustainable infrastructure". To read the whole statement, see https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_964.

[17] It is worth pointing out that the European Green Deal had been included in the programme of the European Commission led by Ursula von der Leyen which took office in December 2019 since the very start; however, the outburst of the pandemics has offered a boost to its implementation thanks to the resources allocated for the post-pandemic recovery.

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2.4 Gender

The marked inequalities associated with the pandemic have brought to light the existence of another frontier of global justice that deserves a mention. This is no novelty: gender inequality is a structural injustice that has hitherto been discussed largely in relation to the notions of justice within state boundaries, but it has been largely neglected in reflections about global justice. It is widely acknowledged that, during the last two years, the persistence and pervasiveness of structural gender-related inequalities have been aggravated by the emergency situation; at the moment, we lack comprehensive data and research to develop an adequate understanding of the magnitude of this phenomenon. In general, female researchers have experienced greater difficulties than male researchers during the pandemics – even here, the phenomenon seems to have an intersectional dimension, with precarious researchers, mothers of school-aged children and women caring for family members carrying a heavier burden; in general, it seems that they could produce less research because of the extreme circumstances created by the pandemic emergency (Buckle 2021). Since the vast majority of researchers who contribute to the study of gender dynamics are women, these inequalities could have not only the negative effects of exposing them to worrying levels of physical and psychological stress and slowing down their career advancement, but they also risk to hamper the possibility that we have of fully appreciating and making sense of the pandemic gender-based inequalities, because the quality of research outputs could be reduced.

Not only researchers, but all female workers have faced difficult work conditions, especially during the lockdowns, but also once they could go back to their workplaces. At home, the difficulties of separating and harmonising work and family/care life increased considerably because of the perceived need to perform many tasks while reassuring family members – especially children – scared by the possibility of the contagion, anxious because of the unprecedented emergency situation and upset because of the forced confinement (Boncori 2020). This impacted negatively not only on time

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management and work productivity, but also on the mental load and the "cognitive labour" that women have been experiencing during the last months, a dimension which is generally neglected in official reports. Drawing on the definition proposed by Allison Daminger (2019) in a study based on interviews, I use the expression "cognitive labour" to refer to all those cognitive activities that women normally do to anticipate others' – in particular, family members' – needs, searching for solutions, taking decisions and monitoring the effectiveness of the adopted solutions. This kind of labour, which is often invisible, is tiring and stressful, especially when under challenging physical and emotional conditions such as those experienced during the pandemic emergency. Although there is not (yet) a wide body of scholarly research dealing with them, the unequal effects of the pandemics on women have been continuously present in the public debate throughout the past months; data provided by international organisations, governments, civil society actors have been transmitted by media outlets and they have fueled the discussion on the gender-specific difficulties encountered by women during the pandemics. In the implementation of recovery policies undertaken by many governments, however, the specific attention to gender dynamics does not seem to be a top priority.

It is important to notice that the gendered effects of this pandemics are not unprecedented: all kinds of global health emergencies hamper the access to effective health services, especially to those service which have to do with sexual and reproductive health (Wenham et al. 2020; Bristow 2017). Also, the rise of sexual and domestic violence which is associated with emergency situations makes the current phase even more dramatic for women and girls, and inadequate or late health and psychological care services might conduce to the second victimization for victims of sexual and gender-based violence. In conflict and post-conflict situations and more in general in many developing and emerging countries, where the infrastructures and human resources are normally lacking, the difficulties to receive assistance for women can be unsurmountable: this explains why, for instance, in Sierra

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https://doi.org/10.6092/issn.2724-6299/14242

Leone after the 2014 Ebola emergency teenage pregnancies grew by 23% with respect to the previous year and in the Zika-affected countries of South America in 2016 – Brazil, Colombia and El Salvador, all countries where abortion is illegal – there has been widespread resort to unsafe abortions (Neetu et al. 2020; Wenham et al. 2020, 196).

The negative consequences of the pandemics which are especially affecting women are many and very often some of them are experienced at the same time. Extreme stress borne by caregiving women – be they professionally and economically acknowledged or not as caregivers –, women's increased economic and occupational precariousness, increase in gender and domestic violence especially during lockdowns and, systematic violations of girls' right to education in developing/emerging countries – all these are worrying signs of a worsening trend in the quality of life that women experience in different parts of the world.[18] An aspect that has received remarkable attention by the media as well as by international organisations, governments and civil society organisations is the steep increase in the (reported) cases of domestic violence and, in some countries, of femicides and women's suicides which has occurred after February 2020, while the policies undertaken to contrast gender-based violence have received less attention (Peterman et al. 2020; Standish and Weil 2021; Blofield et al. 2021). This rise of gender-based violence has been denounced since the early weeks of the pandemic by UN Women, which has coined the expression "shadow pandemic" to refer to this phenomenon.[19] To conclude this section on the fourth frontier of global justice that appears especially frightening in the light of the pandemics, it is important to stress that a theoretical account of the

[18] Data on various aspects of increasing gender-related inequality during the pandemic can be found on a dedicated page of the European Institute for Gender Equality website: https://eige.europa.eu/topics/health/covid-19-and-gender-equality.

[19] UN Women has recently published a rapid assessment report, which, although based mainly on "preliminary and anecdotal information" because of the scarcity of systematic and reliable data, gives an idea of the trends of gender-based violence during the pandemic: https://www.unwomen.org/en/digital-library/publications/2020/05/impact-of-covid-19-on-violence-against-women-and-girls-and-service-provision#view

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gendered effects produced by the current emergency ought to be framed within the framework of global justice, spurring societies, international organisations and individuals to take concrete actions to enhance the empowerment of girls and women.

3. Redistribution and Regeneration as Solutions to Global Injustices

Hitherto those involved with global justice have tended to favour the quest for solutions along redistribution lines: to reduce inequalities and lighten their impact in such a way as to benefit persons and peoples bearing the brunt. For simplicity's sake one might say that whereas cosmopolitan theory has gone for an egalitarian pattern of redistribution, the various forms of liberal internationalism are proposing a scheme of sufficientarianism. The cosmopolitan approach to global justice aims (at least in the long term) to achieve zero inequality in people's individual or collective access to resources and opportunities. Measures of redistribution to this end include levying a global tax on the consumption or production and sale of unsustainable resources and products – e.g., fossil fuels and plastic – the proceeds being destined to fund development schemes. By contrast, liberal internationalism favours redistribution mainly within the frontiers of the single State, confining the obligations of global justice to ensuring that disadvantaged populations and persons have access to the primary goods needed for subsistence.

The fact remains that, in our present world scenario, quite clearly the economic and social crisis triggered by the pandemic (or heightened by it in societies that had not yet surmounted the phase that began in 2008) will *not* generate a surplus of resources usable for redistribution according to the principles of social justice, whether these be egalitarian or sufficientarian. Thus, any significant reduction of worldwide inequalities achieved by global institutions or governments sharing a sense of global justice would seem a remote, not to say utopian, prospect. At which point one might be tempted to

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conclude that the issue of redistributive global justice has foundered and might just as well be abandoned. However, during the pandemic certain egalitarian proposals for redistribution measures have received a new lease of life: the social justice debate not only figured in the American presidential campaign, but it has received public impetus in various European countries – Italy, Spain and Germany, amongst others. During 2020 the idea of an unconditional basic income – as theorised nearly thirty years ago by Philippe van Parijs (1991) – returned on the agenda. It was presented as a temporary emergency redistribution measure designed to meet various needs: to mitigate inequalities, provide social protection for the low-income bracket, obviate social discontent and reboot consumption. The basic income idea, envisaged as a national-level project, has also been aired as a transnational measure to be adopted simultaneously by the 27 EU countries.[20] As things stand at present, none of these measures have yet been put into practice, but the emergency situation may spawn experiments that seemed unthinkable in 'normal' times. So, it seems early days to write off the concept of redistributive justice, unlikely though it seems to be achievable on any really broad scale.

The thinking behind this paper on the frontiers of global justice suggests certain tentative conclusions. Our need to prevent the outbreak of viruses like Covid-19 demands that the theory and political agenda of global justice[21] include not just redistribution-based arguments, but greater attention to the inequalities produced by the ecological crisis. The post-pandemic global justice scenario ought to incorporate a regenerative justice dimension designed to restore impaired ecological equilibria or at least offset the adverse

[20] On this see the European Commission press communiqué released on 15 May 2020 concerning the European citizen scheme "Start Unconditional Basic Incomes (UBI) throughout the EU". It may be found online: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_840.

[21] As shown at the beginning of the article, global justice does not merely exist in the writings of political philosophers, but is being proposed as a series of adoptable policies advocated by authoritative representatives of institutions (such as the United Nations and World Bank) who are actively involved in world governance.

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effects of human activity on the ecosystem. Such a view of social justice would link the arguments of environmental and climate justice to those of social justice, establishing a binding commitment to justice and identifying mechanisms for political institutions to make good that commitment, as well as an ethical basis underpinning the decisions taken by individuals and communities.

If we survey the current international scene, a number of liberal governments still do not appear ready to take on board any conception of global justice that combines these various dimensions. However, in the last few years we have witnessed the rise of movements forcibly arguing – and coordinating transnationally – the claims of worldwide climate/environment and gender justice. One thinks of the youth protest movement Fridays for Future, or the women all over the world contributing to the #metoo discussion, the issue of female discrimination and sexual violence in the workplace, or again the Black Lives Matter movement which has come to the fore internationally during the pandemic in protest against police brutality and all racial violence against black people. Such progressive movements are the avant-garde of global justice. Joining forces with international organizations (like the United Nations) working towards a new global governance that both reduces inequalities and safeguards the ecosystem, they are also spurring political philosophy to hone the principles and priorities of a global justice system geared to the post-pandemic future.

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Space Sustainability in the Context of Global Space Governance

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ABSTRACT

The article aims at discussing the importance and role of space sustainability in the context of global space governance. After having presented the Outer Space Treaty provisions reflecting a global governance approach to space resources exploitation, as well as their interpretation by space law scholars, reference is made to State practice eventually posing challenges to a global approach on the use of space resources; such as, in the fields of asteroid mining and debris mitigation. Against this background, it is argued that the concept of space sustainability was developed to eventually remedy shortcomings of the said legal framework. The concept, based on a two-pronged approach, combines top-down and bottom-up initiatives; hence, it appears to provide a solution to the perceived inadequacy of (some) international space law institutions, taking additionally into account the needs of (private) investors and society –while using space resources–, as a result of its flexibility.

Keywords: space sustainability, global space governance, space resources exploitation, sustainability of space activities, protection of the space environment

ATHENA
Volume 2.1/2022, pp.29-72
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13756

1. Introduction

In the framework of the 2nd Manfred Lachs International Conference on Global Space Governance – that was organized by leading international space law institutions –, 122 experts from 22 countries (space-faring and non-space-faring nations) involved in various aspects of space activity and regulation, took part in negotiations which led to the adoption on May 31st, 2014, of the *Montreal Declaration.*[1] In its Preamble, the participants recognized that the current space governance system, created during the 1960s -1970s, has not been thoroughly examined by the international community since its establishment.

The space governance system was defined as comprehensive, including "a wide range of codes of conduct, confidence-building measures, safety concepts, international institutions, international treaties and other agreements, regulations, procedures and standards"[2]. Bearing this in mind, the participants – having declared their willingness to examine in greater detail the long-term effects of space operations–, agreed to work in the direction of convening a wide international conference aimed at the establishment of a global governance regime, for the peaceful *and sustainable exploration and use of outer space*.

In adopting this decision, they took into account the strong growth that the space economy is currently enjoying, in conjunction with the fact that many activities pose threats to current and future space operations, as well as to the sustainable use of space for the benefit of all humankind (Montreal Declaration, *Preamble*). In this context, it was laid down that the core objective of sound and sustainable use of space resources would be given all

[1] The Montreal Declaration, adopted at the 2nd Manfred Lachs International Conference on Global Space Governance, May 29-31, 2014, Mc Gill University, Montreal, Canada, organized in collaboration with *inter alia* the United Nations Office for Outer Space Affairs (UNOOSA) and the Secure World Foundation, available at https://www.mcgill.ca/iasl/gsg/montrealdeclaration
[2] Montreal Declaration (Preamble).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13756

the visibility and importance it deserves.[3]

However, whereas the "sustainable space exploration, use and exploitation for the benefit of all humankind" is established as a primary objective in the document,[4] there is not (yet) any commonly agreed definition of the concept. In fact, sustainability emerged as a means of addressing the worrying environmental consequences of the Great Acceleration triggered in the 1950s (Scarano, 2019; Michelsen et al., 2016). Bound with the concept of environmentalism – which refers to the belief in the value and fragility of the environment, with the intend to protect it (Lincoln, 2021; Slocombe, 1984) – ,sustainability was first discussed during the United Nations (UN) Conference on the Human Environment in Stockholm, Sweden, in 1972 (Michelsen et al., 2016), and put on the international agenda following the publication of the 1987 *Brundtland Report* (Scarano, 2019). In this report, the concept was described as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*"[5], based on three coequal elements closely interdependent.[6] The term was further elaborated in the following years (Du Pissani, 2006; Barral, 2012) and established as a reference concept, allowing governments to regulate the intensity and type of use of resources, and/or the location of exploitation. In short order, it received significant academic and policy attention, with the aim to ensure the sustainable use of Earth resources.

At the same time, in a different environmental context –that is outer space, history almost repeated itself. The space era started with a first phase based on competition between the US and the USSR (Ehrenfreund and Peter, 2009), aimed at succeeding in exploring space and launching space objects.

[3] Montreal Declaration, 2014: "Hereby resolves by consensus to (…) ensure that the above-mentioned study examines inter alia: (iii) space opportunities and the need for sustainable and peaceful use, exploration and exploitation of space for all humankind".
[4] Montreal Declaration, 2014, Preamble.
[5] The Brundtland report provided "what came to be the best-known definition of the concept of sustainable development" (Michelsen G. et al., 2016, 11-12).
[6] Environment-economy-equity; sustainability can only be achieved by simultaneously protecting the environment, maintaining economic expansion and growth, and promoting equality *(*Portney, 2015, 6).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13756

Following on from this exploratory phase, actors invested more heavily in improving space technology; space activity increased strongly, driven by both public and private actors (Williamson, 2012; Nirmal, 2012), allowing the development of numerous vital services and market products[7] on Earth. Nowadays, the promotion and use of new technologies, collecting and processing large amounts of space data, show new perspectives for expanding the uses of space resources (Soroka and Kurkova, 2019). Nonetheless, as a result of these developments, the near-Earth environment evolved into an increasingly congested and contested domain where space missions began to be at risk, due to the proliferation of space debris (Mejía-Kaiser, 2009).[8]

The growing dependance of Earth on space systems[9] – in a context of massive increase in debris population – became a cause of concern[10]. The question was raised on how to ensure the long-term sustainability of space activity and infrastructure, to the benefit of present and future generations. Hence, in seeking to provide a solution to this issue, space actors developed the concept of *space sustainability* and established it as high priority, as exemplified by the *Montreal Declaration*. The aim was *first* to ensure the protection of space assets in orbit (which remains, up to date, the principal concern for space-faring countries: Martinez, 2015),[11] *via* a balanced and safe exploitation of the (near-Earth) space environment, but also the right of non-space faring countries – and space users, in general – to benefit from space

[7] For an analysis of EU member States: Adriaensen, Giannopapa, Sagath and Papastefanou, 2015.
[8] Defined by the ESA as "(…) non-functional, artificial objects, including fragments and elements thereof, in Earth orbit or re-entering into Earth's atmosphere", ESA (2021). FAQ, *ESA / Safety & Security/Space Debris*, https://www.esa.int/Safety_Security/Space_Debris/FAQ_Frequently_asked_questions, accessed in June 2021. On risks caused by space debris, see OECD (2021). *Space Economy for People, Planet and Prosperity, OECD paper for the G20 Space Economy Leaders' Meeting, Rome, Italy 20-21 September 2021*.
[9] "In 2019, 95% of the estimated $366 billion in revenue earned in the space sector was from the *space-for-earth* economy: that is, goods or services produced in space for use on earth." (Weinzierl and Sarang, 2021). For benefits arising from Space resources exploitation, see OECD (2021) *supra* note 8.
[10] As regards the military, economic and scientific uses of space for all nations, see Lim, 2018.
[11] Given that space systems are now major global utilities which meet various societal needs.

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https://doi.org/10.6092/issn.2724-6299/13756

activities on Earth and/or to ensure their future access to Earth orbits (Martinez, 2021).

Against this background, this article aims at discussing the importance and role of space sustainability in the context of space governance. More precisely, *Section 2* will examine the rules reflecting a global governance approach to space resources, initially as established in the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (Outer Space Treaty, OST)[12] – referred to as the *Magna Carta of Outer Space* and legally binding on States, because of both its high level of recognition and customary character (Hofmann and Bergamasco, 2020) – and then, as these are interpreted by space law scholars. Following this analysis, *Section 3* will make reference to State practice eventually posing challenges to a global approach on the use of space resources such as, for example, in the fields of asteroid mining and debris mitigation. Subsequently, *Section 4* will focus on the emergence of the concept of space sustainability, which is first considered to be rooted in the treaty but second, also further defined with the aim to complement the OST in a more practical way. *Section 5* will analyze the institutional and other sources of law determining the concept, which appears to be based on a two-pronged approach combining top-down and bottom-up initiatives. In *Section 6*, the substantive normative gaps filled by the concept of space sustainability will be addressed, as it provides a solution to the perceived inadequacy of (some) international space law institutions and allows to also take into account the needs of (private) investors and society while using space resources, as a result of its flexibility. In the final *Section 7*, some conclusions will be drawn.

[12] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, January 27, 1967, U.N.T.S. 610 at 205 (entered into force on October 10, 1967), (Outer Space Treaty or OST).

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https://doi.org/10.6092/issn.2724-6299/13756

2. Treaty Provisions Setting the Tone for a Global Governance of Space Resources and Their Limits

The adoption of the Outer Space Treaty (OST) regulating precisely[13] all types of activities carried out in space by the numerous operators was deemed necessary, given that "(n)ot all rules are directly translatable into the space environment" (Blount, 2008). Hence, the fundamental referencing basis for space activities is laid down in the OST, and further elaborated in related international space law instruments referred to as *corpus juris spatialis.*[14] On this basis, it appears that the OST provisions have set the framework for a global and sustainable use of space resources.

2.1 Basic Framework Rules for the Use of Space Resources to the Benefit of All

The fundamental freedom to explore and use outer space resources – more precisely, "outer space, including the Moon and other celestial bodies" –, was established in the first Articles (hereafter, Art.) of the OST. Precisely, Art. I para. 1 stipulates that "(t)he exploration and use of outer space (…), shall be carried out for the benefit and in the interests of *all countries*, irrespective of their degree of economic or scientific development, and shall be the province of *all mankind*"[15]. In addition to that, Art. I para. 2 clarified that space "shall be free for exploration and use *by all States without discrimination of any kind, on a basis of equality* and in accordance with international law, and there

[13] On the view that space law is *lex specialis, inter alia,* Jakhu and Freeland, 2016).
[14] In addition to the OST, four international treaties (and five sets of principles on space-related activities) have been adopted: (i) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched in Outer Space ("Rescue Agreement"), 22 April 1968 UNTS 672 (p.119), entered into force on 3 December 1968; (ii) Convention on International Liability for Damage Caused by Space Objects ("Liability Convention"), 29 March 1972 UNTS 961 (p.187), entered into force on 1 September 1972; (iii) Convention on the Registration of Objects Launched into Outer Space ("Registration Convention"), opened for signature on 14 January 1975, entered into force on 15 September 1976 and (iv) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies ("Moon Agreement"), opened for signature on 18 December 1979, entered into force on 11 July 1984.
[15] Emphasis added.

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https://doi.org/10.6092/issn.2724-6299/13756

shall be free access to all areas of celestial bodies"[16]. At the same time, Art. II of the OST established *expressis verbis* that: "(o)uter space (…) *is not subject to national appropriation* (…) *by means of use* or occupation, or by any other means"[17]; this clause is referred to as the key principle of the non-appropriation of space and consists in one of the fundamental rules of international space law. As a result, outer space and space resources are regarded as *res communis* (Leepuengtham, 2017, 14; Trimble, 1984, 17), and more precisely, as the *common heritage of mankind*; namely, "a new category to be added to the tripartite division of the world made by traditional international law: national territory; res nullius; and res extra commercium"[18].

Furthermore, on one hand, Art. III stated that "States Parties to the Treaty shall carry on activities in the exploration and use of outer space (…) in accordance with international law (…), in the interest of maintaining international peace and security and *promoting international cooperation and understanding*"[19]. On the other hand, the OST promoted international collaboration in particular, by enshrining principles such as the obligation to cooperate, provide mutual assistance and undertake appropriate international consultation before proceeding with any potentially harmful activity (Art. IX of the OST)[20], and to inform the UN Secretary General as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of their space activities (Art. XI of the OST) (Stelmakh, 2015).

The said OST rules on the use and governance of space resources are further elaborated in relevant instruments of international space law, on

[16] Emphasis added.
[17] Emphasis added.
[18] "The concept of CHM [*i.e., common heritage of mankind*] is applicable to areas which not only in themselves are not subject to national appropriation in a territorial sense, but the fruits and resources of which are also deemed the property of mankind at large" (Williams, 1987).
[19] Emphasis added.
[20] OST, art. IX: any State party must "undertake appropriate international consultations before proceeding with any (…) activity or experiment" it has reasons to believe would cause potentially harmful interference with the activities of other States Parties. If such action is planned by another State, each State party to the treaty "may request consultation concerning the conduct of this activity or experiment".

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https://doi.org/10.6092/issn.2724-6299/13756

specific aspects of space activity. *Inter alia*, they are reiterated and detailed in the International Telecommunication Union (ITU)[21] Constitution,[22] aimed at regulating the use of orbits and frequency bands for radio services. In particular, Art. 44.2 of the ITU Constitution underlines that such use must be made taking account of the interests of all countries:

> (i)n using frequency bands for radio services, Member States shall bear in mind that radio frequencies and any associated orbits, including the geostationary-satellite orbit, are *limited natural resources and that they must be used rationally, efficiently and economically* (…) so that countries or groups of countries may have equitable access to those orbits and frequencies, taking into account the special needs of the developing countries and the geographical situation of particular countries[23].

In this context, it is clear that "the governance of such a 'global commons' (…) *cannot follow from the authority of a single nation*"; a global governance approach is established, and the substance of any limitation may come from international treaty law, such as the OST, or other relevant sources of international law (Von der Dunk, 2020). Practically, the core of the global governance structure for outer space and activities carried out in that realm "lies in the role that each state has to fulfill *with respect to activities by other categories of legal subjects active in this 'global commons*'" (*Idem*).

[21] The ITU (International Telecommunication Union) is the UN specialized body established to "facilitate international connectivity in communications networks, (…) allocate global radio spectrum and satellite orbits, develop the technical standards that ensure networks and technologies seamlessly interconnection etc.", see 'About International Telecommunication Union (ITU)' at https://www.itu.int/en/about/Pages/default.aspx, accessed on September 2021.
[22] *Constitution and Convention of the International Telecommunication Union*, 22 December 1992, UNTS 1825, 1826 (entered into force 1 July 1994).
[23] Emphasis added.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13756

2.2 Diverging Interpretations of the Fundamental Non-appropriation Principle

The OST provides a basis of commonly agreed principles to regulate the conduct of space activities, in line with the agreement of States that the domain of outer space is *res communis* (Martinez, 2015, 262). At the same time, more and more voices are being raised to criticize the existing legal framework for being poorly adapted to regulate newly emerging fields of activity – which are strongly attracting both public and private stakeholders – , ranging from space exploration to asteroid mining.[24] Against this background, the development of low-cost small satellites and high-tech robotics (made much easier thanks to cheaper manufacturing techniques and to the growth of commercial off-the-shelf components: Scatteia, Frayling and Atie, 2020) allowed the promotion of space uses showing the greatest potential for the future.

As a result, various aspects relating to the interpretation of the key principle of non-appropriation of space, laid down in Art. II of the OST (establishing that "*Outer Space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means*") have been at issue and further discussed. In particular, questions arised in relation to the exact scope of its application, mainly in the light of asteroid mining. Whereas the provision clearly prohibits national appropriation of territories on the Moon or other celestial bodies, the issue of the regime applying to the extraction of mineral or other resources remains open (Cheney, 2019).

In this context, a first view advocates that all types of use, exploitation and mining of space resources are clearly prohibited by international space law. Indeed, to allow and/or regulate resource mining and similar activities

[24] "The resources of just one asteroid in our solar system could be worth up to $95 trillion, significantly higher than the world's total GDP in 2016 (…) Most do not consider the consequences of removing part of the mining industry from Earth altogether, which could benefit the environment by reducing terrestrial mining activities, thus preserving the planet's limited resources." (Iliopoulos and Esteban, 2020, 87).

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https://doi.org/10.6092/issn.2724-6299/13756

(eventually on the basis of Art. VI of the OST, establishing that States are responsible for their national activities in outer space, thus required to regulate them), a State should first have jurisdiction over the said area; this is, however, prohibited *expressis verbis* by Art. II of the OST. This approach is also based on the general view that space resources are part of the global commons, hence their use and exploitation require an international regime to be authorized (*Idem*, 142). From this viewpoint, mining and exploitation activities are regarded as resulting on an acquisition of (some parts/elements of) the celestial body in which the resources are found, and the extraction of these resources an infringement to Art. II of the OST.

However, following a second approach, in case the space resources being removed amount to a small proportion of the celestial body and/or are extracted without causing any (important) damage, the extraction activities would not necessarily consist in an infringement of the said provision (*Idem*, 112). To corroborate this second view, it is argued that (i) States adopting national laws allowing asteroid mining are acting in line with Art. VI of the OST – which is *not specifically prohibiting* States from adopting legislation on mining activities – (*Idem*, 143) and that (ii) the Moon Agreement did elaborate further the non-appropriation principle established in Art. II of the OST,[25] based on the premise that mining activities would most probably (at some time) take place (Leepuengtham, 2017, 15). In particular, the Moon Agreement provides, in Art. 11 para. 5, for the establishment of an international regime to regulate resources exploitation and calls for their equitable sharing (Art. 11 para. 7.d).[26]

Thus, the OST set the general framework within which space actors may carry out activities aimed at the use and exploration of space resources and established the rules for their global governance. Nevertheless, the Treaty was

[25] Moon Agreement, Art. 11.2 ("The Moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means").
[26] "The Moon Agreement has received much less support than the Outer Space Treaty. Nevertheless, it provides a starting point for the formulation of an international mechanism governing the exploitation of space resources" and, therefore, cannot be (Jinyuan Su, 2017, 994).

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https://doi.org/10.6092/issn.2724-6299/13756

adopted at a time where space activity was principally conducted by States, mainly for scientific and military purposes. Today, given the divergent interpretations of the OST, the questions arise of whether the legal framework on the use of space resources is sufficiently flexible to be adapted to economic and technological developments in space activities.

3. State Practice Posing Challenges to the Global Approach on Space Exploitation

In practice, the global governance of space resources – to the benefit of all – is challenged by the divergent interpretations of the OST rules, as a result of the divide between space-faring (or developed) and non-space-faring countries. *Inter alia*, voices are raised to underline that space exploitation is, currently, mainly benefiting to leading space-faring nations.

Developing infrastructure to exploit space resources requires significant investment – due to the high technical standards and costs required for space robotics[27] – and can be provided only by a few States. Hence, it is probable that a further exploitation of space resources will serve to increase the gap between developed and developing countries.[28] As a result, it appears that a global approach to space resources utilization is challenged, *first*, by policies and practices on mining activities adopted by (and favoring) particular space-faring nations and *second*, by different approaches and levels of ambition as regards space debris and the protection against hazards occurring in space.

[27] "(…) despite increasing number of new entrants to space activities or usage, barriers to entry still exist, largely disguised as security constraints, and lack of enablement to increase capacity emerges through restricted international cooperation or technology transfer, even where commercial." (Aganaba-Jeanty, 2016, 3).

[28] "Given that the exploitation of natural resources in outer space is ultimately a hi-tech and costly enterprise, only a small number of private entities or States will have the capability to do so. States not directly involved in the exploitation may ask for a share of the benefits derived, as well as for technology transfers so that they can carry out exploitation themselves in the future." (Jinyuan Su, 2017, 1007).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13756

3.1 Policies and Practices Aimed at Reframing the Right of Access to Space Resources

Frameworks creating the conditions for the exploitation of natural resources with the aim to generate income – and requiring (in addition to expensive infrastructure) well-organized mechanisms –, already exist in other fields of international law. As an example, the exploitation of the seabed and subsoil and its natural resources is regulated in detail in the Law of the Sea Convention (LOSC) signed in 1982,[29] and may eventually be used as a point of reference.

In particular, the LOSC vested a specific body (i.e., the Authority) with the power to act on behalf of States, so as to adopt rules, regulations and procedures for the exploitation of specific sea resources.[30] In this sense, it appears that the OST adopted a completely different approach for the exploitation of space natural resources (no specific body was created by the OST); the LOSC provisions are only comparable to the ones adopted in the Moon Agreement, which required *expressis verbis* the adoption of an international regime to govern exploitation activities.[31] However, the Moon Agreement which leaves open the question of future space resources exploitation and "remains the only international law treaty that contemplates at all the issue of ownership in space" (Iliopoulos and Esteban, 2020), has been ratified by very few States. Hence, in the absence of such mechanism for space resources exploitation – and in the absence of a new international agreement eventually amending or clarifying Art. II of the OST –, States have

[29] United Nations Convention on the Law of the Sea ("LOSC") 10 December 1982, UNTS Vol. 1833 (p. 3), entered into force on 16 November 1994.
[30] See, for instance, LOSC, Art. 137.2 ("All rights in the resources of the Area *are vested in mankind as a whole, on whose behalf the Authority shall act*. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated *in accordance with this Part and the rules, regulations and procedures of the Authority*") and Annex III titled "Basic conditions of Prospecting, Exploration and Exploitation".
[31] "Article 11 of the Moon Agreement provides a valuable framework for the development of an international coordination and benefits-sharing mechanism for the exploitation of space resources" (Jinyuan Su, 2017, 999).

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https://doi.org/10.6092/issn.2724-6299/13756

to take into account the non-appropriation principle laid down in the OST, when programming this type of activity.

Against this background, some State parties adopted the second approach to Art. II of the OST, to promote measures – namely proposals and space missions –, with the aim to encourage specific (commercial) uses of space natural resources, such as in the form of asteroid mining. For example, the US Commercial Space Launch Competitiveness Act, adopted in 2015 (Freeland, 2017),[32] addressed for the first-time space resource mining operations, by way of its Title IV entitled Space Resource Exploration and Utilization. It laid down that US citizens and entities are "entitled to any asteroid resource or space resource obtained, including to possess, own, transport, use, and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States"[33], allowing property rights on space resources on a first-come, first-served basis (Von der Dunk, 2018, 429). At the same time, it underlined that "the United States does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of any celestial body"[34].

In the same line of thinking, Art. 1 of the Luxembourg law on the use of Space Resources, adopted in 2017,[35] stipulates that such resources are capable of being owned and lays down a licensing process for space resource companies to receive approval from the Luxembourg government (Cheney, 2019, 119). As in the case of the US Commercial Space Launch Competitiveness Act, the law raised concerns as to its compatibility with Art. II of the OST. In reality, both (US and Luxembourg) initiatives paved the way

[32] Public Law 114 - 90 - U.S. Commercial Space Launch Competitiveness Act (titled "An act to facilitate a pro-growth environment for the developing commercial space industry by encouraging private sector investment and creating more stable and predictable regulatory conditions, and for other purposes"), available at https://www.govinfo.gov/app/details/PLAW-114publ90.
[33] U.S. Commercial Space Launch Competitiveness Act, § 51303.
[34] U.S. Commercial Space Launch Competitiveness Act, SEC 403 entitled "Disclaimer of Extraterritorial Sovereignty".
[35] Law adopted on the 20 July 2017 on the exploration and utilization of space resources, published at the Journal Officiel du Grand Duché du Luxembourg / Memorial A n° 674 dated 28 July 2017; Art. 1 stipulates that: "Space resources are capable of being *owned*".

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for a more pragmatic approach to space exploitation; other governmental and non-governmental entities, established in Japan, China and the United Arab Emirates (Hofmann and Bergamasco, 2020; Jinyuan Su, 2017, 992), promoted likewise a series of similar measures and proposals, in parallel to resource exploitation projects.[36]

Overall, it is argued that such practices will eventually provoke the development of customary international law regarding space resource exploitation (Cheney, 2019, 127). However, until the scope of Art. II of the OST is clarified, there is a risk that divergent national approaches will remain, to the detriment of a global approach. At the same time and from a more practical perspective, countries hold different views and operate at different scales (and with different ambitions) also with regard to risk mitigation.

3.2 Different Levels of Ambition in Reference to Risk Mitigation: Debris and Threats

In regulating access to and use of space resources, States must also take into account (in addition to the rules of international law) such practical factors as the significant –and constantly growing – number of space debris, obstructing the use of the Low Earth Orbit (LEO) and the Geostationary Orbit (GEO).

According to the United Nations Office for Outer Space Affairs (UNOOSA), the competent UN authority to promote international cooperation in the peaceful use and exploration of space, space debris are "all man-made objects, including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional"[37]. They consist in non-cooperative elements which are difficult to capture (Shan, Guo and Gill, 2016), varying from small pieces to very large ones; according to the Kessler

[36] With regard to these initiatives, it appears that one of their central elements is the development of a legal and regulatory framework confirming certainty about the future ownership of minerals extracted in space (Hofmann and Bergamasco, 2020, 2), in the context of what is referred to as "the most recent space mining boom" (Cheney, 2019, 126).

[37] UNOOSA, Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, UN, Vienna, 2010, available at https://www.unoosa.org/pdf/publications/st_space_49E.pdf.

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effect (Adilov, Alexander and Cunningham, 2020), in case of collision between them or with other space objects, the resulting debris cloud will be particularly dense and create a cascade of collisions without end. Despite the fact that space debris have long been identified as key threats to space activity, they still occur in the context of civilian or military operations, such as in the case of the Russia's anti-satellite missile test in November 2021.[38]

The Secure World Foundation – a US private entity collaborating with *governments, industry and international organizations to promote* cooperative solutions for space sustainability[39] – underlined that the growing number of debris resulting from accidents and intentional destructive events, or arising in the context of routine operations, could "quickly lead to a sharp decrease in our ability to sustain the benefits that space systems provide to the entire world"[40]. In truth, any deterioration in the conditions of use of the orbits would consist in (irreversible) environmental damage and give rise to a wide array of security challenges *that cross national boundaries.*[41]

In reality, addressing the space debris problem requires complex and expensive-to-maintain surveillance networks and tracking systems, eventually composed of "ground and space-based radars, lasers and telescopes that currently track some 23 000 orbiting pieces of debris larger than 10 cm in low-earth orbit (LEO) and 30 cm in geostationary orbit (GEO)"[42]. Practically, such networks and/or tracking systems may be developed by leading space-faring countries or through effective partnerships

[38] "Russia conducted a direct-ascent anti-satellite (ASAT) test on Nov. 15 to destroy one of its own satellites (…), creating a field of at least 1,500 trackable pieces of debris in low orbit and threatening space operations and human spaceflight" (Bugos, 2021).
[39] Secure World Foundation – Promoting Cooperative Solutions for Space Sustainability, available at https://swfound.org/about-us/
[40] Secure World Foundation (October 29, 2018), Space sustainability - A practical guide, available at https://swfound.org/resource-library/space-sustainability-challenges/ accessed in December 2021, p. 4.
[41] "As more countries integrate space into their national military capabilities and rely on space-based information for national security, there is an increased chance that any interference with satellites could spark or escalate tensions and conflict in space or on Earth." (Secure World Foundation, 2018, *supra*, p. 5).
[42] OECD (2019). Space exploration and the pursuit of Scientific Knowledge (Chapter 5), in *The Space Economy in Figures*, OECD Publishing Paris, available at https://www.oecd-ilibrary.org/sites/d2d4146e-en/index.html?itemId=/content/component/d2d4146e-en

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between them, namely between space-faring countries and/or their space agencies; such as in the case of the European Space Surveillance and Tracking (SST) Consortium established in 2014,[43] and composed of the national space entities of seven EU member States.[44] Non-participating countries may have access to such data only on the basis of a data-sharing agreement; by way of illustration, "in 2017, the US Strategic Command issued hundreds of warnings to their partners, with more than 80 confirmed collision manoeuvres from satellite operators"[45]. From this perspective, access to information on orbiting pieces of debris remains a critical challenge for non-space-faring countries [which could be, however, expected to have an interest as (small) satellite owners].

This relatively uneven development is explained by the fact that information on space debris is of key importance to space-faring countries, as they require it to carry out their space activities with safety. Hence, they prioritize the effort to develop surveillance networks and to establish norms of (responsible) behaviour in space. On the contrary, developing States are lagging behind. In addition to economic issues, they also have to face policy and implementation challenges; they may lack the proper means to tackle space issues, such as capacity in government or experience in the regulation of space activity, or due to a "general lack of awareness among policy makers" on space sustainability issues (Martinez, 2020; Johnson, 2020, 5) (and may miss out on critical opportunities, to the detriment of their national interests).

Hence, as regards more practical issues as well, States adopt (in reality) different approaches, as in the case of regulating asteroid mining. At the same time, it seems that the international community agrees on the identification of an issue of common interest that all space actors wish to resolve.

[43] The Space Surveillance and Tracking (SST) Support Framework was established by the European Union in 2014 with Decision no 541/2014/EU of the European Parliament and of the Council of 16 April 2014 *Establishing a Framework for Space Surveillance and Tracking Support (SST Decision), OJ L 158, 27.5.2014, p. 227–234.*
[44] EU SST, "What is EU SST?", available at https://www.eusst.eu/ accessed in January 2022.
[45] OECD (2019), *supra* note 42.

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4. Emergence of the Concept of Space Sustainability

In addition to divergent national policies on specific space matters, there remains a considerable grey area between legal – e.g., scientific research for purposeful purposes – and clearly prohibited space operations (such as placing in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction).[46] Thus, against the background of an unprecedented development of space endeavours and the growing awareness of (space) environmental constraints, the challenge was first to agree on the characteristics of sustainable space operations, to the benefit of all.[47]

In this regard, the concept of space sustainability was promoted and said to be rooted in the OST, particularly in the provisions making reference to the protection of the space environment *lato sensu* (as the OST prohibits uses which are highly destructive to the outer space environment *per se*: Gabrynowicz and Serrao, 2004, 230). However, as the treaty provisions on the subject remain rather general, the concept was further developed and defined through the elaboration of more practical guidelines.

4.1 Treaty Provisions on the General Protection of the Outer Space Environment

A clear requirement for sustainable use of space resources appears to be *prima facie* absent from the OST or other international space law treaties. However, even though:

> (t)he UN space treaties do not specifically address the concept of 'sustainability' as such or provide a definition of the term (…) *it would fall short of the UN space treaties' spirit to deny that they*

[46] OST, Art. IV.
[47] OST, Art. I para. 1: "The exploration and use of outer space (…) shall be carried out for the benefit and in the interest of all countries".

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> *would not include any forward-looking, environmental concern altogether* (Palmroth et al., 2021; emphasis added).

