LUDOVIKA
UNIVERSITY PRESS

ACTA HUMANA

HUMAN RIGHTS PUBLICATION

VOLUME XII (2024)
ISSUE 2

ISSN 0866-6628 (print)


ACTA
HUMANA
HUMAN RIGHTS PUBLICATION

IMPRESSUM

ACTA HUMANA • Human Rights Publication
The Ludovika University of Public Service's peer-reviewed,
human rights journal

The publication of this edition was carried out with the cooperation of Balázs Vizi.

Copy editor: Ágnes Resofszki

Published quarterly

Published by the Ludovika University of Public Service | Ludovika University Press
Address: H-1083 Budapest, 2 Ludovika tér
Responsible for publishing: Gergely Deli, Rector

Cover picture: depositphotos.com

ISSN 0866-6628

ACTA HUMANA
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Volume XII
Issue 2 (2024)

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ACTA HUMANA • 2 (2024) 5–20. • DOI: 10.32566/ah.2024.2.1

Sahrawi Women and the Liberation Struggle: Agency and Resistance in a Minority Context

LUCREZIA GIORDANO[1]

This paper aims to explore Sahrawi women's experiences of maternity within the Sahrawi liberation struggle, framing it as both an individual and a collective act of resistance against the occupation of Western Sahara. Rooted in the pronatalist politics of the Sahrawi liberation front's (Polisario), it investigates how Sahrawi women approach biological reproduction as part of a minority group. Choices of biological reproduction among Sahrawis are inscribed within a history of occupation and refuge that, together with colonialism and nationalism, also shape Sahrawi women's agency in navigating the socio-political dimensions of reproduction. This paper critically engages with an increasing number of humanitarian interventions in reproductive health, exploring the balance between addressing health concerns and the potential imposition of Western perspectives on biological reproduction. Empirical evidence highlights Sahrawi women's adaptive strategies within in response to changing realities, emphasising the intricate interplay between reproductive autonomy, collective resistance, and identity.

Keywords: nation, reproduction, agency, resistance, reproductive health

Introduction

In the Sahrawi's struggle for liberation, independence, and recognition, women are acknowledged as crucial actors – at least on paper. Praised by the international community for their role in setting up and maintaining the refugee camps in Tindouf, Algeria, while men were fighting in the war against the Moroccan occupation of Western Sahara, Sahrawi women embodied the essence of the anti-colonialist struggle. The role of women in the resistance against the occupants is one of the pillars of the political agenda of the Sahrawi liberation front – the Popular Front for the Liberation of Saguia el-Hamra and Río de Oro (commonly known as Polisario Front or POLISARIO), which places gender equality at its core, positioning it in opposition to perceived mistreatment of women in Morocco and other Arab countries.[2] Patriarchal

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2 Allan 2014: 704–708.

oppression is not included in the POLISARIO's discourse on gender equality: the only recognised oppression is colonialism, and women and men are urged to stand together against it.

The Polisario Front's pronatalist politics fall under this framework of women's contribution to the Sahrawi cause. The active promotion of demographic growth by encouraging families to have numerous children aligns with the broader goal of resisting Moroccan occupation. Consequently, the role of Sahrawi women transforms from symbolic level to a bodily commitment. The POLISARIO's hegemonic nationalist discourse urges Sahrawi women to view their bodies as political weapons of resistance, subordinating reproductive health to the biological reproduction of the nation.[3] Thus, the bodies of Sahrawi women become an ensemble of individual experiences acting upon social structures and under political pressure. Maternities transcend individuality to partake in the collective effort of national reproduction. It is necessary to detach understandings of bodies and maternities in the Sahrawi society from Western perspectives on the same concepts: Western individualism frequently clashes with the emphasis on community in other cultures, overlooking factors that may hold central importance within specific communities.[4] The necessity of investigating Sahrawi women's experiences of maternity, from a perspective that includes collective and political reasons, calls for a decolonial feminist approach to this study.

Decolonial feminism aims to unveil the layers of colonial power embedded in Western knowledge. Analysing Sahrawi women's decisions through a decolonial epistemology of "situated knowledge"[5] recognises their agency as political subjects, where individual experiences intertwine with the specific social and historical context. Decolonial agency proves crucial in understanding the interaction between nationalism and gender in Sahrawi society, allowing for a positive exploration of women's roles in resisting colonial oppression.[6] Considering agency in relation to practices and processes of collective resistance, thus, allows the development of an informed understanding of female bodies as agents of nation-building and political change. However, the influx of humanitarian programs addressing sexual health and reproductive rights in Sahrawi refugee camps introduces new variables to perspectives on maternities. While these interventions may reflect Western ideas of aid and health, they address Sahrawi women's information gaps on risks associated with continuous pregnancies. This shift introduces strategic interests related to preventing unwanted pregnancies and impacts women's autonomy in decisions concerning sexuality and reproduction.

Using semi-structured interviews, focus groups, and desk research, this paper explores Sahrawi women's understanding of maternities as bodily and embodied

3 Yuval-Davis 2007.
4 Brook 1986.
5 Haraway 1988: 575–599.
6 Medina Martín 2014, 2016.

experiences of collective and individual resistance. Additionally, it investigates how the role of Sahrawi women as national reproducers changed with the rise of humanitarian projects targeting sexual and reproductive health. It is necessary to highlight this paper's focus on the socio-political meaning, rather than the medical aspect of reproductive health within Sahrawi society, as despite improvements in maternal and infant health and declining birth rates, the enduring pronatalist discourse persists, particularly amid recent conflicts with Morocco since 2020.

Note on methodology, limitations, and ethics

For this paper, I conducted research as a white European woman employed by an international non-governmental organisation (INGO) in the health sector, with its headquarters located in the administrative centre of the Sahrawi refugee camps. My position provided valuable access to detailed information on reproductive health and available resources in the camps, along with the opportunity to gather insights from Sahrawi medical professionals. However, security regulations restricted my field access, leading me to focus on easily reachable informants, primarily Sahrawi women in and around the administrative centre, potentially overlooking perspectives from those outside this setting. To mitigate this, I interviewed local midwives to glean insights into changes in pregnancies, births, and health risks across the camps based on their direct experiences. While recognising potential ethical biases associated with working for an INGO, I believe, my firsthand knowledge of the humanitarian sector has enabled a critical assessment of aid mechanisms. Nonetheless, I advocate for future assessments to incorporate a broader range of local voices.

Constructing gender equality: a historical overview

The Sahrawis, originally from Western Sahara, are a minority group who have faced prolonged forced displacement since Spain relinquished colonial control in 1975, leading to the subsequent occupation by Morocco.[7] Sahrawis, a nomadic people with diverse ethnic groups, didn't recognise fixed borders to their territories. This, along with the absence of a central authority, led colonial powers to deny their sovereignty over Western Sahara. Despite a 1975 international court ruling favouring a yet-to-occur referendum on Western Sahara's independence, the occupation persisted. Sahrawi people, who had long been marginalised in socio-political and economic spheres, founded the Polisario Front in 1973.

The Polisario actively engaged in conflicts against the occupiers, particularly after Morocco's Green March in 1975, which prompted thousands of Sahrawis to flee to Algeria. In 1976, they proclaimed the Sahrawi Arab Democratic Republic (hereinafter SADR), marking the beginning of a government-in-exile under Polisario

7 As decided in the 1975's Madrid Accords.

Front's control. While a ceasefire was agreed upon in 1991, hostilities resumed in 2020, and are currently ongoing. Nowadays, around 90,000 Sahrawi refugees[8] live in the surroundings of Tindouf, distributed across five municipalities. These settlements, established nearly fifty years ago, have evolved into semi-permanent structures with their own administrative and political system, although they mostly depend on humanitarian aid to receive basic goods and services.

Establishing refugee camps within the politically ambiguous territory of the Algerian desert, ostensibly belonging to Algeria but serving as a no-man's land, signified creating a new society in an ideological vacuum that provided a blank canvas where to design a social order based on the Polisario Front's vision.[9] Central to this collective-based resistance discourse was the pivotal role of Sahrawi women in constructing and administering the SADR, exemplified by their organisational responsibilities in camps, supply distribution, and tasks related to the management of family and the public sphere.[10]

The establishment of the National Union of Sahrawi Women (hereinafter NUSW) in 1974 further underlined the significance of gender equality in the Sahrawi liberation struggle. The founding purpose of the NUSW was to contribute to national consciousness, and to work on the emancipation of women and their liberation from colonial legacies.[11] Notably, this discourse reframed women's oppression as inherently colonial rather than patriarchal, acknowledging the intersectionality of factors influencing Sahrawi women's positioning. Perspectives on women's empowerment in the Sahrawi society should in fact take into account their history of anti-colonial struggle and war; their Berber, Arab and nomadic traditions; the Islamic religion; and their status as refugees.[12] All these factors concur in shaping the understanding of women's oppression within the Sahrawi society as intersecting with its nationalist history, creating the specified ground for the context- and history-specific emancipation strategies of Sahrawi women.

Patriarchal oppression gets buried under other forms of oppression, encouraging the emancipation and empowerment of Sahrawi women as a form of anti-colonial resistance. However, scholars such as Allan (2010, 2014), Fiddian-Qasmiyeh (2010), and Finden (2018), caution against an idealised perception of Sahrawi women's emancipation, highlighting potential strategic motives behind portraying them as inherently empowered and politically active. This construct might in fact serve the purpose of garnering international recognition and support, potentially shaping the narrative to align with Western expectations. As a matter of fact, the role of Sahrawi

8 This is the official number used by the UNHCR for aid distribution. However, other sources estimate that over 173,000 refugees live in the camps. As an official census is not available for political reasons, it is impossible to know the actual number of Sahrawis living in the proximities of Tindouf.

9 Allan 2010: 189.

10 Medina Martín 2014a: 898.

11 Lippert 1992: 641.

12 Medina Martín 2014b: 195.

women arguably changed after the 1991's ceasefire, with men returning and taking over political responsibilities. The loss of autonomy and decision-making capacity led to a reconfiguration of gender roles, relegating women to reproductive work within the private sphere. Despite this, the official discourse from NUSW and the Polisario Front maintains an image of Sahrawi society as a gender-equal one, emphasising women's essential role in the liberation struggle.

Understanding how overlapping oppressions are perceived and represented within the ideological discourse of the SADR serves as a foundational framework for analysing how bodies, reproduction, and agency intersect, shaping the experiences of reproduction as acts of resistance within the Sahrawi context.

Rethinking reproduction in the POLISARIO's discourse

The struggle for liberation and independence is central in the Sahrawi socio-political discourse. This is recognised in the constitution of the SADR, which depicts it as the culmination of the Sahrawi people's historic endeavour to preserve their national sovereignty and territorial integrity, reflecting their aspiration to live autonomously in alignment with international acknowledgments of their right to self-determination and independence.[13]

Polisario's foundational ideology, rooted in the socialist and revolutionary movements of the 1970s,[14] emphasised collective participation in nation-building efforts. While men were predominantly engaged in military activities, women were required to take on a reproductive role. Initially involved in constructing and managing refugee camps during exile,[15] they were then encouraged to contribute to the Polisario's pronatalist effort by having as many children as possible. Asking Sahrawi families to increase the number of their members aligns with Yuval-Davis' concept of "people as power", linking the nation's future to continuous growth, primarily dependent on women's reproductive capacities.[16] The political imperative for population growth in the Sahrawi context thus shapes the identity and aspirations of the nation, creating an imagery where biological reproduction serves as a tool of resistance against occupying forces. In the Sahrawi context, who live as a minority both in Western Sahara and in Algeria, demographic expansion serves as a form of political activism. An increased Sahrawi population is seen as a means to enhance resistance, both militarily and institutionally, as it will provide the necessary manpower to participate in the war and to vote in the referendum on independence. Informants

13 See: https://frentepolisario.es/constitucion-rasd-agosto-1976/

14 Including the Vietnamese, Palestinian and other African causes, as well as of revolutionary thinkers such as Castro, Guevara, Nasser, and Mao Tse-tung (Allan 2010: 190).

15 Lippert 1992: 636–651; Juliano 1998.

16 Yuval-Davis 1996: 18.

also emphasise the strategic importance of high birth rates in maintaining Sahrawi identity, and countering attempts to erase their history by the occupying power.[17]

Pronatalist politics contribute to shaping narratives of reproduction centred on the concepts of power and identity, transforming the act of having children from a cultural practice to a political one. Discourses on resistance intersect, in this sense, with existing social structures that traditionally placed the family at the core of Sahrawi societal organisation. The meanings attached to biological reproduction amid occupation and exile have deep roots in the Arab and Berber heritage of the Sahrawi people: informants emphasised the significance of biological reproduction, suggesting that a larger family size equates to greater influence and prestige, regardless of material possessions.[18] The Polisario's political discourse leveraged the pre-existing importance of family to ascribe new significance to the power connected to having a large number of children, linking it to contributions to nation-building and collective resistance. The struggle for liberation and independence serves as the unifying force for the previously nomadic and fragmented Sahrawi population, forming the basis for the concept of national identity and nation-building processes.[19]

This political transformation also influenced the perception of maternities and motherhood within Sahrawi society. As explained by a Sahrawi informant: "In the camps, motherhood has been revolutionized. They added a political dimension to it. Women were praised for having as many kids as possible and for having a big number of boys to join the liberation army."[20] As all biological reproduction occurs within specific social, political, and economic contexts that shape it,[21] it is not really possible to consider pronatalist politics as something that forced a shift from "natural" to "controlled" reproduction. However, the Polisario exacerbated pre-existent cultural expectations of reproduction by introducing a political dimension, capitalising on the crucial role of collective participation in the liberation struggle. This newfound significance of biological reproduction in Sahrawi resistance and nation-building processes created new spaces of action for women, but also intensified pressure related to meeting gender-specific expectations.[22] Despite being framed as a collective effort, biological reproduction is inherently tied to biologically female bodies: "They want

17 Interview with E., 8th May 2022, interview with H., 2nd May 2022.

18 Interview with E., 8th May 2022.

19 The Front facilitated these processes by dismantling norms prohibiting inter-ethnic marriages among Sahrawis, and by virtually eliminating the dowry system to alleviate economic barriers to marriage. "This society is an Islamic society. So in the marriage, they require a dowry given from the man to the woman. So [the Front] set it symbolically for one dinar. I don't know how much that is in dollars, but it's like nothing, it's not even a cent". Interview with M., 5th May 2022.

20 Extract from the interview with M., 5th May 2022.

21 Yuval-Davis 1997.

22 Acknowledgment of the political use of biological reproduction and the evolving role of women was evident in an informant's interview, who stated that "since the start, it was crucial to have liberated lands filled with liberated people, and the Front really focused on that. In a sense, it's understandable, as it has been used in a lot of other causes, not just our own, but still. It put a lot of pressure on women at that moment". Extract from the interview with M., 5th May 2022.

to have many children. The thing is, who has the children? The woman."[23] Women's bodies became new privileged individual sites for collective resistance, intertwining experiences of maternity with participation in the Sahrawi revolutionary effort.

The presentation of women's agency within the Sahrawi cause

Analysing nation-building processes in Sahrawi society reveals that women's reproductive power serves as a weapon of collective resistance.[24] Maternities, rather than individual choices, become revolutionary acts carried out by women as members of a specific national collectivity.[25] Living as a minority also influences Sahrawi women's reproductive choices, as their state of occupation and exile shapes their engagement in political action. Authors such as Medina Martín (2014, 2016), Isidoros (2017), and Donadey (2001), add to Yuval Davis's concept of female agency within the 'people as power' discourse by emphasising how the colonial factor impacts biological reproduction and reproductive health in non-Western societies, challenging Western individualistic views of motherhood that are unable to reflect reproduction as a collective and political process that contributes to physical and imagined acts of resistance. Medina Martín argues that Western critiques often oversimplify Sahrawi women's reality and their willing participation in the liberation and revolution discourse.[26]

A decolonial perspective on agency is therefore essential for understanding Sahrawi women's stance towards pronatalist policies. Agency and resistance operate within the constraints of social, cultural, and historical contexts:[27] thus, it is crucial to examine how Sahrawi women's reproductive agency has been influenced by the political narratives of the Polisario and the NUWS. The NUSW aligns the struggle for national liberation with women's emancipation:[28] following the Sahrawi motto, "women are nothing without the country, the country is nothing without women",[29] the NUSW and the Polisario Front are committed to involve women in political and military life, along with educational opportunities.[30] Interviews suggest that access to education and participation in decision-making have led to appreciation for the political establishment of the SADR, which provided women with new opportunities in the public sphere and altered their perceptions of their societal roles.[31]

23 Extract from the interview with M., 5th May 2022.
24 Yuval-Davis 1996: 17–24; 1997.
25 Yuval-Davis 1996: 17–24; 1997.
26 Medina Martín 2016b: 368.
27 Butler 2014, 2020.
28 Medina Martín 2014: 200.
29 Medina Martín 2014: 200.
30 According to Lippert (1992), the education programs introduced by the SADR reverted female literacy levels: starting from a 95% illiteracy level before the beginning of the revolution, now 90% of women are able to read and write.
31 Interview with M., 5th May 2022.

Promoting the image of Sahrawi women in refugee camps as empowered and politically conscious has led to new forms of resistance. Those unable to undergo mandatory military training found an alternative form of participation by contributing to the revolution by "giving more kids to the cause".[32] Educational opportunities for women also introduced them to political activism, aligning it with their commitment to the revolutionary cause and the willingness to give back to the SADR. In this context, women accepted and took on giving birth to a large number of children as their own form of revolution.[33] Considering the central importance of independence among Sahrawis, it can be argued that, by engaging in the revolutionary struggle through their bodies, Sahrawi women defy the perception of passive victimhood within a patriarchal system. Drawing on Mahmood's view of agency (2002), what might appear as passive compliance to a socio-political system where women are forced to function as voiceless pawns, is actually a form of conscious action that needs to be understood within the discourses that create the conditions for its enactment. For Sahrawi women, motherhood transcends a conventional understanding; it symbolises active participation in the revolution.[34] Viewing colonialism and nationalism as influential factors in gender dynamics recognises women as active agents within a specific set of possibilities. This approach rejects victimising and infantilising discourses in favour of a decolonial perspective, which portrays Sahrawi women as conscious political subjects who enact bodily practices of resistance.

Nevertheless, it is necessary to investigate how agency in biological reproduction is influenced by different socio-political factors that steer and re-direct practices of resistance within the Sahrawi society. As discussed earlier, the collected data implies that women's choices regarding reproduction are impacted social, cultural, and religious expectations. While acknowledging the revolutionary role of maternity among Sahrawi women, informants underscored how reproduction is more of an obligation than a choice for many,[35] as the decision of not having children is met with social and political stigma. Therefore, when analysing reproductive agency in this specific context, it is important to underline that we are referring to a set of practices that take women's maternity wishes for granted. The treatment of single mothers adds another layer to the discussion on the impact of social and religious pressure on having children, as unmarried pregnant women are sent to live into the "Centre for Single Mothers" until the end of their pregnancy. While not explicitly referred to as a prison, the Centre is managed by the Sahrawi Ministry of Justice, and the children born to single mothers are often defined "illegal children".[36] This reveals a dissonance between Sahrawi moral norms and Polisario's political discourse: instead of being celebrated for contributing to the pronatalist effort, single mothers face exclusion

32 Interview with A., 29th April 2022.
33 Interview with M., 5th May 2022.
34 Interview with M., 5th May 2022.
35 Interview with H., 8th May 2022.
36 Original: *niños ilegales*. From the interview with C., 13th May 2022. My translation.

and stigma, illustrating the complex interplay of societal and political influences on reproductive decisions.

It is therefore possible to argue that social norms, religion, and politics, concur in shaping Sahrawis' experiences of maternity. After nearly five decades of occupation, these various factors interact, making it challenging to pinpoint the primary influence on Sahrawi women's reproductive decisions: pronatalist politics, pervasive for over forty years, have thoroughly permeated society, making it difficult to separate political, cultural, and religious elements.[37] The bodies of Sahrawi women can be considered as an ensemble of individual physical experiences, acting upon social structures and under political pressure. The choices around biological reproduction are embedded in the history of a population living under occupation and in refuge, feeling increasingly distant from their perceived homeland. Here, political pressure functions as a macro-category encompassing social, cultural, and religious pressure to reproduce – as every maternity became, in this context, intrinsically political.

Adopting a decolonial, phenomenological approach to the female body in Sahrawi society involves acknowledging women as political subjects embedded in a specific socio-cultural and historical context, influencing their perception and use of the body. Yuval-Davis' analysis emphasises that while men are generally the dominant group in global sex/gender systems, women are not mere passive victims or objects of reproductive control ideologies and policies.[38] This perspective suggests the integration of Brownmiller's concept of female bodies as "battlefields"[39] with the notion of female bodies as "weapons" that women are trained and prepared to use. Nevertheless, bodies also have their own physical existence. Considering women as biological reproducers of the nation implies a bodily aspect to their role, to be understood not only discursively but also phenomenologically.

Bodies, reproductive health and contraception

According to socio-political practices at the origin of the SADR, the role of women in the resistance was often narrowly defined by reproduction, even at the expense of their health. This approach resulted in the politicisation and instrumentalisation of women's bodies as a means of resistance, which often resulted in severe health implications for women. Some informants criticised pronatalist discourses, stating that the accounts of women facing birth complications due to limited medical resources in the camps highlights the drawbacks of this approach, and diverted attention from considering alternative ways individuals could participate in the Sahrawi cause.[40]

It is possible to argue that the reproductive health of Sahrawi women has been subjected to the political agenda of the Polisario. In the refugee camps, the healthcare

37 Interview with C., 13th May 2022
38 Yuval-Davis 2007: 49.
39 Quoted in Alsop–Hockey 2001: 465.
40 Interview with M., 5th May 2022.

system is not always able to cope with maternity-related health problems, particularly among multiparous women,[41] resulting in cases of severe complications and maternal deaths, mainly due to postpartum haemorrhage.[42] Recent shifts, however, have seen a growing emphasis on the intersection of health considerations with biological reproduction practices. In a 2007 interview, Maima Mahamud (the then-State Secretary for Social Affairs and the Advancement of Women in the SADR) highlighted the importance of being aware of women's condition in the camps when choosing to have children, stating:

> "I have a goal: that when a woman spreads her legs, she knows why she is doing it. Do you want to collaborate with the government and increase your family's size? Fine, but think about the circumstances. Why are we being asked to increase the population? Because if there aren't many of us, they won't pay any attention to us. […] Well, let's give birth, but with conditions: let them provide food, health, education, comfort, and then we'll bring children. I am a human being and not a rabbit."[43]

She emphasised the need for improved living conditions and services before encouraging population growth, signalling a shift toward questioning the subordination of individual health to collective resistance. This evolving perspective aligns with increased attention to reproductive health in Sahrawi refugee camps, driven by humanitarian projects focusing on sexual health and reproductive rights, which started to be implemented around the beginning of 2000s.

It is important here to highlight the interconnection between reproductive health, agency, and decolonialism. Humanitarian initiatives addressing sexual health and reproductive rights may inadvertently impose a Western perspective on biological reproduction in the refugee camps, prompting a need for a more nuanced consideration of women's agency in maternity. Isidoros states that what Harrell-Bond defines the neocolonial "imposition of aid"[44] fails its aim to emancipate Sahrawi women, as it does not take into consideration their historical position in the Sahrawi society. Similarly, Brook (1999) emphasises the complex dynamics between "traditional" practices and Western biomedical models in post-colonial countries, urging exploration of these interactions in local contexts. Jolly's analysis of maternities in Asia and the Pacific (1998) underscores how women, even amidst changing reproductive patterns in colonial and postcolonial eras, exercised agency by selectively embracing, rejecting, or accommodating different recommendations.

41 Women who had three or more pregnancies.

42 "I remember the case of a woman who died. She had severe anaemia, which is very common in this area, and she died of postpartum haemorrhage after her eleventh pregnancy." Interview with C., 13th May 2022.

43 See: https://elpais.com/diario/2007/05/12/sociedad/1178920813_850215.html

44 Isidoros 2017: 6.

Simultaneously, humanitarian initiatives introduced novel perspectives on maternity for Sahrawi women. Despite being rooted in Western notions of aid and health, these programs played a crucial role in addressing the lack of information among Sahrawi women concerning risks associated with multiple continuous pregnancies. Midwives, trained under these programs, emphasised the positive impact of heightened awareness of reproductive health on the Sahrawi society. The focus on awareness, medical accompaniment during childbirth, and education on pregnancy and postpartum care led to significant improvements: women became more informed about pregnancy-related diseases, such as hypertension, diabetes, and anaemia, prompting a shift in attitudes toward family planning. This increased awareness has generated strategic interests among Sahrawi women, focusing on preventing unwanted pregnancies and enhancing autonomy in decisions regarding sexuality and reproduction.[45] This included the introduction of different forms of contraceptives that, until the arrival of humanitarian programs, were not available, nor allowed.

The use of contraceptives has met with political and religious resistance, which seemingly overrides women's health. As stated by Alsop and Hockey, in fact, contraceptives are part of those reproductive health's symbolic and material resources that transcend the immediacy of women and their healthcare needs in favour of politicised notions of national identity.[46] Sahrawi authorities disapprove of widespread contraceptive distribution, resisting promoting family planning beyond the World Health Organization's recommendation of maintaining a two-year gap between pregnancies. The SADR's first and, to date, only Family Planning Protocol, published in 2015, permits contraceptive use only "under special circumstances".[47] Religious factors also contribute to the reluctance to use contraceptives: data collected by Kridli (2002) are in line with the SADR's Protocol, recognising that Islam generally only approves using family planning for child spacing – but not to limit family size.

Nevertheless, information collected during interviews shows that Sahrawi women are actively asserting control over their bodies, particularly in relation to the use of contraceptives. Following reproductive health programs, awareness has shifted, with women now seeking to control family size (viewing two to four children as adequate)[48] and revealing a dual consideration of both health concerns and the burden associated with having numerous children.[49] Increased openness to

45 Focus group with Sahrawi midwives, 12th May 2022.

46 Alsop–Hockey 2001: 456.

47 The special circumstances listed in the document are: Two or more previous caesarean sections; one year after a caesarean section; history of uterine rupture; confirmed hereditary diseases impossible to diagnose in the camps; high multiparity (4 or more children); interspacing pregnancies; relevant medical pathology likely to worsen with pregnancy (SADR 2015).

48 Focus group with Sahrawi midwives, 12th May 2022.

49 "I met a woman in the National Hospital who came asking for a contraceptive method. She arrived with a baby in her arms, and she said please put me on something, I don't want and I can't have any more children. She already had eight children, and she was from a very poor family." Interview with C., 13th May 2022.

contraceptives mark a positive shift in reproductive health practices: women have more access to contraceptives, ask about them, and know how to use them.[50] This attitude shift marks a transformation from the past. In deciding to use contraceptives, women bring their body from a symbolic level to a *bodily* one: they do not only think about political resistance, but also enact strategies of individual survival. Analysis of reproductive rights in non-Western societies must acknowledge how individual agency is framed within collective interests and political tensions. Sahrawi women exercise agency in deciding the extent to which they adopt recommendations on contraception, negotiating between Western-bonded humanitarian aid and their own cultural practices.

This transformation aligns with what Young defines as "a reconceptualization of the body",[51] recognising it as a complex entity shaped by anatomical, physiological, experiential, and cultural factors. Sahrawi midwives noted that increased awareness of sexual and reproductive health practices has influenced women's perspectives on the role of biological reproduction in nation-building processes. While prominence of the political discourse on liberation and independence remains central in daily life within the camps,[52] the adaptation of pronatalist discourses by the Polisario and the NUSW also reflects an acknowledgment of the evolving tendencies. The NUSW, in particular, has embraced a reproductive health-focused approach, recognising the dual importance of having many children while emphasising the need to safeguard women's health. This signifies a shift towards a more health-oriented perspective, prompting Sahrawi women to redefine their societal roles and implement strategies of survival as acts of individual resistance within the broader context of the liberation struggle. Prioritising reproductive health over biological reproduction as a tool for nation-building, Sahrawi women have sought new sites of resistance, engaging in community work and awareness campaigns on topics like decision-making and political participation.

Examining how Sahrawi women's individual agency transforms discourses of collective resistance, it is possible to talk here about bodies who are "talking back"[53] – understanding them as entities specifically and temporally placed within a particular society and experienced in discursively produced ways, while at the same time contributing to and enacting those experiences.[54] Bodies, therefore, function as epistemological tools whose knowledge-making processes are influenced by both individuals' experiences and their positioning in a specific time and context. However, despite their evolving roles, Sahrawi women continue their domestic duties, especially

50 Younger women, in particular, seem more receptive to contraception, and more aware of the importance of safe births and health. Interview with E., 8th May 2022.

51 Young 1984: 61.

52 "[The liberation struggle] is the most important thing in life. Because if we don't fight for our independence, why are we living, honestly. We'd give everything for it. If they tell us that we have to die for it, well, we'd do it without thinking about it." Interview with E., 8th May 2022.

53 Brook 1999: 34.

54 Brook 1999: 34.

amid the return to a state of war. While their contribution to the liberation struggle has diversified, reproductive work still impacts their health. Balancing productive activities, caregiving, household duties, and community tasks has led to a work overload in their daily lives. Although their ability to handle various responsibilities challenges traditional norms, the persistent lack of a balanced division of duties within Sahrawi society might raise concerns about the physical and mental health implications for women.

Conclusion

In this article, I explored the evolving perspectives of Sahrawi women on maternity as an embodied experience of resistance within the liberation struggle, particularly in response to increasing humanitarian projects addressing sexual and reproductive health. Applying a decolonial lens to the analysis, I investigated the interplay between individual health and collective resistance, considering how the dominant nationalist discourse encourages Sahrawi women to use their bodies as political weapons, indirectly asking them to subordinate their reproductive health to the biological reproduction of the nation.

The Polisario's pronatalist politics integrated political significance into the traditional cultural expectations of reproduction, turning maternity into a political act contributing to the Sahrawi cause. However, the introduction of humanitarian projects raised awareness of reproductive health resources, prompting women to reconsider their role in the struggle. This shift emphasised individual resistance over collective contributions, challenging the subordination of health to political objectives. In this sense, female bodies became privileged individual sites for collective resistance, and experiences of maternity began to intersect with women's participation in the Sahrawi revolutionary effort. Maternities in Sahrawi society, framed as acts of resistance in the liberation struggle, transcend individual experiences, and become acts of resistance shaped by historical contexts of occupation and refuge. Political pressure, encompassing social, cultural, and religious elements, redefines the inherently political nature of all maternities.

Simultaneously, recognising women's agency in Sahrawi society includes acknowledging their choice to redefine their stance on biological reproduction. Humanitarian projects addressing sexual health and reproductive rights prompt women to reconsider their contribution to the liberation struggle. This shift, prioritising bodies as sites for individual resistance, marks a growing reluctance to subordinate individual health to Polisario's pronatalist politics. While the imperative to increase the Sahrawi population persists, the introduction of contraceptives enhances women's autonomy in reproductive decisions, reflecting a more nuanced approach. The analysis also highlighted the risk of Western perspectives influencing reproductive practices in refugee camps, while acknowledging the positive impact of humanitarian interventions in addressing women's information gaps on pregnancy-related risks.

By opting for contraceptives, women transition from a symbolic to a physical dimension, shaping personal survival strategies alongside political considerations. A decolonial approach recognises Sahrawi women as political subjects within resistance strategies, navigating context-specific vulnerabilities without necessarily challenging existing socio-cultural norms.

While in the Sahrawi refugee camps the prevailing discourse on liberation persists, particularly amid renewed conflict with Morocco, a health-focused perspective prompts women to redefine their societal roles. Prioritising reproductive health over biological reproduction, they engage in new sites of resistance like political participation and community awareness. Yet, these additional roles, coupled with existing caregiving responsibilities, contribute to a work overload. The extensive non-biological reproductive tasks undertaken by Sahrawi women in camp life warrant further research into the impact of an uneven division of duties and gender-related expectations on the population's physical and mental health.

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ACTA HUMANA • 2 (2024) 21–41. • DOI: 10.32566/ah.2024.2.2

Crisis of Human Rights of Refugees and Asylum Seekers in Japan

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The year 2022 marks the 40th anniversary of the start of Japan's refugee recognition system. Despite being a prosperous democracy and a staunch supporter of the international system, Japan has consistently admitted only a small number of refugees. According to the Immigration Services Agency of Japan, the number of people recognised as refugees in 2022 reached a record high of 202, while those not recognised exceeded 10,000. Furthermore, the legislative bill to revise the Immigration Control Law, passed by the House of Councillors Judicial Committee on June 8, 2023, limits applications for refugee recognition to twice in principle. From the third application onwards, there is a possibility for forced deportation to the applicants' home countries. This legislative bill can be seen as violating the human rights of refugees and asylum-seekers, contravening international human rights law, and the 1951 Convention Relating to the Status of Refugees. Therefore, this article specifically explores Japan's stronger stance on control over protection, whether its low recognition rate indicates non-compliance with international refugee protection criteria, and the reasons behind this. These aspects will be methodically examined, employing rationalist, normative, and domestic institutional theories of international conformity. Finally, the article will suggest measures to improve Japan's refugee recognition rate and enhance the protection of the human rights of refugees and asylum seekers.

Keywords: Japan's refugee policy, human rights, international obligations, asylum seekers, legislative reforms, non-refoulement

Introduction

In 2022, Japan commemorated the 40th anniversary of its refugee recognition system, a milestone that prompts reflection on the nation's role and responsibilities within the global refugee crisis. As a prosperous democracy, Japan holds a unique position on the international stage, priding itself as a staunch supporter of the international order and human rights. However, this image contrasts starkly with its record on the admission and recognition of

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refugees and asylum seekers. According to the Immigration Services Agency of Japan, the year 2022 saw a record high of 202 individuals recognised as refugees, while the number of those not recognised exceeded 10,000.[2] This discrepancy raises critical questions about the effectiveness and fairness of Japan's refugee recognition system.

The issue of refugee recognition in Japan is further complicated by legislative changes that seem to tighten the already stringent controls over asylum seekers. In June 2023, a legislative bill to revise the Immigration Control Law was passed by the House of Councillors Judicial Committee. A notable provision within this bill limits applications for refugee recognition to twice in principle, introducing the possibility of forced deportation from the third application onwards.[3] This legislative move has sparked controversy and concern among human rights advocates, as it appears to contravene international human rights law and the principles set forth in the 1951 Convention Relating to the Status of Refugees.[4] These developments underscore a growing crisis in the human rights of refugees and asylum seekers within Japan, signalling a shift towards stronger control over protection.

This article aims to explore the complexities and contradictions of Japan's refugee policy, examining the reasons behind its low refugee recognition rate and the implications of recent legislative changes. The analysis is structured around several key questions: Does Japan's stringent stance on refugee recognition indicate a failure to comply with international refugee protection standards? What are the underlying reasons for Japan's approach to refugee and asylum seeker rights? And critically, how can Japan reconcile its international image as a defender of human rights with its domestic policies on refugees and asylum seekers? To address these questions, this article will dissect the legal, social, and political factors influencing Japan's refugee policy, highlighting the tension between control and protection in the management of asylum seekers and refugees.

The significance of this exploration extends beyond academic interest. At stake are the lives and rights of individuals seeking refuge from persecution, conflict, and human rights abuses. Japan's policies towards refugees and asylum seekers have profound implications for its international reputation, its compliance with international law, and its moral standing in the global community. Moreover, the issue touches on broader questions of global responsibility, solidarity, and the mechanisms of international protection for those most in need.

In structuring this discussion, the article is divided into several sections, each addressing different aspects of the crisis of human rights of refugees and asylum seekers in Japan. Following this introduction, the article will delve into the historical context and current state of Japan's refugee policy, examining the evolution of its refugee

2 Ministry of Justice (Japan) 2022.

3 Ministry of Justice (Japan) 2023.

4 The fundamental tenet of the 1951 Refugee Convention is that of non-refoulement, stipulating that refugees must not be sent back to a country where they are at serious risk of facing threats to their life or freedom. This principle is recognised as a standard of customary international law.

recognition system and the impact of recent legislative changes. Subsequent sections will analyse Japan's refugee policy in detail, explore the human rights implications of current practices, and compare Japan's approach with those of other countries. The article will also identify the challenges and barriers to reforming Japan's refugee policy, offering solutions and recommendations for improving the recognition rate and enhancing the protection of refugee and asylum seeker rights.

In conclusion, this article seeks to shed light on a pressing issue at the intersection of international law, human rights, and domestic policy in Japan. By critically examining Japan's approach to refugees and asylum seekers, it aims to contribute to the ongoing dialogue on how to best protect the rights and dignity of some of the world's most vulnerable populations.

Historical context and current state

This section aims to delve into the historical context and evolution of Japan's refugee policy, examining the interplay between Japan's international commitments and its domestic policy imperatives. Through an exploration of legislative developments, recognition rates, and the broader geopolitical considerations, this section will shed light on the complexities and challenges that have shaped Japan's stance on refugee protection and human rights, setting the stage for a critical examination of its current policies and the implications for international refugee law.

Brief history of Japan's refugee policy

Japan's journey within the international refugee protection framework commenced in earnest in 1981, upon its accession to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.[5] This landmark decision marked Japan's formal commitment to international refugee law, setting the stage for the development of its domestic refugee policy. Initially, Japan's approach was characterised by a conservative stance, mirroring its broader immigration strategy focused on maintaining societal homogeneity and addressing concerns over national security and economic stability.

In the decades that followed, Japan introduced several legislative measures and policy shifts, albeit maintaining a cautious approach. The Immigration Control and Refugee Recognition Act (ICRRA), established shortly after acceding to the 1951 Refugee Convention, laid the groundwork for Japan's refugee assessment procedures.[6] However, the implementation of this Act revealed Japan's reticent posture towards accepting refugees, with recognition rates remaining significantly lower than those of other developed nations. The early 2000s witnessed modest reforms aimed at enhancing the transparency and fairness of the refugee recognition process. Despite

5 Japan acceded to the 1951 Convention relating to the Status of Refugees in 1981 and its 1967 Protocol in 1982. Ministry of Foreign Affairs of Japan 2023.

6 Japan: Cabinet Order No. 319 1951.

these efforts, Japan's refugee policy continued to be marked by stringent criteria and a lengthy application process, reflecting an enduring emphasis on immigration control. The introduction of a resettlement programme in 2010, allowing a limited number of Myanmar refugees from Thai camps, represented a cautious step towards international cooperation in refugee protection.[7]

Throughout this period, Japan's legislative and policy landscape regarding refugees has been shaped by a complex interplay of international obligations, domestic concerns, and geopolitical considerations. Despite growing international calls for solidarity and burden-sharing in the face of global displacement crises, Japan's refugee policy has evolved cautiously, maintaining a balance between its international commitments and domestic priorities.

The recognition rates of refugees and asylum seekers in Japan have been notably low, underscoring a persistent trend that contrasts sharply with the country's global standing as a developed democracy. In 2022, a record high of 202 individuals were granted refugee status by the Immigration Services Agency of Japan, out of over 10,000 applicants. This figure, although a peak, underscores the stringency of Japan's refugee policy, with a recognition rate of approximately 2%, starkly low compared to global standards.

Over the past decade, Japan's annual recognition rates have seldom surpassed 1%, reflecting a cautious, if not restrictive, approach to asylum claims. In contrast, countries like Germany and Canada have exhibited significantly higher acceptance rates, often exceeding 40% in recent years, according to the United Nations High Commissioner for Refugees (UNHCR).[8] This discrepancy highlights the disparities in refugee recognition practices globally and places Japan's policies in a more restrictive light. Furthermore, the number of asylum seekers in Japan has seen a steady increase since the early 2010s, peaking in 2017 with over 19,000 applications.[9] Despite this, the acceptance rate has remained low, with the majority of applicants either denied or left in prolonged limbo. This situation points to a critical need for policy reassessment, especially in light of increasing international displacement crises and calls for shared global responsibility in refugee protection.

The legislative bill passed in June 2023 and international refugee protection standards

In June, 2023, the Japanese government enacted a legislative bill imposing stringent restrictions on the refugee application process. This legislation caps the number of attempts for refugee status recognition at two, introducing the risk of forced deportation from the third attempt onward. This legislative shift has ignited a contentious debate, highlighting a divide between governmental intent and human

7 Lee 2018: 1219–1234.
8 UNHCR 2023. See also UNHCR 2022.
9 The Asahi Shimbun 2019.

rights advocacy.[10] Supporters of the bill argue that it is designed to streamline the refugee recognition process, deter fraudulent claims, and manage the country's immigration control more efficiently. They contend that these measures are necessary to maintain public order and ensure that the asylum system is reserved for those genuinely in need of protection.[11] Conversely, human rights organisations and refugee advocates vehemently oppose the bill, claiming it severely undermines the principle of non-refoulement. They argue that limiting asylum applications and the looming threat of deportation could endanger the lives of genuine asylum seekers, forcing them back to situations where they may face persecution, torture, or death.[12] This, they assert, contravenes not only Japan's international obligations under the 1951 Refugee Convention but also the fundamental human rights principles. The bill's enactment raises grave concerns about the future of asylum seekers in Japan, potentially exacerbating vulnerabilities for this already marginalised group and distancing Japan further from its international human rights commitments.