In fact, the essence of such a concern may be found in OST provisions regulating specific aspects of space activities, such as Art. IV of the OST prohibiting the use of space for particular military purposes;[48] Art. VI of the OST stating that States parties bear international responsibility for all their activities in outer space[49] and Art. VII of the OST laying down the launching State's international liability for damage caused to other States (or to their natural or juridical persons) by their space objects or component parts in space.[50] Finally, Art. IX of the OST appears to also reflect this approach, stating that:

> (i)f a State Party (…) has reasons to believe that an activity or experiment planned by it or its nationals in outer space (…), would cause potentially harmful interference with activities of other State Parties in the peaceful exploration and use of outer space (…), it shall undertake appropriate international consultations before proceeding with any such activity or experiment.

From a certain perspective, it would appear that Art. IX of the OST was adopted to tackle environmental and safety issues in space, "by creating a

[48] OST, Article IV, para. 1: "States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner" and para. 2: "(…) the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden".
[49] OST, Article VI: "States Parties to the Treaty shall bear international responsibility for national activities in outer space (…) whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space (…) shall require authorization and continuing supervision by the appropriate State Party to the Treaty".
[50] OST, Article VII: "Each State Party to the Treaty that launches or procures the launching of an object into outer space (…) is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons".

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'proscriptive positive legal obligation' for States to (1) avoid harmful contamination of celestial bodies and (2) undertake international consultations in advance before any potentially harmful interference may arise from their activities" (Chung, 2018). However, the provision is also criticized for not being sufficiently precise as regards the type of degradation which should be prohibited and to what extent. In particular, it is understood that it would hardly cover "alteration of the topography and geology of a celestial body, which could be a consequence of large-scale human activities such as space mining" (Hofmann and Bergamasco, 2020, 4).

In truth, a closer look at Art. IX of the OST suggests that the wording is vague and poorly adapted to the requirements for an effective framework for environmental space protection,[51] given that no precise and legally binding rules can be derived on space sustainability as such (Palmroth et al., 2021, 4). For instance, Art. IX does not specify when contamination –of the Outer Space, including the Moon and other celestial bodies– is harmful, if all contaminations must be considered as harmful and/or what kinds of adverse changes in the Earth environment must be avoided. At the same time, the OST does not provide for any specific liability regime for *environmental damage* in general, or for damage resulting from the violation of Art. IX of the OST.

Given the difficulty of using this rule as a basis for the application of environmental recovery (Taylor, 2006, 76), Art. IX of the OST has even been regarded "as an impotent provision because it fails to set standards in the field of the space environment or, at a minimum, entrust a regulatory body to do so" (Chung, 2018). In theory, the general obligation deriving from Art. IX of the OST, and aiming at the protection and preservation of the outer space environment, could have been set aside. However, contrary to that, space actors worked together to establish common standards, to allow the OST initial environmental concern to be practically implemented.

[51] The generic terms 'appropriate measures' and 'where necessary' further water down any rigorous content of the obligation: Hofmann and Bergamasco, 2020, 4; Chung, 2018.

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4.2 Developing Space Sustainability to Complement the Treaty Provisions

The said legislative lacunae in space environmental protection, – eventually explained by the fact that space law treaties were negotiated before the emergence of (and the knowledge emanating from) environmental law[52] –, were therefore filled by the concept of space sustainability. As it was first unclear "what components make up a sustainable space environment (or) what steps should be taken in order to achieve this desired result" (Williamson, 2012), several results-based initiatives were taken, starting from the premise that the long term management perspective is the most prominent need in the view of space actors[53] and should be defined. Thus, the concept was set up gradually, in cooperation with the operators involved.

In June 2007, G. Brachet, Chairman of the UN COPUOS – which is the Committee of the General Assembly dealing exclusively with international cooperation in the peaceful uses of outer space[54] – suggested a series of initiatives, focusing amongst others on the topics of "contribution of satellite technology to sustainable development" and "long-term sustainability of space activities" (Brachet, 2012). After several attempts to take the issue further, the French delegation to COPUOS formally proposed the topic of 'Long-term Sustainability of Outer Space Activities' as a new agenda item, in 2010. Hence, during its 47th session, the COPUOS created a formal working group to precisely address this challenge, chaired by Dr. Peter Martinez.[55]

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[52] "The traditional legal framework for outer space activities does not contain specific environmental standards, as it was developed well ahead of the codification of environmental law. Rather, environmental protection was considered – if thought was given at all – as a hindrance to the emerging space activities at that time. (…) The same Earth-centric perspective can be found in the Liability Convention (…). Other norms of the UN space treaties – such as Article 7 of the Moon Agreement – refer to the environmental considerations related to the exploitation of natural resources in outer space" (Bohlmann and Petrovici, 2019, 4).

[53] UNOOSA (May 2021), *Space Sustainability: Stakeholder Engagement Study - Outcome Report*, p. 10.

[54] The COPUOS is the UN body responsible for developing policies related to outer space on behalf of the Un Member states. It does not deal with military space issues, UNOOSA, 'Committee on the Peaceful Uses of Outer Space (COPUOS)' at https://www.unoosa.org/oosa/en/ourwork/copuos/index.html accessed in September 2021.

[55] The Working Group on the Long-term Sustainability of Outer Space Activities, *idem*.

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After several proposals for draft reports and preliminary sets of draft guidelines prepared by the said working group,[56] the *Guidelines for the Long-Term Sustainability of Outer Space Activities* of the Committee on the Peaceful Uses of Outer Space (LTS Guidelines) were finally adopted in 2019,[57] reflecting the latest global consensus on what responsible and sustainable space activities should look like.[58] The value of the LTS (non-binding) Guidelines was to provide authoritative guidance to space actors, taking into account that governments are responsible for the authorization and ongoing supervision of space activities conducted by entities under their jurisdiction or control[59], as established in international space law.

The LTS Guidelines adopted a comprehensive approach providing that the long-term sustainability of space activities is defined as:

> the ability to maintain the conduct of space activities *indefinitely* into the future in a manner that realizes the objectives of *equitable access* to the benefits of the exploration and use of outer space for peaceful purposes, in order to meet the *needs of the present* generations while *preserving the outer space environment for future* generations.[60]

This definition is in accordance with the objectives of the *Declaration of Legal Principles Governing the Activities of States in the Exploration and*

[56] *Inter alia*, UNCOPUOS - Working Group on the Long-term Sustainability of Outer Space Activities (2014), *Proposal for a draft report and a preliminary set of draft guidelines of the Working Group on the Long-term Sustainability of Outer Space Activities - Working paper by the Chair of the Working Group*, STSC 51st session, UN Doc A/AC.105/C.1/L.339; UNCOPUOS -STS (2015), *Updated set of draft guidelines for the long-term sustainability of outer space activities*, UN Doc A/AC.105/C.1/L.340.
[57] UNCOPUOS, *Report of the Committee on the Peaceful Uses of Outer Space COPUOS* 62nd session, UN Doc A/74/20 (2019).
[58] UNOOSA (May 2021), *supra* note 53, p. 5.
[59] "(T)he guidelines can have a legal character in the sense that States may choose to incorporate elements of the guidelines in their national legislation, as has been the case with the UN COPUOS space debris mitigation guidelines" (Martinez, 2021, 102).
[60] See UNCOPUOS (2019), *supra* note 57, p. 50 - Annex II: Guidelines for the Long-term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space, Part I. "Definition, objectives and scope of the guidelines", [emphasis added].

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Use of Outer Space adopted in 1963,[61] the Outer Space Treaty (OST) signed in 1967 and takes into account the recommendations contained in the *Report of the Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities,* established in 2013.[62]

From a private entity perspective, the Secure World Foundation stated that space sustainability generally refers to the ability of "all humanity to continue to use outer space for peaceful purposes and socioeconomic benefit over the long term"[63]. It is clear that this second view is less precise than the one established in the LTS Guidelines.[64] However, the two approaches do share a common feature, as they both mainly focus on "protecting the ability of *current and future* space and non-space actors to use space for their benefit, in accordance with international law" (Lopez, 2016, emphasis added).

On the basis of this (clearer and more precise) definition of space sustainability, State and non-State space-actors were able to negotiate and promote a more specific framework for the practical implementation of the concept. In practical terms, space sustainability was developed to combine institutional guidance and dialogue, with knowledge coming from space operators' practical experience.

5. Institutional and Other Sources of Law Determining the Concept

The rules applying to the use of space resources are of immediate and practical relevance to both public and private stakeholders. Indeed, on the one hand, States are responsible for the authorization and control of space

[61] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, GA Res 1962 (XVIII), UNGAOR, 18th session, 1963.
[62] GA, Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities, UN Doc A/68/189 (2013).
[63] Secure World Foundation, 2018), *supra* note 40, p. 4.
[64] This view is also criticized for taking as a premise that "(1) all humanity thus far is using space for peaceful purposes and for socioeconomic benefit; (2) this use is threatened; (3) measures must be taken to protect it; and (4) all humanity currently possesses the ability, in the sense of having a skill or the capacity, to ensure space sustainability for peaceful purposes" (Aganaba-Jeanty, 2016, 10).

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activities, pursuant to Art. VI (and VII) of the OST. On the other hand, private companies have more resources to invest in space activities; hence, having invested a lot of effort and funds in developing space infrastructure, they seek to ensure that they will be able to deliver the optimum in terms of productivity. It is, therefore, reasonable to assume that both institutional and non-institutional sources of law will have an impact on how the concept is being developed.

5.1 Top-down Development of the Concept: Contribution of the COPUOS and the 'Working Group on the Long-term Sustainability of Outer Space'

In the framework of its powers and in order to "comprehensively address the present challenges in using outer space for peaceful purposes pertaining to the long-term sustainability of space activities"[65], the COPUOS Scientific and Technical Subcommittee (STS) established, in 2010, a specific body named *Working Group on the Long-term Sustainability of Outer Space Activities* (Brachet, 2012). Within this body, four Expert Groups were tasked to provide supporting work to the working group by covering specific aspects of space sustainability, with the aim to develop efficient approaches (Martinez, 2015, 266).[66]

The working group focused on the sustainability of space operations in the context of the broader framework of sustainable development on Earth; on the state of ongoing practices, functional procedures, technical standards, and policies associated with space sustainability and safety and on the existing UN treaties and principles governing space activities as a legal framework

[65] UNCOPUOS, *Fiftieth anniversary of the United Nations Conference on the Exploration and Peaceful Uses of Outer Space: the Committee on the Peaceful Uses of Outer Space and global space governance*, COPUOS 59th session, UN Doc A/AC.105/2016/CRP.4 (2016), para. 62.

[66] Expert Group A focused on "*Sustainable Space Utilization Supporting Sustainable Development on Earth*"; Expert Group B focused on "*Space Debris, Space Operations, and Tools to Support Collaborative Space Situational Awareness*"; Expert Group C examining "*Space Weather*" and Expert Group D, on "*Regulatory Regimes and Guidance for Actors*".

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(Martinez, 2015, 264 ff.).[67] Based on such preparatory work, the working group released a set of guidelines – the *Guidelines for the Long-Term Sustainability of Outer Space Activities* (or LTS Guidelines) –, officially adopted in 2019.[68]

As regards their content, the LTS Guidelines are not binding[69] but they do provide –after a long debate (Palmroth et al., 2021, 5) – a commonly accepted approach to space sustainability.[70] Additionally, States and international intergovernmental organizations are encouraged to voluntarily adopt rules, which will ensure that the guidelines are implemented to the greatest extent feasible and practicable (taking into account, of course, the needs of States, their specific conditions and capabilities, and their obligations under international law).[71]

In particular, the document contains 21 guidelines, divided into four main categories, consisting in specific guidance to governments, to help them establish a better adapted legal framework;[72] guidelines on how to design safe space operations;[73] guidance on how to develop international cooperation, capacity building and awareness[74] and finally guidance in relation to scientific and technical research and development.[75] The LTS Guidelines take into consideration the growing concern about orbital debris and the risks they pose

[67] More precisely, the four expert groups –created to discuss specific issues and to propose candidate guidelines– concentrated on: (a) Sustainable use of space that supports sustainable development on Earth; (b) Space debris, space operations and tools to support cooperation in space space-related activities, tools, and support for the development of space-based technologies and support for space-related activities; (c) Space weather and (d) Regulatory regimes and guidance for new actors in space; see also the 2019 Fact Sheet on UN COPUOS Guidelines for the Long-Term Sustainability of Outer Space Activities.
[68] See, *supra* note 57.
[69] LTS Guidelines, para. 15.
[70] LTS Guidelines, para. 5 and *supra* note 57.
[71] LTS Guidelines, para. 16.
[72] LTS Guidelines, "A. Policy and Regulatory Framework for Space Activities", guidelines A.1 to A. 5.
[73] LTS Guidelines, "B. Safety of Space Operations", guidelines B.1 to B. 10.
[74] LTS Guidelines,"C. International cooperation, capacity building & awareness", guidelines C.1 - C. 4.
[75] LTS Guidelines, "D. scientific and technical research and development", guidelines D.1 and D. 2.

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to space operations, with the aim to propose specific measures and solutions.[76]

Finally, the LTS Guidelines also build on the achievements already made, as non-governmental entities are encouraged to adopt other instruments on more specific issues (related to space sustainability), such as the *COPUOS Space Debris Mitigation Guidelines*.[77] This latter document was released in 2007, focusing on specific aspects, such as that (a) States should take into account debris mitigation during the design of a space object;[78] (b) the amount of debris produced during operation and after mission should be minimized[79] and particular attention be given to space objects in the geosynchronous and low Earth orbit regions;[80] (c) adjustment of the launch time and on-orbit avoidance manoeuvre should be considered if a potential collision is known[81] and (d) intentional destruction of space objects should be avoided.[82]

The specific reference to the *COPUOS Space Debris Mitigation Guidelines*, made in the LTS Guidelines, shows a continuum in the normative activity and convergence of approaches, first of all at the institutional level.

5.2 Bottom-up Initiatives and Space Operators' Contributions

Contrary to institutional approaches – such as the one adopted by the COPUOS in the LTS Guidelines –, market participants and space operators seem to focus more on operational and technological aspects of space sustainability. As non-governmental actors are growingly involved in space

[76] *Inter alia*, the LTS Guidelines encourage States and international intergovernmental organizations to develop and use relevant technologies for the measurement, monitoring and characterization of the orbital and physical properties of space debris (Guideline B.3.1) and adopt new measures, including technological solutions, to address the evolution of and manage the space debris population in the long term (Guideline D.2.1).
[77] LTS Guidelines, Guideline C.4: "Non-governmental entities (…) can play important roles in increasing international awareness of issues associated with space sustainability, as well as promoting practical measures to enhance space sustainability. Such measures could include adoption of the Space Debris Mitigation Guidelines of the COPUOS".
[78] COPUOS Space Debris Mitigation Guidelines, Guidelines 1–3.
[79] *Idem*, Guidelines 1, 2, 5.
[80] *Idem*, Guidelines 6, 7.
[81] *Idem*, Guidelines 3.
[82] *Idem*, Guidelines 4.

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activity, it is beyond doubt that these practical approaches provide important information to be taken into account.

Space agencies and companies appear to aim, initially, at further clarifying the scope of application of space sustainability, as well as practical aspects concerning its implementation. *Inter alia*, they promote the idea that the concept is applicable to the sustainability of the Near-Earth environment – and mainly the LEO and GEO – and the sustainability of economic growth on Earth, but also to the sustainability of celestial bodies (even though this was qualified as a non-pressing issue).[83] It is noteworthy that, contrary to that, the sustainability of celestial bodies is not really developed in the LTS Guidelines, despite being a key requirement for future space activity like space mining. In practice, space sustainability seems to reflect (thus far) the differences of opinion between space stakeholders; it is addressed locally, "as there is an increasing tendency to find practical implications on what sustainability means for the actors in terms of requirements and applications in their domestic contexts"[84].

In a more concrete and tangible way, the *Inter-Agency Space Debris Coordination Committee (IADC)* – which is a network of space agencies, authorized governmental or inter-governmental entities for the coordination of activities related to human-made and natural debris in space –[85], released in 2002 a set of voluntary guidelines, later endorsed by the UN General Assembly.[86] The IADC Guidelines reflected a series of existing standards, practices and codes developed by national and international organizations, and aimed at reducing the creation of space debris during routine operations. In short, the purpose of the IADC Guidelines was to gather the best expertise available, in order to minimize the potential for accidental on-orbit breakups,

[83] UNOOSA (May 2021), *supra* note 53, p. 11.
[84] *Idem*, p. 14.
[85] For the members of IADC, see 'Inter-Agency Space Debris Coordination Committee' at https://www.iadc-home.org/what_iadc accessed in September 2021.
[86] UNCOPUOS Scientific and Technical Subcommittee (STS), *Inter-Agency Space Debris Coordination Committee space debris mitigation guidelines*, 40th session, UN Doc A/AC.105/C.1/L.260 (2003).

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regulate the disposal of spacecraft post-mission, prevent on-orbit collisions and to avoid intentional destruction and other harmful activities.[87]

From a different perspective, but still as a bottom-up (here, regional) initiative aimed at facilitating and promoting the sustainable use of space resources, the EU released a draft *International Code of Conduct for Outer Space Activities (ICoC)*, in 2008 (Lopez, 2016). The draft, which was revisited and modified several times, mentions as its purpose – in the 2014 version – "to enhance the safety, security, and *sustainability* of all outer space activities pertaining to space objects, as well as the space environment"[88]. Detailed rules are laid down, such as that States should minimize the risk of accidents in space, or collisions between space objects (Art. 4.1); or refrain from any action which brings about, directly or indirectly, damage or destruction of space objects, unless such action is justified (Art. 4.2). The code serves to clarify how sustainability may be applied in space, where the nature of acceptable activities is not always apparent and remains a key soft law instrument to consider in the discussion on space resources exploitation.

The numerous bottom-up initiatives give an overview of space operators practical approach to space sustainability, showing a high degree of participation; they develop voluntary guidelines, rules of engagement or rules of conduct, involving *more and more* non-state agencies and complementing the OST provisions. These initiatives improve the efficiency of the concept and may be viewed as an important step allowing to create a wide and inclusive notion, able to provide practical and well-adapted solutions in the context of space resources exploitation.

[87] On the importance of the IADC guidelines, see UNOOSA, Space Debris Mitigation Guidelines of the COPUOS, *supra* note 35, para. 2: "The Committee on the Peaceful Uses of Outer Space acknowledges the benefit of a set of high-level qualitative guidelines, having wider acceptance among the global space community (...)".

[88] EU, Draft International Code of Conduct for Outer Space Activities – Version 31 March 2014, Art. I para. 1.1., available at https://eeas.europa.eu/archives/docs/non-proliferation-and-disarmament/pdf/space_code_conduct_draft_vers_31-march-2014_en.pdf accessed in January 2022.

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6. Substantive Normative Gaps Filled by the Concept of Space Sustainability

Having clarified how the concept of space sustainability was built up and developed, it is necessary to also examine its normative contribution. In practice, space sustainability was developed as a dynamic policy instrument, with the purpose to eventually remedy the shortcomings in international policy coordination.[89] The perceived inadequacy of some international space law institutions, in conjunction with the need to take into account the newly emerging needs of space industry and society, paved the way for a more flexible approach that would complement the OST provisions.

6.1 The Perceived Inadequacy of (some) International Space Law Institutions

The number of space-faring countries increased and diversified, as new space-faring States joined the network of existing ones to gradually create a "more polycentric governance" (Aganaba-Jeanty, 2016, 6). More and more States – such as Nigeria (in 2010), Finland (in 2017), Greece (in 2018) and Portugal (in 2019) – adopted legislation on space matters (Tapio, 2018; Von der Dunk, 2020); this development resulted in a rapidly rising number of members in international fora, and in the strengthening of pluralism.[90] At the same time, the strong influence exercised by leading space-faring nations in the previous decades was being criticized, *inter alia*, as being an impediment to the development of newly emerging space activities.

[89] In raising the awareness of space sustainability, "China emphasized that the participating States should not blindly pursue a quick adoption of the ICoC [i.e. Code of Conduct] but conduct in-depth discussions on the text of the ICoC, and the consultation process should ensure equal participation of all interested States" (Rong Du, 2017, 8).

[90] "There are good reasons to be optimistic that we are moving in the direction of multilateralism rather than unilateralism regarding the regulation of mineral exploitation in outer space." (Jinyuan Su, 2017, 1008). Also, "At the UN, membership of the Committee on the Peaceful Uses of Outer Space (COPUOS), the leading UN intergovernmental forum for space policy discussions, has seen membership rise by over 25% since 2017 – one of the fastest-growing multilateral policy-making fora in the entire UN system", UNOOSA (May 2021), *supra* note 53, p. 5.

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However, any change to the current legal framework applicable to space activity requires international agreement. As outer space is *res communis*, an agreement is required even on such specific issues as "in which country should corporations operating in outer space be paying tax to, given that their extra-terrestrial activities take place in an environment of ambiguous geopolitical boundaries" (Iliopoulos and Esteban, 2020, 90). Against this background, practice showed that reaching an international agreement on the regulation of (newly emerging) space activities is proving difficult. Effectively, no further treaties have been concluded – through the UNCOPUOS or other international space law fora – since the Moon Agreement adopted in 1979; at the same time, this allowed the development (or made it necessary to develop) soft law guidelines and codes of conduct.[91]

Practically, certain States fear that in the absence of commonly agreed rules, space activities would be carried out to the benefit of space-faring countries, allowing a "potentially disruptive economic impact of space resources exploitation activities on existing global inequality"[92]. It is argued that space-faring countries seem reluctant (until now) to share benefits[93] arising from space exploitation, based on the absence of a clear legal obligation to do so.[94] Similarly, proposals to establish a right to participate in the sharing of the benefits stemming from the exploitation of space resources – such as by sensed States over their remote sensing data (i.e., on data

[91] "There has been a strong tendency towards the development of soft law guidelines and 'codes of conduct' for space-related matters, notwithstanding the inherent risks that this (potentially) brings of greater 'non-compliance" (Jakhu and Freeland, 2016).
[92] Following this line of argumentation, a working document was submitted, for example, to the COPUOS Legal Subcommittee by Belgium and Greece, suggesting that an international regime for the sustainable use of Outer Space resources is necessary, see Hofmann and Bergamasco, 2020, 2.
[93] This in one of the main criticisms against space resources exploitation. See *inter alia*, "(…) imagine if the exploitation of large quantities of plutonium, a highly strategic material, were monopolized by a few States or even private entities. Even if the use serves all, the resulting inequality might be so grave that the additional material benefits enjoyed by the disadvantaged group would be negligible in comparison with the heightened inequality between them and the advantaged group" (Jinyuan Su, 2017, 1003).
[94] "We do not know the scope and meaning of the "legal right" to benefit from space activities" (Aganaba-Jeanty, 2016, 8).

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collected over, and related to, their own territory) – were rejected, *inter alia* when the Remote Sensing Principles were being discussed.[95]

Therefore, as commercial interests are not directly addressed in the international space law treaties (Hertzfeld, 2009), the most complicated and crucial issues are yet to be negotiated. However, given a strongly rising commercial space market (and divergent State interests), it is argued that the potential of international space law institutions –such as the UN COPUOS or the legal subcommittee of UN COPUOS[96] – is not fully used. Particularly as regards the protection of the outer space environment, it is likewise underlined that there are no "environmental agencies with clear regulatory powers for the extra-terrestrial environment"[97].

At the same time, space programs and activities "slowly migrate from government-owned and controlled projects to profitable commercial ventures" (Hertzfeld, 2009). Thus, in addition to the perceived inadequacy of (some) international space law institutions, a second challenge posed is to better take into account emerging space actors, such as non-leading space-faring nations[98] and private or other entities. The current legal regime was "remarkably good over the past forty years in helping to maintain a peaceful and productive international space environment", but the needs of new stakeholders must also be met.

[95] To find solutions, "Peter and Rathgeber proposed bridging the participatory gap through cooperation and other forms of exchange (*n.b. of the south*) with the north and established space actors, including data sharing, knowledge transfer, and discussion fora and core groups" (*idem*, 13).

[96] "(T)he legal subcommittee of UNCOPUOS, where space governance issues are deliberated, finally recognized that it is in a state of flux and needs to re-invent itself" (Aganaba-Jeanty, 2016, 7).

[97] For this reason, any consultation with regulatory authorities will be complicated, see Mustow, 2018, 475.

[98] "It was in this discussion [i.e. at the 1972 Stockholm Conference] that the formula "poverty is the biggest polluter" emerged. This made it possible for developing and undeveloped countries to become engaged in environmental protection without having to make compromises regarding their development goals. Furthermore, it became clear that the environmental problems recognized in the 1972 Conference (e.g., the destruction of the rainforest or pollution of the oceans) could not be solved without taking social and economic perspectives into account" (Michelsen et al., 2016, 9).

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6.2 Additional Needs to Take into Account While Using Space: Investors & Society

In the current state of the law, a *first* remark to be made is that the State-centric regulatory regime applied to space activity – and resulting initially from Art. VI and VII of the OST – is not entirely in tune with the needs of the commercial space sector. On one hand, space resource exploitation is highly promising; the field attracts a wide range of investors, who expect the most from their investments. On the other hand, resource exploitation requires numerous pilot experiments, based on highly specialized and expensive technology, as planetary missions consist in energy-intensive, long-distance[99] and long-timeline[100] operations. An example of this is the Interstellar Probe[101] which would be "a multi-generational effort;[102] it might reach fruition in the lifetime of people working on it now, but (…) would certainly exceed the span of any researcher's active career" (Powell, 2021). Missions aimed at the exploration or exploitation of space should, therefore, plan for a multigenerational approach from the beginning (Benningfield, 2020), in addition to the significant funds that must be invested.

From this perspective, the OST regulatory regime seems to be poorly adapted to the purpose of protecting the value of private investments in space. In truth, the treaty only established a set of *a posteriori* measures, such as the

[99] For example, "A half-century after launch, Interstellar Probe would reach a distance of 1,000 astronomical units from the Sun. (An astronomical unit is the average Earth-Sun distance, equal to almost 150 million kilometres.)" (Benningfield, 2020).
[100] "Another aspect is that the duration of space exploration missions is often unknown. The achievement of milestones (e.g. building an outpost on the Moon) requires a step-by-step approach including the construction of launch and crew vehicles, development of infrastructures, astronaut training and many others. Therefore 'sustainability' would be a better term to express the time scale of activities in space exploration" (Ehrenfreund and Peter, 2009, 249).
[101] "A launch technologically possible in the 2030s would propel an Interstellar Probe farther and faster than any spacecraft before it, leading to new and inspiring exploration across heliophysics, astrophysics and planetary science – helping us understand our home in the galaxy and representing humanity's first deliberate step into the sea of space between our Sun and other potentially habitable systems." (The Johns Hopkins University, 2021).
[102] "They're trying to design a spacecraft to launch around 2030 and get a thousand AU [astronomical units] from Earth in 50 years," said Janet Vertesi, (…) "The problem is, by then they'll all be dead." (Benningfield, 2020).

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international liability of States for damage arising from their activities in space[103] (which is at the same time criticized for discouraging several initiatives)[104]. No concrete and binding *a priori* measures were really laid down; a system of international consultations was established to avoid harmful interference between space activities (Hoffman and Bergamasco, 2020, 3),[105] but the provision is too vague to impose clear obligations – such as, standards, controls or procedures – on States[106], to efficiently protect (private or public) space infrastructure. Hence, due to the high value of space technology, a legal solution had to be found to protect (and encourage) the growing participation of private-sector companies as well.

Second, the issue of protecting the broad range of societal benefits derived on Earth from space science and technology was also raised. In particular, pursuant to Art. I of the OST, the use of outer space must be carried out *for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development*. Hence, space resources, such as the LEO and GEO, cannot be used in a predatory way or at the expense of other State or non-State actors (such as, in the context of cross-border GIS and/or remote sensing activities: Deekshatulu, Raghu and Chandrasekhar, 1995; West, 1990).

[103]Liability for outer space activities can be established under the Outer Space Treaty (Article VII) and more precisely under the dual liability regime of the Convention on International Liability for Damage Caused by Space Objects (the "Liability Convention"), applicable to States (Art. II for damage caused on the surface of Earth [in this case, an absolute liability regime applies] and Art. III for damage caused elsewhere [here, a fault-based liability regime].

[104] "There is a growing need to address the troublesome problem of national liability with regard to launched 'space objects' that is actually serving to retard efforts to undertake active debris removal" (Pelton, 2013, 26).

[105] OST, art. IX: "In the exploration and use of outer space (…) States Parties to the Treaty shall be *guided by* the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty (…). If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, (…) would cause potentially harmful interference with activities of other States Parties (…) it shall undertake appropriate international consultations before proceeding with any such activity or experiment".

[106] See, also, *supra* note 51.

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By way of illustration, a case of unwanted interference caused almost damage in 2010, when:

> Galaxy 15, an Intelsat communications satellite in geosynchronous orbit, failed to operate properly and began to pose a frequency interference risk to the operations of other satellites in its vicinity. Although Intelsat responded to the emergency immediately and worked quickly to limit possible interference with other nearby satellites the incident still underscored the potential risk of inadvertent signal interference to communications satellites (Williamson, 2012, 155).

Thus, to avoid irreparable losses, the International Communication Union (ITU) has developed and formulated specific conditions for the sustainable use of frequency bands for radio services, to the benefit of all (these must be used "*rationally, efficiently, and economically*").[107] In addition to that, the ITU competent bodies formulate the technical and operational conditions for the use of the radio spectrum, as well as elements of standardization (Lyall and Larsen, 2018, 208).

From this perspective, it is clear that the OST regime applying to space resources exploitation must be complemented; tighter standards and specific rules are necessary to allow space operators to make optimum use of the resources and infrastructure available and to ensure the fair and equitable sharing of benefits among users, on *both* an inter-nation (between developed and developing States) and inter-generational basis (Bohlmann and Petrovici, 2019; Spijkers, 2018),[108] in recognition of the limitation of space resources (Martinez, 2015, 259-260). Hence, as a solution to the difficulty and length of time needed to reach international law agreements on these topics,

[107] See, also, *supra* notes 21 and 22.
[108] The concept of inter-generational equity is being mentioned in art. 7.1 of the Moon Agreement.

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stakeholders focused on the concept of space sustainability as a possible way of managing the said issues.

6.3 Space Sustainability as a Solution: A Flexible & Task-oriented Concept

In theory, it is not clear whether sustainability – and other international law concepts – can be applied in space under the same terms and conditions as in the context of Earth activities, due to the unique characteristics of activities conducted in the extra-terrestrial environment.[109] However, unanticipated problems and gaps surfaced in the space law regime. The concept of space sustainability gradually emerged in an effort to overcome the rigidity in the State-centric international space law framework. Based on economic reality, it is aimed at the participation of all actors involved in this field, like States and national space agencies, but also industries, universities, research institutions, and other non-governmental organizations (NGOs).

In practice, space sustainability seems to have gained widespread acceptance, and at the same time some autonomy from the complex space governance structure as defined in the *Montreal Declaration.*[110] In the absence of a provision making clear the obligation of States to protect the space environment, voices are raised to apply *mutatis mutandis* relevant principles of international law to space activities –under the concept of space sustainability, and in line with the meaning of Art. IX of the OST– to allow an *ad hoc* approach.

By way of illustration, S. E. Mustow argues in favour of conducting Environmental Impact Assessments (EIA) of space activity projects namely, to investigate and evaluate the environmental impact of the proposed projects or actions before they go forward (Yang, 2019), and propose actions to mitigate them. The view is based on the concern that, in relation to space

[109] However, "Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration on Environment and Development refer to 'areas beyond the limits of national jurisdiction', which can be considered to include outer space" (Bohlmann and Petrovici, 2019).
[110] See, *supra* notes 1 and 2.

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environmental protection, "although a number of existing laws apply, such as Article IX of the Outer Space Treaty, the level of legal protection is inadequate" (Mustow, 2018). Hence, the obligation to conduct an EIA may be established and developed in national law.[111] In a similar way, Professor Olavo de O. Bittencourt Neto supports the full application of the precautionary principle in space law matters, given that "conceived upon a prospective approach, (it) seeks the protection of the environment from specific human activities involving grave risks, even when scientific knowledge on that regard may seem insufficient to fully comprehend the particularities of the resulting threat to nature" (Neto, 2013). The need to apply the precautionary principle to space activities would arise from the continuing degradation of the space environment, resulting from the growing number of space debris and pending the adoption of a binding treaty rule establishing a clear obligation to mitigate the production of debris (*Idem*).

Nevertheless, the concept of space sustainability should not only be viewed as an instrument to ensure the optimal use of the LEO and GEO. Having regards to the latest developments in the field of space activity, it is apparent that space environmental protection is an issue of great strategic importance. In particular, it is already alleged that the emerging consensus on the need to protect the space environment from specific threats, such as space debris, should be "channelled into more robust action, and its focus extended beyond the LEO" (Newman and Williamson, 2018). In this context, it would appear that space sustainability, as a flexible, evolving and task-oriented instrument, could be likewise used to address possible future threats to the space environment *lato sensu*.[112]

[111] "The legal frameworks of Belgium and France are exceptions as they require that EIA considers extraterrestrial impacts. Belgium's Law on the Activities of Launching, Flight Operation or Guidance of Space Objects (Kingdom of Belgium 2013) requires that an EIA be submitted prior to the launch, assessing the effects of the action on both the Earth and any celestial body affected (Kramer 2014) etc." (*ibid*, 468).

[112] "(C)rewed missions introduce a human population to the extraterrestrial environment which requires consideration of population and human health effects, which may be significant due to exposure to high natural radiation levels and other health risks. The

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https://doi.org/10.6092/issn.2724-6299/13756

7. Conclusions

The persistent problem in relation to space resources exploitation consists in the fact that:

> global governance would help improve the situation (…) and strengthen space sustainability. Yet no global authority exists to govern the (…) issue *per se* with verification mechanisms and powers and funding to monitor and manage violations. Still, elements of a (…) regime have emerged on a voluntary basis (Trur, 2021).

The argument relates to the specific issue of space debris, which is a key threat to the unhindered use of Earth orbits, but applies equally well to other space resources exploitation issues.

Against this background, the concept of space sustainability may be characterized as an "element of a regime" emerging on a voluntary basis. Contrary to the mechanism applying to the space debris issue,[113] space sustainability is a broader and more flexible notion. It may be described as an umbrella concept, and more particularly a dynamic and changing one which is constantly expanding[114] in an effort to combine scientific development and discovery[115] with economic progress.

introduced population may also be a receptor for noise, vibration, visual and other impacts" (Mustow, 2018, 472).

[113] "The governing mechanisms in place for tackling the global debris issue are characterized by their mostly voluntary nature and the absence of a global authority equipped with the mandate and resources to direct and implement an international response to the debris problem. Some elements of a debris regime have emerged, yet a binding regime is still work in progress" (Trur, 2021).

[114] "(…) a new wave of space expansion advocates is using sustainable development in an alternative way. 'Sustainable' is used to refer to self-perpetuating private economic activities off-world. 'Sustainable' is also employed to refer to permanent space habitats that rely on the harvest of local (but unrenewable) space resources. Finally, 'sustainable' is used to describe forms of extra-terrestrial extractivism —e.g., strip-mining asteroids — which would be carried out with the aim of offsetting Earth-side resource deficits" (Tabas, 2021).

[115] "Hence, the definition for space exploration utilized in this paper merges the concepts of 'development' and 'discovery', as employed in NASA's Strategic Plan 2018" (Iliopoulos and Esteban, 2020, 86).

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As a concept, space sustainability is rooted but not limited to Art. IX of the OST. Its strengthening allows to establish rules complementing the protection of the space environment – *via* the sustainable use of space resources –, taking into account the treaty's objectives but also its shortcomings. Its flexibility allows for the incorporation of existing environmental law principles (Navalgund, 2020) on the sustainable use of resources, without first requiring a global authority that would be responsible to adopt and implement an international regime for space resources exploitation, or to coordinate State and/or non-State actors initiatives. In parallel, space sustainability is regarded as the legitimate basis for a wide range of initiatives – each time in line with all space stakeholders' needs and requirements –, varying from space situational awareness to space safety.[116]

Under this concept, practical steps are taken to establish cooperative mechanisms for an effective protection of space resources on an *ad hoc* basis[117] and taking into account (environmental law) best available knowledge. In truth, due to:

> competing uses of outer space, the methods of reaching sustainability *require methodological innovation*. Outer space is open to all states that wish to operate in the realm peacefully; it will consequently also require the willingness of states to give up

[116] "(T)here is no agreed definition on space sustainability. It often appears in association with space safety and space security or encompasses the meaning of safety and security in outer space, with an emphasis on the long-term impact of current space activities and due considerations deserved by future generations" (Rong Du, 2017). In the same line of reasoning, "(…), the concept of space sustainability is also used interchangeably with the following: (1) space security, which entails access to space and freedom from threats; (2) space stability addressing space situational awareness; (3) space safety, which is protection from all unreasonable levels of risk (primarily protection of humans or human activities); and (4) responsible uses of space" (Aganaba-Jeanty, 2016). See also, Newman and Williamson, 2018).

[117] See, for example, the ongoing effort to tackle the space debris issue: "The current international legal regime regulating space activities has proven to be incapable of handling this issue progressively. The international community needs to come together and undertake certain responsibilities to solve this issue and evolve future plans to prevent the creation of large amounts of debris" (Haroun et al., 2021).

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> some freedom of action in order to reach a greater collective good than can't otherwise be achieved (Williamson, 2012, 155).

From this perspective, space sustainability may be defined as a remarkable set of good practices promoting an *ad hoc global approach* to space resources exploitation, and relying on legal and scientific knowledge, on efficiency and lessons learned, and on efficient and effective cooperation among states. Its final aim remains to ensure to the maximum feasible extent the sustainability of space exploitation activities,[118] to the benefit of all, and in a very practical way while consolidating confidence in this domain.

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[118] Space missions should be "(…) capable of long-term survival in uncertain, remote environments, and converge on accomplishing the most relevant and useful mission, informed by intermediate results and experience in the operation environment. (…). Sustainable architectures accomplish their missions, remain relevant for long durations and show adequate investment planning; they must include 'system effectiveness, reliability, safety, and affordability as new technologies and discoveries emerge." (DeLaurentis, Sindiy and Stein, 2012).

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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

International Law and the Struggle for the Future: Historicizing Agenda 2030 for Radical Critique of International Legal Ideology

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ABSTRACT

This paper addresses the UN's 'Agenda 2030' from a historical-materialist perspective, interrogating its potential to effectively 'transform our world' in the face of the 'crisis of the future'. It explores the ideological dimensions of the international legal form, critically reflecting upon the role of international lawyers in the reproduction of global capitalist relations, on the limits of international law as an instrument of social transformation and of the Agenda as a roadmap to a 'better future'. Specifically, it demonstrates how the a-historical and depoliticized legal language of the Agenda conceals and legitimises the inherently 'unsustainable' logics of value and capital accumulation. Finally, the paper denounces the Agenda's ideology of Progress, pointing to its epistemological 'blindspots' and proposing a reclaiming of utopian and revolutionary thinking in order to rescue international legal theory's capacity to imagine a different future and act towards a new mode of sociability and human-nature relationship.

Keywords: agenda 2030, sdgs, marxism and international law, ideology, crisis

ATHENA
Volume 2.1/2022, pp.73-115
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13853

1. Introduction

The existential challenges posed by the climate crisis intensify global inequalities and conflicts between nations, transnational groups and classes, escalating global crises to unprecedented levels. As these challenges grow in magnitude and imminency, they put into question not only the social capacity to imagine alternative, 'better' futures, but also the very limits and the capacity of the international community, international legal norms, global governance instruments, and development policies to build, bring about, such better futures.

In this context of 'struggle for the future' – in which humankind's hope for a better future is at stake –, '*Transforming our world: the Agenda 2030 for Sustainable Development'* (UN, 2015) emerged, establishing 17 sustainable development goals (SDGs) and specific indicators to measure progress towards a 'better' future. Building on the legacy of '*The future we want*', *'Our Common Future'*, and the *'Millenium Development Goals'*, the 2030 Agenda today constitutes, alongside the *'Paris Agreement'*, the main international legal document for protecting the future, proposing to 'transform our world'.

However, despite the many calls for more ambition, decisiveness, determination and urgency made around the Agenda,[1] and the deafening alarm bells rang by the last IPCC report (IPCC, 2021), which caused Secretary-General Guterres to declare 'code red for humanity' (UN, 2021a) - , 'Transforming our world' still seems to lack real transformative power, showing itself incapable of making the necessary changes to alter the course of 'unsustainable' capitalist development. In an alarming finding, the latest SDG report showed that, if progress towards achieving the SDGs was already insufficient, the COVID-19 pandemic led to a worrying regression, revealing the fragility and insufficiency of the instrument in question and the

[1] In September 2019, the United Nations General Assembly even proclaimed the Decade of Action for the achievement of the Sustainable Development Goals (SDGs) to "accelerate efforts to realise the ambitious, universal and inclusive 2030 Agenda".

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https://doi.org/10.6092/issn.2724-6299/13853

international community's difficulties to implement it and deal collectively with global crises (UN, 2021b).

Drawing from Marxist critiques of law, ideology, and critical approaches to international law, this paper analyses the 2030 Agenda from a historical-materialist perspective, interrogating its real transformative potential and seeking to reveal not only its ideological and theoretical underpinnings, contradictions and epistemological blindspots, but also the limits of international law itself as an instrument of social transformation.

Building from the work of critical international legal scholars such as Orford (1998, 2017), Skouteris (2009, 2016), Koskenniemi (2007), Kennedy (2013, 2016), Singh and Mayer (2014), Moyn (2016), and D'Aspremont (2019) and, in general, on the tradition of critical theory and historical materialist analysis of law, I start by identifying and criticising the technocratic and eurocentric narrative (or ideology) of progress that accompanies the history of international as a discipline. This mainstream traditional narrative mostly presents international law as a synonym of 'progress', 'civilisation' and 'development', or as a panacea to the world's problems. By delving into the subjective and ideological dimensions of the international legal form, my paper takes a critical stance on this mainstream position, following the lines of Marxist and TWAIL critique of imperialism, eurocentrism and colonialism.[2]

From this angle, I bring Agenda 2030 into focus, with a view to understand how this complex global governance mechanism approaches global problems, envisages a different future, and enables the 'transformation of our world'. The core of my argument is that the Agenda eventually reproduces the same neoliberal technocratic and eurocentric ideology of progress and the fetishism of the law. Due to its technical, universal and formal international

[2] On the relationship between International law and capitalism, imperialism and neocolonialism, see, among others: Miéville (2005), Anghie (2004, 2017), Chimni (2006, 2012), Marks (2008), Knox (2014), Rasulov (2008, 2018, 2018a) Gathii (2011), Eslava, Obregón and Urueña (2017), Parfitt (2019), Bernstorff and Dann (2019), Tzouvala (2020), Forji Amin (2021).

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https://doi.org/10.6092/issn.2724-6299/13853

(soft) legal language, the Agenda presents a high degree of a-historicity, generalisation, depoliticisation, abstract universalism. With a focus on expertise and empiricism (measurement over politics) the Agenda operates ideologically to conceal the historical, economic, social content of law - the capitalist relations of production - and, thus, legitimises capitalist, imperialist, neocolonial, and dependency relations. This renders the agenda incapable of bringing about a 'better future' - of 'transforming our world', stopping or reversing climate change. This because, I claim, its capitalist rationality is structurally incapable of identifying and criticising capitalism's core elements such as the commodity, accumulation (growth), and value (understood as a social form or relation), which are mostly responsible for capitalism's 'autophagic', colonising and destructive forces.

Actually, my analysis of this complex global governance mechanism aims to expose the limits of international law itself, and its instruments, in reversing the current global crises within the ideological framework in which they operate. I ask: what kind of 'transformation' is sought after by the declaration? What is the degree of rupture and radicality of this transformation? What is the ideological reality ("worldview") in which 'global leaders' and distinguished 'international lawyers' are submerged? How and from what assumptions are their subjectivities constituted? What are the structural, political and ideological limits of this instrument which promises to deliver us a transformed world? What kind of legal and political subjectivity does it rely on? This paper is an attempt to reflect on these issues. Finally,

As for the SDGs themselves, I must say that do not engage directly with them. Rather than engaging with the empirical debates concerning indicators, targets, measurement, data collection and review procedures, I focus on the theoretical aspects of their legal status, language, universality, ideology. With this, not only I seek to throw some light on the most evident practical problems of the Agenda (fragmentation, 'greenwashing', 'SDG-washing', 'business as usual', 'anthropocentrism', 'growth at-all-cost', 'corporate

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https://doi.org/10.6092/issn.2724-6299/13853

capture', etc.), but also on its 'blind faith' in 'progress', 'growth' and' technology.

Finally, the study points to the need for a radical theory of society and of international law and a reclaiming of revolutionary expectations, for the sake of a concrete utopia and a real project of social transformation. I conclude by arguing that, if the Agenda's language of international legal expertise operates to naturalise the main gears that drive environmental destruction, a radical change in the way we approach and think international law and global governance mechanisms becomes necessary. Instead of restricting itself to a simple 'measurement of progress', maintenance of order, 'cushioning' of crises, management of the possible, a transformative agenda for the future should 'be realistic and demand the impossible', embracing a new form of critical subjectivity that is solidarist, collective, popular, class-based, and community-oriented, and a new critical rationality that reclaims or recreates utopian and revolutionary imagination - the capacity to imagine alternative futures.

2. Historicizing the Agenda

This section presents some preliminary comments of methodological nature regarding, specifically, the use of 'history as theory' of international law.

In the first place, by 'historicising the Agenda', I mean interpreting it according to the principles of Historical materialism. According to Karl Marx (1859) in the '*Preface to a Contribution to the Critique of Political Economy',* legal relations and political forms should not be comprehended 'by themselves or on the basis of a so-called general development of the human mind, but (...) on the contrary (...) in the material conditions of life'. (Knox, 2016) In this vein, by using historical materialism in international law, I mean analysing the law not according to its 'internal' dynamics, but in relation to the development of modes of production. Thus, I take the capitalist mode of production as a central point of legal analysis and, by observing the

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https://doi.org/10.6092/issn.2724-6299/13853

mercantile forms and the social structures stemming from it, I try to identify the materiality, historicity and tendencies that make up the system and determine, in different degrees, the totality of social relations, including law.

For that I find inspiration in the Althusserian 'symptomatic reading' of international law proposed by Ntina Tzouvala (2020) in 'Capitalism as Civilization'. Contrary to Tzouvala, I do not look to international legal arguments 'of the past', but, instead, to an international legal document 'of the present'. Nevertheless, by thinking in terms of material social forms and structures (relations and mode of production), I am able to look to the present of international law and see a specific moment in the history of capitalist development. It becomes, then, possible to point out historical tendencies, continuities, ruptures, determinations, inconsistencies, contradictions and limits of international law, seen as in relation with the totality. In this sense, Cutler (2008, 202) conceives historical materialism as a philosophy of praxis and as a method of critical analysis [which] (...) conceptualises world order as an historical bloc comprised of material, ideological and institutional forces that embody both the traces of the past and seeds of the future [and which] (...) is inherently and unavoidably transformative.

Secondly, I use history as a way of creatively reimagining international law and reality. In this sense, mention should be made to Anne Orford's view, according to which the critical use of the history of international law should emphasise the creative role of legal reasoning, inasmuch as the past 'is constantly being retrieved as a source or rationalisation of present obligation' (Orford, 2013, 173). It is, therefore, a matter of using history not to look back to some distant, disconnected past, but to look to the present and to the future as a continuum. After all, the future, according to my perspective, is not a mere prolongation of the present, but an open field of future possibilities or 'futureabilities', as put by Berardi (2009). Thus, if reimagination requires creative energy, the use of history should serve this purpose of glimpsing alternative futures, especially in the current context in which the feeling of

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https://doi.org/10.6092/issn.2724-6299/13853

hope over a better future seems to have disappeared, or 'the future has been 'cancelled''.

Furthermore, I present some reflections based on Benjamin's theses on the concept of History. According to Thesis VII (Benjamin, 1940) "(...) The historical materialist (...) regards it as his task to brush history against the grain." According to commentator Löwy (2001), this phrase can be understood both in the sense of going against the current official versions of history; and in the sense that 'redemption/revolution will not happen due to the natural course of things [progress]', so that 'It will be necessary to fight against the current'. Thus, by 'historicising the Agenda 'against the grain', I mean to read it critically, against the mainstream current, against the mainstream eurocentric narratives that present international law and capitalist development as progress, development, civilization, while at the same time conceal and legitimise the relations of violence, domination and exploitation that constitute the world.[3]

Still on the use of history, I must mention the famous Thesis IX, in which Benjamin (1940) presents the Angel of History, whose face is 'turned towards the past' while the storm of progress carries him through to the future; and Thesis XIIa, that subverts the idea of revolutions as the locomotive of history, proposing, instead, the idea that a revolution is humanity pulling the locomotive's emergency brake. Both images suggest metaphorically that if humanity allows the locomotive to go on its way, it will quickly and directly head towards disaster. To Benjamin, the only possible way to halt this fatal destructive progression of the Storm of Progress is by pulling the emergency brakes. As Horkheimer (1973) summarises in different words: '[revolution]

[3] I thereby refuse the triumphal and self-indulgent eurocentric narratives of maniestream internationalists, who believe themselves to be champions of justice and humanitarianism ('the legal consciousness of the civilised world'), and who believe international law and capitalist development to be the same as progress. These triumphal and self-indulgent eurocentric narratives that associate international law with progress, civilisation and development abound the history of the discipline with the history of the imperial expansion of Europe, which was founded upon the exclusion of non-Europeans from the International society. Examples of such narratives can be found in Orford (1998; 2006), Skouteris (2009, 2016), Koskenniemi (2004, 2011).

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(...) the end of exploitation. (...) is not a further acceleration of progress, but a qualitative leap out of the dimension of progress'. Inspired by these passages, I undertake a critique of the notion of progress, central to the ideology of international law and very present in Agenda 2030. I argue that, with its obsession with measurement, data collection SDGs and their quantifiable targets and indicators, and 'progress towards the achievement', the Agenda relies heavily on the 'illusion of progress'[4], merely proposing to measure and 'manage' the course of the locomotive of progress (a metaphor for capitalist development) while refraining from 'pulling the emergency brake, with 'leaping out of progress' instead.

3. On International Legal Ideology and the Limits of Law as an Instrument of Social Transformation

In order to assess the transformative potential of 'Agenda 2030' and of international law in general, it is necessary to understand how international law, as a social form, guarantees the reproduction, functioning and survival of global capitalism. In light of that, this section 1) explores the material and ideological dimensions of the international legal form; 2) discusses the structural limits of international law as an instrument of social transformation; and 3) points to the need for a radical theory of transformation of society and of international law in the face of the 'crisis of the future'. Finally, it 4) addresses the dimension of international legal ideology that associates law with progress and cosmopolitanism, which I have called 'the narcissistic fantasy of international law'.

3.1 Ideological Dimensions of the International Legal Form

The material and ideological dimensions of law and its function in the reproduction of the system can be understood from Pashukanis' theory of law as a historically specific social form of capitalism, derived from the

[4] On Unsustainable development in International Law and Policy, See Gillespie (2001).

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commodity-form. According to Pashukanis, through the horizontal constitution of 'free' and 'equal' legal subjects in the moment of exchange, law perfects or 'complements' the commodity fetishism[5], thereby naturalising social relations of production/exploitation through the moral-legal ideology of freedom to contract and formal equality before the law.

Importantly, for Pashukanis, the legal form is not a simple ideological reflection, it "(...) does not exist only in the heads and theories of juristic specialists. It has, in parallel, a real history, which develops not as a system of ideas, but as a specific system of relations" (2017, 83, my translation from Portuguese). Indeed, relations of exchange are not ideas or phenomena of consciousness, but objective economic relationships, 'That is why, in looking at the form of law, one cannot be restricted to 'pure ideology' without taking into account this whole existing objective apparatus" (Pashukanis, 2017, 64, my translation, from Portuguese). For Pashukanis, therefore, the relationship between the material and the ideological is dialogical (Parfitt, 2019, 37).

Building on Pashukanis' theory, China Miéville (2005), presents a theory of international law also derived from the commodity-form. The British writer argues that '(...) it was only (...) with the triumph of capitalism and its commodification of all social relations that the legal form universalised and became modern international law (Miéville, 2005, 161). This allows for an understanding of international law as the movement of universalisation of legal forms which corresponds to the expansion of capitalism globally. Accordingly, 'With the spread and universalisation of commodification under capitalism, law – including international law – had a similar universalising dynamic, with a tendency towards the realisation of the juridical sovereignty of polities' (Miéville, 2005, 256).

[5] According to Miéville (2005, p. 88): "This formal equality of distinct and different individuals is in exact homology with the equalisation of qualitatively different commodities in commodity exchange, through the medium of abstract labour (the stuff of value). Thus, with the generalising of legal relations, '[l]egal fetishism complements commodity fetishism'". See also Kennedy (1985).

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This lesson opens a path to better understand the extent to which international law constitutes and is constituted by imperialist relations of violence, dependency, exploitation, oppression and structural inequality, within and between nations.[6] In Miéville's words, 'Specifically in its universalised form, predicated on juridical equality and self-determination, international law assumes imperialism' (Miéville, 2005, 293).

The ideological dimension of the international juridical form can also be assessed via Althusser's reflections on the form and content of law (Althusser, 2014, 59). According to the French philosopher,

> Law's formalism and its correlative systematicity constitute its formal universality (...) The obvious effect of law's formalism is to bracket, in law itself, the different contents to which the form of law is applied. But it by no means makes these contents disappear by enchantment. Quite the contrary: the formalism of law makes sense only to the extent that it is applied to defined contents that are necessarily absent from law itself. These contents are the relations of production and their effects. Hence, we can begin to see that: 1) Law only exists as a function of the existing relations of production. 2) Law has the form of law, that is, formal systematicity, only on condition that the relations of production as a function of which it exists are completely absent from law itself. This singular situation of law, which exists only as a function of a content from which it abstracts completely (the relations of production), explains the classical Marxist formula: law 'expresses' the relations of production while making no mention at all, in the system of its rules, of those relations of production. On the contrary, it makes them disappear.

Thus, even if it exists only as a function of classes, law abstracts them and only takes individuals into account. The same process takes place at the

[6] In 'Between Equal Rights' Miéville (2005) provides the rationale and examples for such claim, which I hereby endorse

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https://doi.org/10.6092/issn.2724-6299/13853

international level, insofar as international law's necessarily abstract, universal and formal equality between states, operates to conceal, naturalise, or 'completely abstract' the relations on which it is based, namely the material relations of power, domination and inequality between formally equal states. These reflections enable us to understand how the international legal language of 'expertise' operates to depoliticise the economy, abstract the asymmetric materiality of social relations, constitute subjectivities, colonise imaginaries, and carry out capitalist ideology within and across nations (Parfitt, 2019).

3.2 On Capitalism and Environmental Destruction

A second assumption of this research appears in the form of a determinant and radical observation that goes as follows: there is a necessary causal relationship between capitalism and environmental destruction; or, to put it differently, capitalist imperatives are the main drivers of 'unsustainable development'.[7]

According to Jappe (2019), in *The autophagic society*, 'the hunger that gives rise to the capitalist desire for accumulation is, like the hunger in the Greek myth of Erisicton, 'an abstract and quantitative hunger that can never be satisfied'. 'This myth', says Jappe, 'anticipates, in an extraordinary way, the logic of value, commodity and money'; it tells us not only about the devastation of nature and social injustice, but also 'about the abstract and fetishistic character of mercantile logic and its destructive effects' (Jappe, 2019, 11, author's own translation).

From these observations derives the idea that it is only possible to contain the destruction of the environment by confronting and destroying the capitalist system and the mercantilization of all life and nature. As Jappe states, 'The ecological crisis cannot find its solution within the framework of the capitalist system, which needs to grow permanently, to consume more and more raw materials, just to compensate for the decrease in the mass of value'.

[7] For more arguments on this relationship, see Jappe (2019), Klein (2014) and Magdoff and Foster (2011).

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It happens that, 'In the capitalist mode of production, the production of objects of social utility is wholly subordinate to the 'production' of surplus-value, that is to say, the production of capital on an extended scale, or what Marx calls 'the valorization of value', so that, it can be said, 'the driving force behind the capitalist regime is the 'profit motive'' it is "the uninterrupted growth, and thus the growth on an extended scale" (Althusser, 2014, 33).

In the same vein, after comparing the situation of contemporary capitalism to a steamboat that only continues to sail by burning up the planks of the deck, the case, etc., Jappe (2019, 22, author's own translation) writes:

> Value as such has no natural limit to its growth, but it cannot renounce having a use-value and thus representing itself in a real object. The growth of value cannot occur without a growth - necessarily much faster - of material production. Material growth, by consuming natural resources, ends up consuming the real world.

On the one hand, this assumption on the necessarily destructive (autophagic) nature of capitalism alerts to the structural dimension of unsustainable development, demanding an anti-capitalist critique of growth (even the 'sustainable and inclusive' growth, as in the Agenda), of 'green economy' solutions, and of easy 'technological fixes'. On the other hand, it leads us to think about the limits of international law as an instrument of social transformation.

3.3 The Limits of International Law as an Instrument of Social Transformation

From the above it follows that, 1) being law a social form specific to capital, and 2) capitalism, with its autophagic nature, intrinsically linked to crisis, social and climate stress, international law finds structural limits to effectively tackle current global problems such as, unsustainable development and climate change.

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https://doi.org/10.6092/issn.2724-6299/13853

What we perceive in this scenario, is that, tied to positivist, state centric and liberal worldviews, the mainstream liberal theoretical models of international law are themselves in crisis, insufficient to fully grasp and address global problems effectively. Historically, instead of being a 'solution' to these problems (as commonly believed), international law has, in fact, contributed to their deepening, to the extent that it is structurally linked to capitalist [(neo)extractivist, (neo)imperialist, (neo)colonial and (neo)liberal)] forms of contemporary exploitation and domination.[8] Besides that, trapped within the ideological limits of capitalism, like Sisyphus, doomed to eternally roll a stone up the hill, law seems doomed to a reactive role of managing, cushioning, draining and redirecting crises, unable to confront private property, the sanctity of contracts, the global power of corporations, the commodification of life and nature, in sum, the real drivers of social disintegration, environmental destruction, climate change.

The ideological dimension of this phenomenon derives from the positivist, pragmatic, technocratic and problem-oriented character assumed by modern international law specially after the 'institutionalist' or 'managerial' turn' of the 1960s, which, simultaneously, generated a notion of the discipline as a 'neutral' language; sustained a naïve optimism regarding its transformative potential (legal fetishism); and culminated in a loss of capacity for legal, political and economic transformative imagination.

The current crisis is a multidimensional, structural, systemic, total one, both in the sense that it has gone beyond the economic, political and legal spheres and has reached all dimensions of social life; and that it affects the

[8] There is a wide range of critical literature that discusses and seeks to demonstrate the link between international law and the colonial and imperialist project, as well as the continuity of this link in the post-colonial period and in the neoliberal age. In the words of Anghie, (2006, 245): 'We cannot understand how international law became universal, how it extended from its European origins to encompass the societies of Africa and the Americas, Asia and the Pacific, without focusing on the technologies and doctrines that international law used to advance the civilising mission whose extension resulted in the entire globe being governed by a single international law. For more on this, see also Chimni (2017), Brabazon (2017), Mattei and Nader (2008), Knox (2018), Britton-Purdy, Kapczynski and Grewal (2021), Golder and McLoughlin (2017), Özsu (2019), Baars (2019), among others.

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centre as well as the periphery (there is simultaneous talk about 'the recolonisation of the Third World' (Chimni, 2006) and the 'peripheralization of the First world') (Davis, 2017; Hochuli, 2021). In light of this, it is my understanding that, if real world transformation is in sight, it is necessary to recognize the limits of transformation through legal forms. As Miéville (2005, 319) has argued, 'A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us is the rule of law.' Therefore, it is necessary nothing less than a radical critique of society and of the law, one that aims to transform the social forms and structures of human sociability and relationship with nature in order to stop the decomposition, collapse and autophagy of the system.

3.4 On the 'Crisis of the Future' and the Need for Utopia

As Franco Berardi (2009, author's own translation) argued in *After the future*, at the beginning of the 20th century the future used to be imagined in a euphoric way, and the prospect of progress and social transformation shone on the horizon alongside promises of expansion and growth, development, reform, revolution and liberation. However, in the beginning of the 21st century, the future has come to be imagined in a rather decadent and melancholic way.[9] Indeed, with the weakening of Fordist paradigms (welfare state, development, employment, and social security systems), humankind has come to face an unprecedented crisis of the reproduction of social forms. Neoliberalism brought along a wave of social disintegration, individualism, consumerism, competition, indebtedness and depression that, coupled with the imminent threat of climate catastrophe (climate anxiety), contributed to lower people's expectations concerning the future. As illustrated in the cultural sphere, ideas and representations of the future have become

[9] Franco Berardi mentions the enthusiasm of the Futurist movement, but one could easily extrapolate his analysis to the enthusiasm of the liberal-internationalist project of the 20th Century, the related institutional developments of international law throughout, or even the optimism of national liberation movements and of the 'bandung spirit', in contrast to the pessimism that arose with the crisis of multilateralism and liberal internationalism of the 21st Century.

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dystopian, while, tragically, reality more and more came to resemble dystopias. Berardi named this phenomenon, the closing of the horizon of expectations, 'the slow cancellation of the future'.

Mark Fisher (2009, 2) also had an interesting way of understanding the 'crisis of the future', which he called capitalist realism. According to him, this new state of affairs, symbolically inaugurated by Margareth Thatcher's slogan 'there is no alternative' (also 'there is no society'), Fukuyama's 'End of History', and the fall of USSR, 'capitalist realism', means 'the widespread sense that not only is capitalism the only viable political and economic system, but also that it is now impossible even to imagine a coherent alternative to it'. According to Fisher (2009, 7), capitalist realism is like a 'pervasive atmosphere' which acts as 'a kind of invisible barrier constraining thought and action', thus preventing social change through the dissemination of the idea that capitalism is the only viable system, and that it is impossible to imagine an alternative to it.

Fisher shrewdly noted that 'capitalist realism' colonised the imaginary not only of apologists of capitalism, but also of its critics. Accordingly, like powerful founding myths, the slogans 'End of history' and 'There is no alternative' somehow became entrenched in the ideology of our times, legal institutions and social thinking, causing the very idea and possibility of revolution, utopia, and future to disappear from social imaginaries. Politically, in this scenario of retraction of progressive struggles, uncertainty came to prevail over hope, and with 'ideology', Utopia and Revolution presumed dead, the management of the capitalist machinery became the only *realist* thing left, while the neoliberal restructuring of the state, globalisation, individualisation and competition, followed its course as a 'naturalised' sign of progress and 'development'.

In the realm of politics, this 'constrained atmosphere' appeared in the way in which the utopian, futurist, progressivist and revolutionary projects of the 20th century, were relegated to the level of the unthinkable, while the only realistic, viable political alternatives should be to surrender to neoliberal

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https://doi.org/10.6092/issn.2724-6299/13853

policies, market reforms and liberal democracy. In the realm of international law (then 'turned' to 'institutions', 'pragmatism' and 'management'), 'realist capitalism' resulted in the loss of political engagement among international actors and lawyers, and in the erasure of 'revolutionary' spirit that resulted from the 'Baku Conference'[10], the 'Bandung Conference'[11], and the NIEO (New International Economic Order) movement.[12]

In the field of international law, 'capitalist realism' pervaded the 'international community', decisively influencing the development of the discipline. Eventually, neoliberal ideology became a hegemonic common sense, constituting legal-political subjectivities and institutions (the WTO, for example), and causing a series of transformations in the international legal arena. These transformations, which came to be known as the 'managerial', 'institutional', 'pragmatic' or 'technocratic' 'turns' of the discipline, can be listed as follows. They 1) transformed international law into a technical, neutral, pragmatic, theory-averse tool oriented towards problem-solving, strengthening liberal institutions and positivist legalism; 2) raised the separation between politics and economics to the transnational level, consolidating a 'neoliberal legality' that advanced the globalist aspiration for an unified space for the free movement of capital, to the detriment of Third World sovereignty, welfare, development and social protection; and 3) resulted in the loss of political engagement among international actors and lawyers.[13]

[10] On the anti-imperialist internationalist spirit that resulted from the First Congress of the Peoples of the East, held in Baku (1920), see Riddell (1993) and Riddell, Prashad and Mollah (2019).
[11] On the anti-colonial internationalist spirit that resulted from 'Bandung' Conference and the Tricontinental to the 'New International Economic Order', see: Robert Young (2006), Prashad (2007), Shilliam (2010), Bret Benjamin (2015), Pham and Shilliam (2016), Devetak, Dunne and Nurhayati (2016), Eslava, Fakhri and Nesiah (2017), Getachew (2019), Berstorff and Dann (2019).
[12] On the legal initiatives that came to be known as the New International Economic Order, please see Sauvant and Hasenpflug (1977), Agarwala (1978), Bedjaoui (1979), Laszlo (1980), Anghie (1981), Golub (2013) and Özsu (2017).
[13] After the 1970s, prospects of radical transformation, reform and revolution, as well as utopian and revolutionary forms of prefiguration and imagination concerning the future were relegated to the realm of fantasy, bluntly declared outdated, unrealizable utopias, totalitarian 'grand-narratives'. Even when some forms of critique were allowed, they mostly remained

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https://doi.org/10.6092/issn.2724-6299/13853

As a result, a) 21st century international law became surrendered by the dynamics of private international law, to such a point that there has grown a widespread feeling that public international law is "dead" or "gone"; and b) International lawyers became 'experts', members of a technocratic elite, detached from the interests of the populations and nations they 'represent' and colonised by the interests of transnational capital. Finally, 3) constrained by the narrow possibilities of 'capitalist realism', international law lost its transformative potential (if it ever had one), becoming no more than a technical tool for the management of present crises. Unfortunately, I argue, with its obsession with measurement and progress, and its lack of capacity to generate the political engagement necessary for transformation, Agenda 2030 is an example of such a state of affairs of contemporary international law.

Faced with the 'crisis of the future', I propose a rescue of utopian thinking in international law. As written by Miéville (2016) in the preface to Thomas More's Utopia,

> We who want another, better Earth are understandably proud to keep alternatives alive in this, an epoch that punishes thoughts of change. We need utopias. That's almost a given in activism. If an alternative to this world were inconceivable, how could we change it?

According to Ruth Levitas (2013), 'The core of utopia is the desire for being otherwise, individually and collectively, subjectively and objectively.' According to the author, Utopia is thus better understood as a method than a goal – a method for the Imaginary Reconstitution of Society. As put by her '(...) utopia as a method is concerned with the potential institutions of a just, equitable and sustainable society which begins to provide the conditions for grace' (Levitas, 2013).

Finally, I intend to use utopian imagination to drive the international community's gaze towards the future, challenging the dominant paradigm of

restricted to small isolated academic circles - 'the crits', and therefore would never reach mainstream.

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https://doi.org/10.6092/issn.2724-6299/13853

liberal legalism. According to Douglas, Sarat, Umphrey utopian imagination seeks to 'find its realization not in the dissolution of social arrangements and institutions but in their dialectical transcendence or radical improvement' (Douglas, Sarat, Umphrey, 2014, 3) The authors also understand, based on Benjamin, that 'Utopianism represents a form of resistance to commodity fetishism, a subversion of existing phantasms of the real.' In this sense, two things deserve to be noted, one is the transcendental and subversive aspect of utopia as a method for building an alternative future, the other is its antithetical character to liberal legalism, highlighted by the authors. Both aspects are fundamental in the critique undertaken in this paper. Here we should also briefly mention Bloch's concept of concrete utopia, which means both 'a move from the purely fantastic to the genuinely possible'; but also 'a move from the potentially fragmentary expression of desire to social holism, a move from speculation to praxis and to the social and political pursuit of a better world' (Levitas, 2013, 6).

3.5 The Narcissistic Fantasy of International Law

In order to dispel the ideology of progress present in the Agenda and, in general, the fetishism of the law, this subsection delves into the ideological dimension of contemporary international law with an aim to demystify the illusory self-image that internationalists have 1) of themselves as cosmopolitan agents of progress, 2) of the international community as "saviours", benevolent, true 'embodyers of universalism', 'legal conscience of the civilised world', and 3) of international law as a panacea for global problems, as synonymous with progress, development and modernity.

For Althusser, ideology is 'a "representation" of the imaginary relationship of individuals to their real conditions of existence' (Parfitt, 2019, 38). It is, then, possible to explain the ideological dimension of international law from the way in which internationalists imagine and narrate their relationship with the real world. It is therefore appropriate to examine the international legal discourse of universalism in order to identify this illusory self-image. It is

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https://doi.org/10.6092/issn.2724-6299/13853

hoped that this procedure will expose and dispel these myths, narcissistic fantasies of international law, stressing its internal conflicts and, potentially, realising its Oedipal tendencies (Pahuja, 2005, 469).

In "The Autophagic Society", Jappe proposes to think together the concepts of "narcissism" and "commodity fetishism", indicating their parallel development. Or, more precisely, 'showing that they are two sides of the same social form'. In the same terms, I propose to think of the narcissism of international jurists as the other face of the legal fetishism, as the representation of the abstracting tendencies of global capital itself, from which international law derives its principle of formal equality.

Modern international law was constituted as a discipline and acquired its legitimacy from narratives that associate it with the idea of Progress, understood as the evolution, advancement or improvement of humanity towards a (Kantian) ideal of peace, order and justice.[14] Accordingly, these triumphalist narratives also associate the discipline with values such as humanism, liberalism and cosmopolitanism, attributing to international law a practically unquestionable status of universality, rationality and virtue. A good illustration of this is Article 1 of the 1873 Statute of the *Institut de droit international*, which laid down as the purpose of the institute: "De favoriser le progrès du droit international, en s'efforçant de devenir l'organe de la conscience juridique du monde civilisé."

Throughout the 20th century, the international legal order was founded upon this very spirit of optimism, hope and 'belief' in progress: from 1919, to 1945, and to the 1990s, successive waves of optimism inaugurated, each time, new (supposedly) post-ideological eras of international law; "New World Orders". As a result, however,

> Rather than explore the centrality of international law to past and present processes of imperialism, exploitation, domination,

[14] On the idea of progress and the theory of International law, see Skouteris (2009, 2016). On The Illusion of Progress, Unsustainable development and International Law and Policy, see Gillespie (2001) On the Kantian Theory of International Law, see Fernando R. Teson (1992).

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https://doi.org/10.6092/issn.2724-6299/13853

> recolonisation and elite identity formation, international law students and teachers idealise international law as a subject devoted to world order, humanitarianism, human dignity, peace and security. International law's favourite narratives are premised upon an image of the international community as the heroic agent of progress, security, order, human rights and democracy. (Orford, 1998)

Today, I argue, the self-image that international jurists ("international community") have of themselves and of their roles continues to be that of "saviors", unquestionable agents of progress, humanitarianism, global justice, and benevolence. Ideologically soaked in capitalist ideology, they continue to see themselves as the true embodyers of true universalism and, much like in 1873, to think of themselves as the "legal conscience of the civilized world". It is worth recalling that, although formally, with the end of colonialism, the pattern of civilisation has lost strength, it still operates by other means, as Tzouvala has demonstrated. As a result, mainstream international theories are insufficient not only to make sense of the complex nature, depth and dimensions of the crises but also to propose the substantial, systemic, transformative changes needed to tackle climate change and achieve sustainable development globally. It is assumed that, rather than being 'part of the solution', or 'progress', international law (its institutions, norms and practises) is 'part of the problem'', bearing a great deal of responsibility for the critical situation in which the world is found. In other words, mainstream approaches to international law (state-centric, formalist juspositivism and (neo)liberal cosmopolitanism) are incapable of subsidising the systemic transformations needed in the face of the enormous looming climatic challenge, for the achievement of an alternative sustainable future. This is so because they 1) ignore the relationship of the discipline with colonial and imperialist practices, hiding structural historical problems; 2) mystify the underlying antagonisms that make up capitalist international legal relations, such as transnational class divisions, dependency and the marriage between law and neoliberal forms of imperialism; and 3) fetishize the role played by

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https://doi.org/10.6092/issn.2724-6299/13853

law(yers) in solving the world's problems, ignoring the structural limits of the legal form and concealing law's constitutive role in the reproduction of environmental injustice and unsustainable models of development.

4. "Transforming our Word": Agenda 2030 for Sustainable Development SDGs

In light of the theoretical background previously developed, this section proceeds, finally, with the analysis of Agenda 2030 itself. Through critical discourse analysis, I seek to identify presences and absences, emphases and omissions, in order to understand the Agenda's dominant discourse order and its ideological underpinnings. The analysis is subdivided as follows: first, I present a general context of critique of international 'sustainable development' law. Second, I critically analyse the title of the document itself, interrogating its supposed universality, collectivity and worldview. Third, I deal with its perspective of action, change and transformation; fourth, I address the ideology of progress, technological fetishism and overreliance on economic growth. Finally, I deal with 'the absences'.

4.1 International 'Sustainable Development' Law

From the Stockholm Conference, through Rio 92, to Rio+20 and today, the subfield of international environmental law emerged in the context of the mentioned managerial, pragmatic, institutional turn in international law, which saw an unprecedented specialisation of the discipline, with a new focus on 'problem-solving' and a new dialogue interface with the 'scientific community'. Relatedly, 'sustainable development' emerged in 1987, in the *Brundtland Report*, making thus an unprecedented development on sustainability and development, and exposing conflicting interests between 'developed' and 'developing' countries. It is in this sense that one can speak of 'international law of sustainable development', understood as the law that

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https://doi.org/10.6092/issn.2724-6299/13853

brings together the complex nexus between environment and development, having the 'future' of the new generations in perspective.

Many criticisms have been made of the controversial concept of sustainable development, in the sense (and here I only exemplify) that it is 'business as usual', anthropocentric, captured by corporate, private interests, that it conveys illusions with green capitalism; that it does not deal well with the North-South divide and the complicated equation between economy, society and environment.[15] There is also recognised difficulty regarding the implementation of international environmental rules[16]; and criticism that Green Economy and international public-private cooperation initiatives are in reality ineffective, toothless, although disguised as solutions.[17] This paper is inserted in this context of general criticism of the international law of sustainable development, appropriating some arguments of this discussion while developing other original ones in order to assess the SDGs potential of transformation.[18]

4.2 Transforming our World?

From the title of the document 'Transforming Our World', three points for consideration were selected. The first one regarding 'transformation'. *What* should be transformed and *in which direction*? Very broadly, the preamble of the Agenda mentions the objectives 'to take the bold and transformative steps which are urgently needed to shift the world onto a sustainable and resilient path' and 'transform the world for the better' (par.91). By their turn, par.7,

[15] For bibliography regarding the North-South divide in International Environmental Law, see Banerjee (2003), *Beyerlin, (*2006), Atapattu (2015), Kamal Uddin (2017)
[16] On legal and political challenges for the implementation of international environmental rules and climate change policies, see: Meadowcroft (1999), Sands (2016), Daudy (2021)
[17] On critical approaches to International Environmental Law, Green Economy and Sustainable Development, see Park, Conca and Finger (2008), Santamarina, Vaccaro and Beltran (2015), Liodakis (2010), Kotzé (2015), Deutz (2014), Okereke (2007), Hopwood, Mellor and O'Brien (2013), *UNRISD*, 2015*).*
[18] On specific critiques of Agenda 2030 and the SDGs, see Merry, Davis and Kingsbury (2015), Koehler (2016), *Montes (*2016), Deacon (2016), Adelman (2017) and Hickel (2017, 2019, 2020).

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par.8 and par.9 present the Agenda's 'supremely ambitious and transformational vision'. I argue that 'transforming our world' simply cannot achieve its objectives since it is constrained by 'realist capitalism', stuck in the technocratic illusion that it is enough to simply measure progress, manage crises instead of addressing the forms that underpin capitalist sociability.

Par.13 of the Declaration details the need for a 'new approach' in order to implement the goals: 'The challenges and commitments (...) are interrelated and call for integrated solutions. To address them effectively, a new approach is needed. In a way, a new approach is what I propose here. However, I argue, this new approach would only be capable of implementing the SDGs if it followed anti-capitalist principles and action. This means that, instead of 'business as usual', or 'legal theory-as-usual, transformation could be understood along Karl Marx's terms in Eleventh Thesis on Feuerbach, implying a focus on addressing the root of the problem (capitalist forms and their determinations) before it's too late. 'Two roads diverged in a wood, and I — I took the one less travelled by', said Robert Frost 'And that has made all the difference'. I argue that it is about time to pull the emergency break and take 'The Road not taken' (1915), thereby making a real difference in the way social relations are organised and resources distributed.

Still on 'transformation', one could ask: what is the degree of rupture and radicality of the transformation proposed in the Agenda? Here I recall the reflection upon the role and limits of law as a praxis of social transformation, pointing to law's structural limitation due to its commodity-form, and on the inexcusable importance of radical critique of legal ideology in order to radically transform the world. In this regard, I notice that the word 'action' appears 48 times in the document. There is even a chapter entitled 'A call for action to change our world'. This shows that there is, indeed, a big concern in the agenda for action (just see that in September 2019, the UN General Assembly proclaimed the Decade of Action for the achievement of the SDGs). However, it is not enough 'to act' without knowing exactly how and, more importantly, against what. The problem of unsustainable development

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demands a direct confrontation of capitalism and its mercantile logic, which touches everything, devours everything. As Lenin (1901) wrote in What is to be done? 'without a revolutionary theory, there can be no revolutionary movement'. It is in this sense that I argue in favour of the need to rescue utopian and revolutionary thinking, talk about the need to burst the bubble of capitalist realism that prevents us - the agenda - from thinking and acting for a better world.

4.3 'Our' World?

Secondly, I look to the 'our' in 'Our World', questioning the Agenda's universality, liberal strand of cosmopolitanism, and reliability on capitalist legal subjects and individuals for transformation. To put it bluntly: in these individualistic times, is it possible to speak of "our'' world ("we the peoples", as in par.52) when the very existence of a collective political subject has been liquidated (decomposed) by neoliberalism? When social bonds have been eroded, replaced by competition and entrepreneurial ideology? When attempts to reform the global economic system, proposed under the New International Economic Order[19] were overthrown by neoliberal counterrevolution? Here I recall section 2's reflections on the ideological function and narcissistic fantasies of international law.

It is worth then asking: who is the 'us' of which the agenda speaks about? For that, I highlight three moments in which the Agenda gives the contours of what it understands by 'us', and thus manifests its idealised cosmopolitanism, its abstract universalism. First, par. 4 reads "As we embark on this great collective journey, we pledge that no one will be left behind". By conjugating a transnational class approach to international law (Chimni, 2010; Rasulov, 2008 and 2018) and a reading of international law as a specific social field (Bourdieu, 1987; Dezalay, 2017), it is possible to criticise this idealised and abstract notion of collectivity conveyed therein. Based on that,

[19] For literature regarding the International Economic Order, please refer to footnotes 11 and 12.