Japan's adherence to international refugee protection standards, particularly in light of its recent legislative amendments, has come under scrutiny. As a signatory to the 1951 Refugee Convention and its 1967 Protocol, Japan commits to upholding the rights of refugees, including the principle of non-refoulement, which forbids returning individuals to territories where they face serious threats to life or freedom.[13] Despite these commitments, Japan's actions, characterised by notably low recognition rates and stringent application procedures, have sparked criticism from international human rights organisations and refugee advocacy groups. Reports from entities such as the United Nations and Amnesty International have highlighted Japan's policies as being restrictive and not fully aligned with its international obligations.[14] These critiques often point to the procedural barriers within Japan's asylum system that contribute to the low acceptance rates and the lengthy, opaque decision-making process that leaves many asylum seekers in a state of uncertainty and vulnerability for years.

Japan defends its policies by emphasising the need for a balanced approach that protects the rights of asylum seekers while ensuring national security and public order. The government argues that its measures are necessary to prevent abuse of the asylum system and to maintain the integrity of its immigration control, asserting that these policies are in compliance with its international commitments.[15] This stance, however, continues to be a matter of debate among international legal scholars and human rights advocates, who urge Japan to reconsider its approach to ensure greater compliance with international refugee protection standards.

10 Ando 2023: 137–160.
11 Ando 2023: 137–160.
12 Kasai 2023. See also Tian 2023.
13 Wolman 2015: 409–431.
14 OHCHR 2023. See also, Amnesty International 2023.
15 OHCHR 2023.

Analysis of Japan's refugee policy

This section delves into the complexities of Japan's refugee policy, examining the rigorous and often criticised refugee recognition process and its alignment with international obligations. It explores the stringent application and review procedures that hinder asylum seekers' access to protection. The section also discusses the challenges faced by asylum seekers, including lengthy delays, detention practices, and a narrow interpretation of persecution that diverges from international best practices. The analysis reveals a control versus protection paradigm within Japan's policy, emphasising the need for a balanced approach that fulfils international obligations while addressing national concerns.

Japan's refugee recognition process

Japan's refugee recognition process is characterised by a rigorous and often criticised system that presents numerous hurdles for asylum seekers. This system, while designed to adhere to Japan's obligations under the 1951 Refugee Convention and its 1967 Protocol, is marked by stringent application and review procedures that significantly impact the recognition rates of refugees in the country.

The cornerstone of Japan's legal framework for refugee recognition is the ICRRA, which establishes the criteria and processes for determining refugee status. Under this act, individuals seeking asylum must demonstrate a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion.[16] The process begins with the submission of an application to the Immigration Services Agency of Japan, followed by interviews and an assessment of the applicant's claims. Applicants face a multi-stage process that includes initial screening, a formal interview, and, if denied, an appeal process. Despite these provisions, the process is marred by lengthy delays, with some cases taking years before a final decision is made. Furthermore, the criteria for recognising refugees are applied in a manner that is often seen as excessively strict, leading to a low acceptance rate compared to other industrialised nations.[17]

One of the primary barriers faced by applicants is the high burden of proof required to establish a well-founded fear of persecution. Many asylum seekers struggle to provide the extensive documentation and evidence required, particularly those fleeing conflict zones or oppressive regimes where obtaining such documentation is impractical or dangerous.[18] Language barriers, limited access to legal representation, and a lack of information about the asylum process further complicate the application for many.[19] Additionally, the Japanese government's policy of detaining asylum seekers

16 Buschmann 2021: 79–96.
17 Buschmann 2021: 79–96.
18 Kitamura 2022: 59–91.
19 Tarumoto 2019: 7–24.

during the review process has been a point of significant international criticism, as it can exacerbate the vulnerabilities of individuals fleeing persecution.[20]

The criteria used by Japan to determine refugee status have been criticised for not fully aligning with international best practices. Reports from international bodies, including the UNHCR, highlight a discrepancy between Japan's legal obligations and its implementation practices. For instance, the UNHCR has pointed out that Japan's interpretation of what constitutes a "well-founded fear of persecution" is often narrower than that recommended in international guidelines.[21] Official statistics underscore the challenges within the system. According to the Immigration Services Agency of Japan, the recognition rate for refugees has remained markedly low, with only a small fraction of applicants granted refugee status annually. This is in stark contrast to the global average acceptance rate reported by the UNHCR, indicating a significant divergence in Japan's application of refugee protection criteria compared to other countries.

Japan's refugee recognition process, while structured to provide a pathway to asylum, is fraught with barriers that limit access to protection. The stringent application of criteria, combined with procedural and administrative hurdles, places Japan's system at odds with the more accommodating practices recommended by international human rights and refugee protection standards.

Control versus protection paradigm

Japan's refugee policy is emblematically caught at the crossroads of a control vs. protection paradigm, illustrating a profound tension between stringent immigration control and the humanitarian obligation to protect refugees. This dichotomy is deeply rooted in Japan's national policy frameworks and reflects broader socio-political concerns, including national security, demographic stability, and social integration.

Japan's emphasis on immigration control is often justified through national security concerns. The government argues that rigorous screening processes are essential to prevent potential threats under the guise of asylum claims.[22] This stance is indicative of a broader global trend where states prioritise border security, sometimes at the expense of international protection obligations. However, such an approach disproportionately impacts genuine refugees, subjecting them to lengthy and uncertain application processes that can exacerbate their vulnerability. Moreover, demographic considerations also play a crucial role in shaping Japan's refugee policy. With a rapidly aging population and declining birthrate, Japan faces significant demographic challenges. While increased immigration could theoretically mitigate these issues, there is a prevailing concern within policy circles and the broader public about the impact of immigration on social cohesion and the maintenance of cultural

20 Slater–Barbaran 2020: 1–17.
21 UNHCR 2004.
22 Wolman 2015: 409–431.

identity.[23] As a result, refugee and asylum policies are crafted within a framework that limits entry, reflecting a cautious approach to demographic change. Social integration challenges further complicate the protection paradigm. Japan's historical emphasis on homogeneity has influenced its approach to integration, with policies that often leave refugees and asylum seekers on the margins of society.[24] Limited access to social services, employment, and language training impedes the ability of refugees to integrate effectively, raising questions about Japan's commitment to providing meaningful sanctuary.

The control vs. protection paradigm within Japan's refugee policy framework reveals a complex interplay of national security, demographic concerns, and social integration challenges. This paradigm significantly impacts the treatment of asylum seekers, reflecting a cautious, sometimes restrictive approach to offering sanctuary. A re-evaluation of this balance, considering the perspectives of all stakeholders, is essential for Japan to fulfil its international obligations while addressing its national concerns.

Japan's compliance with international refugee protection criteria

The legislative changes in Japan's refugee policy, notably the 2023 bill limiting asylum applications and introducing the potential for forced deportation, have profound implications for the rights of refugees and asylum seekers. This policy shift not only signifies a tightening grip on immigration control but also marks a critical departure from the humanitarian principles enshrined in the 1951 Refugee Convention and its 1967 Protocol, to which Japan is a signatory. By restricting the number of asylum applications to two, the Japanese government narrows the window of opportunity for individuals fleeing persecution to secure protection. This cap, ostensibly aimed at streamlining the asylum process and deterring fraudulent claims, inadvertently heightens the risk for genuine refugees. The possibility of forced deportation after the third application exacerbates this risk, directly contravening the principle of non-refoulement, which prohibits returning individuals to territories where they face threats to life or freedom. Article 33 of the 1951 Refugee Convention states as follows:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judge-

23 Horiuchi–Ono 2023: 459–473.
24 Horiuchi–Ono 2023: 459–473.

> ment of a particularly serious crime, constitutes a danger to the community of that country.[25]

These legislative changes undermine the essence of asylum as a right, transforming it into a privilege narrowly granted. Such policies not only impact the legal status of asylum seekers and refugees in Japan but also their psychological well-being, as they face increased uncertainty and the looming fear of deportation to potentially dangerous situations.[26] Critically, this approach reflects a prioritisation of control over protection, raising significant concerns about Japan's commitment to its international human rights obligations. The impact of these legislative changes on refugees and asylum seekers in Japan is a stark reminder of the delicate balance between sovereign rights to regulate borders and the imperative to protect the rights and dignity of all individuals, regardless of their legal status.

Japan's obligations under international human rights law and the 1951 Refugee Convention are foundational to its role in the global community, especially regarding the treatment of refugees and asylum seekers. As a signatory to the 1951 Convention and its 1967 Protocol, Japan commits to upholding the rights of individuals fleeing persecution. Additionally, Japan is bound by various international human rights treaties that advocate for the rights and dignity of all individuals, including those seeking asylum such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). However, Japan's interpretation of the principle of non-refoulement and the right to seek asylum has been cautious and, at times, restrictive.

The Japanese government rationalises its refugee policies by emphasising the need to balance humanitarian obligations with national security and social cohesion. It argues that strict controls are necessary to prevent abuse of the asylum system and to ensure that refugee status is granted to those genuinely in need.[27] This stance reflects a broader tension between international commitments and domestic policy priorities. However, by narrowing the pathway for refugee recognition and increasing the risk of deportation for individuals whose applications are not accepted on the first two attempts, Japan risks violating the core tenet of non-refoulement.

Critically assessing Japan's policy within the context of its international commitments reveals a dissonance between its legal obligations and its domestic practices. Additionally, Japan has been commended for its financial contributions to international refugee assistance programmes and its involvement in resettlement initiatives, albeit on a small scale.[28] These efforts demonstrate Japan's willingness to support the international refugee protection regime, albeit more comfortably from a distance than within its own borders. While national security and immigration

25 Article 33 of the 1951 Refugee Convention.
26 Ichikawa et al. 2006: 341–346.
27 Wolman 2015: 409–431.
28 Phillimore et al. 2021: 17–35.

control are legitimate governmental concerns, they must not override the fundamental rights and protections that are enshrined in international law. Japan's current stance, therefore, necessitates a thorough re-evaluation to ensure that its refugee policy aligns with its international obligations, safeguarding the rights of refugees and asylum seekers within its jurisdiction.

Experiences of refugees and asylum seekers in Japan

Japan Association for Refugees (JAR), a Japanese nonprofit founded in 1999 which have been dedicating to supporting refugees in Japan, has consistently criticised Japan for its failure to align with international standards.[29] JAR provides a range of services aimed at protecting and empowering refugees, including legal assistance, social integration support, language education, and advocacy for refugees' rights. The organisation works to promote a more inclusive society for refugees in Japan and to enhance the understanding of refugee issues among the Japanese public. It argues that the "individual recognition theory" is a uniquely Japanese interpretation that says a person is not a refugee unless he or she is personally monitored and targeted by the government, and it extremely narrows the scope of people who should be recognised.

For example, consider the case of a Syrian man who arrived in Japan in 2012 and sought refugee status. He had participated in demonstrations against the Assad regime after witnessing the murder of innocent children. Japan denied his refugee status, arguing that the risks he faced, such as potential attacks during protests, were not unique to him but were general risks faced by anyone involved in such demonstrations. Consequently, Japan's evaluation posited that refugee status is reserved for individuals facing specific dangers, and since all Syrian protestors were deemed at risk, they did not qualify as refugees.[30]

Moreover, consider the case of a woman from Africa who arrived in Japan in 2009 and was finally recognised as a refugee in the fall of 2016 after a legal battle. Initially, her application was rejected because she was not in a leadership position within her political party. Despite being attacked alongside her fellow opposition members and suffering a miscarriage as a result – a fact she supported with a medical certificate from a hospital – her evidence was initially dismissed. However, the Nagoya High Court ultimately ruled that being at risk upon return to her home country qualified her as a refugee, regardless of her leadership status. The court recognised that the human rights situation in her country of origin posed a danger to ordinary party members, who were also subject to arrest and assault. This landmark decision marked an unprecedented success in recognising the broader implications of individual risks in refugee status determinations.[31]

29 See: https://www.refugee.or.jp/en/org/
30 JAR 2023b
31 JAR 2023b

Furthermore, JAR highlights that Japan's interpretation of persecution is narrowly defined, contrasting with broader definitions used in the United States, Canada, European countries, and others.[32] These nations understand persecution to encompass not only threats to life and bodily freedom but also serious human rights violations, which may include physical restraint, forced labour, denial of religious freedom, and the deprivation of educational and employment opportunities. In Japan, the concept of persecution is often strictly limited to threats against life and physical freedom. Even instances where an individual's physical freedom is compromised might not qualify as persecution under this narrow interpretation.[33] For example, the Rohingya, an ethnic minority fleeing persecution in Myanmar (Burma), experienced forced labour and physical restraint over extended periods. Yet, because their immediate survival was not perceived as being threatened, they were not recognised as refugees in Japan.[34] This case underscores Japan's restrictive approach to defining persecution, differing significantly from international counterparts that acknowledge a wider range of human rights violations as grounds for refugee status.

Lessons from countries with higher refugee recognition rates

The refugee recognition rate in Japan pales in comparison to the rates in Germany and Canada. For instance, Germany, during the Syrian refugee crisis, admitted over a million refugees, demonstrating a commitment to offering sanctuary to those fleeing conflict and persecution.[35] Canada has consistently maintained a high refugee acceptance rate through both governmental and private sponsorship programmes, showcasing a flexible and humane application process.[36] The difference in recognition rates can largely be attributed to the legislative frameworks and administrative practices that govern the asylum process. Japan's system, characterised by a rigorous and often protracted application process, contrasts sharply with the more streamlined and transparent procedures in Germany and Canada, which are designed to fairly and efficiently assess refugee claims.

Beyond the application process, Germany and Canada have implemented comprehensive integration programmes and support systems for refugees. These programmes include language training, employment services, and access to healthcare and education, facilitating a smoother transition for refugees into society. Germany's "*Willkommenskultur*" (welcome culture) and Canada's community sponsorship model exemplify their commitment to integrating refugees as valued members of society.[37] In contrast, Japan's support for refugees' post-recognition is limited, with

32 JAR 2023b
33 JAR 2023b
34 Burmese Refugee Application Lawyers in Japan 2010.
35 Momin 2017: 55–79.
36 Pohlmann–Schwiertz 2020.
37 Pohlmann–Schwiertz 2020; See also Herrmann 2020: 201–219.

few structured integration programmes or social supports. This not only hampers refugees' ability to contribute to their host country but also impacts their long-term well-being and self-sufficiency.

Countries with higher refugee recognition rates offer crucial insights into effective refugee support and integration, presenting lessons Japan could learn from. These nations underscore the importance of extensive support systems that cater to the multifaceted needs of refugees, ranging from legal assistance during the application process to comprehensive integration programmes. Legal assistance is pivotal, as it equips asylum seekers with the knowledge and resources needed to navigate the complex asylum system, significantly enhancing their chances of recognition.[38] Moreover, the adoption of flexible and transparent application processes is instrumental in these countries' success, ensuring that refugees are treated with dignity and fairness.[39] Such processes not only expedite the recognition of genuine refugees but also reinforce the legal system's integrity, building trust among asylum seekers.

Moreover, community engagement and public awareness campaigns play a transformative role in shaping public perception and fostering a welcoming environment for refugees. By educating the public about the challenges faced by refugees and the positive contributions they can make to society, these campaigns cultivate a culture of inclusivity and support.[40] For Japan, adopting these practices could help dismantle barriers to refugee recognition and integration, aligning its policies with international humanitarian standards and enhancing its global standing as a protector of human rights.

Furthermore, non-governmental organisations (NGOs) play a pivotal role in support capacity building in refugee protection, providing technical assistance, training, and resources. This support aims to bolster Japan's legal and administrative frameworks, ensuring better alignment with international standards. In addition, global initiatives like the Global Compact on Refugees seek to enhance international cooperation and responsibility-sharing for refugees. The Global Compact on Refugees establishes a system aimed at distributing responsibilities more fairly and predictably, acknowledging that resolving refugee issues requires global collaboration. This framework serves as a guide for governments, international entities, and various participants to guarantee support for host communities and to empower refugees to have meaningful, productive lives. It presents an unprecedented chance to revolutionise the global approach to refugee crises, providing advantages for both the refugees and the communities that accommodate them.[41] Japan's participation in such agreements reflects its acknowledgment of the importance of international standards, though its compliance and commitment to the Compact's objectives

38 Phillimore et al. 2021: 17–35.
39 Akashi 2021: 249–270.
40 McGarity-Palmer et al. 2023: 117–132.
41 Triggs–Wall 2020: 283–339. See also United Nations General Assembly 2018.

are areas where further engagement and implementation are needed. These efforts underscore the significant influence of international organisations and NGOs in shaping refugee policies towards more humane and effective systems.

Challenges and barriers

Japan's legislative approach to immigration and asylum is emblematic of a broader conservatism that pervades its political institutions, emphasising control and security over humanitarian considerations. This stance is deeply ingrained in Japan's political culture, where the imperatives of maintaining public order and national security often outweigh the demands of international humanitarian obligations. The reluctance of political leaders to enact significant reforms in refugee policy can be partly attributed to fear of political backlash from a public wary of liberalising immigration policies, as well as concerns over the potential implications for national security.[42] Such caution reflects a prioritisation of internal stability and cohesion, which, while understandable, has led to a refugee policy framework that is markedly restrictive when compared to international standards.

This conservatism within Japan's political landscape creates a stark contrast between its international image as a humanitarian supporter and its domestic agenda. Japan is a significant contributor to international aid, often positioned as a staunch advocate for human rights on the global stage. However, this international persona belies a domestic reality characterised by a stringent asylum process and low refugee acceptance rates. The tension between Japan's global obligations and its internal political dynamics underscores a complex balancing act: striving to maintain a humanitarian façade internationally while navigating domestic political constraints. This dissonance between outward humanitarian commitments and inward-looking refugee policies highlights the challenges inherent in aligning Japan's refugee protection efforts with its international commitments.

In this context, domestic social factors play a critical role in shaping Japan's approach to refugees and asylum seekers, deeply influencing public perception and the integration process. Central to these factors are concerns about social cohesion and the prevailing myth of homogeneity, which foster apprehension towards individuals perceived as "outsiders".[43] This apprehension is often compounded by cultural barriers, making integration a daunting task for refugees.[44] Language proficiency emerges as a significant hurdle, limiting access to employment opportunities and broader societal engagement. The challenge is not only linguistic but also cultural, as refugees navigate the complexities of Japanese social norms and practices, striving for acceptance within a society that values conformity and homogeneity.[45]

42 Wolman 2015: 409–431.
43 Horiuchi–Ono 2023: 459–473.
44 Horiuchi–Ono 2023: 459–473.
45 Phillimore et al. 2021: 17–35.

In addition, the role of media in shaping public opinion on refugees cannot be understated. Media representations often frame refugees within narratives of security risk or economic burden, which can reinforce stereotypes and exacerbate societal apprehensions.[46] However, civil society organisations in Japan are actively working to counteract these narratives, advocating for more inclusive policies and greater public awareness. These organisations endeavour to highlight the positive contributions that refugees can make to Japanese society, challenging the myth of homogeneity by promoting a more diverse and inclusive national identity. Efforts by civil society, coupled with examples from countries with more progressive refugee policies, underscore the potential for Japan to reform its approach. Learning from these international examples, Japan could adopt policies that not only facilitate the integration of refugees through language support and employment opportunities but also leverage media and public campaigns to foster a more accepting and inclusive society. These measures would not only aid in the integration of refugees but also enrich Japanese society as a whole, bridging the gap between Japan's international humanitarian image and its domestic practices.

In light of economic factors, they significantly impact the integration and well-being of refugees in Japan, presenting substantial challenges to accessing the labour market and achieving economic independence.[47] Legal restrictions on work eligibility for asylum seekers during the prolonged application process exacerbate financial vulnerabilities, forcing many into a precarious existence without stable income. Even recognised refugees often face hurdles in having their professional qualifications acknowledged, limiting their employment opportunities to lower-skilled jobs that do not match their expertise or education level.[48] This underutilisation of skills not only affects the refugees' potential to contribute to the economy but also impedes their socio-economic integration and sense of self-worth.