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it is also possible to argue in favour of the (re)construction of a popular, class-based, community, collective subject of transformation.

Second, on 'Means of Implementation', par.39 provides that

> The scale and ambition of the new Agenda requires a revitalized Global Partnership to ensure its implementation. We fully commit to this. This Partnership will work in a spirit of global solidarity, in particular solidarity with the poorest and with people in vulnerable situations. It will facilitate an intensive global engagement in support of implementation of all the Goals and targets, bringing together Governments, the private sector, civil society, the United Nations system and other actors and mobilizing all available resources.

Much can be said about this call for Global Partnership and spirit of global solidarity. The importance attributed by the Agenda to the theme of cooperation is great, given that, in an attempt to harmonise the other goals, SDG 17 appeared precisely with the purpose to 'Strengthen the means of implementation and revitali[s]e the global partnership for sustainable development'. However, it is worth questioning par.39's self-image of heroic cosmopolitanism and the idealistic foundations of this call for solidarity in the face of the asymmetrical realities of material inequality and dependency that constitute the imperialist international order. The Agenda recognises the principle of 'common but differentiated responsibilities' (par. 12), but it should be noted that doing so is not enough, given that the imperialist competitive structure of a globalised world ordered from and for the accumulation of capital is incapable of sustaining a new global partnership 'for sustainability'. Besides the inequality between the first and Third worlds (and within nations), the power of the private sector, business, to influence the agenda seems much greater than that of civil society and especially of the Transnationally Oppressed Class (workers, peasants, women, indigenous peoples, minorities, Third World peoples, (Chimni, 2006). I argue here, then, that this global solidarity necessarily requires a recomposition of the

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https://doi.org/10.6092/issn.2724-6299/13853

collective political subject, so that this 'we' in the agenda can actually represent the peoples and the 'wretched' of the world.

Finally, the self-proclaiming language of par.50 exemplifies the mainstream eurocentric and triumphal narrative which I have named 'the narcissistic self-image of international law'. par. 50 reads: 'Today we are also taking a decision of great historic significance. We resolve to build a better future for all people, (...) The world will be a better place in 2030 if we succeed in our objectives.'

4.4 'World'?

Here I question the ideological foundations of the 'world', as articulated in the Agenda, unveiling the ideological reality ("worldview") in which 'global leaders' and distinguished 'international lawyers' are submerged. I address the dominant ideology, hegemony of corporate interests that 'capture' the Agenda, making it a toothless soft law instrument, subordinate to the movements of global capitalist accumulation and to the imperialist arrangement.

As already mentioned, today, it is easier to imagine the end of the world than the end of capitalism; we face a choice between the end of nature or the end of capitalism (ecosocialism or barbarism). It is worth, thus, asking: which world does the international community aims at with this transformation? Just a 'better world' or a 'new', 'alternative' world? Paragraphs 14, 15, 16 and 17 of the Agenda present the Agenda's conception of 'Our World Today' as challenge, but also opportunity, and the optimistic tone regarding the progress made so far stands out.

4.5 Ideology of Progress: Legal Fetishism, Technology and Growth

Another feature that becomes evident in the analysis of the Agenda is its obsession with the idea of progress. In the Agenda, this so-called ideology of progress appears in at least four distinct ways. First, the word 'progress' appears 31 times in the Agenda, mostly in the sense of recording and

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https://doi.org/10.6092/issn.2724-6299/13853

'tracking' progress towards the achievement of goals, targets and indicators, or, optimistically, as reference to the 'progress made so far'. This reveals what I call an empiricist obsession of the Agenda with the SDGs. Second, the ideology of progress appears in the historical and ideological sense, as the idealistic notion that a better future is certain, linear, inevitable, and that law is an instrument to achieve this goal. The ideology of Progress in this sense permeates the entire document.

Thirdly, the ideology of progress appears in the form of technological fetishism, which I understand as a belief that technological fixes (or tricks) will simply solve global problems. Already in the preamble appears the expression 'technological progress'. par.15 regards 'The spread of information and communications technology and global interconnectedness [as] great potential to accelerate human progress, (...)'. Par. 28 makes a call for '(...) Governments, international organizations, the business sector and other non-state actors and individuals' contribute to (...) to strengthen (...) scientific, technological and innovative capacities to move towards more sustainable patterns of consumption and production'; and par. 41 mentions the '(...) mobilization of financial resources as well as capacity-building and the transfer of environmentally sound technologies to developing countries. (...).

Furthermore, central to the Agenda, 'technology' appears in several SDGs, cutting across different themes and targets: SDG 1 'End Poverty', target 1.4; SDG 2 'End Hunger', target 2.a; SDG 4 'Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all', target 4.b; SDG 5 'Achieve gender equality', target 5.b; SDG 6 'Water and sanitation for all', target 6.a; SDG 7 'Energy for all', targets 7.a and 7.b; SDG 8 'sustained, inclusive and sustainable economic growth, full and productive employment for all', target 8.2; SDG 9 'Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation', targets 9.4, 9.5, 9.a, 9.b, 9.c); SDG 12 'Ensure sustainable consumption and production patterns', target 12.a; and SDG 14 'Conserve and sustainably use the oceans,

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seas and marine resources for oceans, seas and marine resources for sustainable development', target 14.a. By its turn, SDG 17, 'Strengthen the means of implementation and revitalize the global partnership for sustainable development' devotes a specific section to the topic of technology, which appears in SDGs 17.6, 17.7, 17.8, 17.16. Finally, par. 70 launched the Technology Facilitation Mechanism.

It is worth saying that it is not a question here of taking a stance against technological development. Technology should, on the contrary, be seen as an ally of the revolutionary transformation of the world, and in this sense, the Agenda is correct in betting on technological progress. The problem is that this belief in the technological fix or trick cannot ignore central issues such as class struggle, the relations of production that make up technology, as well as bypass the necessary political engagement for transformation, as is the case with the Agenda.[20]

Finally, the ideology of progress appears in the Agenda in the form of an over-reliance on and naturalisation of economic growth made throughout the agenda. The word 'growth' appears 17 times, mostly as 'sustainable, inclusive and sustained economic growth (par.3, par.9, par.13, par.21, par.29, par.67 e par.68). SDG 8, Specifically, vows to 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'. Despite the reference to 'sustainability and inclusiveness' and promises to make '(...) fundamental changes in the way that our societies produce and consume goods and services.' (par. 28), I argue that SDG8 continues to reproduce the same destructive patterns of accumulation, typical of capitalist development.

4.6 Final Considerations on the SDGs

The central point I seek to make with my structural critique of the Agenda is a radical one: under capitalism, all SDGs are compromised. If it is not capable

[20] For historical-materialist critiques of technology, alienation, and fetishism, see Marx (1867) Marcuse 1964), Feenberg (2002), Sarewitz (1996), Canguilhem (2008).

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of transcending its own paradigms, which limit its transformative potential, the Agenda will not achieve its objectives. In fact, the challenge is twofold: it is necessary to increase ambition and also break down its theoretical-epistemological limits. The same goes for the commitment to the juridical-moral capitalist ideology of the rule of law (which structures the Agenda and keeps capitalism working 'on its own'): breaking it down for the sake of a new sociability and relationship with nature is needed. However, in Paragraphs par.10, par.11, par.12 and par.13, the Agenda declares 'full respect' for international law, which is, however, imperialist violence itself, in Miévilles terms.

Another aspect that stands out when examining the Agenda is its fragmentation. This criticism is made by many studies that point to the need to think from the multidimensionality, trade-offs, synergies, nexus between the goals, as well as to think the agenda in a holistic way (Hickel, 2019; Koehler, 2016). In fact, no matter how much the Agenda emphasises the integration and interdependence between the goals, its instrumental reasoning is only capable of measuring fragments of reality. This allows for 'cherry-picking' approaches to measure 'progress'. Thus, not dialectical, the Agenda's rationality loses sense of the totality, the dimension of the social whole, and the whole is precisely where the relations of production are structured. An example of this is SDG 1, which measures poverty only in econometric terms and thus isolates the problem of poverty from 'social reproduction' and the other SDGs.

Finally, I address the 'blind spots' of Agenda 2030. The document represents the future in a linear, teleological, optimistic way, believing in the ideology of progress. However, as demonstrated, the reality of neoliberalism and capitalist realism points to different experiences of the future - dystopian. Global threats point to the need for a break, rather than progressive change, within the same capitalist quadrants, as the Agenda does. Hence the need to identify the absence of the elements of anti-capitalist rupture in the discourses and instruments of international law. In this sense, among the most notable

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absences from the document are the words 'Revolutionary', 'Critique', 'Class', 'Utopia', 'Radical' all the appear zero times, which is no surprise considering the mainstream narrative that underpins the international legal language of this instrument. Interestingly, words like 'Green growth', 'Green economy', 'Commons', 'Accumulation', 'imperialism', and 'Capital' appear only one time each, and the same occurs to words like 'Civilization', 'commodity', 'colonial'. This is interesting because it demonstrates that words central to capitalist development as 'commodity', 'capital', 'accumulation' and more recently the 'green economy', and also for the expansion of international law, such as 'civilization' and 'colonial' have been strangely left out of this instrument of struggle for the future, even though dealing with the impact of these phenomena is essential to actually transforming the world.

As I interpret, these absences show that the Agenda is incapable of addressing and recognizing the conflicts, contradictions and social structures that cause and perpetuate unsustainable development. It is unable to recognise the destructive colonising power of the value-form, capitalist obsessions with growth and accumulation, imperialism, global patterns of accumulation, the power of corporations; of denouncing the commodification of life and nature, of acknowledging the determining role of capitalist relations in the metabolic rift of the human-nature relationship, among others. The structural limitation of the Agenda is thus evident: via the instrument, it is simply impossible to think of an alternative future and to propose the necessary rupture to avoid climate chaos.

Finally, there is one last notable absence in 'transforming our world': the word 'historic' appears just twice in the Declaration, and both times in the self-proclamatory sense of the document, and never as a reference to the past. This demonstrates at least three things: firstly, it reaffirms the narcissistic self-image that the internationalists have of themselves, as benevolent agents of historical progress and development, which conceals a dangerous illusion. Secondly, the absence of the term history reveals the high degree of

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https://doi.org/10.6092/issn.2724-6299/13853

abstraction and generalisation of the legal language used in the Agenda. This high degree of abstraction and generalisation renders the Agenda completely de-historicized and de-politicized. Indeed, as seen, there is no mention at all of the imperial and neo colonial role played by corporations and Global North countries in the constitution of the world-economy and of its structural inequalities, which are mainly responsible for the North-South divide that cuts across International Sustainable Development Law. Thirdly, as a consequence of such a de-historicized approach to law and global governance, the Agenda reveals that its own conception of the future is frail, too abstract, and therefore detached from real, material concerns of people. If the road to the future winds its way through the past, there is no way to build a better future without taking history into account.

5. Conclusions

In today's scenario of 'crisis', the 'struggle for the future' has become a central concern of the international community. The 2030 Agenda has become one of the main legal instruments aimed at reversing the climate impacts of human action and unsustainable development. In a scenario of social disintegration and advanced climate crisis, aggravated by the Covid-19 pandemic and the economic crisis triggered there, a series of discussions on 'resumption', 'healing', 'way out' of the crisis, 'global reset', 'green new deal' started to appear, thus renewing the importance of the Agenda as an instrument for ensuring a future for the new generations.

In light of that, this study has undertaken a foray into the ideological dimension of international legal form in order to question the dimensions of this struggle for 'a better future', the Agenda's ability to achieve the changes it aims for. In other words, it assessed its capacity to 'transform the world'. It found that, as ambitious, complex and noble as its vision and purposes may be, and as measurable as its goals and targets may be, the 2030 Agenda has structural limitations due to its legal form and its belief in the ideology of

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https://doi.org/10.6092/issn.2724-6299/13853

progress. A-historical, and faithful to its juspositivist (state-centric), technicist (technical-instrumental reason) and liberal (imperialist) paradigms, the Agenda operates within the framework of a decaying liberal order, of 'realist capitalism', being incapable of proposing and delivering an alternative future to humankind.

Specifically, the study showed how the agenda abstracts the main gears of destruction of the system (capitalist relations of production), refraining from breaking them in the name of a new form of sociability and restricting itself to a simple maintenance of order and progress, management of 'the ruins' of the present. Also, by not questioning the central elements of capitalism, its 'autophagic' tendencies, international law itself became devoid of the revolutionary perspective needed to effectively transform the world, that is, to stop the inexorable march of the autophagic society of growth and accumulation towards the abyss of climatic chaos (environmental catastrophe, global eco-apartheid, etc.)

Thus, although being a complex 'superstructure', technically very well developed through a commendable legal-diplomatic effort, the Agenda does not have the capacity to exercise an effective and efficient "return action" on the capitalist 'base' relations of production. Under capitalism, even the achievement of the SDGs themselves is compromised.

The current challenge faced by humankind requires no less than imaginative capacity, political radicalism and resolute action towards the radical transformation of society towards an alternative future ("system change not climate change!"). So far, nothing guarantees that in 2030, international society will not have to meet again, in a spirit of global solidarity, to design a new agenda with renewed objectives for 2050. In this sense, the present work poses a provocation to the international community and jurists who naively believe in the transformative potential of the Agenda without confronting capitalism; and who 'pragmatically' believe that simply preserving present legal and political forms and institutions and measuring progress without serious political engagement should be enough to achieve

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13853

the necessary 'transformation of our world'.

In 2001, at the World Social Forum in Porto Alegre, the slogan 'another world is possible' was coined. However, after successive crises, somewhere down the road this slogan seems to have lost its force and raison d'être - much like Bandung. I argue that it is time to summon back the 'spirit of Porto Alegre'. The time has come to engage in ideological dispute in order to recompose the collective political subject and the capacity to imagine another world again, stretch it until a breaking point is reached, so as to burst the bubble of realist capitalism. It is a political challenge after all, and this dispute necessarily involves a radical commitment, a critical reflection on law and its role in the reproduction of capital, as well as a restoration of revolutionary anti-colonial, anti-racist, anti-imperialist internationalist theory (which seems to be totally absent in the Agenda).[21]

Finally, the research points decisively to the need to rethink the world, to recover our collective capacity of imagination beyond value, and to break through the ideological barrier of realist capitalism, restoring utopian thinking and reclaiming the idea and action of revolution and organised social struggle (empowerment of local actors, communities and social movements). It is my understanding that only by doing this it will be possible to make global 'calls for action' to 'transform our world' more than ineffective rhetorical tropes.

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ISSN 2724-6299 (Online)
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ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Cosmopolitan "No-Harm" Duty in Warfare: Exposing the Utilitarian Pretence of Universalism

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ABSTRACT

This article demonstrates *a priori* cosmopolitan values of restraint and harm limitation exist to establish a cosmopolitan "no-harm" duty in warfare, predating utilitarianism and permeating modern international humanitarian law. In doing so, the author exposes the atemporal and ahistorical nature of utilitarianism which introduces chaos and brutality into the international legal system. Part 2 conceptualises the duty as derived from the "no-harm" principle under international environmental law. Part 3 frames the discussion within legal pluralism and cosmopolitan ethics, arguing that divergent legal jurisdictions without an international authority necessitates a "public international sphere" to mediate differences leading to strong value-commitment norm-creation. One such norm is the "no-harm" duty in warfare. Part 4 traces the duty to the Stoics, Christianity, Islam, Judaism, African traditional culture, Hinduism, and Confucianism. Parts 5 and 6 explain how the duty manifests in principles of distinction and proportionality under international humanitarian law.

Keywords: cosmopolitan "no-harm" duty in warfare, legal pluralism, cosmopolitan values of restraint and harm limitation, international humanitarian law, principles of distinction and proportionality

ATHENA
Volume 2.1/2022, pp.116-151
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

1. Introduction

Is there a duty not to harm in warfare? Positivist lawyers say there is no such duty and ethical choices between military necessity and humanitarian considerations are determined by outcomes that achieve the greater good of minimising losses among one's own soldiers. Such agent-relative utilitarianism is prevalent in military interpretation of international humanitarian law, prioritising protection of one's own interests above prevention of harm to civilians and civilian objects. This perpetuates a longstanding malaise in the international legal system that those with superior means can inflict any harm on those with lesser means. But utilitarianism's pretence of universalism is far removed from cosmopolitan values underpinning international humanitarian law. Philosophical and religious doctrine across centuries and civilisations developed *a priori* cosmopolitan values of restraint and limitation of harm in warfare. During the antiquity period, the Stoics believed that to cause unnecessary harm was to breach the most basic principle that members of humanity should observe in their dealings with one another. Cicero argued that a duty not to harm was owed to other human beings without needing prior connections or social bonds. The commonality of being human and the interest in maintaining humaneness were sufficient to ground an obligation towards others.

This article argues that *a priori* cosmopolitan values of restraint and limitation of harm establish a cosmopolitan "no-harm" duty in warfare that predates utilitarianism and permeates modern international humanitarian law. In doing so, it exposes the atemporal and ahistorical nature of utilitarianism that introduces more chaos and brutality into the international legal system. Part 2 conceptualises the "no-harm" duty as typical of international environmental law where it finds specific expression in the "no-harm" principle. Part 3 situates the discussion within legal pluralism and cosmopolitan ethics by arguing that divergent legal jurisdictions without an

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

overriding international authority necessitates a "public international sphere" to mediate differences, leading to strong value-commitment norm-creation. One such norm is the "no-harm" duty in warfare, which is traced in Part 4 to the Stoics, Christianity, Islam, Judaism, African traditional culture, Hinduism, and Confucianism. Part 5 explains how the duty manifests in international humanitarian law through the principle of distinction, the prohibition on attacking civilians and civilian objects, and the presumption against attack in ambiguous situations. Part 6 considers the "no-harm" duty as contained in the principle of proportionality, the prohibition of attacks causing excessive civilian harm, and the precautionary obligation to cancel or suspend attacks.

2. Conceptualising the "No-Harm" Duty

A duty is something that must be done or a duty-holder is required to do. In international law we refer to State obligations towards other States, but there is also a wider notion of duty owed to humanity as a whole that supports the international legal order and protects universal values or global common goods. Incremental development of this wider notion of duty can be seen in the customary international environmental law "no-harm" principle under which States have a duty to prevent, reduce, and control pollution and significant transboundary harm. The duty is pronounced in several international judicial and arbitration cases and is adaptable to different contexts beyond the environment. The origins of the "no-harm" principle can be found in the *Trail Smelter* arbitration case concerning transboundary air pollution caused by a Canadian lead and zinc smelter. The tribunal decided that State territorial sovereignty was "limited" by an obligation imposed on States not to allow their territory to be used in a way that causes harm to other States:

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

> under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence (*Trail Smelter Arbitration,* 1965).

In *Gabcíkovo-Nagymaros Project*, concerning the legality of suspension of a dam project agreed to by treaty, the International Court of Justice (ICJ) conceded that instances where a state of necessity is invoked by a State to suspend and abandon a treaty may include the protection of "essential interests" related to environmental concerns. The Court emphasised "the great significance that it attaches to respect for the environment, not only for States but for the whole of mankind", citing the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control (*Gabcíkovo-Nagymaros Project,* para. 53). In *Pulp Mills,* concerning the location of a pulp mill on a shared watercourse, the ICJ clarified the obligation of due diligence to prevent transboundary harm as requiring a State to "use all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (*Pulp Mills,* para. 101).

These examples of international law's use of the wider notion of duty foresees a class of beneficiaries not determined by territory or nationality but membership of a global community reliant on global common (sometimes finite) goods where harmful practices can have wider transboundary impacts.

The wider notion of duty falls within the cosmopolitan legal theory developed in this article as it relates to transboundary rights and duties, concern and protection of others beyond one's own State, and systemic concerns for the benefit of humankind. International law provides for this wider notion through a special class of norms (*jus cogens*) from which no

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

derogation is allowed, and obligations (*erga omnes*) which are owed to the community of States as a whole (*Barcelona Traction Case, Belgium v Spain*, para. 32). Thus, if transboundary duties for global common goods are considered obligations *erga omnes*, this would entitle each State to take action against violations whether or not they are directly injured or affected by the violation. Jurisprudence of the ICJ affirms both the *jus cogens* nature and obligations *erga omnes* status of core rules of international humanitarian law, further supporting the need for restraint and limitation of harm in warfare crystallising as a broad "no-harm" duty.

In *Legality of the Threat or Use of Nuclear Weapons* the Court referred to international humanitarian law rules as "intransgressible principles of international customary law" because they are "so fundamental to the respect of the human person and 'elementary considerations of humanity'" (*Legality of the Threat or Use of Nuclear Weapons*, para. 69). In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court affirmed that rules of international humanitarian law "incorporate obligations which are essentially of an *erga omnes* character." Common Article 1 of the 1949 Geneva Conventions requires High Contracting Parties "to respect and to ensure respect for the present Convention in all circumstances", and every State Party to the Conventions, whether or not a party to a specific conflict, is under an obligation to ensure that they are complied with (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 157-159).

3. Legal Pluralism and the "No-Harm" Duty

To posit there is a duty not to harm in international law is to suggest that there is a universal principle or at least a principle that is capable of universalisation. This raises heckles from realist-positivist international lawyers pointing to the decentralised international legal order that has no central enforcement mechanism (Goldsmith and Posner, 2005, 211-213).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

Whilst true enough about the lack of a central law-making authority and enforcement body in international law, these need not be the defining features of what is sought for or needed in the international legal order. Indeed, mimicking the State-centred structure, or deference to the "domestic analogy", proves inadequate at the international level where independent State entities must forge relations in order to tackle cross-jurisdictional, transboundary, and global issues beyond the microcosm of what one State could hope to achieve. Branches of State - executive, legislature, judiciary - are neat organisational tools of how a State should function to meet the needs of its people. But these do not address the "non-neat" nature of composition of the international legal order - States (including post-Westphalian European sovereign entities, post-colonial independent States, post-Cold War independent States, newly independent States); and non-State actors (including self-determination/liberation movements, multinational corporations, indigenous peoples, networked global civil society movements) - and "non-neat" means of law creation and enforcement at the international level. What binds States and non-State actors to come forward to articulate and advocate through international fora and mechanisms? They must perceive some value in doing so. And that value is the possibility of establishing normativity across different jurisdictions to impact those in similar circumstances or facing the same issues. A sense of common purpose in addressing an issue can lead to strong value-commitment adopted as a rule that binds many, passing the threshold from aspirational to normative. Strong value-commitment is immersion in rule-creation despite legal pluralism and structural deficiencies at the international level. Legal pluralism, here, follows Griffiths' "strong pluralism" of different legal jurisdictions governing territories and peoples without being bound by a single international authority (Griffiths 1986, 5-8).

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3.1 Strong Value-Commitment Normativity in the "Public International Sphere"

Strong value-commitment normativity makes a virtue out of a fragmented international legal order of legal pluralism and recognises, in Arendt's words, "the essential human condition of plurality, the acting and speaking together, which is the condition of all forms of political organization" (Arendt, 1999, 202). Just as the commonality of individuals being human and the difference of their individuality, so too is there a commonality of States as formal subjects of international law administering control over defined territories and populations yet difference in terms of how they administer control. Without individuality difference or State jurisdictional difference there would be no public sphere or, more accurately, a "public international sphere" in which interaction could take place. There would instead be a rather stifling outward appearance of homogeneity completely separate from the inward reality of difference in action, words and deeds. Individual State leadership operating in this fashion is tyranny susceptible to self-destruction through disobedience, resistance, rebellion, and revolution. In a similar vein, the insularity and parochial vision of States as concerned with their national interests and protecting their territorial boundaries, belies the machinations of difference within and without which makes it unrealistic to maintain this stance at the international level. It also does not solve transboundary issues requiring exchange of ideas and pooling resources to cooperate in the "public international sphere". So all of this to say that difference, or plurality, is not the problem at the international level. It is the very existence of plurality that provides the need for a "public international sphere" which can then lead to strong value-commitment normativity producing new norms and rules.

At this point we may appear to be heading down the abyss of "the pluralism of chaos" (Mégret, 2020, 539), which is certainly not the intention. Instead, what is being identified here is norm-creation in the "public international sphere" emanating from human commitment to speak and take action. This

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

norm-creation process is a "cosmopolitan pluralist approach" informed by a set of principles (Berman, 2012, 145-150).

3.2 "Cosmopolitan Pluralist Approach" to Norm-Creation

As a theory of global ethics, cosmopolitanism transcends State interests and territorial boundaries to recognise the formation of an ethical community based on transboundary rights and responsibilities (Linklater, 1998; Vertovece and Cohen, 2002). The Stoics referred to "human fellowship and community" whereby "reason and speech reconcile men to one another, through teaching, learning, communicating, debating and making judgements, and unite them in a kind of natural fellowship" (Cicero, 1991, 21). From this ethical premise of transboundary human fellowship and community emerges cosmopolitan legal theory, which develops our understanding of what justice amounts to in the "public international sphere", and notions of transboundary rights and responsibilities. Theorists have focused on structural deficiencies at the international level, redistributive justice to manage finite global resources and alleviate poverty, global governance structures, and normative principles such as fairness (Sen, 2009; Pogge, 2002; Archibugi and Held, 1995; Rawls, 1999). Specifically in the context of international humanitarian law, cosmopolitan legal theory is used to develop a "world community interest" approach to norm-creation for new weapons technology (Ulgen, 2016). This approach recognises "global interest issues that impact on humanity, transcend individual State interests and the inter-state dimension, and typically require transnational regulation" (*ibidem*, 10). All of these cosmopolitan theories work with rather than against the prevailing "strong pluralism" of the "public international sphere". Each offers something different in terms of addressing a structural, process, or substantive issue of international law. What binds them is what Berman refers to as a "cosmopolitan pluralist approach" to norm-creation informed by six principles (Berman, 2012, 144-150). The six principles of cosmopolitan

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https://doi.org/10.6092/issn.2724-6299/14648

pluralism can be applied to the existence of a cosmopolitan "no-harm" duty in warfare.

3.3 Six Principles of the "Cosmopolitan Pluralist Approach" and the "No-Harm" Duty in Warfare

First, individuality difference is accepted. Cosmopolitan pluralism accepts difference between individuals, complete strangers, without seeking to enforce sameness or assimilation. There is no superficial group identification or loyalty assumed; rather, individuals are open to operating in a public sphere characterised by individuality differences. Tracing the origins of the "no-harm" duty in warfare we can see influences in both secular and religious doctrine, as well as legal scholarship. Whilst legal traditions and cultures across the centuries have had particular codes of law and ethics relating to conduct in warfare, nevertheless, a persistent thread of commonality emerges of trying to provide some restraint on methods and means of warfare. Part 4 provides analysis of the persistent thread of commonality; suffice to say it is evident in the Stoics' works, Christianity, Islam, Judaism, African traditional culture, Hinduism, and Confucianism.

Second, conflict is managed through procedural mechanisms, institutions, and practices which draws States and non-State actors into a shared social space, the "public international sphere". This seemingly undermines pluralism if it requires acceptance and adherence to centralised conflict-resolution mechanisms, institutions, and practices, which we know not all States let alone non-State actors do. But for there to be any possibility of normativity emerging at the international level, there must be some convergence on the existence, utility, and value of such conflict-resolution processes. These do not necessarily have to entail formal adjudication through courts. "Conflict-resolution" is suggestive of armed conflict between opponents whereas it could mean "navigating" differences through dialogue, raising-awareness, representations, and information-gathering at international fora. Berman concedes the "common social space" with underlying values of

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https://doi.org/10.6092/issn.2724-6299/14648

procedural pluralism is "a vision consonant with liberal principles … [which] … many may reject … on that basis", but that it is necessary to have any sort of functioning legal system that can negotiate differences. He argues that a "cosmopolitan pluralist approach" is "*more likely* able to draw participants together into a common social space than a territorialist or universalist framework would" (*ibidem*, 146). When States engage in armed conflict, they enter a theatre of operation governed by international rules protecting civilians and civilian objects, and others who may be designated protected status. Armed conflict is not simply a bilateral matter between States as it disrupts the orderly course of international relations, breaching the fundamental principle of the prohibition on the use of force. Armed conflict engages the whole international community's interest to seek resolution in the "public international sphere".

Third, active engagement with differences is the third principle informing a "cosmopolitan pluralist approach". This means that the decision-makers in conflict-resolution mechanisms, institutions, and practices should be encouraged to actively engage with "questions of multiple community affiliation and the effects of activities across territorial borders, rather than shunting aside normative difference" (*ibidem*, 146). It is incumbent on all decision-makers, particularly those from States engaging non-State actors and international organisations representing international law-making and conflict resolution, to consider whether conflict has arisen due to affiliations beyond territorial boundaries or multiple affiliations, and to properly analyse and categorise the conflict in order to address underlying issues and provide appropriate resolution.

Fourth, taking account of the international systemic value of conflict resolution or navigating differences. Domestic judicial and regulatory decisions within States would take account of "a broader interest in a smoothly functioning overlapping international legal order", seeing the value of reciprocal tolerance and goodwill. States and non-State actors do not operate in isolation and when armed conflict is resorted to there are wider

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https://doi.org/10.6092/issn.2724-6299/14648

ramifications for neighbouring communities, States, and the overall stability of the international legal order. Thus, domestic judicial and regulatory decisions within States would see the benefit in not only limiting the causes of conflict but also having a "no-harm" duty.

Fifth, there may be public policy exceptions to justify "illiberal communities and practices" but this does not mean such practices are fully recognised or the norm. Rather, they require a strong normative statement to justify the exception. The Talibans' forceful takeover of Afghanistan in August 2021 is a case in point. There is yet to be a strong normative statement from the Anglo-American/European post-Westphalian States actively engaged in international law-making, participation in conflicts and conflict resolution (e.g. the United States, the United Kingdom, the EU, Australia, Canada) justifying the toppling of an elected Afghan government by a repressive and illiberal regime. UN Security Council Chapter VII sanctions continue to apply under Security Council Resolution 1267(1999), freezing assets, funds, and financial resources of the Taliban. The Resolution was adopted in 1999 as an enforcement measure against the Taliban for harbouring terrorists, yet it continues as a leverage for any future recognition of the Taliban as the legitimate government of Afghanistan. Equivocal statements by the UN and States may point to the development of new conditions for formal recognition under international law, such as respect for human rights and the formation of a representative government.

Rather than calling for non-recognition of the Taliban, Security Council Resolution 2593 (2021) called on all parties "to seek an inclusive, negotiated political settlement, with the full, equal and meaningful participation of women, that responds to the desire of Afghans to sustain and build on Afghanistan's gains over the last twenty years in adherence to the rule of law, and underlines that all parties must respect their obligations." In October 2021, the Moscow Format Consultations led to a Joint Statement by nine States (Russia, China, India, Pakistan, Iran, Kazakistan, Uzbekistan, Turkmenistan, Kyrgyzstan) acknowledging that "practical engagement with

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https://doi.org/10.6092/issn.2724-6299/14648

Afghanistan needed to take into account the new reality, that is the Taliban coming to power in the country, irrespective of the official recognition of the new Afghan government by the international community" (Chia and Haiqi, 2021), and noting that "a truly inclusive government that adequately reflects the interests of all major ethnopolitical forces in the country" was a precondition to formal recognition. During the period of uncertainty over formal recognition, the Taliban are non-State actors bound by international humanitarian law rules governing non-international armed conflict with terrorist groups within Afghanistan, in particular, common Article 3 of the 1949 Geneva Conventions and Articles 7 and 13(2) of Additional Protocol II. There is harm caused within and outside Afghanistan's borders with people fleeing to neighbouring States, risking their lives to escape a country they no longer feel secure or safe in. It represents a collapse in global leadership on a matter of systemic impact on the international legal order and on the "no-harm" duty.

The final principle relates to cosmopolitan pluralism seeking a middle ground between realist-positivist fixation on sovereign territorial paramountcy, and universalism's overbearing centralism. Thus, "successful" mechanisms, institutions, or practices within the "public international sphere" will be those that "simultaneously celebrate both local variation and international order and recognize the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange" (Berman, 2012, 150). The "no-harm" duty is not a complete anathema to individual legal traditions and jurisdictions to be meaningless. Drawing from the persistent thread of commonality in trying to provide some restraint on methods and means of warfare, this can be aligned with a cosmopolitan "no-harm" duty.

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https://doi.org/10.6092/issn.2724-6299/14648

4. Cosmopolitan Roots and Contemporary Manifestations of the "No-Harm" Duty

One clear example of how the "no-harm" duty in warfare is rooted in historical religious and secular *a priori* values of restraint and limitation of harm is the principle of distinction. The idea of separating combatants from non-combatants, the sparing of innocents, is as old as warfare itself. Ancient civilisations and cultures established customs and practices to distinguish between combatants and civilians, especially women, children, the elderly, and clergy. Prior to the Westphalian period of State formation, restraint and limitation of harm were advocated as practices. Numerous international legal scholars have refined these customs and practices to crystallise a norm of harm-limitation or do-no-harm under international law. Despite Vitoria's unethical categorisation of the "barbarian other" and "civilised European", his natural law theory on the law of nations advocated a customary practice of treating strangers humanely during war (Vitoria, 1991, 277ff.; Cavallar, 2008). Grotius notably developed specific rules of limiting harm in warfare which had the effect of sparing innocents (e.g. prior to war an exit period for persons on enemy territory; prohibition of killing or injuring persons on neutral territory; prohibition of killing children, old men, priests and scholars, prisoners of war, and women) (Grotius, 1625, 4.7-4.8, 11.9-11.10, 11.13). These scholarly perspectives and ancient civilisations and cultural norms established rules of engagement in warfare intended to reduce or eliminate harm.

4.1 Stoics' Prescient Duties

The Roman Stoics' law of nations, *jus gentium*, originally for the purpose of governing relations with foreigners, extended to relations between States centred on principles of cooperation and minimisation of harm. On the basis of "human fellowship and community", Cicero developed a series of principles and duties relevant to moral conduct of individuals in peace and

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

wartime. The commonality of being human sufficed to warrant "certain duties that we owe to even to those who have wronged us" (Cicero, 1913, 35-37). Duties in warfare included honouring promises to enemies, prohibiting poisoning or treacherous killing of enemies, and prohibiting inflicting unnecessary suffering on enemies (*ibidem*, 35-45, 83).

These prescient duties are indeed reflected in contemporary international law: the principle of *pacta sunt servanda* as a general principle of international law and specific to the law of treaties as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties and customary international law; the prohibition of perfidious acts that betray an enemy's trust and confidence in warfare as reflected in Article 37(1) of the 1977 Additional Protocol I to the Geneva Conventions and customary international law; the prohibition of poison and poisoned weapons in Article 70 of the 1863 Lieber Code and Article 23(a) of the 1907 Hague Convention IV Regulations; the principle of preventing unnecessary suffering of enemy combatants in the 1868 St. Petersburg Declaration, the 1899 Hague Declaration Concerning Asphyxiating Gases, the 1899 Hague Declaration Concerning Expanding Bullets, Article 23(e) of the 1907 Hague Regulations IV Respecting the Laws and Customs of War on Land, and Article 35(2) of the 1977 Additional Protocol I to the Geneva Conventions, as well as forming part of customary international law.

A final contribution from Cicero's conception of duties in warfare was premised on proportionality; that any proportionate retributive action may be taken against an enemy so long as it is not gratuitous violence and "great care should be taken that nothing be done in reckless cruelty or wantonness" (*ibidem*, 83). This is reflected in the principle of proportionality today, as contained in Articles 51(5)(b) and 57(2)(a)(iii) and (b) of the 1977 Additional Protocol I to the Geneva Conventions and customary international law, which requires evaluating whether an anticipated military advantage to be gained from an attack is proportionate to the expected incidental civilian injury, including death to civilians and damage to civilian objects.

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https://doi.org/10.6092/issn.2724-6299/14648

4.2 Christianity's Just War and Virtuous Warriors

Early Christian theological writings on war and its consequences sought to inculcate warrior values of restraint and limitation of harm. Founder of the just war theory, Augustine elaborated virtue ethics of self-awareness, compassion, and restraint. He counselled, "condemn injustice without forgetting to observe humanity. Do not indulge a thirst to revenge the horrors inflicted by sinners, but rather apply a willingness to heal the wounds of sinners" (Augustine, 2004, 62). Properly understood, Augustine's just war theory is not a licence to kill. It is a carefully crafted dictum against presumption and excess; war is a response to an injustice by an aggressor and should never be entered into lightly for revenge or cruelty (Augustine, 1954, 207). The virtuous warrior's heightened sense of humaneness and compassion restrained their action and conduct, including prohibiting attacks on places of worship in order to provide sanctuary for victims of warfare (*ibidem*, 19, 24-25, 27).

Aquinas deemed war a "sin contrary to peace" (Aquinas, 2006, Q.37) yet also sought to set parameters for legitimate resort to war. The just war theory was further developed to include three conditions: (i) the need for a sovereign authority to declare war; (ii) the existence of a just cause, which is when there is a response to a prior injustice committed by the enemy; and (iii) the need for an intention to do justice and attain peace (*ibidem*, Q.40 Article 1). Similar to Augustine, Aquinas emphasised warrior virtues, in particular "military prudence" and "protection of the entire common good" which is the attainment of peace (*ibidem*, Q.50 Article 4).

4.3 Islam's "Jihād" and Distinction Between Combatants and Civilians

Islamic jurists had their own conception of a just war, referred to as "jihād", requiring certain formalities under law and justifications in accordance with religion or societal customs (Khadduri, 1955, 57-58). Such a war can only be declared and waged by the State (not individuals) with authority and responsibility vested in the head of State. Rules were established to

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https://doi.org/10.6092/issn.2724-6299/14648

distinguish between combatants and civilians, and to prohibit certain types of conduct in warfare. It was prohibited to kill civilians and prisoners of war, as well as to destroy animals, fertile land with crops, and trees. Poisonous weapons were also prohibited (Hassan, 1974, 173). Prisoners of war and deceased bodies of enemy combatants were not to be ill-treated (*ibidem*, 177; Khadduri, 1955, 108). Further categories of protected persons (women, children, monks, old men, people sitting in places of worship, traders, merchants, and contractors) were not to be killed (Ibrahim, 1984, 132-133). Modern manifestations of these rules are contained in the following: fundamental guarantees under common Article 3 of the 1949 Geneva Conventions (requires humane treatment of civilians and *hors de combat* and prohibits outrages upon personal dignity); Articles 1(2) and 75 of the 1977 Additional Protocol I to the Geneva Conventions (requires enemy combatants to be afforded protection under the principles of humanity and the dictates of public conscience, and treated humanely); Articles 13 and 14 of the 1949 Geneva Convention III and Article 11(1) of the 1977 Additional Protocol I to the Geneva Conventions (requires prisoners of war to be treated humanely at all times); Article 15 of the 1949 Geneva Convention I, Articles 18 Geneva Convention II, Articles 13, 120-121 Geneva Convention III, Article 16 Geneva Convention IV, and Article 34 of the 1977 Additional Protocol I to the Geneva Conventions, which require prevention of ill-treatment of deceased enemy combatants, humane treatment of prisoners of war and deceased prisoners of war, and special protection for wounded and sick civilians.

4.4 Prohibition on Sustenance Destruction and Siege Warfare in Judaism

Maimonides, a leading scholar of medieval Judaism, was concerned about preventing wanton destruction and established a prohibition on sustenance restrictions on civilians under siege, such as destruction of fruit trees and blocking access to water, and an obligation to allow the enemy to surrender or exit by offering peace and not besieging a city from all four sides

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https://doi.org/10.6092/issn.2724-6299/14648

(Maimonides, 1170-1180, chap. 6, paras. 1, 7 and 8). Jewish warfare rules were said to be founded on "gentleness" and "humanity" even towards enemies (Josephus Book II, para. 30). Maimonides' prohibition on siege warfare reflects international humanitarian law's concern with protecting civilians. Article 54 of the 1977 Additional Protocol I to the Geneva Conventions, and Article 14 of Additional Protocol II prohibit starvation of civilians as a method of warfare, and attacks, destruction, removal or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, and drinking water.