The economic implications of maintaining a restrictive asylum process are profound, affecting not just the asylum seekers but also placing a financial burden on the government. Resources allocated to detention and deportation could be redirected towards integration programmes that enhance refugees' employability and self-reliance, benefiting both the individuals and the broader economy. By examining countries with more progressive refugee policies, Japan can identify strategies for legal reform and support systems that facilitate smoother economic integration of refugees, such as credential recognition programmes and targeted job placement services, ultimately enriching Japan's labour market and society.

Barriers to policy change within Japan's refugee recognition system are deeply entrenched, reflecting broader challenges in reconciling domestic priorities with international obligations. The rigidity of Japan's bureaucratic institutions is a significant impediment, with administrative structures and procedures proving

46 Hosokawa 2021: 277–291.
47 Phillimore et al. 2021: 17–35.
48 Phillimore et al. 2021: 17–35.

slow to adapt to the evolving needs of refugees and asylum seekers. This inflexibility is compounded by a lack of political will; despite mounting international criticism and calls for reform, political leaders remain hesitant to undertake substantial changes that would liberalise the refugee policy framework. Such reluctance is often rooted in concerns over national security, social cohesion, and the potential economic impact of increased refugee admissions.[49]

Furthermore, Japan's prioritisation of its domestic agenda over international refugee protection criteria creates a policy environment where international obligations are viewed through the lens of domestic political and social imperatives. This approach not only hinders the implementation of necessary reforms but also places Japan at odds with its commitments under the 1951 Refugee Convention and related international human rights instruments. The challenge, therefore, lies in fostering a political climate that is receptive to change and aligned with global standards, ensuring that Japan's refugee policies are both humane and responsive to the needs of those seeking refuge within its borders.[50]

Recommendations

This section presents a comprehensive set of recommendations aimed at reforming Japan's refugee recognition system and enhancing the protection of refugees and asylum seekers' human rights. It outlines a multi-faceted approach and highlights the importance of international cooperation and the role of societal changes in fostering a more inclusive environment for refugees and asylum seekers in Japan. By adopting these measures, Japan can align its policies with international human rights standards, improve the well-being of refugees and asylum seekers, and fulfil its obligations under the 1951 Refugee Convention and its 1967 Protocol.

Improving Japan's refugee recognition rate

To address the critical issues within Japan's refugee recognition system, comprehensive reforms are necessary to ensure the process is fair, efficient, and aligned with international human rights standards. First, simplifying the application process for refugee status is paramount. This entails reducing bureaucratic hurdles that currently make the system inaccessible for many asylum seekers and ensuring that decisions on applications are made in a timely and transparent manner. Such streamlining would help eliminate the backlog of cases and reduce the psychological burden on applicants awaiting decisions on their status. Second, providing greater legal assistance to asylum seekers is crucial. Government-funded programmes or partnerships with NGOs could offer the necessary legal support, ensuring that applicants fully understand their

49 Akashi 2021: 249–270.
50 Hatcher–Murakami 2020: 60–77.

rights and the application process. This assistance would empower asylum seekers to navigate the system more effectively and increase their chances of a fair assessment.

Enhancing the protection of refugees and asylum seekers' human rights

To enhance the human rights protections within its refugee policy, Japan must implement several critical reforms that align with international standards and compassionate practices. Ending the detention of asylum seekers, particularly vulnerable groups such as victims of trauma, is a crucial first step. Alternative measures, such as community-based accommodations and regular reporting requirements, can ensure compliance without compromising the dignity and freedom of individuals seeking refuge. Such approaches have been successfully implemented in other countries, demonstrating their feasibility and effectiveness in protecting asylum seekers' rights while their claims are processed. Moreover, firmly committing to the principle of non-refoulement is essential. Japan should establish robust mechanisms to thoroughly review each case, ensuring that no individual is deported to a country where they face the risk of persecution, torture, or death. This commitment requires transparent procedures and the opportunity for asylum seekers to appeal their cases with access to legal representation, ensuring decisions are made with due consideration of international law and the individual's human rights. Furthermore, Japan must recognise that access to healthcare, education, and social services for refugees and asylum seekers is not merely a matter of policy but a fundamental human right. Providing these services not only aids in the integration of refugees into society but also ensures their well-being and dignity.

Role of international cooperation and pressure in reforming Japan's refugee policies

To foster integration and social inclusion within its refugee policy, Japan should prioritise initiatives that facilitate the economic and social integration of refugees and asylum seekers. Implementing comprehensive language and vocational training programmes is critical to enable these individuals to actively participate in the workforce and society. Such programmes should be designed to meet the specific needs of refugees and asylum seekers, providing them with the necessary skills and language proficiency to navigate daily life and access employment opportunities in Japan. Additionally, developing initiatives to promote cultural exchange and understanding between refugees, asylum seekers, and Japanese citizens is essential to fostering a more inclusive society. These initiatives could include community events, cultural workshops, and educational programmes that encourage interaction and mutual understanding between local communities and newly arrived individuals. By promoting a culture of inclusivity and respect, Japan can mitigate social barriers and foster a welcoming environment for all residents. Creating pathways to employment

for refugees and asylum seekers is another vital step. This includes the recognition of foreign qualifications and the development of skills matching programmes that connect refugees and asylum seekers with local businesses in need of their talents. By facilitating access to employment, Japan can not only improve the livelihoods of these individuals but also benefit from their contributions to the economy and society.

Suggestions for policy, legislative, and societal changes

To enhance its refugee policy and align with international human rights standards, Japan should leverage international cooperation and be receptive to global pressures and recommendations. Actively engaging with UNHCR is essential. Japan can benefit from adopting best practices in refugee protection and integration, drawing on the expertise and recommendations of international organisations to refine its asylum procedures, improve its refugee recognition rates, and ensure the rights of refugees and asylum seekers are upheld. Being receptive to international pressure and recommendations from human rights bodies can serve as a crucial impetus for reform. Constructive criticism from international entities, including human rights organisations and foreign governments, should be viewed not as censure but as an opportunity to enhance Japan's legal and institutional frameworks. This openness to global insights and standards can catalyse the necessary legislative and policy adjustments, fostering a more humane and effective refugee policy.

Participating in global refugee resettlement and support initiatives offers Japan a pathway to share responsibility and benefit from the collective wisdom of the international community. By joining efforts in resettlement programmes and support networks, Japan can not only alleviate the pressures on countries with large refugee populations but also enrich its societal fabric through the integration of refugees. Learning from the experiences of other nations that have successfully balanced security concerns with humanitarian obligations can guide Japan in crafting policies that reflect both its national interests and international commitments. Embracing this global perspective underscores Japan's role as a proactive member of the international system, committed to upholding the principles of human rights and refugee protection.

To address the crisis of human rights of refugees and asylum seekers in Japan, comprehensive reforms across policy, legislative, and societal dimensions are essential. Firstly, amending the Immigration Control Law and other relevant legislation is crucial to adopt a more humane and rights-based approach to asylum and refugee protection. This involves ensuring that the principles of non-refoulement and the right to seek asylum are unequivocally upheld, reducing the risk of forced deportations and providing multiple avenues for asylum applications beyond the current restrictive cap. Enhancing transparency in the decision-making process for refugee recognition is also vital. This includes establishing clear, accessible procedures and criteria for asylum applications, and holding authorities accountable for their adherence to both

domestic and international legal standards. Such measures would foster trust in the asylum system and ensure that decisions are made fairly, based on the merits of each case and in line with Japan's obligations under the 1951 Refugee Convention and its 1967 Protocol.

Finally, implementing public awareness campaigns is crucial to shift societal attitudes towards refugees and asylum seekers. Educating the Japanese populace about the plight of these individuals, the benefits of a diverse and inclusive society, and Japan's international obligations can foster a more welcoming environment. Such campaigns should highlight the contributions that refugees and asylum seekers can make to the community, dispelling myths and fostering a culture of acceptance and support.

Conclusion

The crisis of human rights for refugees and asylum seekers in Japan presents a compelling challenge at the intersection of domestic policy and international obligations. As Japan marks the 40th anniversary of its refugee recognition system, the time is ripe for introspection and reform. The country's starkly low refugee acceptance rates and the recent legislative changes, which potentially exacerbate the vulnerabilities of those seeking refuge, underscore a critical departure from the humanitarian ideals Japan purports to uphold on the international stage.

Japan's current stance on refugee recognition and asylum – a cautious approach characterised by stringent control over compassionate protection – raises significant human rights concerns. The legislative limitations on asylum applications and the spectre of forced deportations not only contravene international human rights law but also betray a fundamental misunderstanding of the global refugee crisis. These policies not only fail to recognise the legitimate fears and rights of individuals fleeing persecution but also undermine Japan's reputation as a defender of human rights and international law.

The recommendations outlined in this article – ranging from legislative reforms and enhanced procedural transparency to societal changes aimed at fostering a more inclusive attitude towards refugees and asylum seekers – are not merely aspirational. They are practical, actionable steps that Japan can and should take to reconcile its domestic policies with its international image. By amending restrictive laws, engaging more constructively with international bodies, and embracing a more inclusive societal approach towards refugees and asylum seekers, Japan can significantly improve its refugee recognition rate and enhance the protection of human rights within its borders.

This process of reform is not without its challenges. It requires a shift in both policy and perception, demanding political will, societal engagement, and a recommitment to the principles of international cooperation and human rights. However, the benefits of such reforms extend far beyond the immediate improvement of refugees' and asylum seekers' lives. They contribute to a more just, compassionate, and inclusive

society that values the dignity and rights of all individuals, irrespective of their nationality or status. Moreover, Japan's leadership in addressing the refugee crisis can set a precedent for other nations, demonstrating that it is possible to balance national security concerns with humanitarian obligations. In doing so, Japan would not only be fulfilling its international obligations but also enhancing its standing as a moral and ethical leader on the global stage.

In conclusion, the crisis of human rights of refugees and asylum seekers in Japan is a complex issue that requires a multifaceted response. By implementing the recommended policy, legislative, and societal changes, Japan has the opportunity to transform its refugee recognition system into a model of compassion, efficiency, and adherence to international human rights standards. Such a transformation would not only better the lives of countless individuals seeking refuge but also reaffirm Japan's commitment to the values of humanity, justice, and international solidarity. The time for such reform is now, as the world watches and waits for Japan to take its rightful place as a staunch defender of human rights and a beacon of hope for refugees and asylum seekers worldwide.

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ACTA HUMANA • 2 (2024) 43–57. • DOI: 10.32566/ah.2024.2.3

Violence against Women as a Structural Risk: Responding through Prevention with Due Diligence[1]

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Situations of crises such as the Covid–19 pandemic expose the fissures in society, both domestic and global. Using violence against women as an example, the paper shows how structural risks amplify during crises and how the concept of due diligence can be used to address these risks. By focusing on prevention, it analyses the existing approaches towards due diligence in the context of violence against women by the Inter-American Court of Human Rights, the European Court of Human Rights, the Committee on Elimination of Discrimination against Women and the Special Rapporteur on violence against women. The paper looks at how these mechanisms have considered the invocation and applicability of the duty of prevention with due diligence as well as the measures that states need to take to discharge such a duty. It concludes with a reflection on what can be done to further strengthen the arguments of the mechanisms analysed in this paper to utilise the full potential of due diligence concerning state obligations towards the prevention of violence against women.

Keywords: violence against women, structural risks, prevention, due diligence

Introduction

The purpose of this paper is to explore the interrelation between risk, due diligence in international human rights law (IHRL) and the state obligation to prevent violence against women. In a nutshell, the paper asserts that the state

1 We thank all our friends who have contributed to this article through comments on the content, structure, grammar review, or in any other manner. We are also grateful organisers and participants of the conference War and Peace in the 21st Century 2nd Edition – The Fate of Human Rights (29-30 September 2023 Budapest, Ludovika University) for their great remarks on the topic of this article.

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obligation to prevent human rights violations has to be carried out with a certain level of due diligence. Due diligence is, however, to a certain extent dependant on risk because only when risk attains a certain level or characteristic, the positive obligation to prevent further escalation of that risk and eventual harmful results by exercising a sufficient level of due diligence arises. Moreover, in IHRL due diligence is often intertwined with states' duty to prevent, because it serves to clarify and strengthen states' duties concerning prevention. The ultimate aim of the paper is to show that prevention through due diligence is a helpful tool to address structural risks such as violence against women.

The discussion begins by exploring why violence against women is a clear example of a structural risk, and how this has been disclosed by the Covid–19 pandemic. The paper then turns to the legal concept of due diligence, which has strengthened state obligation to prevent violations in the context of violence against women. Next, the paper examines the existing framework for the protection of violence against women, and how due diligence plays out therein. Finally, given that due diligence has been, at least to a certain extent, addressed through jurisprudence and documents issued by different human rights bodies, this paper briefly examines the approaches to due diligence adopted by the Inter-American Court of Human Rights (IACtHR), the European Court of Human Rights (ECtHR), the Committee on Elimination of Discrimination against Women (CEDAW Committee) and the Special Rapporteur on violence against women. It provides evidence on how these institutions have considered the duty of due diligence to arise out of the context of rights in which they have discussed the principle and what are the measures that states need to take in order to discharge the duty of due diligence. The paper concludes with a reflection on due diligence as a principle to combat structural risks and suggests what else could be done to strengthen the findings of the various institutions which aim to concretise state obligations to prevent violence against women.

Violence against women during the Covid–19 pandemic as a structural risk

Risk in international law attracts attention because it relates to inherent problems that international law as a structure tends to perpetuate. Many such problems are revealed in extreme times, such was the case during the Covid–19 pandemic: for instance, while much attention was paid to the economic issues alongside healthcare worries relating the spread of the virus, there was an almost complete dismissal of violence against women in states' response. Different sources showed that the measures adopted to combat the pandemic led to a significant increase in violence against women throughout the world.[4] Economic insecurity and lockdowns led to frequent perpetration of domestic violence and decreased possibilities for women to escape it.[5]

4 See, for example, Council of Europe 2020; UN Women 2021.
5 Nthusang 2020.

In some countries, measures chosen by governments created new opportunities for violence against women.[6]

In this sense, violence against women can be seen as a structural risk, which is often (at least indirectly) caused by states' failures to take measures to either prevent or to put an end to such violence. Women's rights or their lack thereof are, in fact, a pertinent example of structural risks that tend to amplify in situations of crises, potentially even more so if legal measures are enacted but not thoroughly planned. During the Covid–19 pandemic, violence against women was exacerbated despite measures taken to prevent the spread of Covid–19, because protecting women from violence was not necessarily in the policy-making imagination when planning required steps to prevent the transmission of the virus. As such, the issue was only considered when the primary measures worsened the problem of violent acts against women.

In reality, the experience of Covid–19 has only proven that despite significant advances in women's rights and the remarkable evolution of international law in this area, women's rights never make the initial cut for national emergency responses or allocation of funds in the face of a crisis. Women continue to experience high levels of violence globally and violent acts against women represent a continuous threat to society. Further, discrimination against women including violence against women is rather systemic.[7] Despite much work being done on the subject, achieving a gender balance remains a far cry from the ideal.[8]

Apart from the social and religious factors that contribute to the suppression of women in every society, one of the important factors is the male-oriented construction of the global order especially its economic orientation that places little value on the work done inside the home thus creating a public/private divide and substantially reducing the scope for state intervention within the "home". Within international law, this public/private divide is evident in the fact that women's rights were traditionally relegated to the domestic sphere and have more recently become an issue of international concern.[9]

6 International Committee of the Red Cross 2020.

7 When these measures are upheld by government policies, they should engage state responsibility. See, in this sense, Chinkin 1999: 393.

8 What the pandemic has done is that it has made starkly evident the structural deficiencies, such as the lack of attention paid to the women's issues, that have for long formed part of the international order.

9 Protection of rights in the private sphere has occurred through the adoption of different documents. Regarding women's rights, this has been achieved through the sources which focus entirely or partially on discrimination against women, a few examples are the Convention on the Political Rights of Women (adopted in 1953); the Convention on the Nationality of Married Women (adopted in 1957); the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted in 1962) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted in 1979), the Declaration on the Elimination of Violence against Women (adopted in 1993).

Due diligence: the solution for addressing structural risks?

In a way, due diligence is the most natural response to structural risks. It suggests that the least a state can do is to take measures to the best of its ability to ensure that a perceived unwanted outcome does not materialise or is at least undermined.[10] Due diligence to states is what the duty of care is to independent actors, which "is the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation".[11]

The field of human rights is one that has been very proactive in promoting a diverse view of due diligence in terms of preventing risk. For example, the UN Guiding Principles on Business and Human Rights use due diligence in a very specific way to ensure that businesses do not have an adverse impact on the human rights situation in the country in which they set shop.[12] At the same time, the UN Guiding Principles bring the responsibility of the state towards ensuring that this due diligence is being seriously conducted (due diligence of due diligence, so to speak).[13] Nevertheless, since due diligence has gained significant recognition in IHRL through jurisprudence and its use in this sphere is seen as different and innovative,[14] many questions still remain to be addressed, for instance, whether due diligence plays a role in all state obligations concerning individuals and whether the level of diligence required from states in IHRL compares equally with other subfields of international law, which have more experience in using this concept.[15]

Another way to describe due diligence is to call it an intermediate step between risk and harm. In the case of women's rights, it would mean the efforts that states have to show when faced with a certain risk to prevent harmful consequences. In the context of women's rights, the legal benefit that due diligence entails vis-à-vis the public/private divide is that it acts as a bridge between the state and private individuals. This is because state responsibility may arise due to the failure on part of the state to take all reasonable and necessary measures to ensure that women's rights are respected by private actors. In fact, one may argue that due diligence was advanced precisely to expand the doctrine of state responsibility and increase chances to hold states responsible for their failure to prevent, investigate, punish and provide redress for acts of violence committed by private actors within the private sphere. At the heart of these advances lies the broader feminist agenda to challenge the public/private divide as a gendered structure that historically organised women's relationship to the state and IHRL differently so as to prevent the recognition of domestic matters,

10 Such understanding of due diligence would correspond to what McDonald calls "due diligence carried out as a policy decision". McDonald 2019: 1049.

11 *Black's Law Dictionary* 2006 as cited in Kryczka et al. 2012: 125.

12 UN General Assembly 2009: paras. 49–54.

13 See further Bonnitcha–McCorquodale 2013.

14 Abi-Mershed 2008: 129.

15 An appealing idea is that states should consider the importance of the interest which needs to be protected when deciding how to implement due diligence. Pisillo-Mazzeschi 1992: 44.

including violence against women, as a relevant concern for states.[16] Throughout the years, the cases on violence against women addressed by the CEDAW Committee, the IACtHR and the ECtHR, among others, became sites where feminist actors were able to contest, negotiate, and redefine the relationship between women and the state.

Prevention of violence against women and due diligence

The positive duty of states to prevent violence against women stands on a sound legal framework, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[17] the Inter-American Convention on the Prevention, Punishment and Eradication of Violence of Women (Convention of Belém do Pará)[18] and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[19] are among the documents which represent significant progress in establishing and clarifying the existence of such an obligation. In the view of some authors, positive obligations to prevent violations of, in that case, gender-based violence, have even attained status of customary international law.[20] Moreover, violence against women is a broader human rights issue and can be considered as a violation of various human rights, including the right to life, the prohibition of ill treatment, the right to private life and the prohibition of discrimination.[21] Thus, states' obligation to take active positive action concerning prevention can be further subsumed under other international and regional human rights treaties.[22]

While the binding obligation for states to prevent violence against women by taking concrete steps is uncontroversial, there is less clarity over the actual meaning and scope of this obligation under international law. In this regard, the principle of

16 Positioning violence within the private sphere has compromised women's ability to legitimately make claims against the state. García-Del Moral – Dersnah 2014: 663.

17 Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979, 1249 U.N.T.S. 13. While it is unfortunate that this treaty does include direct prohibition and duty to prevent violence against women, this gap has been filled by the CEDAW Committee which explained that violence against women results in violation of arts. 2, 5, 11, 12 and 16 of CEDAW. CEDAW Committee, General Recommendation No. 12: Violence against Women, 1989.

18 Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence of Women, 1994, arts. 7 and 8.

19 Council of Europe 2011, Chapter III.

20 Grans 2018: 735.

21 For discussion on which rights are violated by domestic violence, see Sousa Gant 2002: 15–17.

22 In its General Comment No. 2, the Committee against Torture (hereinafter CAT Committee) defined state failure to comply with due diligence when preventing violence against women as a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. CAT Committee, General Comment No. 2, 2008, para. 18. Likewise, the Human Rights Committee stated that states parties to the International Covenant on Civil and Political Rights are under due diligence obligation to take positive measures to prevent violation of the right to life. Human Rights Committee, General Comment No. 36. Article 6: right to life, 2019, para. 21.

due diligence is supposed to assist in deciding on measures which could fall in the duty to prevent. In a nutshell, due diligence is obliging states to pursue "best efforts" in taking reasonable measures to prevent certain human rights violations. A state does not actually need to succeed in achieving such a goal. In this sense, due diligence is an obligation of means, and states may comply with due diligence even in cases where the violation that the state tries to prevent eventually occurs – if and when the measures adopted attain the standard of due diligence.[23]

One may believe that states' compliance with due diligence standards has particular value in the context of violence against women because of the common lack of responses from states in the past.[24] This principle is therefore included in international and regional frameworks for the protection of women from violence.[25] In the view of some, due diligence has in the context of state obligations concerning violence against women achieved a status of customary international law.[26] Many international bodies, including the CEDAW Committee,[27] the Secretary-General[28] and the Council of Europe[29] as well as instruments, for instance, the Convention of Belém do Pará,[30] the Istanbul Convention[31] and the Declaration on the Elimination of Violence against Women[32] acknowledge due diligence as a standard that should be applied to states regarding their duties with respect to violence against women.[33] Further, due diligence is commonly referenced in discussions about states' obligations concerning violence against women, in particular with respect to prevention.[34]

The weakness of various documents mentioned above is that they give a loose definition of due diligence (if any at all) and provide no guidance on how to interpret it in practice. What is more, they fail to clarify under which circumstances due diligence is triggered and how states' compliance with this principle could be monitored. Consequently, exercising due diligence in the context of violence against women has

23 Koivurova–Singh 2010.
24 Goldscheid–Liebowitz 2015: 303.
25 For the list of existing standards on due diligence regarding states' obligations to address violence against women see Human Rights Council (hereinafter HRC), Rep. of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2013, paras. 23–40.
26 Commission on Human Rights, Rep. of the Special Rapporteur on violence against women, its causes and consequences, Yakin Erktürk, 2006, para. 29; Hasselbacher 2010: 198–200.
27 CEDAW Committee, General Recommendation No. 19: Violence against Women, 1992, para. 9. *Ending Violence against Women: From Words to Action. Study of the Secretary-General* 2006, 89–91.
28 United Nations 2006: 89–91.
29 Committee of Ministers 2002, Art. 4(II).
30 Art. 7(b).
31 Art. 5(2).
32 GA Res. 48/104, 1993, Art. 4(c).
33 While not all of the mentioned documents have a binding force, they have played a role in the establishment of due diligence as a legal standard through jurisprudence. See, in this sense, Thill 2014: 53.
34 For a detailed discussion on due diligence and prevention in the context of violence against women, see Abdul Aziz – Moussa 2016: 13–30.

been left to the discretion of states and other interpretations, including international jurisprudence. As we will see, the IHRL tribunals and bodies have provided slight guidance in concretising what measures should be taken by states to comply with the principle of due diligence. The exception is the Special Rapporteur on violence against women, which has been slightly more concrete.

Triggering and discharging due diligence in practice

Inter-American Court of Human Rights

Velásquez Rodríguez was the milestone case before the IACtHR in which the Court unequivocally acknowledged state obligation to take *active* steps to prevent violence against women.[35] The IACtHR highlighted that states need to comply with due diligence when discharging their positive obligations of prevention,[36] and that there is no need for the state to actually succeed in preventing violations as long as best efforts (and not just mere formalities) were made in adopting reasonable and effective measures.[37] It further confirmed the obligation to prevent that requires due diligence to be applicable to acts committed by private individuals,[38] which would include violence against women by these individuals in the private sphere.

When assessing the circumstances under which state obligation to exercise due diligence measures of prevention is triggered, the IACtHR turned to the concept of danger in some of its judgments.[39] It found that the state would have to react if the danger against an individual or a group of individuals is imminent and real. At the same time, the state would need to possess an awareness of such a danger in order for its obligation to adopt preventive measures to arise.[40] On the question of how should a state discharge due diligence in practice, the IACtHR said that a list of such obligations cannot be made in abstract and should be decided on a case-by-case basis.[41] It is however clear that some measures would aim towards more general prevention, such is the example of training officials in the judiciary and the specialised police.[42] Further, they would encompass educational programs for the general public to raise awareness on the violence against women, the creation of specialised institutions for assisting

35 IACtHR, Velásquez Rodríguez v. Honduras, 1998, paras. 174–175.
36 IACtHR, Velásquez Rodríguez v. Honduras, 1998, para. 172.
37 IACtHR, Velásquez Rodríguez v. Honduras, 1998, paras. 174; 177. See also IACtHR González et al. ('Cotton Field') v. Mexico, 2009, para. 252.
38 IACtHR, Velásquez Rodríguez v. Honduras, 1998, para. 172.
39 See, for example, IACtHR, Pueblo Bello Massacre v. Colombia, 2006, para. 123; IACtHR González et al. ('Cotton Field') v. Mexico, 2009, para. 280.
40 IACtHR, Pueblo Bello Massacre v. Colombia, 2006, paras. 123; 125; 151. In the case López Soto, IACtHR considered that in the context of widespread violence against women, the disappearance of a woman would be sufficient for obligation to act with due diligence to arise. IACtHR, López Soto v. Venezuela, 2018, para. 145.
41 IACtHR, Velásquez Rodríguez v. Honduras, 1998, para. 175.
42 IACHR, Access to Justice for Women Victims of Violence in the Americas, 2007, para 34.

women who suffered violence at home and efforts to increase the effectiveness of criminal justice processes. Next, there are some measures of prevention that states would have to adopt to comply with due diligence on a specific level, for instance, to conduct a genuine investigation in case of alleged violence against women.[43]

The IACtHR has classified non-compliance with due diligence by states in the context of violence against women as a violation of the prohibition of discrimination and the prohibition of torture, among others.[44] The IACtHR's finding that failing to comply with due diligence in adopting measures of prevention may amount to a violation of various human rights is noteworthy, because first, it puts greater pressure on states to raise measures of prevention to an appropriate standard. Second, such a conclusion underlines that preventive measures should be well planned and sufficiently detailed.

European Court of Human Rights

Just as the IACtHR, the ECtHR has also addressed due diligence in the context of states' obligation with respect to violence against women. Nevertheless, the ECtHR case law which explicitly refers to due diligence is limited and it mostly concerns cases where the applicant claimed a violation of the principle.[45] By relying on risk assessment and the authorities' actual and putative knowledge of risk, the ECtHR in *Osman v. United Kingdom* first decided that a state was obliged to take preventive measures that could be reasonably expected.[46] In a different case, the Court then asserted that whenever a private individual commits an act of violence, the burden that lies on the state to prevent it should not be disproportionate.[47] State responsibility for violations by private individuals could be triggered if there is an immediate and real risk towards an individual of which authorities were aware/knew or ought to have known/should have been aware but failed to exercise their obligations with due diligence.[48]

In a case that was addressed by the ECtHR after *Osman v. United Kingdom,* the suggestion was made that the Osman test is not necessarily adequate for situations of domestic violence, because in such cases there is no need for the risk to be immediate.[49] Instead, one of the judges stated that it suffices for the risk to

43 In this regard, see especially art. 7(b) of the Convention of Belém do Pará. See also IACtHR, Hacienda Brasil Verde Workers v. Brasil, 2016, paras. 367; 378–379. The Court clarifies that opening and conducting effective investigation without delay is implied in the due diligence obligation.

44 IACHR, Jessica Lenahan (Gonzales) et al v. United States, 2011, paras. 111–112; IACtHR, Women Victims of Sexual Torture in Atenco v. Mexico, 2018, para. 180.

45 See, for example, ECtHR, Mudrić v. The Republic of Moldova, 2013, para. 60.

46 ECtHR, Osman v. United Kingdom, 1998, para. 116.

47 ECtHR, Đorđević v. Croatia, 2012, para. 139.

48 ECtHR, Osman v. United Kingdom, 1998, para. 116.

49 Sara De Vido suggests that the ECtHR's reasoning in the case Talpis v. Italy proves that the vulnerability of the victims in each specific case prevails over the strict requirement of the immediacy of risk. De Vido 2017: 7–8.

be simply "present" in order for the duty of due diligence of the public authorities to arise.[50] In the context of widespread abuse known to state authorities, there is the constructive duty to prevent and protect without any need for immediate risk. At the same time, the ECtHR established that such a general risk would only suffice if the applicant proves the existence of a link between the risk, lack of action by a state and the harm produced.[51]

The ECtHR has heard cases concerning due diligence in obligations concerning prevention of violence against women in the frame of the right to life, the prohibition of torture, the right to respect for private and family life and the prohibition of discrimination.[52] Importantly, both the ECtHR and the IACtHR have recognised failure by a state to exercise due diligence to protect women from violence as a gender-based discrimination.[53] On the question of what would be the appropriate measures to implement due diligence to prevent violence against women, the ECtHR's reasoning remained always very general, for instance, the Court suggested the existence of a close link between due diligence and the obligation of criminal investigation, which must be conducted with a certain level of "special diligence".[54]

Committee on Elimination of Discrimination against Women

The Committee's role in the endorsement of the due diligence principle with respect to state obligations concerning violence against women was first seen in General Recommendations No. 12 and No. 19. In the latter document, the Committee highlighted the need of states to adopt "appropriate and effective measures to overcome all forms of gender-based violence".[55] It has also referred to due diligence in some of its individual communications where it instructed states on what due diligence meant in the context of preventive measures.[56] Examples referred to by the Committee are training of law enforcement professionals, coordination between non-governmental organisations, judicial authorities and other relevant bodies, as well as raising awareness.[57] An important observation of the Committee was that states'

50 Concurring Opinion of Judge Pinto de Albuquerque in ECtHR, Valiulienė v. Lithuania, 2013.
51 For further discussion see Stoyanova 2020: 615.
52 See, for example, ECtHR, Osman v. United Kingdom, 1998, para. 115 (right to life); ECtHR, Mastromatteo v. Italy, 2002, para. 67 (right to life); ECtHR, Opuz v. Turkey, 2009, para. 159 (prohibition of ill-treatment) and para. 198 (prohibition of discrimination); ECtHR, Eremia v. The Republic of Moldova, 2013, para. 85 (prohibition of discrimination); ECtHR, T. M. and C. M. v. the Republic of Moldova, 2014, para. 57 (prohibition of discrimination); ECtHR, M. G. v. Turkey, 2016, para. 115 (prohibition of discrimination); ECtHR, Balsan v. Romania, 2017, paras. 83–88 (prohibition of discrimination).
53 Grans 2018: 746.
54 See, for instance, ECtHR, Tërshana v. Albania, 2020, paras. 157; 160.
55 CEDAW Committee, General Recommendation No. 19: Violence against Women, 1992, para. 24(a).
56 See, for example, CEDAW Committee, A.T. v. Hungary, 2005, para. 9.2.
57 CEDAW Committee, Goekce v. Austria, 2007, para. 12.3; CEDAW Committee, Fatma Yildirim v. Austria, 2007, para. 12.3; CEDAW Committee, Angela González Carreño v. Spain, 2014, para.

obligation to prevent violence against women is not conditional on the existence of immediate and real threat towards the victim.[58]

In its latest general comment on violence against women from 2017, the Committee referred to due diligence only in the context of states' obligation regarding acts or omissions by non-state actors.[59] Apart from providing some examples of what can due diligence mean in practice, it defined states' failure to take appropriate measures to prevent gender-based violence as de facto permission or encouragement of violent acts committed by non-state actors, which in itself is a human rights violation. The precondition for the state obligation to take appropriate measures arises if the authorities are aware or should have been aware of the risk of gender-based violence.

Special Rapporteur on violence against women

In addition to jurisprudence, there have been other efforts to clarify what states have to do in order to discharge the obligation of due diligence. For example, according to the report from the Special Rapporteur on violence against women from 2009, states can comply with due diligence by establishing different preventive, educational programmes and special mechanisms such as ombudspersons for tackling the roots of the violence against women. Due diligence may also be exercised by raising awareness on the matter and collecting data on the reported cases of violence against women. Further, healthcare, psychological support and shelters for victims of domestic violence are examples of how states could comply with the standard of due diligence, as long as such interventions are monitored and evaluated carefully in order to ensure their effectiveness and adequacy to the existing situation.[60]

Importantly, the Special Rapporteur on violence against women concluded that states' obligation to act with due diligence should exist on systemic and individual levels.[61] One may consider that systemic due diligence is particularly important because it puts preventive measures at the heart of states' obligations concerning violence against women.[62] In order to assess state compliance with due diligence whose goal is to address systemic issues standards, the Special Rapporteur attempted to develop some factors, namely the existence of constitutional authority that guarantees equality for women and prohibits violence against women, the existence of national

11. See also CEDAW Committee, Rep. on Mexico produced by the Committee on the Elimination of Discrimination against Women under art. 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, 2005, para. 276.

58 CEDAW Committee, V. K. v. Bulgaria, Communication No. 20/2008, 2011, para. 9.8.

59 CEDAW Committee, General Recommendation No. 35 on Gender-based Violence against Women, Updating General Recommendation No. 19, 2017, para. 24(2)(b).

60 OHCHR 2009: 25–26.

61 HRC, Rep. of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2013, paras. 20; 70.

62 HRC, Rep. of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2013, paras. 20; 70.

legislation and/or administrative sanctions that adequately remedy women victims of violence, the existence of policies or plans of action that deal with violence against women, the sensitivity of the criminal justice system to issues regarding violence against women, the existence of support systems for women victims of violence, education and awareness programmes on violence against women as a human rights violation and the collection of data and statistics on violence against women.

Reflections

Violence against women is, as shown in this paper, a structural risk, which could be mediated through the obligation to prevent such violence with due diligence. By highlighting states' key role in addressing violence against women and other similar global risks, due diligence provides a promising opportunity to underpin the international legal order. Due diligence should be seen, on the one hand, as a way of facilitating the discharge of the positive obligation of prevention for states and on the other, as a concept that contributes to understanding what the positive obligation of prevention actually means.

Due diligence is intended to provide a flexible approach and leaves the final decision on the measures that need to be taken in the hands of states. This flexibility can be seen as positive because it can take into account the specificities of each case.[63] At the same time, IHRL bodies and other institutions dealing with violence against women should contribute towards a better understanding of how due diligence could be best implemented and what states are concretely required to do in order to prevent violence against women. For instance, regarding the nature of the measure taken, it is clear that the analysed IHRL bodies agree that efficiency and reasonableness are what matters most for states to comply with due diligence. Their decisions could, however, benefit from more clarity and preciseness.[64]

Although its implementation is not so clear-cut due to the ambiguity, the importance of due diligence lies in the fact that it allows to move away from a system that is not always built for the protection of women's rights. Indeed, states should take advantage of this principle's flexibility and be creative in adopting their measures of prevention. Moreover, they could follow the examples introduced by the Special Rapporteur on violence against women.[65] As a first step, they should engage with domestic violence in a systemic way, and condemn it in its entirety as this can prevent it from occurring. Whenever possible, states should consider the potential impact of any non-emergency or emergency responses (such is the case of Covid-19 measures)

63 Abi-Mershed 2008: 129.

64 For example, in the case of *Opuz v. Turkey* it is arguable whether the ECtHR has expanded the obligation of the state to take general preventive measures in cases where general risks of violence exist. Instead, it seems that the court required that a specific individual necessarily is at risk for the state obligation to take measures to arise. Stoyanova 2020: 610.

65 See the examples mentioned in OHCHR 2009.

before they adopt them. In the development and implementation of these responses, multiple voices and angles must be considered, including different gender-impact studies, research, and cooperation with organisation whose work can assist in making state responses more gender sensitive. At all times, the duty of due diligence should be understood as a responsibility of a state to design and implement responses that result in women's empowerment.

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ACTA HUMANA • 2 (2024) 59–73. • DOI: 10.32566/ah.2024.2.4

Extraterritorial Application of the European Convention on Human Rights at Sea[1]

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We live in a world where we face countless crises and directly experience armed conflicts. The seas, such as the Red Sea, the Black Sea, and South China Sea hold strategic importance in these crises and conflicts. The sea is a unique and challenging environment, considering both its distinct physical characteristics and the jurisdictional issues. At sea, human rights can be compromised in various ways, and these cases often go unreported or they lack sufficient public awareness. It is also an expansive area to monitor, and the effectiveness of the police or military forces is sometimes hindered by limited resources or the reluctance to take action due to the non-compliance with legal regulations. It is the responsibility of the international community to encourage the authorities to prosecute the perpetrators by establishing a legal framework that effectively safeguards human rights and can be enforced by state authorities. This paper aims to explore the challenges of enforcing human rights during the arrest and detention process in cases of transnational crimes or violations of international law, such as piracy, terrorism, and drug trafficking committed on sea, involving the case law of the European Court of Human Rights.

Keywords: European Convention on Human Rights, extraterritorial, human rights, international law, maritime piracy, sea

Introduction

We live in a world where we face countless crises and directly experience armed conflicts, the world order is changing in front of our eyes. Oceans and seas have always had a strategic importance in these processes, a special role in geopolitics. They don't only mean a unique venue for battles to be fought, but the majority of world trade is based on maritime transport, which expands

1 I would like to thank the Nanovic Institute for European Studies, University of Notre Dame for their support. This project would not have been possible without the Patrick and Angela Adams Fellowship. The usual disclaimers apply.

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year by year. More than 80% of cargo traffic[3] is already carried by seas, and maritime trade is expected to grow more than 2% between 2024 and 2028.[4] Nowadays, it is not only about the traffic, but there are approximately 1.4 million kilometres of active submarine cables in the world.[5] The bulk of data transmission occurs beneath the ocean's surface, and these cables facilitate roughly 95% of international data transmission.[6]

Global events are immediately reflected on the maritime trade and its commercial performance. We could track the decline in trade in 2020, when the Covid–19 hit the world. If any incident directly happens at sea or affects it, especially at strategically important locations, it can disrupt maritime trade, as we have seen it in the case of the obstruction caused by Ever Given in the Suez Canal in 2021, the war between Russia and Ukraine, the attacks by Houthi militants on ships in the Red Sea, or we can think about the activity of Somali "pirates", and other armed robbers or terrorists. These activities are menacing shipping and lead to higher costs. End-consumers also feel its effect in the price increase of food and other items, as these higher freight rates are usually passed on to.[7] We also experience delays, and it also leads to higher greenhouse gas emission, for ships have to change their route and sail around the African continent to transport goods from China to Europe. This is, however, still not without any risks, regarding the armed robberies happening in the Gulf of Guinea. Unfortunately, these crimes are impossible to eradicate because they count as usual symptoms of a state having certain economic or social problems.[8]

Consequently, shipping is a unique genre. In international law, we have principles defining jurisdiction, we have maritime zones, flag states etc. Oceans and seas, however, create a specific environment, bringing together those affected by an incident.

Violation of human rights at sea can come in various forms for sure. It may manifest in misdemeanour, or sometimes felonies like sexual violence, violating labour rights, but also in forced labour, child labour, or human trafficking. For this reason, a team of distinguished experts of international law drafted the Geneva Declaration on Human Rights at Sea (Declaration).[9] The document was initiated in 2019, and it serves as a recommendation for various actors of the industry by providing clarity and guidance laying down the basic cornerstones.

The Declaration also recognises that one of the oldest menaces to the security of navigation and to human lives at sea is piracy. In almost every article published in this topic we can read that the first crime in history that triggered solidarity and unity among people, irrelevant to their national affiliation, was actually piracy.

3 UNCTAD [s. a].
4 For further details visit UNCTAD 2023.
5 Gervasi 2023.
6 Symington 2024.
7 For further details on the Houthi attacks, visit Blenkinsop 2024.
8 Kiss 2010: 143–153.
9 Geneva Declaration on Human Rights at Sea.

In international law we prefer to use the term *hostis humani generis* to emphasise its threatening nature.

This article has a special point of view. It provides an insight into what happens when suspects of "piracy" are caught and detained. It is to present the complex legal background because of which states and their navies tend to hesitate detaining these individuals, leading to the practice of impunity if an abuse happens at sea.