An interesting anomaly in the law's development of the prohibition on siege warfare is Lieber's personal endorsement of siege and apparent subsequent permissibility under the doctrine of military necessity under Article 14 of the 1863 Lieber Code. Article 14 states, "military necessity, as understood by modern civilised nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war" (Lieber Code, 1863). Article 15 continues that military necessity "admits of all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable … it allows all destruction of property … and of all withholding of sustenance or means of life from the enemy" (*ibidem*). Predating Lieber, certain Islamic jurists considered permissible besieging enemy cities, using siege artillery to destroy city walls and houses, burning or flooding enemy territory, cutting water canals and destroying water supplies, and using poison, blood or any material to spoil drinking water in order to force the enemy to capitulate (Khadduri, 1955, 105-106). Judaism distinguished wars against the six peoples of Canaan (the Hittites, Amorites, Canaanites, Perizzites, Hivites, and Jebusites) as exempt from restraints on destruction and conduct (Hassner and Aran, 2013, 81-82; Roberts, 1988, 232-233).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

The Lieber and other anomalies seem to contradict a "no-harm" duty. But these anomalies are dated iterations of a type of warfare presumptive of gaining military advantage at all costs, immersed in a misguided utilitarian perspective of short, sharp action leading to the greater good of humanity, as exemplified in Article 29 of the Lieber Code: "the more vigorous wars are pursued, the better it is for humanity. Sharp wars are brief." The complexity of today's types of warfare in terms of hybrid terrains, multiple actors, access to diverse weaponry, and asymmetric capabilities of non-State actors, certainly does not guarantee "sharp and brief" wars. Lack of reference to the humanitarian rationale for the "no-harm" duty risks positioning war as a normal course of conduct rather than a measure of last resort. We have seen devastating consequences of military necessity justifications, such as during the American Civil War when the Union Army General Sherman advocated scorched-earth tactics, pillaging, and indiscriminate killing of civilians (McPherson, 1990, 809), and during the Second World War when "total war" and "unconditional surrender" were used to justify aerial bombardment and fire-bombing of German and Japanese cities (Overy, 2005, chap. 15; Messer, 2005, chap. 16). More recent conflicts in Iraq and Afghanistan have left decades-lasting systemic, transboundary problems of asymmetric warfare with non-State actors, regional instability, proliferation of weapons, humanitarian crises, and displacement and migration of local populations.

4.5 Protection of Collective Goods in African Traditional Culture

In pre-colonial traditional African societies, oral tradition devised community-based rules governing conduct in warfare. These rules pertained to protection of sources of human sustenance, especially water, cattle, and land, which were collective goods and not legitimate military objectives (Mubiala, 1989; Diallo, 1976; Kappeler and Kakooza, 1986). Warriors were expected to uphold virtue ethics prohibiting the killing of wounded or surrendering enemy combatants, requiring negotiations prior to declaring war, and providing emissaries with safe passage (Diallo, 1976, 10; Bello,

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1980, 19). As mentioned above, protection of collective sustenance goods is reflected under Articles 54 and 14 of Additional Protocols I and II respectively. The environment, as a broader collective good, is protected under Article 35(3) of Additional Protocol I which prohibits the employment of methods and means of warfare intended or expected to cause widespread, long-term and severe damage to the natural environment.

4.6 Hinduism's Humane Means of Warfare

From a conception of common humanity involving acceptance and respect for different beliefs and traditions, ancient India set parameters around the conduct of warfare to include categories of protected persons as well as humane practices particularly when fighting an enemy. It was prohibited to kill innocent bystanders, non-combatants, and travellers. Defeated enemies were to be treated humanely and poisonous weapons were not to be used. Certain rules focused on how to conduct combat with the enemy to ensure fairness, avoid unfair advantage, and respect humanity. Combat between mounted and unmounted soldiers was prohibited. Collective attacks against a single soldier and killing a soldier temporarily at a disadvantage during battle were prohibited. Warriors were not to engage in what were considered unjust and improper conduct such as striking someone from behind, poisoning the tip of the arrow, or attacking the sick, old, children, or women (The Laws of Manu, chap. VII, verses 90-92; Mahabharata, Book 12, Section XCV; Penna, 1985, 188-190).

Notions of fairness, avoiding unfair advantage, and respect for humanity in conflict come closest to the cosmopolitan approach. These are reflected in the principle that methods and means of warfare are not unlimited, as contained in Article 35(1) of the 1977 Additional Protocol I to the Geneva Conventions; the provisions on humane treatment previously mentioned; and restrictions or prohibitions on certain types of weapons which by their nature cause superfluous injury or unnecessary suffering, or which are indiscriminate because they cannot be directed at a specific military objective,

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or because their effects cannot be limited (e.g. mines and booby-traps, anti-personnel mines, poison and poisoned weapons, chemical weapons, and prohibition of blinding laser weapons that cause permanent blindness).

4.7 Confucian Influence on Restraining Doing Harm

Ancient China regulated conduct in warfare through martial rules and customs. In the fifth century BC the Chinese military strategist, Sun Tzu, codified rules on military planning, attacks, strategy, warrior attributes, and methods of warfare. Maximising potential for victory was a prevailing objective tempered by limitations derived from Confucian virtue ethics. Examples include: the expectation that commanders exhibit "wisdom, credibility, benevolence, courage, and strictness"; preservation of the enemy capital city, army, and battalions as the best method of warfare; "subjugating the enemy's army without fighting is the true pinnacle of excellence"; besieging a walled city is the worst strategy; humane treatment of captured soldiers (Sun Tzu, 1994, 167, 177, 174). Launching an attack by fire was considered indiscriminate and inhumane (Miller, 2015, 35). Conducting war in a remote location away from non-combatants served to limit doing harm to innocents (Yu Kam-por, 2010, 107). Warfare at all costs was not efficient or wise, and a distinction should be made between warring States and their peoples (Miller, 2015, 73). Flooding the enemy's State was inhumane, and wanton destruction of civilian objects, looting, and imprisonment of enemy civilians was inhumane as well as imprudent as it exposed the attacker ruler to counter attacks (Mencius, 2009, Book 1B.11, Book 6B.11).

Prudent strategising is one explanation to Confucian restraints on doing harm. Yet strategising to avoid fighting in the first place is fundamentally different from Lieber utilitarianism.

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5. The "No-Harm" Duty and the Principle of Distinction

Generally, the principle of distinction under international humanitarian law is a manifestation of the "no-harm" duty. The fact that warring parties cannot associate animosity with or direct hostilities towards whole populations and innocents is a mark of humanitarian achievement. Under customary international law and Articles 51(2) and 52(1) of Additional Protocol I, civilians and civilian objects must not be the subject of an attack. Articles 41(1) and 51(2) of Additional Protocol I prohibit attacks on *hors de combat*, and civilian populations and individual civilians respectively. Similar prohibitions apply in non-international armed conflicts under Articles 7 and 13(2) of Additional Protocol II. The principle of distinction operates in particular ways to demonstrate the existence of a "no-harm" duty, namely, by prohibiting attacks on civilians and civilian objects, and by the presumption against attack in ambiguous situations.

5.1 Prohibition on Attacking Civilians and Civilian Objects

Article 50(1) of Additional Protocol I defines a "civilian" as "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol [i.e. prisoners of war, combatants, *hors de combat*]". Article 50(2) makes reference to "civilian population" which under Article 50(3) does not lose its civilian status if there are individuals who do not satisfy the definition of a "civilian". Under Article 51(2) it is prohibited to attack civilians and the civilian population, suggesting protection of the group and individual. Definitions under Article 50 recognise individuals comprise the population through phrases such as "a civilian is any person", "a person is a civilian", "the civilian population comprises all persons who are civilians", which means the protection is predicated on the individual rather than requiring that the individual belongs to a group or collective. Referring back to the historical religious and secular *a priori* values of restraint and harm limitation, we see

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a persistent thread of commonality to differentiate categories of persons deemed innocents or vulnerable to be spared from harms way, rather than offering generic large-scale protections to populations. This may even be formulated as a right; because such individuals have done nothing to forfeit their right not to be attacked they should not be subject to attack (McMahan, 2009).

Article 52(1) of Additional Protocol I does not define "civilian objects" instead operating a negative rebuttable presumption that these are "all objects which are not military objectives". Thus, civilian objects are protected against attack, unless and for such time as they are military objectives (ICRC Customary International Humanitarian Law Study, Rule 10). The rebuttable element is introduced if the object can be deemed a military objective, under Article 52(2), by virtue of its nature, location, purpose or use. But even if it is identified as falling within one of these characteristics, Article 52(2) requires that the object "make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage." Two elements must be simultaneously satisfied for an object to constitute a "military objective" and therefore be subject to attack: (i) its nature, location, purpose or use makes an effective contribution to military action; and (ii) its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Without going into detailed definitions and interpretations of the object characteristics, the key thing to note in the two-element test is the presence of a restraining and harm-limiting value in the form of a range of attack options, namely, "total or partial destruction, capture or neutralisation". There is no expectation or requirement for elimination or annihilation of the object. Indeed, the availability of attack options indicates the need for restrained thinking to determine an appropriate level of attack according to the circumstances encountered and the object observed, without causing unnecessary or excessive harm. It would not make sense to opt for total

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destruction when a definite military advantage could be gained by capturing or neutralising the object. Lieber utilitarianism's prioritisation of military necessity fails to take account of this restraining and harm-limiting value.

5.2 Presumption Against Attack in Ambiguous Situations

In cases where there is doubt about civilian or civilian object status the law operates with a presumption against attack. The ICRC Commentary makes clear the presumption against attack is intended to protect the civilian population and prevent belligerents from arbitrarily and unilaterally declaring civilian objects as military objectives (ICRC, 1987, 637 para. 2030, 638 para. 2037).

Article 50(1) provides that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian." The ICRC Commentary clarifies that persons who have not committed hostile acts but whose status is in doubt "because of the circumstances" should be considered civilians "until further information is available" and not be subject to attack (*ibidem*, 612 para. 1920). This suggests that any degree of ambiguity is sufficient to trigger the presumption against attack. But it is not clear what standard of human judgement is being applied, the factors entailing "the circumstances" that would need to be considered, and the sort of "further information" that could rebut the presumption. On the standard issues, the ICTY Appeals Chamber in *Prosecutor v Blaškić* referred to "the expected conduct of a member of the military" (*Prosecutor v Blaškić* 2004, para. 111). On the factors entailing "the circumstances" and what amounts to "further information", it would not make sense or support the underlying value of civilian protection to adopt a Lieber utilitarian interpretation that prioritises military necessity. A simple formulation of this type of interpretation is that an armed conflict constitutes "the circumstances" requiring a response based on military necessity. But it is clear that the rules on civilian protection and prohibition on attacking civilians apply in the context of armed conflict so it is insufficient to repeat that there is an armed conflict taking place to rebut the presumption against

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attack in cases of ambiguous civilian status. More is needed to demonstrate a valid rebuttal, particularly as this will lead to a serious consequence of injury or death of another human being. Invocation of military necessity also creates arbitrariness and unfettered discretion which is unjustifiable, unethical, and not in the spirit of the underlying value of civilian protection and harm-limitation contained in the law.

Unlike the two-element test determining military objectives which offers refinement through object characteristics, human target characteristics are not defined to assist in assessing "the circumstances" or "further information". One resolution is to refer to Article 51(3) stating that civilians lose protection when they "take a direct part in hostilities." The ICRC's guidance on "direct participation in hostilities" requires that: (i) the act of participation is likely to adversely affect military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack; (ii) there is a causal link between the act of participation and the expected harm; and (iii) the act of participation is specifically designed to directly cause the requisite level of harm in support of a party to the conflict and to the detriment of another (ICRC, 2009, 46). Another resolution, argued by Haque (2007), is to operate a standard of reasonable belief based on decisive evidence. A person should be considered a civilian unless there is decisive evidence that they are a combatant and the risk of sparing them is substantially greater than the risk that they are a civilian.

As for ambiguous civilian objects, the law also protects these through a presumption against attack. The ICRC Commentary clarifies that civilian objects are protected against attack, unless and for such time as they are military objectives (ICRC Customary International Humanitarian Law Study, Rule 10). Article 52(3) of Additional Protocol I provides that "in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so

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used." The provision is illustrative rather than exhaustive in identifying civilian objects as a place of worship, house or dwelling, or a school, mainly due to a lack of consensus in the drafting process as to what amounts to a civilian object (ICRC, 1987, 638 paras. 2035-2036). Even if a civilian building is on the frontline it cannot be subject to an attack unless it is certain that the building accommodates enemy combatants or military objects (*ibidem*, para. 2034). Requiring "certainty" is a higher threshold than simply relying on a broad discretion of military necessity. It also preserves the underlying value of civilian object protection.

The "no-harm" duty is further represented in precautionary measures which must be applied under Article 57 of Additional Protocol I. Thus, under Article 57(2)(a)(i), those planning or deciding an attack must do everything feasible to verify that the object is: (i) not a civilian object; (ii) not subject to special protection; (iii) constitutes a military objective under Article 52(2); and (iv) not prohibited by the provisions of the Protocol to attack. Failure to properly exercise human judgement in working through the rules contained in Articles 50, 52, and 57 by invocation of military necessity can lead to tragic consequences. NATO's bombing of the Chinese Embassy in Belgrade, in 1999, is a case in point. As a result of inappropriate target location techniques, and failures in target verification and review process, the Embassy was mistakenly attacked killing three Chinese citizens, injuring fifteen others, and causing extensive damage to the Embassy and other buildings in the surrounding area (ICTY Final Report, 2000, paras. 80-82).

6. The "No-Harm" Duty and the Principle of Proportionality

Once a lawful target is selected, the law continues to apply the underlying value of civilian protection and harm-limitation through the principle of proportionality, which requires a decision to be made as to whether the anticipated military advantage to be gained from an attack is proportionate to the expected incidental civilian injury, including death to civilians and

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damage to civilian objects. The principle is contained in customary international law and Articles 51(5)(b) and 57 of Additional Protocol I. An attack is prohibited if it is expected to cause excessive loss of civilian life, injury to civilians, or damage to civilian objects. Additional Protocol II, which applies to non-international armed conflicts, does not explicitly refer to the principle. But the preamble refers to "the humanitarian principles enshrined in Article 3 common to the Geneva Conventions" and the protection afforded by "the principles of humanity and the dictates of the public conscience", which reflect the underlying value of civilian protection and harm-limitation through application of the principle of proportionality. Indeed, it would not make sense to allow excessive harm to take place in non-international armed conflicts yet prohibit excessive harm in international conflicts. So the principle applies to both international and non-international armed conflicts (ICRC Customary International Humanitarian Law Study, Rule 14; Bothe, Bartsch and Solf, 1982, 678). The principle of proportionality operates in particular ways to demonstrate the existence of a "no-harm" duty, namely, by prohibiting attacks that cause excessive civilian harm, and by the precautionary obligation to cancel or suspend attacks.

6.1 Prohibition of Attacks Causing Excessive Civilian Harm

Article 51(5)(b) prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The wording is replicated in Article 57 on precautionary measures. The decision as to whether "excessive" harm will result from an attack is reached by posing three questions - (i) what is the expected incidental civilian harm? (ii) what is the anticipated concrete and direct military advantage? and (iii) is the civilian harm excessive in relation to the military advantage? If there is an affirmative answer to (iii), then the attack is prohibited. The decision is based on the "reasonable military commander" standard, which requires an "honest expectation" and

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"reasonableness" taking into account all relevant factors related to the anticipated military advantage, and the expected civilian loss and damage (ICTY, 2000, para. 50). But in practice, the three-part question is conflated to focus on Lieber utilitarian prioritisation of military necessity with a number of states asserting a presumption favouring operational judgement above all else (Canada, 2001; *Fuel Tankers Case*, 63-65; Israel, 2009; The Netherlands, 2005).

The ICRC Commentary clarifies that "incidental loss" means the primary concern of incidental effects attacks may have on persons and objects (ICRC, 1987, 684 para. 2212). A number of factors determine the nature of harm posed by the attack including: location; terrain; weapon accuracy; weather; the nature of military objectives; and combatant skills (*ibidem*). "Concrete and direct military advantage anticipated" means an attack carried out in a concerted manner in numerous places can only be judged in its entirety. But this does not mean that several clearly distinct military objectives within an urban area can be considered a single objective, which would breach Article 51(4)(a) (*ibidem*, 685 para. 2218). The "advantage anticipated" must be a military advantage and it must be concrete and direct; so creating conditions conducive to surrender by means of attacks which incidentally harm the civilian population are not permissible. A "military advantage" can only consist of ground gained and annihilation or weakening of the enemy armed forces (*ibidem*), yet Australia, New Zealand, the United States, and Israel explicitly recognise protection and security of their own combatants as a "military advantage" (Australia, 2006; Canada, 2001; New Zealand, 1988; the United States, 2007; Israel, 2009).

Although there is no definition of what constitutes "excessive" in relation to the "concrete and direct military advantage anticipated", the underlying value of civilian protection and harm-limitation permeates the interpretation and application of the principle of proportionality. First, the aim is clearly to spare civilian casualties and losses. The ICRC is clear on the "golden rule" that should apply, namely, the duty to spare civilians and civilian objects

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(ICRC, 1987, 684 para. 2215). The ICRC also directs that in situations which are unclear "the interests of the civilian population should prevail" (ICRC, 1987, 626 para. 1979). Second, to remain faithful to the underlying value and overall rationale of international humanitarian law, military necessity should not trump the prohibition on attacking civilians. Third, if "excessive" is determined solely by the subjective assessment of a commander based on military necessity, this unacceptably shifts risk to civilians in armed conflict and does not reflect the law in terms of the presumption in favour of civilian protection and the obligation to prevent excessive civilian harm. An unfettered discretion of subjective judgement biased towards military necessity is unethical (Ulgen, 2017/2018, 174-175 and 177-178), and contrary to the underlying value of civilian protection and harm-limitation.

6.2 Precautionary Obligation to Cancel or Suspend Attacks

Precautionary measures in attack constitute a norm of customary international law applicable in both international and non-international armed conflicts (ICRC Customary International Humanitarian Law Study, Rule 18; *Prosecutor v Kupreškić*, 2000, para 524). Article 57(2)(a)(iii) provides an obligation on those planning or deciding an attack to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." A commander must "refrain from deciding" to launch an attack where application of the proportionality principle determines civilian harm to be excessive. Again, the standard of commander judgement is that expected of a "reasonable military commander", and, as argued above, subjectivity concerns should be resolved in favour of the underlying value of civilian protection and harm-limitation. As the ICTY held in *Prosecutor v Kupreškić*, "the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to

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expand the protection accorded to civilians" (*ibidem*, para. 525). The significance of the obligation to refrain from deciding to attack is further illustrated by its violation constituting a grave breach punishable as a war crime under Article 85(3) of Additional Protocol I.

Article 57(2)(b) provides an obligation on those planning, deciding or executing an attack, to cancel or suspend an attack "if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The choice of means and methods of attack is also subject to the underlying value of civilian protection and harm-limitation, with Article 57(2)(a)(ii) providing an obligation "to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." This also accords with the principle contained in Article 35(1) of Additional Protocol I that methods and means of warfare are not unlimited. State practice also shows that States regard means and methods of warfare as part of the proportionality assessment (Colombia, 1999; India, 1995; Spain, 2007), and in some instances the proportionality of employing certain types of weapons is called into question (e.g. the Rwandan army's use of grenades and rocket-launchers against persons carrying guns, machetes and stones; NATO drone strikes on Libya) (Report on the Practice of Rwanda, 1997; Russian Federation, 2012).

7. Conclusion

Utilitarianism's brutalization of the "public international sphere" through its particular approach to international humanitarian law is today characterised by intermingling micro (local, national) and macro (global, transboundary) interests, and profiteering from the resulting confusion. It is atemporal and

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ahistorical to claim that the law requires a primary consideration of utilitarianism. As we have seen, such a primary consideration would be conceptualised in different ways: the Lieber utilitarian interpretation that prioritises military necessity; interpreting "military advantage" as protecting one's own combatants; and a presumption that favours the commander's operational judgement. However, each of these steers away from the underling value of civilian protection and harm-limitation which creates a "no-harm" duty. The existence of centuries' old diverse legal traditions and cultures with a persistent thread of commonality providing restraints on methods and means of warfare and differentiating categories of persons to limit harm, reveals utilitarianism's atemporal and ahistorical nature. Utilitarianism's failure to recognise harm-limitation as intrinsic to international humanitarian law prevents its universalisation. By contrast, pre-existing cosmopolitan values of restraint and limitation of harm are evident throughout history. Legal pluralism and cosmopolitan legal theory converge to produce strong value-commitment norm-creation in the form of a "no-harm" duty. Instances of practices seemingly opposed to the "no-harm" duty, such as the Lieber, Islamic and Judaic permissibility of siege warfare, have been superseded by the vagaries of modern warfare requiring harm-limitation rules. In the modern law, a series of prohibitions, presumptions, and negative rebuttable presumptions prove the existence and operation of a "no-harm" duty.

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ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

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ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/14648

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Fear of Arbitration and Hope for Transition: Why Should We Care About the Interaction Between Investment Arbitration and Transitional Justice?

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ABSTRACT

Investment arbitration has experienced an exponential growth in the past years. Recently, there has been abundant discussion on how it influences matters of public policy, with strong criticism referring to its ability to restrain state regulatory capacity, specifically through the freezing of public authorities for fear of investment claims. Among these issues, a key consideration, yet one still under-explored, is how investment arbitration interacts with *transitional justice*. Considering that building a long-term and lasting peace is the overarching obligation of states coming out of war, this field of study cannot be understated. This paper aims to study the relationship between investment arbitration and *transitional justice*. To do this, it analyzes how core principles of transitional justice relate to key features of investment arbitration. The analysis concludes that, while investment arbitration and peacebuilding are not fundamentally opposite fields, the characteristics of each system may result in contrast with the other. Further, if this tension is not addressed by public policy, investment arbitration may become an obstacle for the implementation of measures necessary to secure *transitional justice* for victims of armed conflict.

Keywords: investment arbitration, transitional justice, post-conflict, lasting peace, reparation

ATHENA
Volume 2.1/2022, pp.152-203
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

1. Introduction

The relation between law and war dates to ancient times. A relevant question in this regard is how the law addresses contexts of war. The typical example of this is the concept of *bellum justum* in ancient Roman law, which determined whether a war would be "pious" or justified (Nussbaum, 1952, 679). Another, yet more recent, development of the law and war relationship is that of *jus post bellum*, which designates the situation following the end of war and follows the premise that "a theory of just war should encompass a theory of just peace" (Bass, 2004, 384). *Jus post bellum* is concerned with the process of peacebuilding and the multitude of norms, processes, and actors involved (Lawry-White, 2015, 634). It is relevant to note that it is not merely "peace" that is at issue in these cases, but a "real" peace, where mutual respect and the rule of law are key (May and Edenberg, 2013, 1).

Within this broader context, the narrative of war and peace lies at the foundations of international law. As argued by Clapham (2021), the legal discourse of international law has pursued peace as the ultimate value, which has served several agendas. Recently, there have been several shifts in paradigms governing the law and peace relationship. For instance, after the late XXth century, authors like Elster (2004) shaped the concept of *transitional justice*. While this term has been defined in different ways, that will be discussed later, one could say that, as framed generally by Webber (2012, 98), *transitional justice* refers to situations in which a society is moving from a state of injustice to justice, as well as the administration of justice across such a change of regime. The importance of *transitional justice* is such that in the past 20 years it has become one of the topics of most upward trajectory (Teitel, 2003).

Transitional justice has evolved to the point that nowadays the literature relevant to its study refers to many other disciplines such as law, criminology, sociology, history, anthropology, philosophy, and development studies

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

(Lawther and Moffett, 2017). Of particular importance are fields with a direct influence on domestic regulations as, for the purpose of achieving *transitional justice*, states need to implement public policies and programs. In this regard, reviewing the relationship between international investment law and *transitional justice* is critical because recently this field has become one of most notorious issues of international law following debates about its entanglement with public powers and the regulatory capacity of states (Schill, 2011). Additionally, although academic debate on this matter started recently, these fields have been connected since many years ago.

Historical background on the development international arbitration, as addressed in detail by Schwebel (2016), shows that since the late XVIIIth century arbitration became a mechanism for the effective solution of disputes. Actually, arbitration was very close to the resolution of disputes in contexts of armed conflict. This was the case of the 1794 Jay Treaty, which constitutes one of the first serious precedents of international arbitration and addressed the potential escalation of hostilities between the United States and Great Britain. The same applies to another ancient precedent of arbitration, the 1872 Alabama Claims Tribunal, which addressed a series of claims brought by the United States against Great Britain as a consequence of the American Civil War.

Then, since several years ago, international arbitration appeared in international relations as a valid instrument to substitute the so called "gunboat diplomacy" (*Ibidem*), which describes the practice of backing diplomatic efforts with the threat of military power and was the rule of foreign affairs during most part of the XIXth century and went on through the early XX century (Mandel, 1986). By this token, the arbitration of international disputes, whether between states or between states and organizations or investors, not only has been deeply related to matters of war and peace but has served as an effective means of peacefully resolving international conflicts.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Turning to the current status of investment protections, authors have discussed both its positive and negative effects to post-conflict reconstruction. Looking at the historical context of international arbitration as well as the above-mentioned cases it is clear that investment arbitration and armed conflict are not perfect strangers, but old acquaintances. It is noteworthy that, as argued by Paris (2007), since roughly the end of the 1990s peacebuilding operations have included economic, social, and civil reconstruction, all of which are fields relevant to the mechanics of investment arbitration.

This brings even closer both systems, showing that, while they may have several clashing values, their connection cannot be overlooked. Adding to this, they have features in common. For example, Le Moli (2021, 8) shows that they are both embedded in a logic of the *extraordinary*, as both represent forms of *ad hoc* justice, which means that none of them is the ordinary forum of dispute settlement. Now, this section tracked the missing links between investment arbitration and post-conflict. The next one will address their tensions.

Against this backdrop, there has been a fair amount of academic work on the relationship between *jus post bellum* and investment arbitration. The different research on this issue could be divided in three waves. The *first wave* are economic and development studies, which have focused on whether foreign investment is beneficial for the growth of post-conflict nations (Appel and Loyle, 2012). Accordingly, the relevant literature of this approach gathers and compares data about the flows of foreign investments in countries coming out of armed conflict before and after the implementation of *transitional justice* initiatives.

For example, Phiri (2012) shows that in Mozambique, after the 1977-1992 civil war, foreign direct investment increased drastically. Likewise, Joshi and Quinn (2018, 6-8), illustrate a similar situation in Guatemala since the end of the 1960-1996 civil war. These changes may be explained by factors such as an increased sense of political stability or trust in domestic institutions (Neumayer and Spess, 2005). Additionally, relevant activities such as

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

extractive industries may be located in regions particularly affected by conflict (Nichols, 2014), which means that peace processes provide security to carry out these operations.

The *second wave* are studies focuses on very specific matters relevant to the practice of international arbitration. For instance, there is extensive work on the protection of investments in times of armed conflict (Zrilič, 2019), odious debt and *jus post bellum* (Gallen, 2011), and potential claims and defenses of investors and states in contexts of war or post-conflict (Schreuer, 2019). Notably, while this literature has implied the tension between investment arbitration and *transitional justice*, it has not offered a detailed comparison of the key features of both systems and the frictions between them.

The *third wave* are studies on the impact of international investment law in peacebuilding, mostly focused on policy implications and regulatory concerns. Risvas (2019, 209-210) holds international investment protection may play a positive role in post-conflict as it could contribute to the reconstruction of the social and economic tissue of a country. For instance, foreign investors can use investment arbitration to protect their interests when they consider that they have been affected by armed conflict (Zrilič, 2019). BITs tend to have provisions known as "war clauses" to protect the interests of investors in contexts of conflict:

> An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party *due to war or to other armed conflict, State of emergency, revolution, insurrection, civil disturbance, or any other similar event* (…) in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

> third State, whichever is most favourable to the investor (…) (Article 5, Austria-Lybia BIT, emphasis added).

This has been the case in previous investment arbitrations where investors that were affected by armed conflict brought action against the state. In *LESI SpA v Algeria* (2008), investors claimed that due to the guerrilla warfare in certain parts of the national territory, civil unrest and violence had affected a public tender for the construction of a dam. Specifically, they argued that Algeria had breached indirect expropriation, fair and equitable treatment (FET), and full protection and security (FPS) standards in the Algeria-Italy BIT.[1] Similarly, following the Arab Spring, foreign investors in *Lundin v Tunisia* (2015), who considered that their investments had been affected by civil unrest, presented investment claims.

On the contrary, the research of De Brabandere (2015, 602) poses interesting questions on whether BITs will constraint the capacity of states to adopt regulatory measures, creating a concern on the prevalence of nationals versus foreign investors. Likewise, Lawry-White (2015) has discussed the role that investment arbitration could play in the establishment of a just and sustainable peace during post-conflict. These approaches are complemented by novel research from authors that have explored these questions focusing on case studies. For instance, Le Moli (2021) reviews the implications of investment arbitration in African countries like South Africa and Zimbabwe. The same is the case for Velásquez (2016) and Van Ho (2016) for Colombian post-conflict after the 2016 Peace Agreement.

These difficulties about the interaction between investment arbitration and *transitional justice* are the subject of this article. Particularly, it aims to show that, while investment arbitration and *jus post bellum* are deeply interwoven, the application of investment law by domestic authorities could freeze *transitional justice* and pose an obstacle to some of the core principles of this concept that are key for victims of armed conflict. Yet, it is noteworthy that

[1] All claims were dismissed at the merits stage.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

this paper does not commit to the ambitious task of offering solutions to bridge the gap between both fields, which shall be considered further in academia and policymaking.

Put differently, the purpose of this paper is discussing the features of the international investments protection system, specifically those of investment arbitration, that conflict with key principles of *transitional justice*. Considering these aspects, the article will focus on the tension that arises between the two systems and assess the effects of each one on the other. At the outset, it will explain the concept of *transitional justice* and some of its core principles and purposes to show later how, if not addressed properly, the investment arbitration regime may pose relevant obstacles to the fulfillment of these objectives.

The goal of this paper is not to say that international investment arbitration and *transitional justice* are antagonists or that their tensions cannot be resolved, but to show their potential clash of interests and discuss the details underlying such friction. It also seeks to provide insights from a theoretical and a practical perspective, promoting debate in the academia but also regulatory concern. This may help raise awareness about the importance of identifying and addressing these issues among the stakeholders involved in post-conflict to secure the simultaneous protection of foreign investments and *transitional justice*.

This paper is structured into five additional sections. Section 2 defines the concept of *transitional justice* in relevant literature and certain instruments of the United Nations (UN),[2] as well as three of its core pillars: (i) justice, (ii) non-recurrence, and (iii) reparation. Section 3 looks at certain features of investment arbitration that are in contrast with *transitional justice* and its core elements. Section 4 reviews how the application of investment arbitration standards could interfere with the fulfillment of a *transitional justice*

[2] For the purposes of this paper, these instruments are used as mere references to define *transitional justice.* Therefore, their different authoritativeness as sources of law should not be put on equal footing.

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https://doi.org/10.6092/issn.2724-6299/13761

framework. Lastly, Section 5 offers certain conclusions relevant to policymaking.

2. Justice, Non-Recurrence, and Reparation: The Three Pillars for the Effective Implementation of *Transitional Justice*

As a consequence of several post-conflict events during the late XXth century, academics and international organizations came up with modern notions of *jus post bellum*, including *transitional justice* (Paige 2009, 323-325). According to Teitel (2000), *transitional justice* could be defined as the notion of *justice* associated with periods of political change. This is a baseline definition of *transitional justice*, which considers it to be any form of political change after situations of conflict. However, such notion has been developed further. For instance, the UN Secretary General Report "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" issued in March 2010 states that:

> For the United Nations, transitional justice is the full range of processes and mechanisms associated with a *society's attempts to come to terms with a legacy of large-scale past abuses*, in order to ensure *accountability, serve justice and achieve reconciliation*. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law (emphasis added).

Not only are these concepts currently applied in political and legal theory to understand better the wide spectrum of *jus post bellum* and its recent changes, but they are also used for policymaking (Pham and Vinck, 2007). For this reason, *transitional justice* has become essential in discussions about post-conflict and regulatory powers. As argued by De Greiff (2012), while

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https://doi.org/10.6092/issn.2724-6299/13761

transitional justice refers to a wide array of measures adopted to face long periods of abuse, these initiatives must be read holistically. Hence, a proper approach to *transnational justice* calls for the consideration of the many concepts, values, and measures that are key to its accomplishment. As such a review could encompass several principles, this paper focuses on three pillars of *transnational justice* inspired in the work of the UN Human Rights Council (UN HRC): (i) justice; (ii) non-recurrence; and (iii) reparation.

In 2011, following several resolutions on human rights and *transitional justice*,[3] the UN HRC passed Resolution 18/7 appointing a Special Rapporteur "on the promotion of *truth, justice, reparation, and guarantees of non-recurrence*" (emphasis added). Report A/HRC/36/50, which gathered the findings of the Special Rapporteur after a review of *transitional justice* initiatives worldwide, was released in 2017. According to the Report, some of the obligations of the state in post-conflict transition are "(i) to investigate, prosecute and punish those accused of serious rights violations; (ii) to reveal to victims and society at large all known facts and circumstances of past abuses; (iii) to provide victims with restitution, compensation and rehabilitation; and (iv) to ensure repetition of such violations is prevented."

2.1 Justice: Institutional Trust and Legitimacy Through Redistribution

Justice is probably one of the most complex yet most common concepts in discussions about philosophy, law, and politics. Sandel (2009) shows that, while *justice* may encompass matters of maximizing welfare, respecting freedom, or promoting virtue, a question about *justice* is generally related to "what is the right thing to do?" In *transitional* justice, this is a question that

[3] *See* Commission on Human Rights resolutions 2005/70 of 20 April 2005 on human rights and transitional justice, 2005/81 of 21 April 2005, on impunity, and 2005/66 of 20 April 2005, on the right to the truth, as well as Human Rights Council resolutions 12/11 of 1 October 2009, on human rights and transitional justice, 9/11 of 18 September 2008 and 12/12 of 1 October 2009, on the right to the truth, and 10/26 of 27 March 2009 and 15/5 of 29 September 2010, on forensic genetics and human rights, as well as Council decisions 2/105 of 27 November 2006, on the right to the truth. and 4/102 of 23March 2007, on transitional justice.

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https://doi.org/10.6092/issn.2724-6299/13761

interacts with the relevant stakeholders. As pointed out by Elster (2004, 80), "in deciding how to deal with wrongdoers and victims from the earlier regime, the leaders of the incoming regime are often influenced by their ideas about what is required by justice." In this vein, Teitel (2003, 77) shows that recent developments in the *transitional justice* agenda has increased the space of civil society in the formation of post-conflict frameworks.

An important effect of the sense of *justice* of a population is their trust in the institutions and therefore the legitimacy of a state as a whole. As Offe (1999, 70-71) describes, trusting institutions means recognizing as valid its values and deriving that they make sufficient sense to a sufficient number of people to motivate compliance with a set of rules. Here, the role of domestic institutions is crucial, particularly the judiciary and other authorities involved in the design of a *transitional justice* framework. For instance, De Greiff (2006) argues thar a persuasive effort to establish a solid transition out of post-conflict might be seen by victims as an effort of the state to "come clean" and form a truly new political project. However, this cannot be achieved if there is not a sense of *justice* accepted by the community.

Van der Merwe and Schkolne (2017, 224) highlight that, in countries transitioning from dictatorship to democracy or from war to peace, the legitimacy of the state will tend to be compromised and civil society can play a major role in changing that. Notably, local communities can have a reaction to the sense of *justice* promoted by the government leading transition, awakening emotions around fairness or impunity. Civil society organizations may offer official support to post-conflict programs and help them achieve adequate human rights standards and the recognition of victims (Burt, 2009). However, they can also mobilize to pressure authorities into changing substantive parts of the *transitional justice* framework as laws or post-conflict measures if they feel that they are deficient (Díaz, 2008).

In this vein, a key question in the examination of post-conflict transition is about the sense of *justice* that is relevant to the civil society. While this may change on a case-by-case basis, many authors interested in *transitional justice*

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https://doi.org/10.6092/issn.2724-6299/13761

agree that an important part of an effective post-conflict framework is preventing the inequality of resources and the continued dominance of the traditional elites (Pseworzki, 1986, 45-47). Following Galtung (1969), a state should not only accomplish individual reparation, but a more egalitarian distribution of resources and power within a society to prevent the repetition of conflict and lock down an effective and lasting peace. Against this backdrop, another concept that is key for peacebuilding, which has also gained more importance recently, is *distributive justice*.

As opposed to corrective justice, that is concerned with the measures adopted in the event of the infringement of rules about the allocation of rights and resources, *distributive justice* deals with the design of such rules (Benson, 1991, 535-538). In words of Cohen (2016, 664), "distributive justice tells us how and why people in some group may have certain benefits and responsibilities regarding various divisible goods." Therefore, *distributive justice*, inasmuch as it is concerned with the distribution of resources that is precisely the core of many social conflicts, is essential for transition because it entails not only compensating victims for harm suffered during conflict but addressing the social dimension of their suffering and the real causes of war (Saffon and Uprimny, 2010).

To a great extent, *distributive justice* deals with matters of *reparation*. As will be addressed in a subsequent section of this paper, *reparation* is an objective of *transitional justice* that cannot be limited to specific types of measures (De Greiff, 2012). For instance, it is noteworthy that the judicialization of those responsible for atrocities and the implementation of acts of social justice and symbolic reparation are key to an effective transition (Flournoy and Pan, 2002, 114). But *distributive justice* emphasizes in particular the importance of recognizing inequalities in the distribution of wealth and resources. For this reason, this paper focuses on measures concerned with *de facto* redistribution such as processes of land reform.

Against this backdrop, a special case for the question of *distributive justice* is that of the redistribution of property and property rights. As stated by

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Barnes (2009, 61) property rights "are never purely abstract rights or economic rights; they are legal rights and are thereby infused with the values of the community that sustain the legal system." For example, as argued by authors like Teubal (2012) and Adam (2010), commonly marginalized communities in civil conflict, such as peasants and indigenous groups, tend to have a special relation with the land that transcend to values of cultural or religious importance. In this sense, as conflict over the land tends to suppose the dispossession of these groups, effective reparation and transition must take special consideration of these issues (Torres, 2008).

As demonstrated by Bothe (2021), property rights, and the integrity of the legal system supposedly protecting these rights, are often challenged during conflict. Then, redressing harm to property rights is part of peacebuilding and re-establishing the rule of law in this regard is key to securing a durable peace (Lawry-White, 2015, 634). To this end, common transitional measures include the implementation of land reforms and other types of property redistribution aimed at giving back to dispossessed communities (McCallin, 2013). However, as noted by Mani (2005), it is important to bear in mind that *distributive justice* should not only be implemented in the form of a restorative measure but seek the transformation of the conditions of exclusion that led to the origin of conflict.