Considering the above-mentioned, this article has the ambition to raise awareness to those problems related to legal enforcement and human rights that we face on mainland as well, however, the sea is a more challenging environment. Individuals, not working in a job related to the sea, tend to have an "out of sight, out of mind" attitude towards matters at sea, and honestly, many abuses can remain unreported because no one is watching.

"Piracy", or what you will

In the international law of the sea, piracy is defined by Article 101 of the United Nations Conventions on the Law of the Sea (UNCLOS).[10] According to international law, piracy is an illegal act "of violence or detention, or any act of depredation, committed for private ends by the crew of the passengers of a private ship […] on the high seas against another ship […] [and] any act of voluntary participation [in this act]".[11] Consequently, those crimes that are very similar to piracy in nature, but aren't committed on high seas or they actually happen on high seas but by political motivation, are not regarded as piracy according to international law. In reality, however, we see that many incidents happen at ports or in the territorial waters of a state and not on high seas. We face attacks targeting the cargo, the ship, the staff, but we also see perpetrators striking yachts, but drugs or human trafficking are also often involved in these incidents. Then, of course, there is maritime terrorism. It seems to be widely accepted that piracy and maritime terrorism are mutually exclusive categories, because we can usually draw the demarcation line at the intention. We think the motivation is different, it is more like a politically motivated crime, and the *animus furandi* is not a goal, contrary to piracy, it is at most a means. On the other hand, however, we can also observe that piracy appears in political reasoning, especially after the terrorist attacks in 2001. Some experts relied on the piracy analogy. Given that piracy was the first crime targeting people, regardless of their citizenship, the community considered the perpetrators as common enemies of all mankind, just like modern terrorists nowadays.[12]

In reality, defining maritime terrorism is a complex task, for terrorism in general doesn't have a universally accepted definition. The definition of piracy is not entirely clear either, considering the *travaux preparatoires,* analysing how the definition

10 United Nations Conventions on the Law of the Sea (UNCLOS) 1982.
11 Article 101, UNCLOS.
12 Sources rely on Cicero, however, it is also a misinterpretation of his words.

evolved through times. According to Guilfoyle, piracy was originally created as a general term, and the difference is whether an action requires the reaction of the State in form of a sanction. If yes, it is for public ends, otherwise, it is committed for private ends.[13]

From our point of view, the reason for having some clarity in this field is to know whether there is a difference in the way how suspects are detained. If terrorists are identified similarly to pirates, the jurisdictional issues, usually associated with their capture, can be elegantly circumvented.[14] In the author's opinion, a crime committed for private end is not exactly the same when it is committed by private motivation. Motivation includes the reason that triggers an action, and it may include the goal someone would like to reach with the action in question, as the purpose may motivate you. When "private end" comes into picture, it is more like a purpose, what you would like to reach, and what you would like to get out of it.

Consequently, although some argue that hatred itself can also be a private motivation,[15] and to some extent it may be definitely true, however, there is a doubt whether it fits the term "private end".

Nonetheless, despite the careful analysis of the regulatory history, aiming to know what the legislator's intention was, it may turn out, that the meaning of private ends changed, and it is actually more practical to think that it involves some private financial gain.

It is true, however, that in a historical context, ancient pirates were a group of people, distancing themselves from the protection and jurisdiction of their own state and to declare war on civilisation, engaging into activities like the terrorists: killing, destroying, destroying trade, terrorising. In order to reach their goal, they were indiscriminate in choosing their means.[16]

We can observe that these crimes are blended by colloquial language and are indistinguishable for everyday people for they all come in a form of a violent crime happening on sea. International law is aware of this problem, therefore, we have other documents like the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)[17] to think about related incidents.

These classifications may have relevance when determining on jurisdiction, because usually it is limited, except for the traditional piracy cases. Strictly from the perspective of international law, the concept of piracy is an exception to the general regulation that on high seas only the flag state has jurisdiction.

This article primarily focuses on a unique perspective, the human rights concerns when seizing, arresting and transferring the suspects of piracy. This may be important from the viewpoint of those state authorities (coastguards, the navy, courts etc.)

13 Guilfoyle 2015: 36.
14 Burgess 2006: 300.
15 Karim 2017: 48.
16 Burgess 2006: 308.
17 Adopted in Rome, 10 March 1988.

that are involved in the process of arresting and condemning perpetrators. It is of great importance to suppress armed robbery and piracy at sea, but states, as it will be clarified later, face with difficulties when actually prosecuting suspects at sea, as they are usually bound by human rights regulations, which doesn't make them interested in taking actions. Therefore, it may have a general impact on suppressing these crimes in the long run.

The extraterritorial application of human rights

The question of the extraterritorial application of human rights comes into play as suspects will often be pursued and apprehended by law enforcement agencies of another state. The situation is complicated by the fact that pursuing warships are, however, primarily equipped to deal with detainees on the basis of humanitarian law rather than human rights law.[18] Therefore, as problems double, in fear of violating the human rights of the perpetrators, states often decide to release them or, as a more elaborated solution, states (especially European countries) made agreements with regional states so that they would prosecute the suspects.[19] This latter, however, is usually applied in case of armed robbery, which is technically piracy happening on territorial waters.

The reason for doing this is that according to the human rights standards of certain states, the state itself and its authorities could be sued and bear the responsibility of violating international conventions.

In this sense, the best way to learn about human rights issues is from the case law of the European Court of Human Rights (ECtHR), which seeks to ensure maximum protection for individuals.[20] This is linked to the violation of the European Convention on Human Rights (ECHR),[21] with particular involvement of Articles 5 (Right to liberty and security) and 6 (Right to a fair trial). Occasionally, Articles 2 (Right to life) and 3 (Prohibition of torture) also apply. In piracy operations the question of the right to life may arise not only in operations against perpetrators, but also in the context of hostage-taking, which is typical of piracy in some regions.

The role of effective control

In order to the extraterritorial application of the ECHR, it is important to know who has effective control over a territory.[22] In case of sea, it is a complex task to decide, in particular, to determine where the effective control begins. The concept of effective control raised many questions, even when it came up in connection with incidents

18 Manusama 2010: 153.
19 See for example: Council Decision 2009/293/CFSP.
20 Treves 2010: 409; Dubner–Othero 2016: 229.
21 European Convention on Human Rights 1950.
22 Guilfoyle 2010a: 15; Galani 2017: 38.

on mainland. Therefore, it is desirable to discuss it in general as well. Essentially, effective control means that states acts extraterritorially, and also has jurisdiction over a certain area, or they can enforce their interests somewhere outside their territory. In international law, we traditionally meet this in case of diplomatic missions as the most important public administration authority of a state operating in the territory of another state.[23] In this sense, the state controlling an area also has jurisdiction over that territory and the people there. The issue of effective control, however, can be more complicated than that.

Preceding the piracy cases, the question of effective control had already been raised in the highly-debated *Bankovic* case.[24] In 1999, during the NATO bombing in Belgrade, a TV and radio station was struck by a bomb. Sixteen people died and many left injured in the incident. Six people, related to the victims, sued European NATO member states. They based their claims on the violation of the ECHR. They argued that when air strikes took place, these states had *de facto* control over the territory they bombed, so they should have provided the basic human rights laid down in the ECHR for those individuals accidentally being there, falling within the jurisdiction of these states.[25] Applicants insisted on the view, there must be no discrimination in the application of the Convention whether a state acts on its own territory or outside its territory, so to some extent they had a new, not traditional approach to jurisdiction. The real question was, however, whether these states had jurisdiction in a traditional sense during the bombing.[26] In this case we technically see pilots, other members of the military as the agents of the state, taking operations in the airspace. As a result, the Strasbourg Court held that "the jurisdictional competence of a State is primarily territorial",[27] and then it mentioned the traditional cases of international law (law of diplomatic and consular relations, flag states etc.), declaring that it is limited by the home state.[28] Furthermore, there is no jurisdictional link between the victims and the respondent states. For there is no invasion or military occupation of the territory, but a military operation was going on, this cannot be interpreted in a way that victims were under the jurisdiction of these European states.[29]

Considering our topic, this case is important, as later, in the case-law after the *Bankovic* case, this argument reappears again in the *Medvedyev*[30] case, which will be mentioned in the next chapter. This case is different from the *Bankovic* in nature, however, they shared some similarities, so the Court had to justify why the ECHR couldn't be applied in *Bankovic* and why it could be referred to in the *Medvedyev*.

23 1961 Vienna Convention.
24 Bankovic and others v. Belgium 2001.
25 Bankovic and others v. Belgium 2001, see also Roxstrom–Gibney–Einarsen 2005: 61.
26 Bankovic and others v. Belgium 2001: 36.
27 Bankovic and others v. Belgium 2001: 59.
28 Bankovic and others v. Belgium 2001: 59.
29 It must be also noted that the USA and Canada had important role in the incident, but they were excluded since they couldn't be sued based on the ECHR.
30 Medvedyev and Others v. France 2010.

With regard to the above-mentioned, if an individual comes under this practical, *de facto* control of the state, it can be a subject to the jurisdiction of the state practicing it extraterritorially, involving the detention and custody of that individual, depending on the circumstances. In case of maritime incidents, as it was mentioned in the beginning of this chapter, it is important to know when this effective control begins. The reason for this is that on high seas ships can be intercepted and boarded by a warship sailing under the same flag as the intercepted ship. Otherwise, according to the Article 110 of the United Nations Conventions on the Law of the Sea (UNCLOS),[31] boarding is prohibited, unless there is reasonable ground for suspecting that the ship is engaged in piracy, the slave trade, the ship is engaged in unauthorised broadcasting, or the ship is without nationality.[32] In case of suspected illicit drug trafficking, the situation is a bit more complicated as the authorisation of the flag state of the suspected vessel must be obtained according to the Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (INCB), but boarding the vessel is possible with permit.[33] The common ground is that in both cases, navies must approach the vessel in question. As Article 110 (2) states, "[t]o this end, it may send a boat under the command of an officer to the suspected ship".[34] If the grounds for suspicion are right, the officers have the right to take perpetrators in custody, but then the question of effective control raises. Do officers have effective control when they board the ship? Does it mean the suspects are within the flag state jurisdiction of the warship? How should the ECHR apply in case of detention and custody? The next chapter sheds light on the Court's opinion in these questions.

The Medvedyev and Rigopoulos cases as cornerstones

Considering the ECtHR case law on detention at sea, we cannot skip the *Medvedyev* and *Rigoupoulos*[35] cases, as practically everything we know about the enforceability of human rights of perpetrators is built on these two cases.[36] Although these two cases were based on drug smuggling, the same applies to persons detained at sea for piracy. The *Bankovic* case showed us that no effective control over the territory of the state could be exercised from the airspace,[37] and that the ECHR does not apply extraterritorially in situations where states act outside their own territory, except in certain limited circumstances.

In both cases, illicit drug trafficking was involved, nevertheless, what the ECtHR declared applies to those detained on charges of piracy as well. These cases raised

31 United Nations Conventions on the Law of the Sea 1982.
32 Article 110, UNCLOS.
33 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.
34 Article 110(2) UNCLOS.
35 Rigopoulos v. Spain 1999: 11.
36 Bodini 2011: 830; Treves 2010: 409.
37 Bankovic 2001: SE5

questions about the application of Article 5(1) and (3) of the ECHR, as the applicants considered that they had been deprived of their liberty in violation of Article 5.

In the *Rigopoulos* case, the Spanish Navy stopped a Panamanian-flagged vessel in the Atlantic Ocean, on the high seas, and escorted it to a port in the Canary Islands. The journey took 16 days.[38] Article 5(3) of the ECHR requires that suspects be brought promptly before a judicial forum. In the *Rigopoulos case,* the Court held that a detention period of 16 days did not meet this requirement, however, it also recognised that exceptional circumstances may influence this. In the present case, it was decided that the distance involved made it physically impossible to bring the perpetrators to trial sooner.[39]

In the *Medvedyev* case, the French Navy intercepted a Cambodian ship with the flag state, Cambodia's consent. For Cambodia was not a party to the relevant conventions (like the UNCLOS and the UN Convention against Illicit Traffic in Narcotic Drugs), France had no choice, but to look for diplomatic ways to get the consent, which the Grand Chamber approved retrospectively. The suspect vessel was escorted to a French port, resulting in a voyage that lasted for 13 days.[40] Once in France, however, the perpetrators had to be brought to justice immediately. According to the Court, which relied on the *Rigopoulos* judgment, arguments, other than geographical distance, are not acceptable and, in the Court's view, are attributable to the fault of the arresting state.[41] The Court also held that the arrests were not entirely lawful, in particular because they couldn't have contact with family members or a lawyer, and the detention was not supervised by any judicial body. The other problematic issue was that those suspected with drug trafficking on board couldn't foresee that they would be taken away and brought into a court in France.[42]

In this context, the Court ruled that Article 5(1) and (3) must be interpreted as strictly as possible in the case of detention of vessels in the course of maritime operations. In conclusion, the Court held that the detention by the French Navy was in breach of Article 5(1) ECHR, but it didn't violate Article 5(3). In this case, altogether forty days passed by between the arrest and the trial, and the Court found that this time taken to bring the arrested crew to France and before a judge were tolerable.[43]

In these cases, the Court basically agreed that boarding the foreign vessel (with consent) didn't just establish control over it, but also regarded it as the exercise of state jurisdiction. Comparing to *Bankovic,*[44] the situation is more stable for ships at sea, than for aircrafts in the airspace, since ships can make a blockade, they anchor, so, there is no obstacle to effective control within firing range, although it is still less certain than land operations. Again, it must be noted that in terms of jurisdiction,

38 Rigopoulos v. Spain 1999: 11.
39 Rigopoulos v. Spain 1999: 9.
40 Medvedyev and Others v. France 2010.
41 Manusama 2010: 160.
42 Guilfoyle 2010b.
43 Guilfoyle 2010b.
44 Bodini 2011: 844.

traditional piracy is an easier situation as it is still an exception to flag state jurisdiction on high seas. However, this can still conceal numerous problems. If it is easier to accept the jurisdiction of the operating states in case of piracy, it is easier to realise that they should provide the human right guarantees according to ECHR.

Once the suspects are detained on board of a warship, it has jurisdiction, and those regulations of the capturing flag state also apply. Based on the experiences so far, two models have emerged. The typical one, when the Navy checks upon the suspicious ship, they go on-board and they detain suspects on the warship. Besides the usual one, there is the careful one, which we could observe in the operations of the UK, as they do not transfer suspects to their own ship, but they are typically left on the board of the original vessel, of course only after the vessel was neutralised.

Additional aspects of applying the ECHR

Measures taken by an international organisation

Another aspect that can contribute to the clarification of applying the ECHR is related to the responsibility in case of an operation under the auspices of international organisations, like the EU or the UN,[45] for states usually act within the framework of a specific mission when they take actions to suppress piracy.

There were two cases related to the conflict in Kosovo during the late 1990s and early 2000s, the *Behrami* and *Saramati* cases,[46] where the applicants argued that they had suffered harm due to the actions of the United Nations Interim Administration Mission in Kosovo (UNMIK) and the NATO-led Kosovo Force (KFOR).[47] The ECtHR ruled that it lacked jurisdiction to examine the complaints against UNMIK and KFOR, as these are organisations that did not fall under the jurisdiction of any single ECHR state party. The ECtHR found that the armed forces in question acted under the Chapter VII of the UN Charter, so they were attributable to the UN as they are not acting on behalf of their own state in the region, but within the framework of a specific mission.[48]

This is important as it may be an incentive for states engaging in military cooperation to suppress piracy as, in the future, they might try to attribute these operations to international organisations. However, in case of piracy, it is also typical that states retain jurisdiction over their fleets, even though the operation is international. Operations related to the European Union are no exception, but the legal background to the Atalanta mission is more specific, because the EU has legal personality, and the agreements establishing the Operation Atalanta were signed by the EU itself. However, here it also applies that the decision on transfer cannot

45 Bodini 2011: 845.
46 Behrami and Saramati v. France 2007.
47 Behrami and Saramati v. France 2007.
48 Bodini 2011: 845.

be taken by the command of the Force Commander of the EUNAVFOR Operation Atalanta, but must be approved by the flag state of the intercepting vessel. Moreover, the EU itself, despite its independent legal personality, is not yet a member either of the UNCLOS, or of the ECHR.

It is also worth noting that this decision of the Court has been criticised based on the matter of ultimate control, for it is not the organisation that exercises it.[49] The term "operational control" is more adequate and expressive than "ultimate control", as it is closer to the *de facto* control and authority.[50] The International Law Commission has itself changed its terminology in the draft on the Responsibility of International Organizations, and now talks about operational control, which is closer to effective control, but it also means that states are responsible for ensuring that human rights are respected.[51]

As it was mentioned above, we usually see that a state's Navy captures the suspects and they transfer them to another state (for example the flag state of the attacked commercial vessel). International law does not prohibit such a change of jurisdiction by transfer or rendition, it is possible by diplomatic consent or by *ad hoc* agreements, but basic human rights guarantees must be provided.[52] Usually, however, these agreements don't provide more information or regulate the transfer in detail.[53] For example, in theory, it must be ensured that some (not necessarily, but preferably judicial) procedure is followed before the transfer, but in reality, it is often not the case.

Asylum-seekers

It is worth noting, at least briefly, that sometimes the capturing states have other concern as well, which can serve as an additional factor that discourages states from conducting prosecutions. Usually, the procedures taking place in European countries are not deterrents, as offenders can still be released relatively young, and many are particularly happy with the prison conditions Western countries provide, where they have television or even adequate toilets comparing to prisons in their home country. We know of several cases[54] where convicted people have reported that being in prison is the best thing that has happened to them, and that they would certainly not go back. Offenders often have such a background that it needs to be explained to them that they do not face death penalty, mutilation, or they don't need to be in fear that terrorist organisations such as *al-Shabaab* militias will catch them.[55] It is no coincidence that European and U.S. procedures could in theory attract refugee applications. And these states fear that, once perpetrators have completed their

49 Draft articles on the Responsibility of International Organizations 2011: Art. 7.
50 Guilfoyle 2010a: 157.
51 Petrig–Geiss 2011: 125.
52 Petrig–Geiss 2011: 197.
53 Petrig–Geiss 2011: 207.
54 Kontorovich 2012: 227.
55 Lakotta 2011.

sentences, it will be difficult to return them to their own countries.[56] Therefore, it is important to mention the prohibition of refoulement, expressed in the 1951 Geneva Convention, which states that a state may not return a refugee to a place where his life or freedom would be threatened on racial or religious grounds, on grounds of nationality, membership of a particular social group or political opinion.[57] However, this should be interpreted in line with the provision that admission as a refugee is possible if he or she has not committed a serious non-political crime.[58] The question is whether the principle of non-refoulement applies to offenders who apply for asylum during the transfer. As a matter of fact, they do not meet the conditions of the 1951 Geneva Convention, cited above, because the perpetrators of piracy leave their country not for fear of persecution, but to commit a crime.[59] Piracy is a serious crime, the prohibition of refoulement should not apply to them, as they should not fear persecution in their own country because of their origin, religion, etc. Moreover, a state is not obliged to accept asylum applications from those who may pose a threat to the security of the state or its population because they have committed violent crimes.[60] This is important, as the argument that the general condition of enforcing human rights is poor in the state to which the suspect would return is not sufficient, and doesn't make Article 3 of the ECHR applicable.[61]

Furthermore, in practice, we don't talk about traditional asylum seekers, but about offenders who have been convicted and are serving their sentence in the country in question, typically in Europe or the United States. They are looking for the opportunity to stay in the country and escape re-settlement. As discussed above, the legislation allows for an interpretation whereby states are not obliged to admit offenders even in this case. All this is based solely on international law, not forgetting the national legislation on aliens of each state. States often agree with each other to seek diplomatic assurances that a suspect who is brought there will not be subjected to torture or degrading treatment. In this way, they do not need to bother with the non-refoulement principle. Overall, suspected pirates are not eligible to apply for refugee status under international law, nor are they typically able to avoid refoulement. It is very rare[62] that suspected pirates are able to demonstrate in a specific way that they would be subjected to torture or degrading treatment in their home country. Moreover, they have committed a crime that does not allow them to successfully apply for refugee status.

56 Treves 2010: 13.
57 1951 Refugee Convention: Article 33.
58 1951 Refugee Convention: Article 1 F (b).
59 Guilfoyle 2010a: 153.
60 1951 Refugee Convention: Article 33(2).
61 Dutton 2012: 268.
62 An exception was H.M.H.I. v. Australia 2002, where the Committee against Torture accepted the argument that the perpetrator would be subjected to torture in his own state.

Concluding remarks

Despite the numerous examples of European states and the United States conducting proceedings against pirates, they tend to hesitate when taking action and prefer to rely on the proceedings conducted by the states of the respective region, or they simply let wrongdoers go. There are usually two reasons in the background. To begin with, in many cases, states cannot adequately provide the human rights for the suspects, which is not necessarily intentional, but the suspects are detained on a moving warship at sea far from mainland, and this makes things significantly harder. This could lead to violations of the generally stricter European or American regulations, and there have been cases where the European Court of Human Rights has condemned a state based on it. Since the national regulations regarding detention are often even stricter than the ECHR, and they usually specify a concrete period until the detention is lawful. This is why there has already been a decision where the ECtHR, ruling on a six-day detention, concluded that France owed compensation to several Somali pirates.[63] Therefore, the human rights of the perpetrators are important when discussing piracy, because the complications around providing human rights are the main reason why states are hesitant to prosecute perpetrators. The other reason is the fear of developed states of receiving asylum requests.

It is important to know when a state can act and have control over a situation, like in case of a military operation, and whether this control does amount to exercising jurisdiction as well in case of law-enforcement on high seas. In the *Bankovic* case and in the cases related to the topic, it turned out that the extraterritorial application of the ECHR was possible, but also exceptional, however, the Court has no coherent approach to these exceptional circumstances.[64]

We could see how the Court doesn't count with the, sometimes harsh, reality of maritime operations. If a warship approaches a vessel on sea, assuming there are unlawful events going on board, like illicit drug trafficking, they must obtain the consent of the vessel's flag state, and then they still can't make sure whether they can detain the suspects. This applies to those cases that manifest in armed robbery at sea as well. Conversely, in case of piracy, which seems to be an easier situation, as warships don't need a consent, they still need to provide human rights guarantees.[65] This results in a bad practice that European states are not inclined to act themselves, rather, they prefer to rely on states that lack proper regulations and have no ethical concerns or shame if they need to take tougher measures.

Finally, it must be mentioned that the International Maritime Bureau (IMB) itself is also critical of the ECtHR's procedures, fearing that they may encourage piracy.[66] As Prof. Saiful Karim notes in connection with maritime terrorism: "[t]his legal

63 Ali Samatar and Others v. France and Hassan and Others v. France ECHR 361 2014.
64 Guilfoyle 2010b.
65 Guilfoyle 2010b.
66 Dubner 2016: 225.

framework is thus mostly reactive, rather than proactive, with one consequence being the possibility of disputes between States, as some States may seek to exercise jurisdiction that interferes with the freedom of navigation irrespective of restrictions."[67] In the opinion of the present paper's author, this statement, or at least the first sentence is generally true in case of maritime incidents (piracy, armed robbery, drug trafficking etc.), and not much has changed in the past seven years, since the publication of Karim's book.

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ACTA HUMANA • 2 (2024) 75–89. • DOI: 10.32566/ah.2024.2.5

The Crime of Ecocide through Human Rights Approach

The "Universal" Right to a Healthy Environment as a Driving Force Calling for Ecocide Legislation

ORSOLYA JOHANNA SZIEBIG[1]

The environment is often called the "silent victim of war" – the case is not different in the Russo–Ukrainian armed conflict. Since 2014, nature – home to 35% of European biodiversity and varied natural habitats – has suffered a tremendous loss in Ukraine. The war has been responsible for the emission of 33 m tonnes of CO_2, and postwar reconstruction is estimated to generate even more. Additional environmental concerns include extensive pollution, degradation of natural habitats, and species extinction. Regarding the new data, more than 2 thousand events can be considered ecocide. Ecocide is the destruction of the natural environment by deliberate or negligent human action. Transboundary environmental harm is also a pressing issue, as pollution "travels" by wind, air, and water to other countries.

Ecocide is a new yet old concept concerning severe environmental destruction. In the last decade, a debate has emerged concerning legislation, definition and enforcement. Instead of international criminal law, many believe that the solution will be the human rights approach.

Meanwhile, the right to a healthy environment, initially not included in "traditional" human rights conventions, is getting more attention worldwide and in Europe. Recently, the European Economic and Social Committee adopted an own-initiative opinion on the right to a healthy environment in the EU in the context of the war. The aim is to criminalise Russia's actions under European law and ensure environmental protection to safeguard fundamental rights. In the paper, the author would like to focus on the parallel development of the right to a healthy environment and ecocide.

Keywords: environmental destruction at times of armed conflicts, ecocide, right to a healthy environment, human rights approach, international criminal law

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"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."
Rio Declaration, Principle 1

Introduction

Human history is intertwined with the destruction of the environment and the methods of environmental warfare used in armed conflicts. Traditional human rights conventions and other documents, such as the Universal Declaration of Human Rights, were accepted before the era of environmental rights. Under these circumstances, accepting widespread and severe environmental destruction as the fifth international crime seems illusory. Ecocide was already being considered in the 1970s as a result of US military action in Vietnam, however, it has not been incorporated into international law. Nowadays, because of the Russo–Ukrainian armed conflict, the regulation and implementation of ecocide have come to the fore. At the same time, the debate also concerns the perspective from which it should be regulated. First and foremost, international criminal law emerged since ecocide has always been linked to crimes against peace. However, with the declaration of the right to a healthy environment, the possibility of a new path has arisen, namely the human rights approach. The author briefly discusses the history of ecocide. Still, the main focus is on the distinction between international criminal law and the human rights approach, particularly which path is more acceptable and feasible. The author first focuses on the relationship between human rights and environmental degradation, the extent to which the full enjoyment of human rights depends on the quality of the environment, and new trends in the interpretation of human rights. The article also deals with the declaration of the right to a healthy environment, whether we can talk about its universal recognition and what developments have taken place in this direction in recent years.

The background for the study was the presentation at the War and Peace conference in the autumn of 2023, but the study focuses on recent developments given the passage of time. The research methodology relied mostly on desk research, mapping previous studies that are still relevant today, as well as recent literature. The author has endeavoured to synthesise the research findings and develop a unique viewpoint.

Human rights in the shadow of environmental destruction

The link between human well-being and environmental quality is complex and inextricable. For the full enjoyment of human rights, a healthy environment is necessary, as highlighted by several resolutions of various organisations. Also, human rights have long provided an opportunity to approach the most severe injustices from a legal perspective, for example, in the fight against discriminatory treatment and poverty. At the same time, there is a growing demand within the international

community for a similar approach to climate change, linking intergenerational equity, the rights of future generations and the right to a healthy, liveable environment.[2] The interface between ecocide and human rights can be approached from two angles. First, some serious acts of environmental destruction, which may fall within the concept of ecocide, lead to serious violations of human rights. The second link concerns the extent to which relevant human rights instruments, conventions, and forums can help remedy the violation of rights caused by ecocide and whether it is even possible to bring proceedings before the relevant forums on this subject.[3] Environmental degradation highly influences the enjoyment of human rights, including political, social, cultural, economic and solidarity rights. The consequences for the rights to life, health, food, water, housing, and self-determination will worsen as the climate crisis intensifies. The newly emerged human rights concepts – such as the right to food, water, and adequate sanitation – are also impaired by environmental harm.[4]

In 1994 the Report on Human Rights and the Environment highlighted the direct impact of environmental degradation on the enjoyment of a range of human rights, including the right to life and health: "environmental damage has direct effects on the enjoyment of a series of human rights, such as the right to life, to health, to a satisfactory standard of living, to sufficient food, to housing, to education, to work, to culture, to non-discrimination, to dignity and the harmonious development of one's personality, to security of person and family, to development, to peace, etc."[5]

Already existing human rights bodies increasingly often have to deal with petitions of environmental concern. In 2019, sixteen children filed a petition alleging that Argentina, Brazil, France, Germany and Turkey violated their rights under the United Nations Convention on the Rights of the Child by making insufficient cuts to greenhouse gases and failing to encourage the world's biggest emitters to curb carbon pollution. The UN Committee on the Rights of the Child affirmed that a state party to the Convention could be held responsible for the negative impact of its carbon emissions on the rights of children, both within and outside its territory, and countries have extraterritorial responsibilities related to carbon pollution.[6] The Committee applied the method established by the Inter-American Court of Human Rights (IACtHR) to decide the jurisdiction of the body.[7] In 2019, the UN Human Rights Committee concerning the International Covenant on Civil and Political Rights stated that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[8] Furthermore, state parties should "ensure sustainable use of natural resources, develop and implement substantive

2 Adelman 2014: 5.
3 In details, see Sziebig 2021: 85–98.
4 See Tahyné Kovács 2022: 93–123.
5 Ksentini 1994: section 248.
6 CRC/C/88/D/104/2019.
7 Sacchi, et al. v. Argentina, et al.
8 CCPR/C/GC/36 para. 62.

environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach".[9] In 2018, the Committee on Economic, Social and Cultural Rights released a similar statement concerning climate change and its effects on human rights.[10]

The universal right to a healthy environment

In 1987, the final report of the Brundtland Commission, *Our Common Future,* stated that "all human beings have the fundamental right to an environment adequate for their health and well-being".[11] To reach sustainability, "some necessary changes in the legal framework start from the proposition that an environment adequate for health and well-being is essential for all human beings, including future generations".[12] Most human rights treaties were adopted before the era of environmental consciousness, so treaty law does not guarantee the right to a safe and healthy environment. However, there are several non-binding instruments where the right to a healthy environment appears. Furthermore, several international conventions contain indirect references.

The right to a healthy environment exists as a component of human rights in general and the right to life specifically, as well as in the body of environmental law and connection areas, such as humanitarian law.[13] The International Covenant on Economic, Social and Cultural Rights provides the right to the highest attainable physical and mental health standard and calls on state parties to take steps to improve all aspects of environmental and industrial hygiene.[14] The Convention on the Rights of the Child provides that parties shall take appropriate measures to combat disease and malnutrition by providing adequate nutritious foods and clean drinking water, considering the dangers and risks of environmental pollution.[15]

9 CCPR/C/GC/36 para. 62.

10 Statement, Climate change and the International Covenant on Economic, Social and Cultural Rights.

11 Our Common Future, Annexe 1, 1.

12 Our Common Future, Annexe 1, 56 para. 76.

13 Lytton 2000: 73.

14 Art. 12 1: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." and 2. […] (b) "The improvement of all aspects of environmental and industrial hygiene;"

15 Art. 24 2 (c): "To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;"

The main regional human rights conventions contain the right to a healthy environment to some extent: the African Charter of Human Rights and Peoples,[16] the Arab Charter of Human Rights[17] and the Protocol of San Salvador.[18] In the European sphere, the preamble of the Aarhus Convention[19] also refers to an adequate quality of the environment. Nevertheless, the European Convention on Human Rights, opened for signature in 1950, does not mention any environmental standards or rights. Although the greening practice of the European Court of Human Rights (ECtHR) reflects the development of environmental standards, the evolving interpretation of human rights can raise questions.[20] In this manner, the ECtHR interprets the already declared human rights that "can be undermined by the existence of harm to the environment and exposure to environmental risks".[21] These rights are the right to life (Art. 2), the Prohibition of inhuman or degrading treatment (Art. 3), the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), the right to respect for private and family life and home (Art 8), the freedom of expression and the freedom to receive and impart information (Art. 10) and the protection of property (Art.1 of Protocol No. 1 to the Convention). There is an ongoing dispute about a new additional protocol to the ECtHR concerning the right to a healthy environment, which has also emerged with the growing importance of environmental considerations. The UN Human Rights Council resolution is the leading catalysator for human rights development that finally declared the universal right to a healthy environment.[22] One must not forget that the declaration is a non-binding document. On the other hand, soft law has been an important source of international environmental law, often leading to the development of hard law regimes.

It is a growing question of international law whether the right to a healthy environment can be considered *erga omnes.* The right forms the necessary foundation for fully realising all other human rights because "they would become meaningless to a community unable to breathe, drink, produce food, clothing and shelter".[23]

Ecocide

Ecocide is a new yet old concept of international law. The idea that the perpetrators of severe environmental harm must be punished under international criminal law is quite new, yet the concept itself has a long history. The Vietnam War acted as

16 Art. 24: "all peoples shall have the right to a general satisfactory environment favorable to their development."
17 Art. 38: "every person has the right […] to a healthy environment."
18 Art. 11: "everyone shall have the right to live in a healthy environment."
19 Preamble: "every person has the right to live in an environment adequate to his or her health and well-being."
20 ECHR 2023: 1.
21 See Friedrich 2013: 143–371.
22 A/HRC/48/L.23/Rev.1
23 Gray 1996: 257.

a catalyst for ecocide, because, between 1961 and 1971, 73 million litres of chemicals were sprayed on enemy territory, resulting in agricultural land and plantations being destroyed and natural habitats being bulldozed. The term ecocide was first documented in 1970 when American plant biologist and bioethics professor Arthur W. Galston argued for a new international agreement to ban ecocide. Galston, then President of the Yale University Botany Institute, was one of the first to speak out against pesticides in Vietnam as early as 1966, citing their ecological and human health effects. 1972 marked a turning point in international environmental protection when the Stockholm Conference on Human Environment was organised. Former Swedish Prime Minister Olof Palme (1969–1976; 1982–1986) explicitly referred to the USA ecological warfare as ecocide, which he sharply referred to as an "outrage".[24] Following the conference, the Working Group on Environmental Crimes was set up in 1972 and has been supported by several NGOs. Professor Richard A. Falk, an expert on international law and war crimes, published a draft of the Ecocide Convention in 1973 – focusing specifically on wartime ecocide.[25] Subsequently, between 1984 and 1996, ecocide was also on the agenda of the International Law Commission, which dealt with the issue of serious environmental damage as a possible crime against peace at the time. The modern history of ecocide goes back to Pauline Helène "Polly" Higgins, a Scottish international lawyer, author and environmental lobbyist, who submitted a proposal to the United Nations in April 2010 to initiate the adoption of an international crime of ecocide. In her proposal, an amendment to the Rome Statute was issued. Since then, Higgins' organisation, the "Stop Ecocide Foundation", has been working tirelessly for international acceptance of ecocide and the "official" definition of the crime was established by an independent expert panel: "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[26]

Ecocide and the human rights approach

Saad Alfarargi, Special Rapporteur on the right to development, "warned that climate change was a global human rights threat multiplier".[27] The legal acceptance of ecocide is growing, but there is a serious debate about whether it can be the fifth international crime. In this section, the author would like to differentiate between the criminal law approach and the human rights approach in relation to ecocide. Why is it beneficial if ecocide is accepted through the human rights approach and not as an international crime? There is a rapidly evolving relationship between human rights, climate change, and the environment, and human rights in climate litigation

24 Palme Stockholm Conference 1972.
25 Falk 1973.
26 Independent Expert Panel for the Legal Definition of Ecocide 2021: 5.
27 OHCHR 2021.

have become extremely important. Accepting the right to a healthy environment has parallelled the growing attention on ecocide legislation. In 2022, the General Assembly declared the right to a clean, healthy, and sustainable environment related to other rights and existing international law. It affirmed that it's "promotion requires the full implementation" of the multilateral environmental agreements "under the principles of international environmental law".[28] The proposal of ecocide calls for the development of international criminal law to penalise wide-scale environmental destruction. Meanwhile, the growing attention on the right to a healthy environment presents another method, the human rights approach. These territories of international law are quite far from each other. Still, there is a possibility that the solution for the incorporation of ecocide into the body of international law will be through human rights law and not criminal law.[29]

As a definition, "a human rights-based approach is a conceptual framework normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights."[30] Andreas von Arnauld and Jens Theilen identified five functions of human rights rhetoric: an appellative function, a contesting function, a connecting function, a triggering function and a jurisgenerative function. The appellative function draws attention to environmental harm, such as ecocide. The connecting function connects to the appellative function, which serves as a critique of present injustices. The connecting function brings together national, regional and international human rights advocates and unifies them globally. Furthermore, the human rights approach triggers the institutions to fight injustices and respond to violations. Finally, it supports "discursive practices" and grassroot levels beyond the formal law-making of institutions.[31]

International criminal law establishes the legal responsibility of individual persons for international crimes. International human rights law is relevant to international criminal law from several aspects. For example, human rights law defines international fair-trial standards and the principles of legality and culpability.[32] Whether it is the criminal law approach or the human rights approach, the keyword is accountability. Who and under which legal norms can be held accountable for severe environmental harm or destruction? The supporters of ecocide legislation share the strong belief that ecocide would serve as a legal basis for establishing responsibility for those who breach climate laws. Meanwhile, it is hard to establish the responsibility of large

28 Res. A/76/L.75 28
29 Mwanza 2023: 179.
30 OHCHR 2010: 1.
31 Von Arnauld – Theilen 2020: 34–50.
32 Brown 2011: 10.

emitters because of the lack of jurisdiction or hard law.[33] A small but growing number of countries included ecocide legislation in national law, including some post-soviet countries (such as Russia), and recently France.[34] In 2021, France passed the "Climate & Resilience Act" under Article 296 of the new law to report back to parliament within one year on "its action in favour of the recognition of ecocide as a crime which can be tried by international criminal courts".[35]

Based on Article 8(2)(b)(iv) of the Rome Statute: "intentionally launching an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" considered as "other serious violations of the laws and customs applicable in international armed conflict", a war crime. The green shift at the International Criminal Court (ICC) was indicated in 2016 with a Policy Paper on Case Selection and Prioritisation by the Office of the Prosecutor at the ICC.[36] So far, the green shift is still waiting for realisation at the ICC.

There is another angle of human rights that strongly connects human rights and ecocide. Indigenous communities are highly affected by environmental destruction, such as in Brazil, but other countries also have to be considered, including Canada. In 2019, a national inquiry's findings showed a strong link between missing and murdered indigenous women and resource extraction projects, boomtowns and man camps.[37] Based on the findings of the inquiry commission, indigenous activists at COP26 wanted to raise awareness of the linkages between extractive industries, climate destruction and violence against indigenous women and girls. They asserted that femicide is directly linked to ecocide.[38]

The following table (Table 1) shows the differences between international criminal law and the human rights approach.

33 As it was visible from so called „Inuit case". In 2005, two organisations filed a complaint with the Inter-American Commission on Human Rights against the United States of America and Canada, alleging that their actions, or lack thereof, related to climate change violated the human rights of the Inuit people. However, the Commission dismissed the complaint on the grounds of lack of jurisdiction, as it had not been proven that any of the rights enshrined in the Inter-American Convention on Human Rights had been violated. The Inuit case would have provided an opportunity to strengthen the correlation between human rights and the environment, but the Commission has shied away from this possibility. See Osofsky 2007: 675–697.

34 Ecocide Law [s. a.].

35 Loi n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, Journal officiel électronique authentifié n° 0196 du 24/08/2021.

36 ICC 2016: 5, 13.

37 *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* 2019.