2.1. Non-Recurrence: Recognition and the Idea of a Lasting Peace

Lykes and van der Merwe (2017) confirm that ensuring non-repetition or securing *non-recurrence* is an agreed-upon objective of *transitional justice.* Notably, the existence and importance of these guarantees in public international law is supported by customary law and treaty language (Sandoval, 2014, 182). Nonetheless, more detailed literature on the field also suggests that the concept of *non-recurrence* is still under-explored in academia and policymaking (Mayer-Rieckh, 417). Arguably, in contexts of armed conflict, where *transitional justice* represents the change from war to

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

peace, one could say that an important part of implementing *non-recurrence* is maintaining the peace.

As *transitional justice*, "peace" has many meanings. At the outset, Galtung (1969) shows that peace can be defined and understood as the "absence of violence" or, in practical terms, as the end of hostilities. Nonetheless, authors as Stahn (2006, 925-926), explain that nowadays peace means something different, more connected with breaking the cycle of violence itself than with a cease of fire. All in all, as stated by Muvingi (2009), failure to adequately address structural problems of a social system, such as inequalities or systemic violence, undermines the chances of a state to accomplish an effective transition. For this reason, peace is not a concept read in isolation from other elements of *transitional justice* anymore.

This has led authors to develop further layers into the notion of "peace". By way of example, today most of the research on *transitional justice* assumes the idea of peace as a long-term objective. To this end, the idea of a peace that remains in the long term has been defined in many ways, for example, "sustainable peace" (Keating and Knight, 2004) and "durable peace" (Aggestam and Björkdahl, 2012), all of which refer to the same baseline concept. To set a distinction from previous work, this article refers to this idea as a *lasting peace*. Additionally, although there are several aspects that are relevant to guarantee that peace will last in the long term, this article focuses on the issue of peace through *recognition*.

As argued by Honneth (1996), in different ways, all systems of social conflict and thus *transitional justice* itself seek to provide victims recognition for abuses. Such recognition can take several forms but a relevant one is that introduced by Hampton (1981) and contemplates recognizing, via legal instruments such as decisions issued by criminal justice tribunals, that perpetrators' unlawful behavior is not superior to that of victims and that they will be punished for it. Then, as De Greiff (2012, 44) notes, recognition to victims of armed conflict involves acknowledging not only that they suffered a setback to their interests but that they were actually *harmed*, a thicker and

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normative notion referring to the idea of wrongdoing and placing victims in the position of right-bearers.

The decisions adopted within a legal system can affect recognition. A similar situation takes place in regard to policymaking and peacebuilding processes, which nowadays focus more on community-based transformation than on institutional *transitional justice* initiatives (McEvoy and McGregor, 2008). Recently, there is increasing interest in the notion of construing *transitional justice* by taking the victims and the civil society as the starting point for effective peacebuilding, this is, considering the interests and opinions of traditionally marginalized communities, such as peasants, indigenous groups, minorities, etc. (Turner, 2008, 140). This strategy could be defined as the bottom-up approach to post-conflict and reflects on alternatives to achieve longer-term sustainability in peace by shifting away from traditional or institutional approaches to *transitional justice* and allowing the participation of the "voices from below" (Lundy and McGovern, 2008).

This is also complemented by a holistic approach to *transitional justice*. Such notion is key in the work of authors such as Gready and Robins (2014, 340-344) and suggests that policies aiming to facilitate a *lasting peace* should consider all the relevant stakeholders and give them a voice in the design and application of post-conflict measures. This is inspired in taking seriously the complexity of armed conflict as a phenomenon incorporating the interests of several parties that interact with each other (Smith, 2004, 115). Then, the bottom line of this feature of *transitional justice* is that adopting a transformative rather than a restorative approach to peacebuilding and including marginalized communities is necessary to secure a *lasting peace* through the involvement of a plurality of agents.

2.3 Reparation: The Right to an Effective Remedy

There are several forms to address the goal of effective reparation in transitional contexts, including measures of an economic and symbolic nature

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

(Flournoy and Pan, 2002). The same is reflected in international instruments as well as in the practice of international tribunals. The UN Human Rights Office of the High Commissioner (OCHR) issued in 2006 a document on the rule of law tools for post-conflict states, which includes reference to mechanisms available to promote peacebuilding. Within these tools, there are measures such as the prosecution of crimes, the establishment of truth commissions, and the implementation of reparation programs. As identified by Dixon (2017), the practice of states reflects the application of a combination of instruments, avoiding reparation by exclusive means and securing a holistic redress of atrocities. Nonetheless, it would be too ambitious to review all of these alternatives in this paper, which does not intend to commit to such an endeavor.

Conversely, this article narrows the scope of review of remedies to those related to property rights, as is the case of ownership restitution and monetary compensation. It does so due to the particular importance of property rights for *distributive justice* and conflicts related to land dispossession. In such contexts, Leckie (2003) explains that that the default remedy according to the practice of international tribunals and the text relevant instruments is restitution. This mechanism is defined and developed in the 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles). This instrument establishes in Section II(2)(2.1) that "All refugees and displaced persons have the right to have restored to them any housing, land, and/or property of which they were arbitrarily or unlawfully deprived (…)" . By the same token, according to Section II(2)(2.2) states should prioritize restitution over other remedies for victims of forced displacement.

These remedies have also been developed in the practice of international courts. Notably, the Inter-American Court of Human Rights (IACtHR) considers that *reparation* calls for full restitution (*restitutio in integrum*) whenever possible and, under different circumstances, for "a set of measures such that, in addition to ensuring the enjoyment of the rights that were

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https://doi.org/10.6092/issn.2724-6299/13761

violated, the consequences of such breaches may be remediated, and compensation provided for the damage thereby caused" (*La Cantuta v Peru* 2006, para. 201). Anthowiak (2011, 279) has called this stance of the IACtHR a "victims-centered" approach as opposed to the "cost-centered" perspective that could prevail in monetary compensation.

In *Mayagna Awas Tingi Community v. Nicaragua* (2001), the *Awas Tingni* indigenous community from Nicaragua filed a claim against the state for the grant of a logging concession on territories possessed by them (para. 103). The communities did not have a deed or any formal title that accredited their ownership of the lands of their ancestors (*Ibidem*). Yet, the IACtHR interpreted that Article 21 of the American Convention on Human Rights (ACHR), which incorporates the right to private property, "protects private property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property" (para. 148).

According to the IACtHR, it was necessary to recognize that among indigenous communities there are traditions of communal property and relations with the land are not merely a matter of possession (para. 149). On these grounds, the IACtHR ordered the state to implement statutory action for delimiting and protecting the indigenous territories (para. 173). This ruling, which has been followed in other cases that illustrate the importance of restitution in matters related to property rights and the land of local communities,[4] shows the importance of adopting remedies that are broad and adequate to grant an effective *reparation* to the communities affected by state measures.

This broad sense of *reparation* has been arranged around terms such as that of an *effective remedy*, which will be the focus of this section. The right to obtain *effective remedy* is incorporated on rules referring to concepts such as judicial relief (Gray, 1990). For instance, Article 8 of the Universal

[4] *See Yakye Axa Indigenous Community v. Paraguay* (2005); *Sawhoyamaxa Indigenous Community v. Paraguay* (2006); *Xákmok Kásek Indigenous Community v. Paraguay* (2010).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Declaration of Human Rights (UDHR) establishes that "everyone has the right to an *effective remedy* by the competent national tribunals" (emphasis added). Likewise, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the European Convention on Human Rights (ECHR) also recognize the right to get an *effective remedy* from a national authority. The Committee on Economic and Social Rights (CESR) recognized in General Comment 3 to the International Covenant on Economic, Social and Cultural Rights (ICESCR) the importance of judicial remedy for securing the effectiveness of the rights of nationals.

A key question on the concept of *effective remedy* is defining how it should be defined in the context of armed conflict. The European Court of Human Rights (ECtHR) has released many rulings that are relevant in this regard and from which this article highlights the one in *Isayeva v Russia* (2005), in which the ECtHR decided on the killing or serious injury of civilians exiting Grozny during conflict in Chechnya in January 2000 as a consequence of the aerial bombardment of a refugee convoy (paras. 13-34). Among other claims, the victims argued that their right to life and the life of their relatives had been violated (para. 155) and that domestic "authorities had failed to conduct an independent, effective and thorough investigation into the attack" (para. 201).

The ECtHR found that there had been a violation of Articles 2 and 13 of the ECHR which protect the rights to life and to an *effective remedy*. Particularly, two reasonings of this case are relevant to this article. Firstly, the ECtHR considered that Article 13 of the ECHR implies that an *effective* remedy, aside from the payment of compensation, requires a thorough and effective investigation of the facts that caused harm to the victims, including access to the investigation procedure (para. 237). Secondly, that the role of *independence* of domestic authorities in providing *effective remedy* is very relevant as an investigation of the events that led to the harm of the victims required authorities in charge to be independent from those implicated in the events and even from other state agencies (para. 210).

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https://doi.org/10.6092/issn.2724-6299/13761

Another ECtHR case that provides relevant context is that of *Velikovi v Bulgaria* (2007). Here, claimants objected measures adopted by the government as part of the implementation of the Restitution Law, which allowed the nullification of titles of property acquired during the communist regime for granting these properties to people that had been expropriated without compensation in the 1940s (para. 159). The ECtHR found that there had been a deprivation of property as a consequence of the application of these initiatives (para. 160). However, it considered that such actions could be justified if they pursued the "public interest", stating that this was the case of a restoration of property that had been expropriated during a totalitarian regime (para. 170). Then, the ECtHR provided the following:

> Persons who have taken advantage of their privileged position or have otherwise acted unlawfully to acquire a property in a totalitarian regime (…) cannot expect to keep their gain in a society governed democratically through the rule of law. The underlying public policy interest in such cases is to restore justice and respect for the rule of law (para. 172).

This ruling is fundamental because it introduces an additional criterion to assess the concept of *effective remedy*. Briefly, it suggests that, when considering whether to grant restitution of property rights to victims of armed conflict, measures of *transitional justice* that conflict with the right of third parties to private property would be justified if these rights are tainted by unlawful actions. This could be referred to as an application of the principle of *good faith*. Added to the issue of *independence* of domestic authorities discussed by the ECtHR in *Isayeva* and to the principle to seek adequate remedies to redress victims outlined in the case law of the IACtHR, it could be inferred that the idea of *reparation* through an *effective remedy* entails considering the broader context of a post-conflict situation.

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https://doi.org/10.6092/issn.2724-6299/13761

3. Features of International Investment Arbitration that are in Contrast with *Transitional Justice* and its Main Objectives

There are several ways to introduce the tension between investment arbitration and *transitional justice*. This paper will address the issue by looking at four features that arise in the interaction between these systems: (i) the *asymmetry of rights* in arbitral practice; (ii) the *dilemma of state legitimacy* when a government faces compliance with conflicting international and national obligations; (iii) the *victim-perpetrator cynicism* caused by the double role of investors as victims of state measures and perpetrators of conflict; and (iv) the *regulatory chill* caused on public authorities by the threat of investment claims.

3.1 Asymmetry of Rights in Arbitral Practice

At the outset and following De Brabandere (2015, 590-591), investment arbitration is a double-edged sword when it comes to post-conflict matters:

> Indeed, on the one hand, post-conflict economic reconstruction and development requires and relies on FDI. On the other, rights granted to foreign investors before and during the post-conflict phase may result in a backlash for States recovering from conflict because rights granted to foreign investors have – besides the general tensions caused by such instruments – specific consequences in post-conflict situations due to the economic, security-related, social, and demographic specificities of those situations.

This relates to the *asymmetry of rights* in arbitral practice, to which Schreuer (2019, 6) refers by explaining the existence of conflicting rhetoric on the issue of *jus post bellum* in investment arbitration. One side argues for the wide discretionary power of the state in situations of emergency or post-conflict, granting privilege to an effective peace transition. The other side holds that investors should not lose their protections in these contexts and that

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https://doi.org/10.6092/issn.2724-6299/13761

foreign direct investment (FDI) is also in the public interest. The literature shows that there is consensus on the idea that BITs recognize a certain degree of regulatory capacity to states (Schneiderman, 2008). For example, Article 24(3) of the Energy Charter Treaty (ECT) excludes most investors' protections where a state considers a measure necessary for "protection of its essential security interests including (…) in time of war, armed conflict or other emergency in international relations; (…) or for the maintenance of public order."

As held by Lawry-White (2015, 651), this language could mean a limitation to the protection of foreign investors in times of emergency, which could arguably be extended to contexts of post-conflict. Further, investment tribunals have recognized that there is no good reason for the investment protection system to operate in isolation from the rest of public international law. The arbitrators in *AAPL* even acknowledged that a BIT "is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability" (21). This would mean that, following the common rules of international law, situations of emergency such as armed conflict would grant states a degree of flexibility regarding their international obligations (Kamber, 2017). Yet, as pointed out by authors such as Van Harten (2013) and Korzun (2017) the reality of arbitral practice is that BIT provisions and rules of international law securing regulatory capacity are applied narrowly by investment tribunals.

On the contrary, BITs tend to have broad language that protects the rights and interests of foreign investors to a great extent (Bodea and Ye, 2018, 1-2). To avoid dwelling on the different standards of protection in BITs that illustrate this point, a simple example is that of the FET standard. Although the concept of FET is highly ambiguous (Kalicki and Medeiros, 2007, 25), of particular importance is its understanding as a guarantee of legitimate expectations, upheld by tribunals like the one in *Tecmed v Mexico* (2003, 167), which stated that an investor "may know beforehand any and all rules and regulations that will govern its investments." This approach may highly

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https://doi.org/10.6092/issn.2724-6299/13761

restrict the capacity of states to introduce legal reforms addressing non-economic values (Ortino 2008), which would include measures for victims' reparation, for example, instruments of *distributive justice* that could be interpreted as hinderance to the stability of investors' rights.

Schreuer (2019, 10-19) compiles extensively the defenses that a state could argue to justify measures adopted in times of war or post-conflict. These may include (i) the impossibility of performance of treaty obligations under Articles 61 and 62 of the Vienna Convention on the Law of Treaties (VCLT); (ii) self-judging clauses in BITs that limit claims against measures adopted for security interests; (iii) and the circumstances precluding wrongfulness in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), mostly state of necessity and *force majeure.* Nonetheless, in investment arbitrations these allegations entail a very high burden of proof and are unlikely to succeed (Martinez 2010, 336-337). Further, even if this trend would start changing, Franck (2005) shows that the absence of precedent in the system, paired with the lack of consistency in previous decisions, would suppose states taking their chances with every new dispute and arbitral tribunal.

3.2 Dilemma of State Legitimacy

Another feature to consider is the *dilemma of state legitimacy*, which deals with a concept that is critical to the effectiveness of post-conflict environments (Dagher, 2018). Relying on Morris (2004, 18), one notion of legitimacy refers to the belief of a community that its state is rightful and acts within the law. Notably, while political theory recognizes the importance of state legitimacy as an overarching value, it is of particular interest in *jus post bellum* because one of the main causes of internal conflict is usually a lack of trust in state governance or an absence of a state's political legitimacy (Beetham, 2012, 126). This is the case, for example, in situations of unrest where there are belligerent groups that ground their ideology on the idea that the state failed to their values and interests (Goldstone, 2008, 290-291). By

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https://doi.org/10.6092/issn.2724-6299/13761

this token, legitimacy is one of the most important objectives of a state in a situation of *transitional justice* for reasons as the avoidance of replicating the initial causes of conflict and failing to secure effective guarantees of *non-recurrence*.

Against this backdrop, the literature on international arbitration and domestic policy has pointed out that the first shapes the concept of good governance and the rule of law (Kingsbury and Schill, 2009, 12). Then, sovereign decisions on investment matters that could potentially affect the rights of communities of special importance to *transitional justice* are particularly sensitive. This includes both measures adopted by domestic authorities as well as decisions of international investment tribunals. As exemplified by Bonnitcha (2014), the quantum of damages approved by a tribunal, if paid by the host state, can contribute to form the perception of an inequitable distribution of limited resources, thus increasing the sense of social injustice that commonly fuels conflict. Lawry-White (2015, 660-661) puts this in plain terms by asking what happens if states refrain from imposing compensations to millions of victims but are obliged to pay millionaire sums of investors.

In this regard, the investment protection system has been heavily criticized by authors reviewing its tension with public objectives (Tienhaara, 2009). While this paper disagrees with the idea that the investment protection system is essentially and inevitably inclined in favor of the investor, it notes that the opposition to it by the public opinion – including local communities and other stakeholders – is a reality. This is exemplified by the denunciation of the ICSID Convention by Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012. Remarkably, in Ecuador's denunciation, President Rafael Correa stated that the withdrawal from the instrument was necessary for the "liberation" of Latin American countries because it represented "colonialism" and "slavery." Another example of this are the declarations of recently appointed President

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https://doi.org/10.6092/issn.2724-6299/13761

of Peru, Pedro Castillo, who supports the withdrawal from the Convention as he considers that it is partial to multinational companies.[5]

All of the above refers to "domestic legitimacy", the one owed by a state to its own nationals and grounded on concepts such as the democratic governance (Buchanan, 2002). Nonetheless, the politics of foreign affairs have also shaped an "international legitimacy", which refers to the duties of a state to respect its international commitments and the political cost of failing to do so (Hurd, 1999). The latter includes a state's obligation to comply with investment awards, which despite suffering certain problems of non-compliance or delayed payment by rogue states has been proved successful in most instances (Gaillard and Penushliski, 2020). The *dilemma of state legitimacy* is then a feature that arises when a state faces national and international duties that oppose to each other, and it must decide to affirm one and negatively affect the other. Given its costs for any of the stakeholders, this is another feature of the interaction of investment arbitration and *transitional justice* that denotes their tension.

3.3 Victim-Perpetrator Cynicism

The third feature to consider is the *victim-perpetrator cynicism*. As found by Jacoby (2014), the complexity of armed conflict makes it difficult sometimes to separate indistinctly victims and perpetrators. Happold (2008) shows that a typical case of blurred lines between victims and perpetrators is that of child soldiers, who are usually recruited taking advantage of their weakness but end up committing atrocities similar or worse to those of other common offenders. This approach to conflict and peacebuilding may create special discomfort in schemes of *transitional justice*. For example, victims that never formed part of a violent group or never carried out acts of aggression, may feel that there is no place to relativize atrocities or establish any type of comparison between

[5] The candidate proposed the denunciation of the ICSID Convention in his presidential program, as well as in several public debates when he was running for office. He was proclaimed as President in July 2021.

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https://doi.org/10.6092/issn.2724-6299/13761

victims and perpetrators. State measures that contradict this premise may trigger what Pattyn, Hiel, and Dhont (2012) call "political cynicism," which makes communities less eager to trust a government.

This feature is of special importance in investment arbitration. As demonstrated before, it is not uncommon that investors appear before the investment protection system as *victims* of conflict, claiming a failure of the state to security and other rights. Of course, this is completely normal from a legal point of view as BITs are ultimately designed to offer this type of protections (Wälde, 2004). The commonly forgotten reason behind this is that, without investments protection, foreign investors would face huge asymmetries in a dispute against a host state, having recourse to very limited alternatives such as diplomatic protection and the courts of the same state (Schreuer, 2015). However, investor's access to private justice in the cloak of "weak parties" may be shocking for victims in marginalized communities, who do not have the bargaining power of investors and may feel major inequalities in the treatment of similar or worse abuses committed against them.

Discomfort in local communities and other stakeholders may increase – paired with political cynicism– bearing in mind that investors are not only *victims* of armed conflict but could be *perpetrators*. For instance, this could be the case in industries of particular social risk such as mining, where Handelsman (2003) shows that human rights violations tend to occur in conflict zones because economic endeavors such as mining and industrial activities tend to be located in regions far away from big cities. Similarly, even authors with practical experience in the field of investment arbitration acknowledge that activities with a significant impact in aspects such as the life style of local communities or the environment tend to be highly litigious for human rights issues (Burnett and Bret, 2017).

This is not a novel approach. Authors studying the interaction of human rights and investment arbitration have shown *in extenso* that many times economic activities may entail unlawful actions against local communities

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https://doi.org/10.6092/issn.2724-6299/13761

(Steininger, 2017). A typical case here is that of *Copper Mesa v Ecuador* (2016) in which the investor used heavily armed private security corps against civil populations to defend its properties, resulting in the death or serious injury of several members of the community, actions condemned by the investment tribunal. Another interesting work in this regard is that of Van Ho (2013), who reviews cases of corporate complicity with actions related to conflict and fundamental rights violations in Colombia, for example, the forced displacement of communities.

Lougee and Wallace (2008) show that the friction between investors and victims has led to an increase in the development of corporate social responsibility (CSR) in recent years. CSR refers to guidelines and practices those enterprises may follow to limit the negative impact of their activities in a host country, which reflects prior concerns about their actions in sensitive fields like the protection of the environment and the welfare of local communities (Akindeire, 2020). This concern has spread slowly to the investment arbitration system, gaining importance in investment treaties and cases. As tracked by Monebhurrun (2017), five years ago there were around 30 clauses regarding CSR commitments in current BITs.

The actions of investors that conflict with civil society also appear reflected in the development of the clean hands doctrine. According to Fitzmaurice (2005), the clean hands doctrine mandates that "he who comes to equity for relief must come with clean hands". Put differently, investors appearing before an international tribunal shall not be tainted by actions carried out in bad faith or unlawful behavior. Crawford (2019) explains that this concept is part of an overarching principle of legality in international law, that encompasses other ideas such as good faith. Despite the foregoing, in many cases, states have alleged a breach of the clean hands doctrine given actions of the investors that were considered deceitful. In *South American Silver v Bolivia* (2018), respondent presented this argument (para. 294) because agents of the claimant used sacred clothes of indigenous communities and entered into their assembly without permission (para. 318), which

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https://doi.org/10.6092/issn.2724-6299/13761

constitutes a great offense to their traditions. This type of behavior enhances the *victim-perpetrator cynicism* discussed here.

Stakeholders tend to set a hierarchy between human rights and BIT obligations, allocating greater value to the first.[6] This is clear in *Azurix v Argentina* (2006, 254), where the government asserted that "a conflict between a BIT and human rights treaties must be resolved in favor of human rights (…)." However, De Brabandere (2013, 193-194) explains this is not feasible because rights in a BIT may also be human rights and international law proscribes resolving treaty conflict on the basis of subjective attributions of value, with the only exception of *jus cogens* that deals with exceptional breaches as slavery.[7] This approach would seem contrary to common sense and will tend to be rejected by the public opinion and non-investor victims who may think that, in the end, investors have money and power, while other victims are underrepresented. Then, this is precisely how the intricacies of the *victim-perpetrator cynicism* accounts for the tension of investment arbitration and transition.

3.4 Regulatory Chill Caused by Investment Claims

A final feature relevant to this analysis and that is also one of the most important concepts in this paper is that of the *regulatory chill*. This term compiles the notion that, under the pressure of a threat of triggering an investment claim, public authorities will be more flexible in the application of public policies (Bonnitcha, 2011). Other authors have even been of the opinion that, in certain circumstances, authorities will respond to the threat of international investment arbitration by avoiding enacting or enforce regulatory measures, which may significantly reduce the effectiveness of those programs (Tienhaara, 2009). Notably, the latter crystalizes the stance of

[6] This may be explained by what M. Koskenniemi has called a "rhetoric of rights" which appeals to the prevalence of human rights in international law, *see* Steininger (2017).
[7] Due to the ambiguity of the scope of *jus* cogens, there is still ongoing discussion on the issue of whether human rights qualify as such, but many authors agree with this position, *see* Bianchi (2008).

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https://doi.org/10.6092/issn.2724-6299/13761

an important part of the literature that almost depicts investment arbitration and regulatory capacity as non-compatible concepts given their broad differences in terms of fundamental principles, key considerations, and underlying values.

An example of *regulatory chill* is the saga of the Marlin gold mine located in San Miguel Ixtahuacán; Guatemala studied by Pérez-Rocha (2016). Here, the Inter-American Commission on Human Rights advised the government to close the mine due to its severe environmental and social negative impacts, but the state decided to reopen it noting that foreign investors could bring international claims against the policy. Another case is that developed by Tienhaara (2006) on the mining bans imposed in Ghana for areas qualified as forest reserves due to a concern for the exponential depletion of the permanent forest estate. Despite the regulatory agenda of governmental agencies to afford protection to key environmental areas, the author shows that measures were overturned later because of threats of investment claims by foreign investors from Canada and the US who had mining titles to carry out extractive activities in the areas concerned.

This paper notes that this type of situations of *regulatory chill* may be reinforced by the specific circumstances of the state in question. Previous examples show that, as argued by Gross (2003), the threat of arbitration and the use of intimidation may be sufficient in developing countries with lesser capabilities to face these cases. Also, a country subject to several arbitrations in few years may be wary of implementing regulatory measures for a fear of increasing its rate of international litigation. For instance, recently Spain faced mass arbitrations in record time following a renewable energy policy, which to some extent causes concern about the consequences of regulatory action and may disincentivize policymaking (Simoes, 2016). These concerns are increased by what Matveev (2015) identifies as the interpretative indeterminacy of investment arbitration which means that states are in a difficult position to assess what treatment will tribunals afford to foreign investors.

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https://doi.org/10.6092/issn.2724-6299/13761

States that have been sued massively or that have been ordered to pay high sums in damages may also refrain from taking regulatory measures. In the end, if investment arbitration represents major difficulties to them in terms of financial capacity or international legitimacy, it is reasonable to think that they will refrain from adopting such initiatives. For instance, in 2019 an investment tribunal ordered Venezuela to pay around US $8.3 billion in a case against the oil & gas giant ConocoPhillips, which as argued by Kluding (2019), signifies a mighty blow to the state after a saga of measures that have led it to sink economically. Similarly, Argentina has faced 62 investment cases, which equates one tenth of all known claims and makes it the country with most cases in the history of these modern arbitration proceedings.[8] As explained by Titi (2014), these figures have led Latin American countries to reconsider the necessity of retaining investment treaties.

Even countries with strong in-house investment arbitration teams or a successful record as respondents in arbitration cases may instruct other authorities to avoid regulatory measures that could trigger arbitration or unintentionally create a fear of regulation among other state agencies. For instance, Bergen and Bergen (2021, 9-10) find that in states with a high bureaucratic capacity such as Canada,[9] once an investment claim against the country comes through, domestic authorities enter into close coordination with other agencies to assess and manage the case. Arguably, this could make that the threat of investment claims spreads into the language of domestic authorities. In support of this, Moehlecke (2020, 8) also demonstrates that in countries with well-developed bureaucracies such as France and the United Kingdom *regulatory chill* has been common upon an increasing number of investment cases for issues like the plain packaging of cigarettes.

[8] This data was obtained from UNCTAD Report "Investor-State Dispute Settlement Cases: Facts and Figures 2020" issued in September 2021.
[9] For further clarity, authors define "bureaucratic states" in a Weberian sense as states that have high bureaucratic features such as transparency and codification of intra bureaucratic communication and coordination procedures and expertise-based hiring procedures (9).

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https://doi.org/10.6092/issn.2724-6299/13761

But *regulatory chill* does not operate in the vacuum, it must be put in context with countries' reality to grasp its actual consequences. As demonstrated by Franck (2007), while investment claims against low-income countries are not massive, overall arbitrations versus developing countries do represent a significant part of the cases. Further, as argued by Zrilič (2019), the number of damages in these disputes could be an important obstacle to *transitional justice*. Transposing this to the context of post-conflict, most states involved in transition are developing nations (Harris, 2002). Then it is no secret that the *regulatory chill* of investment arbitration poses a major concern for the effective implementation of programs seeking a lasting peace. Not only states may be on the verge of being ordered to pay massive sums of money in situations of financial distress, but their whole transitional agenda may be paralyzed by the fear of being punished for taking regulatory action.

4. How the Application of Investment Standards Could Interfere with the Fulfillment of a *Transitional Justice* Framework

This section will examine the features of investment arbitration reviewed in Section 3 in light of the core principles of *transitional justice* and access to justice described in Section 2. It will consider three aspects: (i) *justice* and how it could be affected by arbitral awards that trigger a sense of unfairness in the community; (ii) *non-recurrence* and how the lack of access of victims to the investment arbitration system could lead to a default in their *recognition*; and (iii) *reparation* and how the fear of investment claims could result in shortcomings regarding the capacity of the state to provide *effective remedy*. By the end of this section, it will be clear why and how, if not addressed properly, various features of investment arbitration could pose a significant challenge to *transitional justice*.

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4.1 Justice: Arbitral Awards that Trigger a Sense of Unfairness

This paper explained before that *transitional justice* relates in great part to the concept of *justice* adopted in a transition. A big portion of this in contexts of post-conflict relates to the intervention of a state on traditional sources of inequality and its assessment of the fundamental differences between marginalized communities and traditional elites. The main issue with this principle of *transitional justice* considering investment arbitration is that inherent to the *victim-perpetrator cynicism* described above. Once a state is confronted with the need to affirm either the commitments of a BIT and those of a peace instrument, a decision in favor of the first will trigger a sense of unfairness in the community. And, while this may be reasonable in legal terms, it will not be perceived as such, damaging the sense of *justice* in transitional decisions. Extrapolating this to the reality, the precedent of certain investment arbitrations against African countries facing transition is crucial.

During the late XXth century, several countries such as South Africa and Zimbabwe implemented a series of measures known as black economic empowerment (BEE) programs, which were aimed at reducing poverty and increasing the share of black population ownership over domestic resources (Esser and Dekker, 2008). Before this transition, foreign investors or local elites had accumulated wealth through systems of oppression and abuse like the *apartheid* and several forms of colonialism. While these forms of enrichment may constitute valid rights in legal terms, there are always fundamental concerns on their legitimacy (Zenker, 2014). Then, BEE measures entailed the redistribution of wealth, meaning the possibility to affect the rights acquired by foreign investors during previous regimes. Because of such actions, some investors presented investment claims against these countries before international tribunals.

For the case of South Africa, as explained by Iheduru (1998), the end of the *apartheid* era triggered a series of BEE measures by the new government. This included the Mineral and Petroleum Development Act (MPDA), which asserted state's ownership of natural resources and requested rights holders

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https://doi.org/10.6092/issn.2724-6299/13761

to re-apply for permits considering that such authorizations would be assessed again based on BEE commitments. This led to the case of *Pietro Foresti v South Africa* (2010), brought by investors from Italy and Luxembourg under the Italy-South Africa and the Luxembourg-South Africa BITs. Investors alleged that BEE measures amounted to expropriation and a breach of the FET.[10]

As to the situation in Zimbabwe, Thomas (2003, 700) explains that, after its effective independence from the UK in 1980, the Government implemented a series of acts aimed at the redistribution of land among the local black community. In particular, the Indigenization and Economic Empowerment Act (IEE) of 2007, required indigenous Zimbabweans to own or control 51% of businesses in sectors such as mining and manufacturing. This resulted in two investment arbitrations, the cases of *von Pezold v Zimbabwe* (2015) and *Funnekotter v Zimbabwe* (2009). In both disputes, the tribunal found in favor of the claimants considering that BEE measures, in particular the occupation of local land by war veterans, amounted to expropriation, which was the focus of the decisions.[11]

These cases show a critical tension between investment arbitration and *transitional justice* from the perspective of *justice*. At the outset, tribunals seem to ignore the complexity of non-economic issues in post-conflict or prioritize investment rules and apply them narrowly. More importantly, they are deferential to the systemic issues behind specific regulations, for example, the tension inherent to the fact that investors' rights might have been acquired in a context of violent dispossession or the role of BEE policies in trying to address this inequality on the grounds of fairness. As concluded by Le Moli (2021, 25), the system seems to overemphasize the protection of foreign investment, downplaying "the broader dimension of inequality and abuse" that are also key to *distributive justice*.

[10] The case was discontinued at an early stage of the proceedings by agreement of the parties.
[11] For further detail, *see* Le Moli (2021, 18-18).

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https://doi.org/10.6092/issn.2724-6299/13761

4.2 Non-Recurrence: Default in the Recognition of Victims

Call (2012, 224-230) points out that, without state legitimacy, a *lasting peace* cannot be achieved, which means that having a post-conflict framework acceptable to the civil society is essential to securing an effective *transitional justice*. As the head of that transition in times of post-conflict, the state is responsible for achieving a long-term peace through regulatory action, including measures necessary to establish its own legitimacy. McDonough (2008) shows that, in cases of civil war that involve belligerent groups as guerrillas, *recognition* is the core of the bargain that leads these organizations to surrender their weapons with hopes of receiving political representation and participation in return. Hence, securing this exchange is paramount to maintain state legitimacy once war is over.

However, peacebuilding not only means legitimacy before domestic stakeholders. As explained before, a state has international commitments that it must fulfill and transition is not an exception. Schreuer (2019) clarifies that, under the general rules of international law, war and emergency situations will rarely suspend the obligations of states concerning the protection of foreign investments. Upon these circumstances, investment claims could place the state in a situation where it must decide between the discomfort of civil society and the respect to international commitments. Then, here appears another obstacle to *transitional justice*, this time concerning the achievement of a *lasting peace* through the *recognition* of victims. To understand this issue better it is necessary to go back to the *legitimacy dilemma*.

Investment arbitration poses a special challenge because it means that governments will put at stake local or international reputation due to transitional measures. In foreign affairs, consequences of default in state obligations are strong (Hurd 1999). But in *transitional justice* they may represent shattering the very foundations of a peace process. As a result of a government endangering the terms of transition by granting prevalent application to the rights of foreign investors, stakeholders such as victims and

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

former armed groups may lose their trust in the system and opt out of the post-conflict program (Bonnitcha, 2014). Even if they do not do so intentionally, spending valuable resources in the reparation of foreigners while weaker communities do not get redress could delay reform and create a sense of injustice.

As peace agreements often take long and entail complex negotiations, the failure of the state to meet its commitments will often be seen as a disrespect and could potentially worsen the perception of unfairness among civil society (Subotic, 2013). *Non-recurrence* would then be at its lowest point because, once it has taken years to reach an agreement and parties have already made concessions, actions perceived as contrary to minimum standards of treatment motivate actors to affirm their initial disagreements. The case of former members of armed groups that have accepted to go back to the civil society despite stigma is a major example. Referring to the case of the Revolutionary Armed Forces of Colombia (FARC) in Colombia, Gutiérrez (2020) shows that, when belligerent groups feel that they are not offered equality of opportunities, adequate protection, and effective reparation they will most probably raise against the state again.

Previously, the paper described the bottom-up approach to transition and that its essence is giving the first place in peacebuilding to voices that have not been heard. When comparing transition and investment arbitration this gives place to a question about the *recognition* of victims. In political theory, this usually refers to the possibility to take part in decision making processes through representatives (Brennan and Hamlin, 1999). This article is not considering the issue of whether victims can or cannot participate directly in investment arbitration, which is not permitted *stricto sensu*. But it does question to what extent they may feel that their interests are underrepresented before international tribunals. And this is because, while local communities may not have a direct interest in taking part of these processes, *jus post bellum* means that they get to feel that they have a voice in decision-making when it concerns decisions that affect their interests (De Waardt and Weber, 2019).

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https://doi.org/10.6092/issn.2724-6299/13761

A well-known feature of international law is that individuals are often left aside from most fora (Clapham, 2010). Indeed, most international affairs are decided between states and, while communities are a key concern of the debate, they are frequently treated as a passive player and given a secondary role, if any. This has changed in recent years with systems that give a greater importance to individuals and communities, for example, the contemporary human rights regime (Buergenthal, 2017). However, this is still not the rule and the situation is more evident in international economic law. Subjects discussed in this system, such as international trade and investments, undoubtedly touch upon issues of great social interest like the protection of public health, the environment, and animal welfare. Nonetheless, the degree of participation of the civil society in international dispute settlement remains minimal and the civil society has shown a low capacity to influence these systems (Hopewell, 2015).

Overall, victims are underrepresented in the investment arbitration system. To this paper, it is not necessary that they are treated as parties to a dispute, but neither should they be completely excluded from the discussion. Potential investment claims against measures of *transitional justice* could affect their implementation and therefore the victims that would benefit from such programs. Consequently, the victim's sense that they were left out from a discussion deciding their future calls to question once more whether they are being part of a fair transition capable of securing *recognition*. As such, this could be a heavy hit on the guarantees of *non-recurrence* in a post-conflict environment.

4.3 Reparation: Shortcomings in Providing Effective Remedy

As extensively argued before, the access of victims to an *effective remedy* is a key consideration for *reparation*. In this regard, the threat of investment claims poses major concerns. The critical aspect here is the contrasting approach to property rights from the perspectives of *transitional justice* and investment arbitration. Under instruments like the Pinheiro Principles,

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transition looks at property as an essential part of reparation, granting a special recognition to remedies such as restitution. At the same time, most part of investment arbitration is centered on property rights, being claims on expropriation one of the core concepts of the system (Reinisch, 2005). Actually, as shown by Barrera (2018), tribunals have recognized the right to property as a human right.

Hence, at first glance, there would not seem to be a clash of values on the assessment of property. Both systems acknowledge the importance of property and put forward protections to property rights. However, the problem arises when there are parallel claims for the same property. This may happen because the state considers that a property is necessary for the reparation of war victims and this conflicts with the private rights of an investor over that property. Another example, though much more complicated, is when victims of an armed conflict had the customary tenancy of a property and were forcefully displaced from that location because of violence, but then a foreign investor acquired that property that was left vacant. *Transitional justice* regulations could make victims entitled to that property as an *effective remedy* for atrocities suffered and an investment instrument may grant a foreign investor protection of its regular ownership right over the same property.

Against this backdrop, the recent work of Velásquez (2016) and Von Ho (2016) on the Colombian case is relevant as it provides an overview of the potential implications of investment arbitration on the implementation of post-conflict policies. There are several theories on how and when did the Colombian conflict emerge. A common explanation is that it appeared since the last part of the XXth century because of the unequal distribution of land and the lack of political participation of non-traditional groups (Díaz 2018). As found by Goyes (2015, 79) land inequality was one of the main complaints of leftist guerrilla groups in Colombia that led to an over 50 years internal conflict. Then, it is generally accepted that conflict on property rights is a key consideration in post-conflict reconstruction in the country, specifically in

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terms of land reform (Saffon and Uprimny, 2010, 379-378). While this paper takes the Colombian case as a reference, these premises could be extended to other situations with similar features.

A necessary context to understand conflict in Colombia is that of the different armed groups that participated in the spiral of violence in the country. Two of these are of particular interest. On the one hand, there are several guerrilla groups, most of leftist ideas and founded on alleged ideals of promoting the redistribution of resources and political upheaval of peasants, indigenous communities, and other marginalized groups of society expecting better opportunities (Post 2009). As the 2016 Peace Process -which is the one that concerns the purposes of this paper- was exclusively with the largest guerrilla group at the time called FARC, the article focuses on it. On the other hand, there were paramilitary organizations, formed by right-wing groups as landowners in a reaction to guerrillas (Grajales, 2011). Of course, the complexity of the armed conflict in Colombia involves many stakeholders, including politicians, public figures, drug cartels, official armed forces, among others, but this paper will not delve deeper into these details.

As a consequence of the conflict in the country, more than 6 million people were forcefully displaced in Colombia (Attanasio and Sánchez, 2012, 2). In this context, as remarked above, the relation of armed conflict with property rights, as well as the role of foreign investors in such intricacies, is crucial to understand the clash of values between investment arbitration and *effective remedy*. To provide sufficient background, Thomson (2011, 347) explains that foreign corporations either sponsored paramilitary groups for taking property off from victims using force or knowingly purchased property that had been acquired by irregular means. Adding to this, Summers (2012, 222) has pointed out the fact that forceful displacement has been intensive in regions with intensive economic activity in sensitive industries such as mining.

While the Colombian Peace Agreement was signed in 2016, there were previous measures aimed at providing *effective remedy* to war victims. In

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2004, the Constitutional Court in Judgement T-025 acknowledged that forceful displacement in the country was a serious problem and that it had not been addressed adequately by the state. Then, it declared the existence of an "unconstitutional state of affairs" in virtue of systemic and massive rights violations due to the forced displacement, ordering a land restitution program to redress the dispossession caused by years of armed conflict. In 2011, Congress passed the Victims' Law, which created an institutional legal framework to protect, assist, and repair victims of armed conflict that had lost their lands, were forcedly displaced, or had suffered other damages. Among its measures, it included the reversion of property titles acquired by illicit means or as a result of an irregular transaction. *De facto,* this includes the possibility of reverting titles from foreign investors that were obtained through the use of force on local communities.

Additional provisions of particular interest in the context of the Victims' Law are those related to the procedure that must be followed in these cases, in particular the burden of proof of such allegations. Broadly, the law states that, once a victim makes a claim that it was displaced from its land, the current owner bears the burden of proof to demonstrate that it acquired the territory in good faith. Otherwise, its ownership titles will be voided and deemed as if they had never occurred. There is also a presumption of illegality of the land property if the underlying contract with the victim was subscribed by a person convicted of actions associated to an armed group outside the law or if the price of the property was below 50% of its value, subject to additional conditions.

In this context, as found by Van Ho (2016) not only transitional measures as those set forth in the Victims' Law could give place to investment claims, but states duty to compensate if such arbitrations came forward would render financially difficult for the state to implement transition through measures such as restitution or economic compensation. The impact of this on the capacity of the state to serve *distributive justice* is clear. Measures on property rights, even if made in the context of favoring victims and sanctioning

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investors for property acquisition through irregular means, would be restricted by international protections under BITs. As a result, investment arbitration would be the material expression of how investment protection can put a straitjacket on *transitional justice* through wealth redistribution, getting in the way of the access of war victims to an *effective remedy*.

Von Ho (*Ibidem*) adds two impacts to the interaction of investment arbitration and *transitional justice*. First, that the effects of measures on investors' rights and the threat of international claims have an inhibiting effect on the very adoption of redistribution policies. Within the theoretical framework proposed in this article, this suggests the same conflicts presented before as a form of *regulatory chill*. Second, that this fear of action by public authorities ends undermining Colombia's compliance with its obligations under international human rights and humanitarian law, for example, facilitating reparation and preventing impunity as illustrated in cases such as *Barrios Altos v Peru* in Section 3. This consideration bears major importance and will be analyzed in depth in the closing remarks of the paper.

Lastly, as expressed in Section 3 on the understanding of the right of war victims to access to justice, there is another layer of the concept of *effective remedy.* This refers to matters of judicial proceedings such as the right of victims to get prompt redress of their claims and actual relief. In the context of post-conflict jurisdictions, access to justice is sometimes envisaged in the actions of transitional tribunals and other decision-making authorities. In Colombia, this role is in charge of different institutions, including the Special Jurisdiction for Peace (JEP) and the Unit for Land Restitution (ULR). A case brought before the ULR in 2017 is of particular interest to this analysis. In the decision rejecting the restitution of lands located in a conflict region, where local communities were forcefully displaced and later a foreign mining company carried out operations with government permits, the entity stated:

> "(...) the analysis of the legality of the contract must be careful, since requesting a declaration of annulment or non-existence of

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> the mining title through the referred presumptions suppose a risk of significant damage for the Victims Unit and the Colombian State. Particularly, *given the dispute resolution mechanisms Colombia has signed within Investment-Treaties, mining investment protection clauses, and the possibility of claims of direct reparation of damages* (…) Ultimately, public funds is what is at stake" (emphasis added, my translation).

Then, limits to an *effective remedy* are another front where investment arbitration and *transitional justice* clash. Considering contexts such as the Colombian case, the role of foreign investors in the direct dispossession of property rights, the *victim-perpetrator cynicism* plays once again a critical role. Investment claims may be read not only as an opposing force that of victim's rights, but as the force that promoted violence in the first place. All of the above should also be read in light of the ability of states to defend their transitional programs against international investment claims. As detailed when explaining the *asymmetry of rights* of states and investors in arbitral practice, the *status quo* would suggest that states have very limited chances to support transitional measures as long as they are contrary to the protections granted to foreign investors. Such a situation inevitably leads to an *impasse* between transition and investment arbitration.

5. Conclusions

This paper was aimed at studying the interaction of investment arbitration and *transitional justice*, particularly the features that could make them be in contrast. To this purpose, it considered essential values of *transitional justice* and confronted them with distinctive features of investment arbitration to review how they would relate to each other. The article found that, due to the strong frictions between these characteristics, investment arbitration could pose an important challenge for a country undergoing transition. Overall, it gives place to questions about the principles of *justice*, *non-recurrence*, and

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https://doi.org/10.6092/issn.2724-6299/13761

reparation. Specifically, for peacebuilding around the implementation of *distributive justice*, the *recognition* of communities, and the capacity of the state to offer victims an *effective remedy*.

The foregoing does not mean that the gap between investment arbitration and transition cannot be resolved. Authors like Lawry-White (2015) argue that it would be possible to have renewed approaches to investment claims in post-conflict, which would mean that, with a plural and holistic approach to investment arbitration, *transitional justice* may not be hindered but promoted. Currently, foreign investors see international investment law as an open door to obtain redress from the harm inflicted by armed conflict, which is a reason to praise investment arbitration. But a similar approach could be adopted when considering other type of victims, aiming to reduce the asymmetries of the system. Despite this, the current state of affairs of arbitral practice in investment cases shows that there is still an important degree of uncertainty as to a change of paradigm in this sense. Regulatory measures would then be at great risk of being challenged and affected by these disputes. This calls for a larger debate on the issue as omissions on the regulation of the interaction between investment protection and *transitional justice* would lead to nefarious results in a post-conflict framework. States could decide to bend before international commitments and allow the prevalence of investors rights over victims interests, affecting a *lasting peace*. But they could also prefer internal transition and downplay the importance of maintaining a working system of FDI protection. Whatever the result, the consequences are undesired and this calls to action for a larger consideration in academia and policymaking.

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ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

The Evolving Qualification of Unilateral Coercive Measures: A Historical and Doctrinal Study

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ABSTRACT

Unilateral coercive measures are deeply rooted in the history of statehood, yet their legal qualification continues to evolve. In a factually unequal international order, the governments of core countries continue to apply such measures as a foreign policy tool in driving peripheral countries to submission despite human rights concerns and a growing consensus on the illegality of their conduct. As most legal scholars struggle to define what constitutes a unilateral coercive measure, the conditions that beget coercive measures and the historical progress that led to today's predominant views are largely overlooked. Thus, this article is the fruit of a historical and doctrinal study of unilateral coercive measures and their qualification, as it aims to provide an insight as to what lies ahead in light of the historical precedent and the current progress in the field of public international law, human rights law and international criminal law.

Keywords: coercion, non-intervention, state sovereignty, responsibility of states, crimes against humanity

ATHENA
Volume 2.1/2022, pp.204-253
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13760

Since the inception of the earliest forms of the political concept that we call a "state", hegemonic powers have been resorting to coercive measures to force weaker states (or proto-states) to change their policies or socio-economic systems, effectively preventing them from exercising full sovereignty. These coercive measures have typically consisted of trade sanctions or overarching embargoes, which were often backed with the use of force or the threat of war as sanctioning parties had little regard for the civilian population suffering from the repercussions of their sanctions. In fact, the suffering of the ordinary citizen has always been a weapon in the hands of the sanctioning state, which seeks to use the desperation of the affected masses to drive their government to submission. Thus, in assessing coercive measures, the principles of public international law *in stricto sensu* go hand in hand with human rights, and modern legal scholars often treat the question as to the legality of unilateral coercive measures from both perspectives.

The reader will notice the slight difference in the terminology when referring to modern coercive measures, namely the addition of the adjective "unilateral". Per their nature, all coercive measures used to be unilateral until the foundation of the United Nations, which conceived a body that can legally adopt coercive measures in order to "maintain or restore international peace and security"[1] – namely, the UN Security Council. Hence, by "unilateral coercive measures" we mean, *in prima facie*, coercive measures which are adopted by states against other states without the consent of the UN Security Council. In practice, however, the Special Procedures mechanism of the UN Human Rights Council has also come to treat the coercive measures applied by a supranational organisation (namely, the European Union) within the broader context of "unilateral coercive measures".[2] As the reader will infer

[1] As per Articles 39 and 41 of the UN Charter.

[2] In the words of the current UN Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Ms. Alena Douhan, unilateral coercive sanctions can be applied by "states" or "groups of states" "in the form of international organisations". In other words, while Douhan (like Jazairy before her) is careful not to come

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13760

from the reports cited in this article, the concept of "unilateral coercive measures" is ultimately to be interpreted as coercive measures applied by the subjects of international law independently from the UN Security Council.

Another question which may arise in view of the modern colloquial usage of the term is "why are economic sanctions referred to as unilateral coercive measures?" and vice versa. This is by no means a matter of coincidence, as the most prominent examples of unilateral coercive measures in recent history consist of ruthless economic sanctions amounting to blockades. Case in point, the United States trade embargo against Cuba brought numerous health crises upon the people of the socialist island nation after the enactment of the 1992 Torricelli Act, which was (in the words of Congressman Robert Torricelli) meant to "wreak havoc upon that island" (Franklin, 1994) after the dissolution of the Soviet Union and the COMECON. Indeed, by effectively inhibiting the vessels registered in third states from travelling to US ports after docking in Cuba, the Clinton administration also prevented Cuba from importing petroleum, feed for livestock, fertilisers, pesticides and cooking oil, which caused a nationwide nutrition problem that became the main catalyst of a neuropathy epidemic leading to a total of 50,863 cases by 14 January 1994 (Román, 1994, 5). This, of course, pales before the numbers reached during the COVID-19 pandemic when Cuba developed its own vaccines and encountered yet another obstacle caused by US sanctions: a lack of syringes due to not being able to receive imports by sea (Whitney Jr., 2021).[3]

However, not every form of unilateral coercive sanctions is as comprehensive as the US trade embargo (or *bloqueo*) against Cuba. In fact, since the dawn of (neo-liberal) globalisation, the quantity of unilateral coercive measures increased as the scope of these measures began to vary.

The non-comprehensive unilateral coercive measures have been colloquially referred to as "targeted sanctions" which, in turn, have also

to a decisive conclusion as to whether international/supranational organisations can apply unilateral coercive measures, the sanctions applied by the European Union are nonetheless assessed in the same category as unilateral coercive measures (applied by states).

[3] The issue was eventually solved with donations.

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varied in scope and implementation. Those targeted sanctions with arguably the broadest scope, i.e., sectoral sanctions, have been deemed to have an impact akin to comprehensive measures, especially in the case of US sectoral sanctions against Venezuela (which target the gold, oil and financial sectors of the Latin American country) and the trade sanctions imposed by the European Union against the Syrian Arab Republic (which have mainly involved the oil sector). On the other hand, some unilateral coercive measures have had a more prominent political character, such as the travel restrictions imposed on alleged human rights abusers under the 2012 Magnitsky Act (US).

Alas, despite the obvious fact that unilateral coercive measures have been around for centuries and have shaped international politics especially since the early 1990s, there has not been a consensus on their definition. It is possible to cite three main reasons as to why this has been the case: To begin with, sanctioning states have used different names and alibis to justify the measures they adopt, arguably due to the growing opposition to the concept of "unilateral coercive measures" at the UN General Assembly (hereinafter "UNGA" or "General Assembly"). Second, in a similar vein, the terms "autonomous sanctions", "economic sanctions", "unilateral sanctions" and "unilateral coercive measures" have been used "loosely and interchangeably" in academic works (Barber, 2021, 4). Finally, as mentioned above, the variety of adopted measures made it hard for legal scholars to classify them. This has been a particularly crucial matter since the International Seminar on Unilateral Coercive Measures held in Vienna in 2019 and Venezuela's referral to the International Criminal Court in 2020 as on both occasions, diplomats and legal scholars alike have discussed whether comprehensive and sectoral unilateral coercive measures constitute crimes against humanity as per Article 7 of the Rome Statute. Furthermore, even though the works of the two UN Special Rapporteurs on the negative impact of unilateral coercive measures on the enjoyment of human rights have duly focused on this matter, two questions remain largely unanswered: What are the material reasons that

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https://doi.org/10.6092/issn.2724-6299/13760

enable the adoption of unilateral coercive measures and what can be expected in terms of their qualification in the near future?

Thus, this article approaches the question of defining unilateral coercive measures by assessing the evolution of their legal qualification in light of the economic and (geo)political conditions that conceive them. Therefore, in the first place, it provides a historical analysis of coercive measures implemented prior to the foundation of the UN and deduces the common conditions and characteristics of coercive measures. Subsequently, it dwells on how unilateral coercive measures were viewed after the foundation of the UN, with particular emphasis on the "Era of Decolonisation" and the "Era of Globalisation" following the dissolution of the socialist camp in Eastern Europe. Finally, it focuses on the contributions of human rights law to the qualification of unilateral coercive measures with particular emphasis on the UN human rights mechanism. Consequently, this article makes use of historical analysis and doctrinal study in terms of methodology and submits that governments should take heed of the fact that the evolution of the qualification of unilateral coercive measures is leading to a categorical prohibition, which calls for their immediate termination.

1. A History of Coercive Measures

Coercive measures have been an instrument used by hegemonic political forces against their weaker adversaries and allies since the inception of statehood at both ends of the Eurasian continent. In Europe, the earliest examples of note in the context of economic sanctions[4] (Watson, 2004, 24) were adopted in the prelude to the Peloponnesian War (431–404 BC) when Athens, one of the mightiest city-states of the era, decided to apply a series of

[4] There are records which indicate that retaliatory action was taken by the city of Aegina against Athens when the former seized the ships of the latter in retaliation for Athens' alleged kidnapping of Aeginian citizens. Jazairy argues that this also constitutes an example for coercive measures; however, due to the "tit-for-tat" nature of the controversy, it is hard to agree with this interpretation. (A/HRC/30/45)

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commercial sanctions against the weaker city-state of Megara as a "retaliation" for the alleged kidnapping of Aspasia's maids and the "desecration" of the *Hiera Orgas* (the meadow of Demeter) by the citizens of Megara. These sanctions, which were dubbed "the Megarian Decree", consisted of the exclusion of Megarian citizens from the markets controlled (either directly or indirectly) by Athens. In other words, Megarians were effectively prevented from trading in the Aegean and beyond, as the so-called "Athenian Empire" (consisting of Athens alongside its allies and tributaries) extended from the Peloponnese in the south to Byzantium in the north (Buckley, 2010, 206). Most historians agree[5] that the sanctions applied by Athens "strangled" the Megarian economy (Watson, 2004, 24) and solidified the impoverished city-state's alliance with another major power of the region, namely Sparta, which demanded that Athenians lift the sanctions on the Megarians. The unsurprising rejection of this demand is widely considered as one of the key moments that led to the Peloponnesian War (Buckley, 2010, 299), which saw the decisive defeat of the Athens-led Delian League at the hands of the Persian-backed Peloponnesian League led by Sparta and the establishment of an oligarchy in Athens.

It would be wrong to assume that it was only the so-called "cradle of Western civilisation" that experienced such a contradiction with hegemonic powers trying to dictate their policy on weaker forces. Indeed, ancient China also saw the rise of regional hegemons who set the rules of commerce and interstate relations in the Spring and Autumn Period and the era of the Warring States that followed. As a matter of fact, the Spring and Autumn Period was marked by the rise of the so-called "Five Hegemons" (**五霸**) who led the other monarchs of the "Middle Kingdom" in safeguarding their common interests in the fields of commerce and security. However, there was one key difference between Chinese hegemons and their Greek counterparts

[5] With the notable exception of Geoffrey Ernest Maurice de Sainte Croix FBA, who argued that the Athenian sanctions on Megara would have barely affected the latter's citizens as trade in the Peloponnese was largely conducted through non-citizen middlemen and merchants (Balot; Forsdyke; Foster, 2017).

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of the same time period: While the ancient Greeks (such as the rulers of Athens and Sparta) sought to rise above the other regional powers through the assertion of their authority, the "Five Hegemons" of ancient China opted for a more "diplomatic" approach and aimed to "set up a new order for an interstate community that was to be guarded by consensus rather than authority" (Loewe and Shaughnessy, 1999, 557).

Nonetheless, from Medieval times onward, there has been greater convergence among various forms of economic hegemony across the greater continent. In Medieval Italy, for instance, the hegemony of the "most serene" maritime republics of Genoa and Venice allowed them to use economic sanctions as a tool in coercing other city-states. An example of this policy was the Venetian threat of blockade against Ancona in mid-13th century, which forced the latter to eventually accept the *Rialto*[6] (in 1264) as the only place where the merchants of Ancona could exchange goods (Lane, 1973, 63). Venice resorted to the same policy when dealing with famine-stricken Bologna in 1273, as it sought to punish the latter for receiving supplies from Ravenna independently from Venice. The combination of the lack of food and the hardship caused by Venetian sanctions eventually forced Bologna to capitulate, which allowed Venice to re-impose a quota on the goods that Bologna could receive from Ravenna (Lane, 1973, 59).

On a larger scale, following the Third Council of the Lateran in 1179, the Holy See tried to prevent Roman Catholic kingdoms from exporting goods and ships to Islamic realms (Summerlin, 2019, 192), in addition to trying to compel the adherents of other churches to abide by the same embargo (Baldwin, 1970, 267). However, even before these sanctions were deemed null with the rise of Protestantism (Stantchev, 2014, 87), major powers were able to circumvent the conditions imposed by the Papacy. An example in that regard was the early regime of capitulations between the Ottoman Empire and the Republic of Genoa (Bulunur, 2009, 5). The source of this regime, i.e., the

[6] The wholesale market in the city of Venice where Venetians would act as middlemen for both Italian and foreign merchants.

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Ahidâme of 1453 was significant for a variety of reasons: Politically, it demonstrated that Ottoman diplomacy was flexible enough to forego the fact that the defence of Constantinople was *de facto* led by a Genovese *condottiere*, focusing instead on the benefits that could be gained by winning over the affluent Genovese community in Galata. Similarly, the readiness of the Genovese to engage in commerce with the Ottomans showed that the Papal decree had almost no effect on the diplomatic and commercial relations of Catholic Christian realms. On a more general note, this served as a demonstration of how the implementation of coercive measures required a position of *material* hegemon - be it military or economic. Correlatively, the fact that a major commercial power of the Mediterranean, which nominally adhered to the Roman Catholic Church, could effectively ignore the *dicta* of the *pontifex maximus* served to prove that only *material* hegemons could use religion as an alibi in applying coercive measures.

In spite of the earlier example set by the "Five Hegemons", this norm was also valid in 16th century East Asia. Indeed, even though the reigning Ming Dynasty officially adopted a policy of "non-interference" in the affairs of the "barbarian" states that surrounded it, this policy depended on whether said "barbarian" states were willing to become the Ming's tributaries (Hazlett, 1999, 11). In the case of Japan, the third *shōgun*[7] of the relatively weak Ashikaga Shogunate, Ashikaga Yoshimitsu, had accepted the status of tributary to the Ming, which allowed Japanese merchants to access the biggest market of the region (Toyoda, 1969, 29). Thus, when Japan ushered in the *Sengoku* era leading to the rise of the so-called "Three Great Unifiers",[8] the island nation was paying tribute to the hegemonic power to its west in order to engage in trade with the realms in its immediate vicinity.

However, this tributary regime established between the two realms was

[7] Much like the evolution of the word *imperator* in Europe, the literal meaning of the word *shōgun* (将軍) was "commander" or "army commander". However, since the foundation of the first shogunate by Minamoto no Yoritomo, it became the hereditary title of the military dictator of Japan who effectively ruled in the emperor's stead.
[8] Oda Nobunaga, Toyotomi Hideyoshi and the founder of the Tokugawa Shogunate, Tokugawa Ieyasu.

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not meant to last forever as the second Great Unifier of Japan, Toyotomi Hideyoshi decided to follow his former master Oda Nobunaga's dream and invade China. From the offset, this ambitious campaign met a major geographical obstacle, namely Joseon Korea, which refused to grant safe passage to Toyotomi samurai as the Joseon Dynasty was a tributary of the Ming. Consequently, the war-hardened Japanese launched a brutal invasion of Korea, to which the Great Ming initially responded by adopting economic sanctions against the Toyotomi regime (Yuan Jiadong, 2013, 136). Later, Ming forces were also involved in the Korean counterattack against the invading samurai and the Japanese were eventually driven back. Nonetheless, the economic sanctions continued until the downfall of the Ming, and the newly established Tokugawa Shogunate in Japan tried to circumvent these already obsolete measures through Satsuma control over the Ryukyu Islands (Hazlett, 1999, 62) and by seeking to engage in trade with the remnants of the Ming Dynasty in southern China (Xing, 2016, 111). Thus, it was proven yet again that once a realm lost its regional hegemony, the implementation of coercive measures became untenable.

Moving to the rise of financial capitalism and modern imperialism in the same geographical context, one can view the so-called "gunboat diplomacy" applied by the United States against the Tokugawa Shogunate in the prelude to the Boshin War as a form of coercive measures. As a matter of fact, the hardly peaceful tactics adopted by the young imperialists of the "New World" aiming to coerce the Japanese to open their ports to North Americans consisted not only of an overt threat of aggression (Beasley, 2002, 5) but also an assault on Japanese economic sovereignty with the invasion of what would be Japanese territorial waters under modern international law of the sea (Beasley, 1972, 89). Similarly, the economic sanctions imposed on the Qing Dynasty by the British Empire following the Opium Wars did not merely consist of the forced importation of British opium as per the Treaty of Nanjing: The imposition of unequal exchange in the tea market and the outflow of silver also helped cripple Chinese production (Yuan Yao, 2021),

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and this was done to make Chinese economy entirely dependent on Western capital. Coupled with the concession of Chinese ports to Western imperialist powers, the economic conditions foisted on the Qing and the people of China were nothing short of brutal, as the country became a semi-colony whose economy was run by foreigners while the commoners were compelled to oppose a corrupt monarchy and European meddling by resorting to armed struggle.

Even though the economic sanctions imposed by Western colonialists on Asian realms drew a particularly grim picture, it was the application of similar sanctions in the Americas that gave birth to popular legal doctrines which brought us closer to modern views on unilateral coercive measures. In point of fact, one of the most popular examples in that context, namely the Venezuelan naval blockade of 1902-1903 directly influenced the Drago Doctrine, which in turn built on the premise established by the Calvo Doctrine.[9]

Before going over the blockade of Venezuela, however, one ought to mention a tragicomical expression of European imperialism in Central America, namely in the young Mexican Republic. After replacing the Mexican Empire between 1823 and 1824, the Mexican Republic had been facing internal strife since its inception (Costeloe, 2002, 59) and the leaders of the centralist government (established by Santa Anna in 1835) had immediately found themselves under a heavy financial burden after seizing power from the federalists, as the constant state of civil war had greatly hindered the country's productivity (Costeloe, 2002, 127). European imperialists, as well as the emerging power that was the United States of America thus sought to seize upon the chance to further their privileges in their commercial relations with Mexico. In the case of the United States, this

[9] Named after Carlos Calvo and inspired by Calvo's magnum opus *Derecho internacional teórico y práctico de Europa y América*, the Calvo Doctrine provided that foreign nations could not claim jurisdiction in cases involving their citizens engaging in economic activity in another country so long as their citizens did not exhaust all domestic remedies in the host country. The Drago Doctrine later built on this premise and upheld the principle that creditor states could not resort to aggression for the purpose of claiming public debt.

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opportunism came in the shape of supporting Texan separatists (MacDonald, 2012, 260), whereas France demanded reparations for the alleged looting of the shop of a French pastry chef in Tacubaya. Aside from questions related strictly to the legality of the claim, the amount demanded by France in its reparation claim was roughly six hundred times the worth of the pastry shop (Casas, 2013). The Mexican government refused to treat French demands, which led to the so-called "Pastry War".

This brief armed conflict between an impoverished former colony and a colonial empire was initiated with an act of aggression by the French fleet which aimed to impose a blockade on all Mexican ports on the Gulf of Mexico from Yucatan to the Rio Grande. Additionally, the French fleet that was tasked with imposing the blockade proceeded to bombard the Mexican citadel of San Juan de Ulúa near the city of Veracruz and, to make matters worse for the Mexicans, US-backed Texan separatists moved to impede Mexican smugglers who were trying to circumvent the blockade (MacDonald, 2012, 262). As a result, despite putting up a tough resistance, the Mexican government was forced to capitulate to French demands and pay 3 million francs in damages (Casas, 2013). Furthermore, France and the US forced Mexico to give further privileges to French merchants and investors as a "substitute" for war indemnities. This regime of subservience which initially arose from coercive measures continued until the end of the second French intervention in Mexico, when the Mexicans were finally able to vanquish the French imperialists (Velázquez Flores, 2007, 117).

The aforementioned blockade of Venezuela, on the other hand, was realised within a more "familiar" framework from a modern point of view: Case in point, the controversy between Venezuela and Western powers was rooted in Venezuela's public debt and the decision of the then president, Cipriano Castro, to halt the payments related to foreign debt. Although the defiant stance of President Castro was an irritation to a number of Western governments, it was the Second Reich that contemplated pursuing a more aggressive policy against the Latin American country as it sought to further

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https://doi.org/10.6092/issn.2724-6299/13760

the privileges enjoyed by the many German investors in Venezuela (Forbes, 1978, 317). As British and Italian capitalists also desired to join the fray (Mitchell, 1996, 195), the governments of Germany, Italy and the British Empire eventually decided to send their fleets to blockade Venezuelan ports. Initially, President Castro thought that the US would interfere in favour of Venezuela, on the basis of the Monroe Doctrine. However, the administration of Theodore Roosevelt interpreted the Doctrine strictly, arguing that it did not consist of a categorical opposition to European intervention in the Americas, and that "if any South American State misbehaved towards any European country", the Europeans would have the right to "spank it" (Kaplan, 1998, 16).

After experiencing European success against Venezuela, however, the Theodor Roosevelt administration had a change of heart and decided to threaten the German and Italian fleets surrounding Venezuela (Hill, 2008, 110). Consequently, the US convinced both the creditors and Venezuela to resolve their conflict "peacefully". As a result, the parties stipulated the Washington Protocols, according to which Venezuela was obliged to pay roughly 27,000 US dollars as war indemnities to the "creditor states" (Tipioğlu and Weisbrode, 2013, 16). However, the European powers responsible for the blockade did not find the Accords sufficient, as they pushed for preferential treatment in the payment of their claims. This resulted in a litigation before the Permanent Court of Arbitration in The Hague, which did not end well for Venezuela. Indeed, in the assessment of the case, the Court made an assumption regarding the intentions of the parties prior to the stipulation of the accords and held:

> In permitting the other powers that had claims against Venezuela to adhere to the stipulations of the protocol of February 13, 1903, the blockading powers could evidently not have intended to renounce either their acquired rights or their actual privileged position. (Hamilton, 1999, 37)

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https://doi.org/10.6092/issn.2724-6299/13760

The Court then took a step further and interpreted Venezuela's perceived lack of opposition to the privileges of blockading states as tacit approval of the privileges in question and construed the expression "all claims" (from the related clause of the Accords) exclusively as "claims of the blockading states". Hence, the Court unanimously ruled that blockading powers were entitled to preferential treatment and that other European powers could benefit from the pre-existing regime (Hamilton, 1999, 37). Although this was a satisfactory outcome for the Europeans, the US was far from pleased as the judgment of the Permanent Court of Arbitration could potentially pave the way for *direct* European interventions in the "backyard" of the US. Consequently, the administration of Theodore Roosevelt made an important addition to the Monroe Doctrine: the Roosevelt Corollary, which provided that the US would be entitled to do the "dirty work" of European creditors instead of letting them gain a foothold in the Americas (Maass, 2009, 383).

The coercive measures adopted against eastern Asians and Latin Americans by Western powers were, therefore, quite similar in essence. Over in the Middle East and Eastern Europe, however, there was a *sui generis* regime based on unilateral concessions made by the Ottoman Empire. As previously mentioned, these concessions, dubbed "capitulations", were initially designed to establish commercial relations with Catholic Christian realms in spite of Papal sanctions. However, as the power of the Empire waned and the "Sublime State" came to be known as the "sick man of Europe", its formerly weaker adversaries began to use coercive measures in order to gain further privileges by means of capitulations (or unequal treaties) without giving the Ottomans anything in return. This created an imbalance in the relations between the Ottomans and European realms which gradually transformed the Ottoman Empire into a semi-colony with Europeans dictating its economic and financial policies through coercive measures, unequal treaties, and capitulations.

Perhaps the most prominent example of this state of affairs is the 1839 Anglo-Ottoman Treaty or the Treaty of Baltalimanı. The treaty itself was the

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https://doi.org/10.6092/issn.2724-6299/13760

result of the British Empire benefitting from the turmoil within the Ottoman Empire, as one of the "founding fathers" of Egypt, the Albanian viceroy Mehmet Ali Pasha of Kavala was, at the time, leading a successful rebellion against the Sultan. The reformist Sultan Mahmut II therefore pleaded for British and Russian aid – which is when the British Empire dictated its conditions. Indeed, the Treaty of 1839 compelled the Ottoman government to dissolve all state monopolies, allow British subjects to have full access to Ottoman markets, lift all internal customs for British goods, and punish all officials who did not permit British subjects to trade freely or prevented the free passage of British vessels. This created a regime that was not merely "unequal" in the sense that Ottoman subjects did not enjoy similar rights in Britain, but they were discriminated against at home as well in that, unlike British subjects, Ottoman traders had to pay internal customs when goods were transferred from land to sea and vice versa (Çeştepe and Güven, 2016).

As a consequence of the continuation of capitulations and the ratification of unequal treaties like the aforementioned Treaty of Baltalimanı, the Ottoman economy became entirely dependent on Western capital and its lack of productivity, eventually resulting in an exhaustive public debt. Hence, the creditor powers contemplated a domestic institution through which they could effectively impose their sanctions – and the Ottoman government had no chance but to comply. Thus, the *Düyûn-u Umumiye* or the Ottoman Public Debt Administration was founded during the despotic reign of Abdülhamit II. One of the many functions of this *sui generis* institution was structuring the public debt according to the demands of the creditor states (Gürsoy, 1984, 20). In a way, the praxis of the *Düyûn-u Umumiye* "internalised" the purpose and instruments of unilateral coercive measures, as it imposed economic sanctions on the decrepit Empire while bypassing the necessity to legislate for the purpose of enforcing coercive measures. Hence, the representatives of a creditor state could, for instance, seize a given percentage of yearly Ottoman revenue by lodging a complaint with the *Düyûn-u Umumiye*, unless the Ottomans fully paid their debt (Gürsoy, 1984, 21). This mechanism, along

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https://doi.org/10.6092/issn.2724-6299/13760

with the persistence of capitulations which effectively prevented Ottoman manufacturers and merchants to compete with their European counterparts and allowed European powers to apply their own laws in Ottoman territory[10] (Ünal Özkorkut, 2004), drew the ire of a new generation of Turkish jurists who studied law in Europe.

One such jurist was a young Mahmut Esat Bozkurt, who condemned the capitulations and European powers' debt collection mechanism in his PhD thesis titled *Du régime des capitulations ottomanes* (1919), arguing that capitulations (including those arising from unequal treaties) were "unilateral concessions wrongly treated as treaties" for the purpose of "creating two distinct categories of norms of international law: One category for 'civilised' nations and an opposite category for 'uncivilised' ones." (Bozkurt, 1940, 1) In view of Bozkurt's later works and his submission in defence of (the Republic of) Turkey in the *Lotus* case (Türkiye Barolar Birliği, 2008, 121), it is possible to surmise that he was also adamant in opposing economic sanctions *in stricto sensu* as well as other forms of interferences with state sovereignty such as denying a state's right to jurisdiction.

Aside from the coercive measures used against the Ottomans to further the privileges stemming from capitulations and unequal treaties, some historians[11] also mention the British-French-Russian joint blockade (1827) against the Ottomans as an equivalent to "coercive measures", even though the aim of the blockading powers was to prevent the Ottomans from (militarily) suppressing the Greek Revolution. Clearly, this is a problematic assumption, as the naval engagement took place in the context of an ongoing armed conflict where the blockading powers had already sided with the Greek revolutionaries. Therefore, the joint blockade of 1827 can also be viewed as

[10] The extraterritorial application (Arıkan, 1995) of the laws of European powers did not only consist of the resolution of commercial disputes between Ottoman subjects and Europeans by "mixed courts" which applied European norms: Indeed, with a judicial reform introduced in 1847, the Sublime Porte also allowed the institution of "mixed criminal courts" which were composed of an equal number of Ottoman judges and European judges (Ünal Özkorkut, 2014).

[11] Among others, Lance Davis and Stanley Engerman (2003, 188).

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an extension of the armed conflict, rather than an isolated attempt to forcefully change Ottoman policy.

Having addressed the Ottoman experience with coercive measures, three key points can be deduced from the general framework of historical coercive measures as observed in the previous passages:

- Effective coercive measures have always required the material hegemony of the sanctioning state. This is crucial in understanding why, in today's world, unilateral coercive measures are a concern for peripheral countries and not for those in the core.
- Even though they became more frequent and "Eurocentric" with modern colonisation and the evolution of capitalism, coercive measures are not strictly related to these phenomena.
- The main difference between earlier forms of economic sanctions and today's unilateral coercive measures is that, in the former case, sanctions were typically backed by the threat of aggression. This was a necessity in most cases since banking systems and industrial sectors were not intertwined, and hegemonic powers could not adopt effective coercive measures without resorting to the use of force prior to the advent of financial capitalism. Furthermore, before ushering in the "Era of Globalisation", international relations were designed according to the characteristics of a multipolar world whereas the international order that was established in the 1990s has allowed a group of countries to *unilaterally* determine the direction of world economy and, of course, international relations.

As the contrast between the past and present becomes more evident as one delves into the 20th century, the next section will observe the qualification of unilateral coercive measures after the adoption of the UN Charter with particular focus on the point of view of peripheral countries and the transition from the "Era of Decolonisation" to the "Era of Globalisation".

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2. Unilateral Coercive Measures After the Formation of the UN

It is well-known that the prohibition of the use of force was an emerging principle of international law even before the drafting of the UN Charter. However, it was not as clear cut as it is currently enshrined in Article 2(4) of the UN's founding text. To give a prominent example: Even though Articles 12 and 13 of the Covenant of the League of Nations provided that Member States would submit any matter of controversy to arbitration, the following provisions did not make any reference to "the use of force". Instead, the drafters preferred the term "act of war" which could be met with, among other things, economic sanctions by all States Parties as per Article 16. However, as history attests, these measures were merely theoretical in the lack of an international body to enforce them. Similarly, the States Parties to the Kellogg-Briand Pact condemned "the recourse to war" and seemingly accepted the view that war should be renounced as "an instrument of national policy" in international relations – only to renege on their agreement soon after. Furthermore, neither text provided a clear definition of two key terms (i.e., "war" and "use of force"), as belligerent states continued to resort to acts of aggression.

It follows that the UN Charter was a solid step in the right direction for a democratic and equitable international order as it distinctly set out the general principle as to the prohibition of the use of force (including exceptions thereof) and the principle of non-intervention *in addition to* introducing an "enforcer" of the norms of international law in the shape of the Security Council. Consequently, it can be surmised that both the eschewal from the use of force in imposing economic sanctions and the creation of a body that can legally adopt coercive measures led to the inception of modern *unilateral* coercive measures – i.e., coercive measures which are taken *without* the consent of the Security Council and typically exclude an overt use of military force.

The progress achieved with the adoption of the UN Charter was thus

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followed by the so-called "Era of Decolonisation", which saw the newly independent states in Africa and the Americas push for further recognition of their economic sovereignty at the General Assembly with the diplomatic aid of socialist states (Hendrich, 2018, 70). As several of these UNGA Resolutions touched on the question of unilateral coercive measures, it is necessary to briefly go over them.

One of the earliest General Assembly resolutions to condemn unilateral coercive measures as a violation of the principle of non-intervention was the 1965 "Declaration on the Inadmissibility of Intervention in the Domestic Affairs and the Protection of their Independence and Sovereignty" (A/RES/2131). Despite its brevity, the Declaration made an important distinction between the use of force and coercive measures, and declared that both forms of intervention were contrary to international law. Furthermore, the drafters made it clear that former colonisers' reliance on coercive measures for the purpose of shaping the social and economic policies of their former colonies could pose a "threat to peace", thereby setting a pattern for later resolutions.

Subsequently, the diplomats and scholars of peripheral countries began to push for an UNGA resolution that would enshrine full economic sovereignty as a principle. This resulted in the adoption of the "Declaration on the Establishment of a New International Economic Order" (A/RES/S-6/3201) at the at the 2229th Plenary Meeting of the UNGA in 1974. Despite being a relatively brief resolution, the Declaration aimed to "close the gap" between the countries in the centre of capital and the periphery of capital, thereby ushering in a more equitable distribution of wealth on a global scale. To that end, the drafters of the Declaration emphasised the "permanent sovereignty of every State over its natural resources and all economic activities" while stressing that the "interdependence" of the constituents of the world community required that humankind exercise the "right to development" in parity and harmony. In that respect, the drafters viewed unilateral coercive measures as a violation of this "inalienable right" and demanded that the

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https://doi.org/10.6092/issn.2724-6299/13760

nations aggrieved by unilateral coercive measures (and neo-colonialism) be assisted by the international community.

Later that year, this revolutionary Declaration paved the way for the more ambitious (and comprehensive) Charter of Economic Rights and Duties of States (A/RES/29/3281). Adopted at the 29th Session of the UNGA, the Charter of Economic Rights and Duties of States contained three maxims that shed light on how unilateral coercive measures should be viewed within the context of public international law. The first of these was befittingly enshrined in Article 1:

> Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or any form of threat whatsoever.

Looking at the wording of the provision through a 21st century lens, one can easily see how it stands in contrast to the more recent developments in international law and politics. As pointed out by De Zayas (A/HRC/39/47/Add.1), one of the main purposes of unilateral coercive measures in today's world is to force peripheral countries to adopt a neo-liberal model. However, back in the 1960's and 1970's, a maxim like the one put forward in Article 1 did not sound utopian, as newly independent states and socialist states held significant influence in the General Assembly (Hendrich, 2018, 57). This was a reflection of the waning of *de iure* Western sovereignty in the periphery of capital, which was brilliantly defined by historian Geoffrey Barraclough in 1967:

> When the twentieth century opened, European power in Asia and Africa stood at its zenith; no nation, it seemed, could withstand the superiority of European arms and commerce. Sixty years later, only the vestiges of European domination remained. […] Never before in the whole of human history had so revolutionary a reversal occurred with such rapidity. (Barraclough, 1967, 153)

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It was therefore inevitable that this "revolutionary reversal" would impact public international law vis-à-vis international politics. It was a time of upheaval against the former colonial masters and the formerly colonised aspired to prevent history from repeating itself. To that end, they sought to eliminate the means through which the colonisers had achieved their dominant status and curb the economic imbalance between the core and the periphery. This determination was particularly prominent in Article 16.1 of the Charter of Economic Rights and Duties of States, which labelled coercive measures as an instrument of, *inter alia*, neo-colonialism and considered them a hindrance to development:

> It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States that practice such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

Thus, it is obvious that the states in favour of the Charter of Economic Rights and Duties of States regarded unilateral coercive measures as a violation of the principle of non-intervention, which called for reparations to the aggrieved state. The drafters further clarified this point in Article 32 of the Charter, which mirrored one of the principles enshrined in the previously adopted UNGA Resolution 2625 of 1970, or the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (A/RES/2625). In point of fact, the latter text established that:

> No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from

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https://doi.org/10.6092/issn.2724-6299/13760

> it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

This crystal-clear statement was then framed in the context of relations between core countries and peripheral countries. In other words, former colonisers' eschewal from resorting to unilateral coercive measures was viewed by the drafters of the Declaration as a precondition for the realisation of peaceful relations among nations. The more crucial aspect of the text, however, was the fact that the principles enshrined therein were described as "basic principles of international law" and that all States should "be guided by these principles in their international conduct and […] develop their mutual relations on the basis of the strict observance of these principles". Consequently, this approach was adopted by the drafters of the aforementioned Charter of Economic Rights and Duties of States, who even envisaged a mechanism that would assess whether these principles had been observed by UN Member States once every five UNGA sessions. Alas, this mechanism did not come to fruition.

Nonetheless, in 1981, the General Assembly further consolidated the link between unilateral coercive measures and peaceful relations among nations in the "Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States". Per its title, the Declaration framed the question of unilateral coercive measures in the context of public international law and asserted:

> The duty of a State, in the conduct of its international relations in the economic, social, technical and trade fields, to refrain from measures which would constitute interference or intervention in the internal or external affairs of another State, thus preventing it from determining freely its political, economic and social development; this includes, inter alia, the duty of a State not to use its external economic assistance programme or adopt any multilateral or unilateral economic reprisal or blockade and to prevent the use of transnational

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> and multinational corporations under its jurisdiction and control as instruments of political pressure or coercion against another State, in violation of the Charter of the United Nations.

This paragraph was then followed by a reference to one of the most common alibis for the adoption of unilateral coercive measures:

> The duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States, of exerting pressure on other States or creating distrust and disorder within and among States or groups of States […]

It would be wrong to assume that such an affirmation was a mere premonition, as it coincided with the foundation of Helsinki Watch with a generous donation by the Ford Foundation (Doder, 1979). Indeed, to this day, the final iteration of Helsinki Watch, i.e., Human Rights Watch opposes a categorical rejection of unilateral coercive measures,[12] arguing that targeted sanctions can be used to force states to comply with their human rights obligations.

Aside from the far-sightedness of the drafters of the Declaration, it is worth noting that the resolution had passed with 120 votes in favour versus 22 votes against, thereby showing yet again that the vast majority of UN Member States viewed unilateral coercive measures as a violation of the principles of non-intervention and state sovereignty, and were aware of how human rights could be weaponised against peripheral countries.

Outside the UN framework, unilateral coercive measures have also been referenced in the founding treaty of the Organisation of American States (OAS). Indeed, as the reader will notice, Article 20 of the Charter of the OAS bore a striking resemblance to Article 32 of the Charter on Economic Rights

[12] One of the co-founders and former Executive Director of Human Rights Watch, Aryeh Neier goes as far as to speak in favour of comprehensive unilateral coercive measures against China and Myanmar while criticising the comprehensive sanctions against Cuba for essentially consolidating the "communist orthodoxy" (Neier, 2021).

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and Duties of States:

> No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Quite noticeably, this provision does contain a historical irony: Even though it may seem reasonable that the continent which conceived the Calvo Doctrine and the Drago Doctrine would recognise the devastating effects of unilateral coercive measures, the two states that have had to sever their ties with the OAS due to political pressure are the ones that have been hit with the most severe economic sanctions by the US.[13]

Be that as it may, in view of the foregoing, one can infer that in the "Era of Decolonisation", the majority of UN Member States categorically viewed unilateral coercive measures as a violation of the norms and principles of public international law. Nonetheless, their revolutionary steps towards a more just division of the world's wealth were deemed to be binding, insofar as they possessed a dubious normative value.[14] Moreover, the destructive impact of *perestroika* policies[15] on the COMECON effectively allowed OECD countries to autonomously determine the direction of the world economy from late-1980's onward, which left peripheral countries with less options in pursuing the right to development. This was followed by what liberal economist John Harold Williamson referred to as the "Washington

[13] Namely Cuba and Venezuela.

[14] It is important to take into account the position that the International Court of Justice (ICJ) adopted in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* in 1996; that is, "the evidence of a rule or emergence of an *opinio juris*" stemming from an UNGA resolution can be determined via an assessment of its content and the number of Member States that voted in favour of the resolution. In other words, even though UNGA resolutions are soft low "by default", they can be deemed binding if they represent the inception of a norm of international law or an *opinio juris* – which is apparently left to the discretion of the International Court of Justice.

[15] While *perestroika*'s failed attempt at "overstretching and overheating" socialist economies is cited by some scholars (Bideleux; Jeffries, 1998, 580) as one of the key reasons as to why the USSR's COMECON reforms failed, one ought to mention that the liberalisation of trade with the European Community per the conditions set by the latter was also significant, in light of the number of former COMECON members that later joined the European Union.

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Consensus" in 1989; that is, a set of pro-capital policies (such as privatisation of public enterprises, deregulation, strict fiscal policy aimed at avoiding large deficits relative to gross national product, market-determined interest rates and liberalisation of foreign direct investment) promoted by Washington-based international organisations like the International Monetary Fund and the World Bank Group in treating the economies of peripheral countries (Williamson, 1990, 7). To make conditions even more favourable for core countries, the multinational trade negotiations held in Uruguay between 1986 and 1993 with the goal of pushing forward a neo-liberal globalisation and founding the World Trade Organisation resulted in the TRIPS Agreement, which imposed the Western intellectual property norms on the rest of the world thereby causing, among other things, higher prices for medicine in impoverished countries dealing with health crises. Notably, this led to a dispute between left-leaning governments of peripheral countries and the governments of core countries, which resulted in the latter resorting to unilateral coercive measures in order to force the former to abide by the new status quo (Bombach, 2001, 274).

In short, the new international economic order that emerged from the defeat of "real socialism"[16] in Eastern Europe made peripheral countries more vulnerable to unilateral coercive measures as not abiding by the new norms dictated by the victorious capitalist powers meant isolation and poverty. This was especially true for those unilateral coercive measures that effectively prevented third parties from engaging in commerce with sanctioned states. Thus, some scholars dubbed the 1990's as "the era of sanctions" (Douhan, 2017, 67) as not only did such measures become more frequent, but they also became more variable with the introduction of different forms of targeted sanctions in addition to the "comprehensive sanctions" already in use. Indeed, the advocates of the former argued that such sanctions were not harmful to the general populace (like comprehensive sanctions) as they allegedly

[16] For the purpose of this article, "real socialism" refers to "existing socialism" in its earlier phases.

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targeted powerful individuals who were accused of human rights violations.[17]

Despite this predicament, the 1990's and early 2000's also saw the evolution of human rights arguments against unilateral coercive measures. In this connection, the most important text was arguably the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993. The approach of the drafters of the Declaration to the question of unilateral coercive measures was largely centred around the exercise of two essential rights, namely the right to food and the right to healthcare:

> The World Conference on Human Rights calls upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services. The World Conference on Human Rights affirms that food should not be used as a tool for political pressure. (para 31)

The significance of the views of the drafters was two-fold: On the one hand, it signified a departure from the categorical approach expressed in the ambitious UNGA Resolutions of the 1970's in that it was implied that there could be unilateral coercive measures compatible with the norms of international law. Consequently, the matter was not treated strictly as a question of non-intervention and sovereignty. On the other hand, it was underscored that unilateral coercive measures can constitute a violation of the right to food and the right to healthcare, which are essential for the subsistence of every human being. In fact, as the reader will observe in the following pages, this is the basis on which modern scholars of international law built

[17] See the "Guidelines on implementation and evaluation of restrictive measures" of the Council of the European Union, paras. 13–24.

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their argument as to how unilateral coercive measures may constitute crimes against humanity.

A more contested text adopted in the same decade was the UNGA Resolution 51/103 of 1996 "on unilateral coercive measures and human rights." (A/RES/51/103) In essence, the Resolution repeated the principles that had been established in the 1970's in light of the newer developments in the field of international human rights law and stressed the link between the exercise of peoples' right to self-determination and the right to development in peripheral countries. Nonetheless, despite the positive outcome of the voting at the General Assembly, the Resolution was far from unanimous with 47 Member States voting against it (as opposed to 53 Member States voting in favour). On the other hand, the drafters of the Resolution did succeed in conferring with the Commissioner on Human Rights regarding the compatibility of unilateral coercive measures with international law, and the points they raised were later picked up by the Human Rights Council.

Finally, it is necessary to recall that, since 1992, the General Assembly has repeatedly condemned the blockade imposed on Cuba by the United States. Even though the subject matter of related resolutions specifically concerns the unilateral coercive measures adopted against the socialist island nation, the fact that the last resolution (dated 23 June 2021, A/75/L.97) passed with 184 votes in favour hint at the emergence of an *opinio iuris* regarding the illegality of comprehensive unilateral coercive measures like the *bloqueo*. As will be observed in the following sections, this trend is in line with the developments in the field of international human rights law.

Before delving further into the debate within the framework of the UN human rights mechanism and modern legal doctrine, it is important to emphasise the main points that can be drawn from the evolution of unilateral coercive measures in the 20th century:

- The adoption of the UN Charter was an important step towards preventing hegemonic powers from resorting to the use of force in enforcing their economic sanctions.

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https://doi.org/10.6092/issn.2724-6299/13760

- The UNGA Resolutions adopted during the "Era of Decolonisation" drew attention to the apparent contradiction between unilateral coercive measures and the norms of international law. The focal point, in that regard, was centred around the notion of sovereign rights.
- The defeat of "real socialism" in Eastern Europe and the advent of neo-liberal globalisation made unilateral coercive measures a more frequently applied policy by the governments of core countries. Correlatively, the unilateral coercive measures implemented from that point onwards varied in scope and nature.
- The new opposition to unilateral coercive measures came from human rights scholars, who argued that such measures hindered the enjoyment of vital economic and social rights.

As can be inferred from this summary of the history of unilateral coercive measures following the foundation of the UN, the lack of a universally accepted definition and the "geopolitical" conflict as to the legality of unilateral coercive measures left human rights scholars with a big gap to fill. Therefore, it is essential to observe the debate on unilateral coercive measures within the UN human rights mechanism and the works of the two Special Rapporteurs on the negative impact of unilateral coercive measures on the enjoyment of human rights.

3. Unilateral Coercive Measures and the UN Human Rights Mechanism

Prior to the introduction of the UN Human Rights Council and the shaping of the new UN human rights mechanism, unilateral coercive measures were referenced in several resolutions of the Human Rights Commission. However, these resolutions only briefly touched on the contradictions between unilateral coercive measures and international law and refrained from condemning them *tout court*. Nonetheless, it is worth noting that the two earliest resolutions (E/CN.4/RES/1994/47; E/CN.4/RES/1995/45) of the

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https://doi.org/10.6092/issn.2724-6299/13760

Human Rights Commission on the topic of unilateral coercive measures (adopted in 1994 and 1995) stated that the Commission denounced:

> […] the fact that some countries using their predominant position in the world economy continue to intensify the adoption of unilateral coercive measures against developing countries which are in clear contradiction with international law, such as trade restrictions, blockades, embargoes, freezing of assets, with the purpose of preventing those countries from exercising their right fully to determine their political, economic or social system.

The first resolutions within the framework of the Human Rights Council also noted this trend among the representatives of core countries. In point of fact, in the first Resolution of the Council regarding the question of unilateral coercive measures (i.e., Resolution 6/7), the Council condemned "the continued unilateral application and enforcement by certain powers of such measures as tools of political or economic pressure against any country, particularly against developing countries." Much like the resolutions of the Human Rights Commission, this early resolution of the Human Rights Council framed this "abuse of power" as an infringement of the right to development. This argument was later picked up in the more detailed Resolution on "the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social Rights, Including the Right to Development" (A/HRC/10/24), in which the Council stressed that unilateral coercive measures "ran counter to the principles of free trade and hampered the development of developing countries". Nonetheless, the Human Rights Council did not view unilateral coercive measures as a "mere" violation of public international law with human rights ramifications, but also "stressed" in every early resolution that unilateral coercive measures were also contrary to international humanitarian law – an idea which was supported by the Non-Aligned Movement.

As a matter of fact, despite adopting a more "moderate" approach

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https://doi.org/10.6092/issn.2724-6299/13760

compared to the UNGA resolutions hitherto observed, the Human Rights Council always took into account the latest declarations of the Non-Aligned Movement in formulating its resolutions. This was, by all means, an appreciably constructive approach by the Human Rights Council as the Non-Aligned Movement has been, a decidedly anti-colonial association of peripheral countries since its inception. Indeed, the purpose of the Movement (as set out by former Cuban President Fidel Castro in the Havana Declaration of 1979) is to guarantee, *inter alia*, the "national independence, sovereignty, territorial integrity and security" of Member States in face of "imperialism, colonialism, neo-colonialism, racism, and all forms of foreign aggression, occupation, domination, interference or hegemony". Thus, as further demonstrated in the following passages, the consistent efforts of the Non-Aligned Movement have been one of the key reasons why unilateral coercive measures have been on the agenda of the human rights community, which has also benefitted from the contributions of Non-Aligned countries.

Case in point, one such contribution was Resolution 15/24 (A/HRC/RES/15/24), proposed by Egyptian diplomats in 2010 on behalf of the Non-Aligned Movement. While the Resolution maintained the moderate tone of its predecessors, it was persistent in upholding the principles enshrined in some of the UNGA resolutions assessed in this article, such as the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States" and the "Charter of Economic Rights and Duties of States". Furthermore, Egyptian diplomats emphasised the impact of the implementation of unilateral coercive measures in the digital space, as they called on all nations to refrain from extending their sanctions to the "information society". Finally, the Resolution repeated the points that previously been raised in the "Resolution on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social Rights, Including the Right to Development" and dwelt on how unilateral coercive measures hindered the exercise of the right to development instead of providing a comprehensive legal definition of such measures.

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https://doi.org/10.6092/issn.2724-6299/13760

These initial resolutions were then followed by the thematic study of the former High Commissioner for Human Rights, Dr. Navi Pillay (A/HRC/19/33). Submitted in 2012, the study did not aim to provide a conclusive and far-reaching definition of unilateral coercive measures within the framework of public international law. Instead, the former High Commissioner concentrated on the impact of different kinds of unilateral coercive measures on the enjoyment of human rights. Briefly put, the report had three key shortcomings: i) it viewed unilateral coercive measures as a solely economic phenomenon; ii) targeted sanctions against individuals were assessed exclusively on the basis of civil rights and; iii) due to the limited scope of the study, the legality of unilateral coercive measures was addressed in a vague manner. However, in this author's view, Dr. Pillay's references to civil rights in the context of individual sanctions were quite accurate, in that she unerringly emphasised that coercive measures targeting individuals could potentially infringe the targeted individuals' right to a fair trial, insofar as sanctioned individuals would have "inadequate possibilities to challenge" the charges against them.

Two years after the thematic study of the former High Commissioner of Human Rights, the Human Rights Council took the first big step in creating the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights. The step in question was Resolution no. 27/21 (A/HRC/RES/27/21) and, much like the thematic study of Dr. Pillay, the Resolution referenced the position of the of the Non-Aligned Movement in assessing the nature of unilateral coercive measures. Particularly, in the preamble of the Resolution, the Human Rights Council "recalled" that the Non-Aligned Countries had decided:

> […] to refrain from recognizing, adopting or implementing extraterritorial or unilateral coercive measures or laws, including unilateral economic sanctions, other intimidating measures and arbitrary travel restrictions, that seek to exert pressure on non-aligned countries – threatening their sovereignty and independence,

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https://doi.org/10.6092/issn.2724-6299/13760

> and their freedom of trade and investment – and to prevent them from exercising their right to decide, by their own free will, their own political, economic and social systems, where such measures or laws constitute flagrant violations of the Charter, international law, the multilateral trading system as well as the norms and principles governing friendly relations among States, and in this regard oppose and condemn these measures or laws and their continued application […]

On its face, one can surmise from this statement that the position of the Non-Aligned Movement moved closer to the anti-colonial trend of the 1960's and 1970's as, once again, the representatives of peripheral countries advocated a categorical approach to unilateral coercive measures. In other words, they reiterated the bold view that unilateral coercive measures would categorically constitute a violation of the norms of international law. For its part, the Human Rights Council did take heed of peripheral theses; however, ultimately it emulated the views expressed in the Vienna Declaration and Programme of Action. Case in point, in paragraph 1 of the Resolution, the Council implied that there could be unilateral coercive measures compatible with the norms of international law. Conversely, in paragraph 2, it was stressed that *comprehensive* unilateral coercive measures would *ipso facto* violate state sovereignty and the principle of non-intervention. Furthermore, the Council argued that those unilateral coercive measures which "disproportionately" affect "the poor and the most vulnerable classes" and deprive these vulnerable individuals of "essential goods" like food and medicine would, in any case, constitute an infringement of absolute rights. Indeed, as far as food and medicine were concerned, the Council categorically stated:

> […] essential goods, such as food and medicines, should not be used as tools for political coercion and that under no circumstances should people be deprived of their own means of subsistence and

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development […]

Nevertheless, one burning question persisted: "What kind of unilateral coercive measures would *not* contradict the norms of international law?" One can see that the drafters of the Resolution sought the answer in the category of targeted sanctions, while comprehensive unilateral coercive measures were, in any case, considered illegal. However, due to the diplomatic essence of decision making in the UN human rights mechanism, one ought to take the global political divide into account. In fact, on the one hand, there is the consistent position of the United States, which is based on the premise that the adoption of unilateral coercive measures is a matter of sovereign rights (Hofer, 2017, 26). This position is tacitly approved by the European Union[18] – albeit with the recognition of an exception, in that the supranational organisation does not deny the fact that the extraterritorial element of unilateral coercive measures (or "restrictive measures" in EU terminology) can be incompatible with international law. One can argue, in that regard, that the European Union struggles to "practice what it preaches" but, in spite of this, there is a certain degree of theoretical compatibility between the European position and the "Third World" position espoused by (among others) the Non-Aligned Movement and Group 77. Indeed, as previously observed, the representatives of peripheral countries have maintained their opposition to unilateral coercive measures on diverse premises ranging from arguments rooted in public international law to those stemming from international human rights law (or both). Consequently, the human rights mechanism has seemingly tried to appease these three political positions while trying to come up with a definition of unilateral coercive measures.

Having previously worked under the roof of the UN on the enjoyment of

[18] One should recall that the European Union does formally comply with its "no comprehensive unilateral coercive measures" policy. Nonetheless, the EU's policy on not complying with other states' comprehensive unilateral coercive measures is "underapplied" as European entities seldom answer for complying with US sanctions, even though the EU does have a mechanism (as per Regulation 2271/96 of the Council of the European Union) meant to provide an effective remedy to European companies affected by unilateral coercive sanctions.

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economic and social rights in peripheral countries, the former Special Rapporteur on the negative impact of unilateral coercive measures, Dr. Idriss Jazairy, was not immune to such political concerns. Moreover, due to the ongoing debate on the normative value of UNGA and Human Rights Council resolutions, he was careful in formulating his arguments against such a widespread policy. Nonetheless, five key features of his reports have greatly contributed to the study of unilateral coercive measures from a "Third World" perspective.

First and foremost, it ought to be mentioned that according to Jazairy, sanctioning states could be held responsible for the violation of the principles enshrined in the core international human rights instruments of the UN regardless of whether the targeted country was under their effective jurisdiction. The crux of this theory had previously been defined by the likes of Olivier De Schutter (2008), however Jazairy applied this principle in the specific case of unilateral coercive measures. In that respect, the former Special Rapporteur urged UN treaty bodies to adopt a more pro-active stance, since widely ratified human rights instruments would not be bound by the jurisdictional obstacles of national courts.

Second, Jazairy was able to rigorously address the concept of "coercion" as defined under Article 18 of the International Law Commission's (hereinafter ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) and apply it in the context of unilateral coercive measures. In that respect, Jazairy noted that the ILC's definition of "coercion"[19] did not exclude "serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached". Instead of merely repeating this theory, however, Jazairy opted to argue that there should be a clearer affirmation of unilateral

[19] "A State which coerces another State to commit an act is internationally responsible for that act if:
(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
(b) the coercing State does so with knowledge of the circumstances of the act."

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coercive measures as extraterritorial sanctions which consist of "an unlawful assertion of jurisdiction by the targeting State, […] contrary to international law". On this premise, Jazairy forged a link between extraterritorial sanctions and the human rights obligations of states, arguing that targeted states as well as third states which have commercial and financial relations with targeted states may not be able to fulfil their obligations stemming from human rights treaties due to the impact of extraterritorial sanctions. Furthermore, with what could be described as an accurate foresight, Jazairy suggested that the International Criminal Court could also play a role to that end (A/72/370) which, as demonstrated in the following pages, can indeed be the case in the near future due to the diligence of Venezuelan diplomacy.

Third, Jazairy duly treated the question as to whether comprehensive unilateral coercive measures could be deemed a violation of customary international law. While his emphasis on this question was already prominent in his earlier reports, from 2017 onward he began to (openly) infer from the hitherto observed resolutions of the UNGA that there is a growing consensus on the illegality of unilateral coercive measures, which could hint at an emerging norm of customary international law. This proposition was, of course, criticised by scholars who espoused more "positivist" views on the concept of "coercion" (Hofer, 2017, 1), although it did touch on a crucial matter of fact: As the reader will recall, every year more and more UN Member States vote in favour of the resolution condemning the US *bloqueo* against Cuba and in 2021, only two Member States (namely the US and Israel) voted against and three Member States abstained. This shows that, at the very least, there is in fact a quasi-universal consensus on the contradiction between comprehensive sanctions and the norms of international law, which may eventually give rise to a norm of customary international law per the formation of an *opinio juris*. (A/HRC/30/45)

Jazairy should also be commended for pointing out that the line between targeted sanctions and comprehensive ones can be blurry at times. One example he provided in that respect was the series of targeted sanctions

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adopted against the Syrian Arab Republic in the context of an oil embargo which not only had an effect similar to that of comprehensive sanctions but also helped "boost the capabilities of extremist Jihadist forces" when the European Union decided to lift the sanctions with regard to those areas controlled by Islamist rebels (A/HRC/42/46).

Last but not least, one ought to mention Jazairy's observations as to how the financial and commercial sanctions applied by potent states can also impact third states and effectively annul the humanitarian exemption. In that respect, Jazairy cites the so-called "undue compliance" of firms based in the European Union in abiding by the comprehensive sanctions imposed by the United States against Iran which, according to Jazairy, had not fulfilled their obligations in delivering humanitarian goods to Iran out of fear stemming from US sanctions (A/HRC/42/46).

These key points should also be read in light of their direct influence on the resolutions of the Human Rights Council. For instance, Jazairy's insistence on an effective remedy for individuals whose human rights have been violated as a result of unilateral coercive measures can also be seen in Resolution 34/13 (A/HRC/34/L.14) of the Council which called for the institution of an independent body within the framework of the UN human rights mechanism dedicated to the claims of the victims of unilateral coercive measures. It can be further observed that, since the creation of the mandate of the Special Rapporteur, the Human Rights Council has repeatedly called on States to take administrative or legislative measures to counteract the adoption and application of unilateral coercive measures.

Up until this point, unilateral coercive measures had been discussed in the context of recurrent violations of human rights related to either basic needs or civil liberties: The right to food, the right to healthcare, freedom to receive and impart information (vis-à-vis access to the Internet) and the right to a fair trial to name a few. However, it is safe to state that the COVID-19 pandemic has exacerbated these pre-existing human rights issues connected to unilateral coercive measures, especially in the field of economic and social rights. This

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global calamity has coincided with the mandate of the current Special Rapporteur, Dr. Alena Douhan, whose works duly explore both the definition of unilateral coercive measures and the human rights issues surrounding the praxis of their adoption to the detriment of peripheral countries.

4. Special Rapporteur Douhan and the COVID-19 Pandemic

Having been appointed by the Human Rights Council in March 2020, Dr. Douhan dedicated her first public statement as Special Rapporteur to the humanitarian crisis generated by unilateral coercive measures with the advent of the COVID-19 pandemic. More specifically, she called on the international community to "to take immediate measures to lift, or at least suspend, all sanctions until our common threat is eliminated" and demanded that "all Governments that use sanctions as foreign-relation tools […] immediately withdraw measures aimed at establishing trade barriers, and ban tariffs, quotas, non-tariff measures, including those which prevent financing the purchase of medicine, medical equipment, food, other essential goods". She later complemented this statement with a human rights guidance in which she repeated her previous call and stressed that unilateral sanctions should at least be reduced to "allow sanctioned states to ensure the effective protection of their population from COVID-19, to repair their economy and to guarantee the well-being of their people in the aftermath of the pandemic." (Douhan, 2021)

It is important take into account that, in Dr. Douhan's view, the illegality of comprehensive and sectoral unilateral coercive measures in the context of public international law has already been established as per the resolutions of the Human Rights Council and the General Assembly. Therefore, she infers that the human rights issues caused by unilateral coercive measures only aggravate the violation of international law. This approach is reminiscent of Dr. Jazairy's views, given the role attributed to "sources of soft law" like Human Rights Council or General Assembly resolutions. Nonetheless, from

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a theoretical standpoint, Dr. Douhan believes that the question lies in the definition of unilateral coercive measures rather than their illegality, as "customary international law provides for the possibility of unfriendly acts that do not violate international law" which usually take the shape of proportionate countermeasures adopted as a retaliation against internationally wrongful acts and treaty obligations. In addition, Dr. Douhan takes heed of the increasing variety in types of unilateral coercive measures, especially as far as targeted sanctions are concerned: In fact, she attempts to distinguish sanctions against individuals (which call into question the right to a fair trial) and sectoral sanctions (such as the ones applied against Venezuela by the US or against Russia by the European Union) as she argues that the latter "reportedly develop in such a way as to lead to consequences […] that are analogous to the consequences of comprehensive economic sanctions." (Douhan, 2021) Dr. Douhan also notes the relevance and growing importance of "cybersanctions": Indeed, due to obstacles caused by unilateral coercive measures, public officials and common netizens from Cuba, the Democratic People's Republic of Korea, Iran and the Syrian Arab Republic have been deprived of the opportunity to purchase essential goods via e-commerce and to conduct online educational activities due to lack of access to platforms like Zoom – given the fact that such platforms are either directly prescribed in the service agreements or prescribed by US legislation.

In short, one can infer that the research that Dr. Douhan conducted in her capacity as the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights had two aims: Defining unilateral coercive measures (theoretical) and assessing their ramifications for the enjoyment of human rights in a pandemic-ridden world (practical). It is in this light that her most recent report (dated 8 July 2021) should be assessed.

In prima facie, compared to the reports of Dr. Jazairy, Dr. Douhan's reports focus more on "overcompliance" and have a novel approach in assessing "cybersanctions". With regard to the former, Dr. Douhan views

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overcompliance as a direct result of the extraterritorial element of unilateral coercive measures (as evidenced by Oxfam International) and notes that the companies in the financial sector are the ones that are most prone to "overcomply" with comprehensive and sectoral US sanctions. This is largely due to the interconnected nature of the banking sector and the fact that banks which provide international financial services do business with the US. It follows that their activities also imply compliance with US law and therefore such companies have the tendency not to take risks with sanctioned countries – even when the services in question do not involve the US. In practice, Dr. Douhan observed that humanitarian organisations have also had their bank accounts frozen due to their activities in countries sanctioned by the US, and that some organisations could not pay the salaries of their employees in the field (A/HRC/48/59).

As far as "cybersanctions" are concerned, Dr. Douhan builds on the arguments that she had laid out in her preliminary "roadmap" report (A/HRC/45/7): She points out that the lack of access to video conference applications (due to US sanctions) did not only deprive students and other netizens of an effective means of communication during the pandemic, it also (initially) prevented the diplomats and other public officials of sanctioned countries from attending UN sessions. Furthermore, in the case of the Syrian Arab Republic, US and EU sanctions prevented the government in Damascus from importing software for CT scanners and ventilators (i.e., essential means for the treatment of COVID-19) which were only produced in the US at the time when the report was deposited (A/HRC/48/59).

Finally, with regard to the theoretical question as to the definition of unilateral coercive measures, Dr. Douhan affirms that the sanctioning states and supranational organisations use different names to refer to unilateral coercive measures and tend to frame them as a means of enhancing (or enforcing) democracy or human rights in the sanctioned country. Behind this alibi, however, lies one of the "five purposes of sanctions" set out by Francesco Giumelli (Giumelli, 2016, 40) "compliance, subversion,

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deterrence, international symbolism, […] domestic symbolism". Nonetheless, despite the apparent ambiguity stemming from various denominations and practices, Dr. Douhan succeeds in providing a list of the characteristics of unilateral coercive measures based on the submissions of UN Member States. These characteristics include:

- Involving activity or the threat of activity;
- Being adopted by a single state, a group of states, a supranational organisation or an international organisation (excluding the United Nations);
- Being taken by hegemonic powers;
- Being taken without the authorisation of the Security Council;
- Being aimed at changing a policy of the targeted state, or to impose a regime change;
- Being allegedly motivated by human rights concerns or aimed at eliminating perceived threats to peace;
- Exerting pressure or coercion or targets (which may be economic, political, financial or judicial), freezing the assets of central banks or people of political importance;
- Making use of the financial, trade, technological and other advantages of the sanctioning party;
- Satisfying the interests of the sanctioning party;
- Failing to respect the right to self-determination of the target country, while limiting its economic capacity and violating the human rights of its inhabitants;
- Violating the sanctioning party's international obligations towards other states and international organizations;
- Falling outside the realm of permissible "unfriendly" acts under customary international law and countermeasures as part of State responsibility;
- Interfering in other states' internal and external affairs, and infringing their inalienable rights to choose and develop political, economic and cultural systems of their own will, thus violating the principles of sovereign equality and non-interference;

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- Violating the principles of international law;
- Being aimed at obtaining the subordination of the exercise of a state's sovereign rights.

Considering the foregoing, the value of Dr. Douhan's contribution to literature cannot be overstated. In the view of the author of this article, this is the closest any scholar has got to providing a precise and all-encompassing definition of unilateral coercive measures, as this report fills in most of the gaps left by previous scholars. On a practical level, however, the report can be viewed as a missed opportunity, in that the negative impact of the *bloqueo* on the development of Cuban COVID-19 vaccines and the aggravation of the Venezuelan financial crisis in midst of the pandemic due to US sanctions could have been emphasised more thoroughly. Indeed, it would be naïve to assume that US governments which have continuously applied unilateral coercive measures with respect to (*inter alia*) Cuba and Venezuela were not aware of the human rights ramifications of their policies, especially as far as the right to food and the right to healthcare are concerned. It is therefore auspicious that recent developments in the field of international criminal law and related legal doctrine shed further light on this aspect of unilateral coercive measures.

5. Venezuela's Referral to the International Criminal Court and the Views of De Zayas and Schabas

On 13 February 2020, the Government of the Bolivarian Republic of Venezuela submitted a referral to the Office of the Prosecutor of the International Criminal Court (hereinafter "ICC") requesting an investigation on the impact of unilateral coercive measures adopted by the United States officials against Venezuela and alleging that the measures in question constitute a crime against humanity. On 17 February 2020, the Prosecutor released a statement confirming that she had received the referral and that she would be initiating preliminary examinations on the questions raised in the

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https://doi.org/10.6092/issn.2724-6299/13760

referral.

The referral itself follows a simple yet well-constructed logical nexus. First, it is established that the unilateral coercive measures adopted by the United States officials against Venezuela have greatly reduced the Latin American country's income in addition to greatly limiting its access to diesel fuel (which effectively disabled backup generators amid a massive electric shortage), hampering its ability to raise money and purchase essential goods (by blocking Venezuela's access to financial markets) and preventing other nations (such as India) from purchasing oil from Venezuela. The financial and economic impact of the unilateral economic sanctions is then connected to the human rights ramifications: In this context, it is demonstrated that the financial and economic impact of US sanctions directly caused the increase in the maternal mortality rate and the mortality rate of children, the drastic decrease in the volume of water per inhabitant as well as the reliance of the undernourishment prevalence index on imported food. This scheme is ultimately linked to the Rome Statute on the grounds that US sanctions are "*intended* (sic) to have impacts upon individuals and groups (i.e., civilians) within Venezuela, and thereby *coerce* political changes (sic) in the country." From a normative standpoint, Venezuela argues that this violation by the United States constitutes "a widespread or systematic attack against a civilian population" as per Article 7 of the Rome Statute, in that "unilateral coercive measures constitute a form of warfare, albeit one that does not involve resort (sic) to arms" and that, under international criminal law, an "attack" may consist of "inflicting conditions of life calculated to bring about the destruction of a part of the population" (ICC-01/20-4-AnxI).

In formulating their arguments, one crucial point of reference for Venezuelan jurists was Professor Alfred Maurice De Zayas. As the former UN Independent Expert "for the promotion of a democratic and equitable international order", Professor De Zayas had previously visited Venezuela during the right-wing protests against the government of Nicolás Maduro in 2018. Aside from acting as a mediator (alongside former Spanish Prime

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Minister José Luis Rodríguez Zapatero) between the rightists and the Venezuelan government, Professor De Zayas also conducted field research regarding the impact of US sanctions and the foreign policy of the Trump administration on the crisis in the Latin American country. In his report regarding the visit, Professor De Zayas referred to "non-conventional economic wars against Chile, Cuba, Nicaragua, the Syrian Arab Republic and the Bolivarian Republic of Venezuela" aimed at "making their economies fall, facilitating regime change and imposing a neo-liberal economic model" (A/HRC/39/47/Add.1). On a more general note, De Zayas argued:

> Modern-day economic sanctions and blockades are comparable with medieval sieges of towns with the intention of forcing them to surrender. Twenty-first century sanctions attempt to bring not just a town, but sovereign countries to their knees. A difference, perhaps, is that twenty-first century sanctions are accompanied by the manipulation of public opinion through "fake news", aggressive public relations and a pseudo-human rights rhetoric so as to give the impression that a human rights "end" justifies the criminal means. There is not only a horizontal juridical world order governed by the Charter of the United Nations and principles of sovereign equality, but also a vertical world order reflecting the hierarchy of a geopolitical system that links dominant States with the rest of the world according to military and economic power. It is the latter, geopolitical system that generates geopolitical crimes, hitherto in total impunity. (A/HRC/39/47/Add.1)

Thus, despite not using the terminology of international criminal law, Professor De Zayas approached the question from a "natural law" perspective, referring to the de facto inequality among states which is exploited by the stronger few as they implement devastating measures which drive the civilians of peripheral countries to desperation, so that the weaker majority would be forced to comply with the unequal status quo in international relations. In other words, even though Professor De Zayas had

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https://doi.org/10.6092/issn.2724-6299/13760

made an important contribution in terms of establishing the fact that comprehensive and sectoral sanctions *ipso facto* violate the norms of public international law and international human rights law, there still was a visible gap in literature with regard to the link between unilateral coercive measures and international criminal law. Nevertheless, this gap was eventually filled in by an expert in the field of international criminal law, Professor William Schabas, in the speech he made at the International Seminar on Unilateral Coercive Measures held in Vienna on 27 June 2019.

Indeed, in his discourse, Professor Schabas duly emphasised that "sanctions resulting in starvation and disease might amount to crimes against humanity falling under the headings of murder, persecution and other inhumane acts" and that "although the Rome Statute declares that the crimes within the jurisdiction of the Court are to be interpreted strictly, in practice judges have given the definitions of crimes, including that of crimes against humanity, a broad and purposive construction" (Schabas, 2019, 51). In this connection, Schabas referred to former Special Rapporteur Idriss Jazairy's statement on Venezuela, in which Dr. Jazairy had stressed that US sanctions against Venezuela could lead to starvation and medical shortages (Jazairy, 2019). Therefore, despite not stating it in clear terms, Schabas inferred that US sanctions against Venezuela could be considered a crime against humanity under the Rome Statute.

Admittedly, in light of the foregoing, one may not be able to definitively state that there is a consensus on whether unilateral coercive measures constitute crimes against humanity. In that regard, the decisions of the Prosecutor and Pre-Trial Chamber of the ICC will clearly play a large role. Furthermore, if the Prosecutor and the Pre-Trial Chamber were to act on this referral by Venezuela, two questions would have to be answered: Which US officials can be charged with such a crime against humanity and, from a practical point of view, will the US (which is not a party to the Rome Statute) ever allow the Prosecutor to run an investigation against US citizens in US territory? The answer to the second question seems quite evident from a

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political point of view but that should not *ipso facto* preclude the Prosecutor and the Pre-Trial Chamber from addressing the first question. In that respect, it must be pointed out that, despite the strong points raised in the referral, Venezuelan officials did not take the opportunity to accuse specific US officials – which makes the Prosecutor's job more difficult. It may therefore be up to leading scholars like De Zayas and Schabas to address the particular question concerning the criminal liability of individuals for the implementation of unilateral coercive measures, especially since the matter has largely been omitted in legal doctrine.

In this author's point of view, the Prosecutor and the Pre-Trial Chamber would have to reach a compromise even if they were to accept the view that the unilateral coercive measures applied against Venezuela constitute crimes against humanity, as seeking to charge every component of the Trump administration (and the successive Biden administration) would be an exercise in futility. However, the mere recognition of unilateral coercive measures applied against Venezuela as a crime against humanity would be ground-breaking and would further strengthen the case for state responsibility even if the ICC were ultimately to fail in bringing US officials to justice.

6. Concluding Remarks

Over the course of centuries, the practice and theory surrounding unilateral coercive measures have progressively evolved from unfettered economic sanctions backed by the use of force to a quasi-consensus on the illegality of comprehensive and sectoral sanctions on the basis of their conflict with the principle of non-intervention and state sovereignty. The historical milestones of this evolution were the adoption of the UN Charter, the subsequent period of decolonisation and the treatment of unilateral coercive measures within the framework of international human rights law – especially after the establishment of the mandate of the Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights.

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In fact, as observed in this article, even the sanctions adopted against individuals have been criticised at times by human rights scholars working under the roof of the UN, on the grounds that such measures would infringe sanctioned individuals' right to a fair trial.

However, one has to keep in mind that the human rights aspect of the debate on unilateral coercive measures largely relates to economic and social rights such as the right to food and the right to healthcare. This is also the basis on which legal scholars (and the Venezuelan Government) have argued that unilateral coercive measures can be defined as crimes against humanity, as hegemonic powers knowingly deprive the citizens of peripheral countries of their means of subsistence so that their governments would comply with the international order designed by core countries. On the other hand, notwithstanding this recent inclination in legal doctrine, it is still not possible to infer that unilateral coercive measures categorically constitute crimes against humanity – which nevertheless does not mean that they will never be regarded as such. After all, it was only a century ago that colonial powers could resort to force without any legal repercussions. Moreover, the contraction of the world economy, the looming issue of the scarcity of resources, the COVID-19 pandemic and the ever-growing income gap between core countries and peripheral countries will inevitably lead legal scholars to further scrutinise the impact of unilateral coercive measures and define them accordingly.

In sum, the definition of unilateral coercive measures under international law continues to evolve and it appears that every step leads to a categorical prohibition of sectoral and comprehensive unilateral coercive measures. States should therefore refrain from resorting to a clear violation of international law if we are to achieve a rules-based international order in which the views and decisions of human rights bodies can bring about concrete change. This is the very least that must be demanded, for as long as there is substantial inequality among nations, the strong will continue to try to coerce the weak and, in the end, the humanitarian burden will fall on the

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shoulders of the impoverished majority.

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