38 Brook 2021.

Table 1: Comparison of international criminal law and human rights approach

	International Criminal Law	**Human Rights Approach**
Focus	Penalise the severest environmental destruction as an international crime Adequate punishment	Identifying rights-holders and duty-bearers
Functions	Deterring, punishing	Appellative, contestation, connecting, triggering, jurisgenerative (based on von Arnauld – Theilen)
Aim of process	Application of criminal law sanction	Reparation
Result	Punish the perpetrators of high-crimes	Spurs duty-bearers to meet their obligations
Legal background	ICC Statute, international criminal law	Human rights treaties and conventions, national legislation
Forum	ICC, national courts/ad hoc bodies	Human Rights Courts and bodies

Source: compiled by the author

The impact of the Russo–Ukrainian armed conflict

The Russo–Ukrainian armed conflict raised attention towards environmental destruction and ecocide. Environmental destruction as a method of warfare is not new. Even in ancient times, systematic destruction or pollution of the natural environment was used to break the power of the enemy. Defenders denied attackers food, water or shelter, or attackers induced defenders to surrender, or as a counter-insurgency measure, to quell stubborn rebellion. As far back as 512 B.C., during the Persian and Scythian War, the Scythians, after being defeated by Darius the Great, resorted to a scorched-earth policy in their retreat, causing a long-term famine for the surrounding population. Later, during the Franco–Dutch War of 1672–1678, the Netherlands self-inflicted large-scale flooding to impede the French forces. As part of the colonisation of the American continent, the ecosystem that supported the Indian tribes has been completely destroyed, causing species extinction (such as pigeons and buffalos). The never-seen systematic destruction of their food stores, crops, and game served the purpose that Indian tribes lose their livelihoods. The methods applied by the United States of America during the Vietnam War effort led to the development of the ecocide definition and the acceptance of the Convention on Prohibition of

Military or Any Other Hostile Use of the Environmental Techniques (ENMOD Convention).[39]

Military techniques harm the agricultural and wildlands and are increasingly capable of disrupting natural habitats. For example, World War II caused enormous agricultural, forest, and other ecological devastation and destruction of cities. The warring parties used high-explosive and incendiary munitions for area bombing of densely populated urban and industrial areas. As it is well known, two cities (Hiroshima and Nagasaki) were destroyed by nuclear weapons. Due to the extent of the war, numerous tropical Pacific Ocean island ecosystems suffered. Furthermore, Germany destroyed 200 thousand hectares (17%) of Dutch agricultural lands through intentional salt-water inundation.[40] On 2 August, 1990, Iraq invaded Kuwait, leading to a war of severe environmental destruction, whose real impact is still unknown. The total volume of oil in the lakes and rivers has been estimated to be between 10 and 20 million tons, and the marine environment was exposed too. The volume of the spills has been calculated to be between 1 and 1.7 million tons.[41]

As Falk stated: "environmental war- fare is a dramatic reminder of the extent to which the planet as a whole must mobilise a response to the ecological challenge to sustain life on earth and beat back reversions to barbarism emanating from the 'advanced' regions and applied to those that are relatively 'backward'." As a result of the armed conflict, the Ukrainian Ministry of Environmental Protection and Natural Resources identified and estimated that the current environmental costs of military actions amount to 2,194 billion Ukrainian Hryvnia. The Ministry established a website, "EcoZagora", where consequences of military actions and impact on the environment are constantly published. The most well-known event was the breach of the Nova Kakhovka Dam, which resulted in 150 tonnes of oil and other toxic substances entering the Dnipro.[42] As a result of the war, air, water, land, and soil pollution and damage to the ecosystem can be detected. Furthermore, natural habitats, including forests, protected biosphere reserves, and national parks, are degraded. Environmental harm, acts of deforestation, explosions, the building of fortifications, and the poisoning of the soil and water became daily problems in the Ukrainian territory.

Despite the ongoing dispute about ecocide as a fifth international crime, the war in Ukraine has served as a catalysator and put ecocide in the headlines. In 2023, a special panel discussed ecocide legislation at the United for Justice Conference.[43] At the European sphere, the European Parliament proposed to include ecocide in the revised Environmental Crimes Directive, which could legally enshrine ecocide and would require implementation into national law. The negotiators agreed on

39 Teclaff 1994: 933–954.
40 Stockholm International Peace Research Institute 1980: 17.
41 Lindén et al. (2004): 6.
42 EcoZagora as it is on 9 February 2024.
43 Stop Ecocide Foundation 2023.

stricter sanctions for so-called qualified offences comparable to ecocide.[44] In 2022, after a decade-long negotiation, the International Law Commission adopted a legal framework to protect the environment during and after an armed conflict, and the principles will apply in intrastate and interstate conflicts.[45]

There are several other international law documents concerning the protection of the environment during armed conflicts, such as the Additional Protocol I to the Geneva Conventions and its Articles 54 (objects indispensable to survival), 35 and 55 (natural environment), and 56 (dams). Furthermore, The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques obliges the State parties not to engage in any hostile use of environmental modification techniques having "widespread, long-lasting or severe" effects as the means of destruction, damage or injury. The Russian Federation and Ukraine are also parties to the ENMOD Convention.

Final remarks

In recent years, increased attention has been paid to the protection of the environment, especially in times of armed conflict, the guarantee of environmental rights and the codification of the right to a healthy environment. We are clearly witnessing the parallel development of the right to a healthy environment and ecocide. The interrelationship between the two areas is evident since both regulations are based on understanding the environment and recognising that the realisation of human rights is closely linked to the quality of the environment, its liveability, its cleanliness and human conditions.

The place of the right to a healthy environment in the corpus of international law is still a matter of debate, in particular as to whether we can speak of the creation of a new cogens norm. Ius cogens are "those rules which derive from principles that the legal conscience of mankind deems absolutely essential to coexistence in the international community".[46] Numerous national constitutions provide the right to a healthy environment, which has spread transnationally, establishing a "transnational environmental constitutional constellation".[47] There is a moral responsibility toward nature – to "establish an equilibrium between humanity and nature is an international human and environmental rights convention, the environmental human rights".[48] So far, several soft law documents and resolutions have strengthened the right to a healthy environment, and the importance of these instruments is indisputable. However, the incorporation of the right to a healthy environment into the traditional and binding human rights conventions is still a task to be done.

44 European Parliament 2023.
45 Protection of the environment in relation to armed conflicts (PERAC).
46 Parker 1989: 415.
47 Kotzé 2018: 136.
48 Shelton, 1998: 103.

Regarding ecocide, it is still just a forming concept, a possible solution to punish those who are responsible for severe environmental destruction. From the appearance of the terminology at the beginning of the 1970s, ecocide has been a simple idea rather than a reality for several decades. However, the paradigm shifts of recent years and the appreciation of environmental protection have led to the creation of the exact definition of ecocide. The key question is whether ecocide regulation will be implemented through the human rights approach or international criminal law. The anthropocentric conception of environmental law is considered by many to be outdated, and an ecocentric concept that takes into account the complexity of the environment is advocated instead, especially in the creation of new regulations. Under these circumstances, human rights might not be a beneficial way to include ecocide. Despite the growing attention of the International Criminal Court, we cannot talk about an increase in the number of environmental cases. The amendment of the Statute relies on a complex procedure, and the state parties have to accept and ratify the changes in the core document of the ICC. The already existing version of war crimes has practically remained unreferenced in the last decades.

The support for ecocide is unquestionable in the European Union, both within the EU institutions and in several Member States.[49] This is reinforced by the fact that the proposal under the current revision of the Environmental Crimes Directive will now explicitly include the need to take action against acts that constitute ecocide. The green shift is now unquestionable in international law, given the practice of the courts, including human rights bodies, the evolving human rights regime and the development of new concepts. At the same time, it should be remembered that all legislation exists only on paper until it is put into practice and applied. Armed conflicts, in particular, have drawn attention to the fact that environmental protection and nature conservation always take a back seat when the necessity of armed conflicts calls for action.

The author did not take a clear position on the future of the ecocide concept and its future place in international law. The reason for this is that the aim of this study was primarily to provide a "snapshot" of the current visions. In the author's view, it is feasible that ecocide law will find its way into both human rights practice and international criminal law. The only question is whether and how long it will take the states to translate the concept to binding sources and for the forums to put regulations into practice. Certainly, time is running out for the environment, and every day, humanity witnesses irreversible damage to our living planet.

49 See Sziebig 2022.

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ACTA HUMANA • 2 (2024) 91–103. • DOI: 10.32566/ah.2024.2.6

Climate Litigation

Can a Sustainable Future be a Human Right?

LILLA JUDIT BARTUSZEK[1]

The last decade has seen an increase in the number, specificity and importance of laws codifying national and international responses to climate change. As these laws have recognised new rights and created new obligations, they have led to the initiation of lawsuits challenging either their effectiveness or their concrete application. The aim of these disputes is to force legislators and policy makers to take a more ambitious and thorough approach to climate change. In addition, litigation has continued to fill the gaps left by legislative and regulatory inaction. As a result, the courts are increasingly adjudicating disputes over actions – or inaction – in relation to climate change mitigation and adaptation efforts.

Keywords: sustainability, climate litigation, policy

Climate change: a growing international trend?

The last decade has seen an increase in the number, specificity and importance of laws codifying national and international responses to climate change. As these laws have recognised new rights and created new obligations, they have led to the initiation of lawsuits challenging either their effectiveness or their concrete application. The aim of these disputes is to force legislators and policy makers to take a more ambitious and thorough approach to climate change. In addition, litigation has continued to fill the gaps left by legislative and regulatory inaction. As a result, the courts are increasingly adjudicating disputes over actions – or inaction – in relation to climate change mitigation and adaptation efforts.[2]

Climate litigation is a heterogeneous umbrella term that refers to litigation on a variety of grounds, both in national and international fora, seeking to force the legislator to take missing or insufficiently ambitious mitigation measures, and to establish liability for climate change damages.[3]

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2 Burger–Gundlach 2017.

3 Osofsky 2010: 134.

The legal and regulatory framework for climate action: "the inverted pyramid" theory

For the implementation of the UN Sustainable Development Goals[4] (SDGs)–and thus for understanding the regulatory system that provides the framework for the disputes that may arise in this area–it is useful to use the analogy of the "inverted pyramid".

International level

The top level of the pyramid is international law. Treaty law plays a more important role in international environmental law than other areas. The legislators' aim was to create and adopt globally agreed rules that would apply to all states, but this seemed impossible to achieve because of the differences of interest between states.

The international (political) community, and the international law that provides the framework for the functioning of this community, provides guidance at global level through ambitious action plans, such as those established in the framework of various international organisations (e.g. the United Nations). However, for the reasons given above, these guidelines are often not legally binding. The best example of this in the present context is the adoption of the 2030 Sustainable Development Goals (SDGs) framework in a UN General Assembly resolution, which as such is not legally binding.[5] The question is, therefore, how to transform the set of ambitious documents at international level into legally relevant instruments for action.

To overcome regulatory difficulties, the framework convention has become a common regulatory technique in environmental regulation. Such framework conventions deal, for example, with transboundary air pollution, ozone-depleting substances, and global warming. One such framework convention is the UN Framework Convention on Climate Change. The parties to these framework conventions enter into concrete and legally enforceable commitments in protocols. The commitments in these protocols are rich in technical detail, for example, they specify the date by which and the extent to which emissions of a pollutant must be reduced relative to emissions at a certain point in time as a baseline. An example is the Kyoto Protocol,[6] which committed signatory developed countries to reduce their greenhouse gas emissions in line with legally binding targets broken down by country. It is also important to mention the Paris Agreement,[7] an international agreement developed by the parties to the 1992 UN Framework Convention on Climate Change[8] in 2015, which is contemporaneous with (and partly influenced by) the SDGs.

4 United Nations 2020.
5 United Nations 2020.
6 United Nations 1997: 162.
7 United Nations 2016.
8 United Nations 1992.

The regional level – the European Union

From the top down, the second level of the pyramid is the area of EU cooperation. The European Union is a very specific entity, as the EU acts as a "quasi-state" in certain areas defined in its founding treaties (e.g. trade policy, or even the single customs policy). The European Union is structured along different lines of competence under the founding treaties, so we can talk about Member States, the EU and shared competences. A review of the SDGs reveals a number of goals and objectives that bring this problem of competence to the surface. On the one hand, there is an expectation from international law to meet the targets, but on the other hand, looking at the steps needed to achieve the goals and targets through the lens of the EU legal system, it is clear that some of these competences are exclusively EU competences, while the rest are Member State competences. Referring to the three-dimensional model of sustainable development (economic, social and environmental objectives), it can be seen that, while the EU has somewhat more room for manoeuvre in the environmental field, the social field, for example, is essentially dominated by the Member States under the founding treaties, and thus consists of 27 almost completely independent and uncoordinated policies.

On the environmental dimension, the EU and all Member States have signed and ratified the Paris Agreement and are strongly committed to its implementation. In line with this commitment, EU Member States have agreed to set the EU on a path to become the first climate-neutral economy and society by 2050. The EU is leading the fight against climate change. Ambitious EU policies and actions will make the EU a global standard-setter and drive climate ambition worldwide. As required by the Paris Agreement, the EU has presented its long-term emission reduction strategy and updated climate policy plans before the end of 2020, and committed to reducing EU emissions by at least 55% below 1990 levels by 2030.

In terms of the legal framework for climate action at EU level, the European Green Deal[9] and the so-called "Fit for 55!" package of proposals should be examined in more detail. The former is a programme presented by the European Commission in December 2019 to promote resource efficiency, shift to a clean, circular economy, restore biodiversity and reduce pollution, among other things, while the latter is a comprehensive and coherent set of climate change proposals that, if implemented, will allow for a large reduction in greenhouse gas emissions over the next decade.

1. The European Green Deal

On 11 December 2019, the European Commission published its Communication "A European Green Deal" to address climate and environmental challenges. The agreement's guiding principle is to achieve climate neutrality in Europe by 2050,

9 European Commission 2021b.

i.e. a net zero greenhouse gas emissions reduction. The Communication was, and is being followed by a series of legislative actions (slightly modified in the light of the pandemic) on a pre-defined timetable covering a wide range of EU policies, including changes to climate targets, energy, transport, environment, agriculture and industrial policy. To achieve the objectives of the ENP, the Commission proposes new measures in eight policy areas. In addition to the new measures, the Commission will work with Member States to ensure compliance and implementation of existing legislation and policies.

2. Fit for 55%!

The EU has set itself a binding target of achieving climate neutrality by 2050, as part of the European Green Deal. This requires a significant reduction in current greenhouse gas emissions in the coming decades. As an intermediate step towards climate neutrality, the EU has stepped up its climate ambition for 2030, and pledged to reduce emissions by at least 55% by the same year. The EU is revising its climate, energy and transport legislation to bring existing legislation into line with the 2030 and 2050 targets as part of the "55% Roadmap".[10]

The climate change package proposed by the European Commission aims to reduce emissions from industry, buildings, transport and land use. The package will have major implications for all European regions, businesses and citizens, and puts the "polluter pays" principle into practice. A central element is a new approach to carbon pricing, and it is, therefore, important that it also contributes to territorial cohesion. The package must take into account the needs of all regions, and ensure that local and regional authorities have a greater say, share revenues and have direct access to funding for green investments and climate-related social spending, as they are responsible for 90% of climate adaptation measures and 70% of mitigation measures.

At this point, I think it is important to stress, with regard to the legal binding force of climate ambitions at EU level, that the Commission is not a legislative body in itself, as in all cases, and so, in this area too, the Parliament and the Council must be involved in order to implement the Commission's ambitious climate ambitions, since it is only in the light of these actions that we can talk about EU legislation with legal binding force.

Sub-regional level

The third level of the pyramid focuses on regional cooperation opportunities. The question to be examined is to what extent smaller regional cooperation formations between EU Member States (e.g. in our case the V4) provide an appropriate and effective platform for the joint implementation of the sustainable development

10 European Commission 2021a.

framework, and as part of this, specifically for climate change efforts, and the intensity of willingness of individual Member States to cooperate in this direction.

Over the past 30 years, Visegrad cooperation between Poland, Hungary, Slovakia and the Czech Republic has been a successful model for regional cooperation. The Visegrad Four (Visegrad Group or V4) started out as a community of shared goals and values to help realise common European aspirations for EU and NATO membership. It has proven that the region can not only strengthen relations and dialogue, but also effectively reinforce each other's positions, while addressing challenges together.

The global challenges of climate change, environmental degradation and growing inequalities pose new threats to our way of life, which leads us to strengthen Visegrad cooperation towards sustainability. Regional cooperation, by its very nature, is dominated by declarations of intent by states, and the action they lead to in practice, as legally binding provisions will be put in place at national level. However, in general, regional incentives can have a strong potential to shape national policy actions in the countries of a region.

National level

The above steps lead us to the fourth level, the question of implementation at the national level, i.e. the extent to which the UN and EU Member States have made progress in implementing the sustainable development framework, in accordance with their legal and, in part, political possibilities arising from their membership of the UN and/or the EU.

As a legally non-binding framework, one of the most crucial issues of the 2030 Agenda for Sustainable Development is the monitoring of the actual implementation of its commitments at national level. The Agenda's monitoring and review mechanisms encourage Member States to regularly and comprehensively measure and report on their progress towards implementing the SDGs at national level. These comprehensive monitoring exercises at national level are expected to form the basis for regular reviews of the high-level policy forum (HLPF) under the auspices of ECOSOC. As foreseen in the 2030 Agenda, these syntheses by the HLPF should be voluntary, involving public leaders and all stakeholders in both developed and developing countries.

The Voluntary National Reviews (VNRs) aim to facilitate the sharing of experiences, including successes, challenges and lessons learned, to accelerate the implementation of the 2030 Agenda. The VNRs also seek to strengthen government policies and institutions, and to mobilise multi-stakeholder support and partnerships to achieve the SDGs. Hungary presented its first such report in July 2018 at the UN High-Level Political Forum for the Comprehensive Monitoring of the Implementation of the SDGs in New York.

If we look at the role of national governments in general with regard to the implementation of the SDG framework, including the climate goals, in the Member

States, we are in effect looking at the extent of the influence that the Member State exerts on its citizens in this regard, and, approaching the same question from the other direction, on the leaders of the state, both in terms of the number of citizens (and more generally, the social and economic set-up of a state).

A growing population and rapid economic growth are significantly increasing the demand for natural resources and infrastructure development. It has become crucial for governments to find effective solutions to meet these growing demands as soon as possible. In this context, one of the key tasks of the state is to develop strategies, to plan strategically and to implement them. In my view, sustainable development is not only a goal to be achieved and desired, but also an instrument for states to use as a strategic tool. The role of the State is to take responsibility for the well-being of its citizens, both for the near and the distant future. Sustainability as a strategic planning tool can help the state (in practice, of course, its leaders) at all levels of government to do just that.

The National Climate and Energy Plan[11] (NEKT), adopted by the Hungarian Government in 2018, can also be described as a kind of strategy. The European Commission published the so-called Energy Winter Package at the end of November 2016, which, along with several new climate and energy policy proposals, requested Member States to develop a National Energy and Climate Plan (NECP), applying a common methodology and with a common content. According to the Commission's position paper, the NREAP could build on existing climate and energy strategies and action plans of Member States, as long as they are compatible with the EU's 2030 climate and energy policy objectives and the greenhouse gas emission reduction commitments under the Paris Agreement.

However, the Hungarian NEKT only sets a 40% emission reduction target. The country had already achieved this in 2013 (mainly due to the collapse of socialist industry), only to see it fall back to 33% again due to rising pollution. The domestic target is far below the EU's 55% and the 60-65% recommended by the scientific community. The question is, therefore, how to force decision-makers to make and keep more ambitious commitments. In a later part of my study, I will address this issue by examining the practices of climate cap-and-trade, which are becoming increasingly common at the international level.

Local government level

Breaking down the national level of our pyramid further, we can distinguish between the government of a state and its activities (state administration) and the territorial level of local government administration. While central government is essentially concerned with macro issues and certain macro policy developments,

11 Innovációs és Technológiai Minisztérium 2018.

local government, as the level closest to the population, could usefully incorporate the concept of sustainability into strategic planning at local level.

The 2030 framework is undoubtedly ambitious. Meeting all its goals, targets and indicators is of course not 100% achievable for any nation. However, to achieve the best possible realisation of these goals, it is essential that we take action outside the high-level political fora, at the level closest to the people. This process is called localising the 2030 Sustainable Development Goals.

The current pace of urban growth is unprecedented. Rapid urbanisation brings with it huge challenges, including increasing air pollution, inadequate basic services and infrastructure, and unplanned urban sprawl, which make cities even more vulnerable to disasters. Our towns and villages need to be clean and safe, with adequate housing and basic services, such as water and electricity. We also need efficient transport systems and green spaces. Localising the SDGs includes both looking at how local governments can support the 2030 Agenda through their grassroots action and how the SDGs can provide a framework for local development policy. One of the first steps towards the implementation of the 2030 framework is to ensure that local governments have the right environment and resources to take real action.

The progress made by individual UN member states in implementing the SDGs can be tracked by studying the Voluntary National Reports discussed above. A mechanism is currently being developed to monitor implementation from the perspective of local authorities, in line with the assessment cycles defined by the UN High Level Political Forum. A number of local and regional authorities in countries presenting their country reports have been invited to participate as soon as possible in the reporting process, which will be essential to engage in dialogue among Member States, and to be ready to contribute to national reviews.

Of course, the key issue here is also the question of funding. The Addis Ababa Action Plan[12] (AAA), which sets out the financing framework for sustainable development policy actions, is an integral part of the 2030 Sustainable Development Goals framework. In line with the Addis Ababa Action Agenda, local authorities should be recognised as individual partners, on an equal footing with civil society organisations and the private sector, and involved in the monitoring of the framework. The role of local authorities in investing in basic services, resilient urban and territorial infrastructure is key to achieving the sustainable development goals. In high-income countries, local authorities are responsible for 50% of public investment, while in low-income countries their contribution is limited to 7%.

A growing number of city leaders are committing to climate action, thanks to the development of municipal climate strategies that focus on local, grassroots issues and problems. The best known example at home is perhaps the capital. Budapest has declared a climate emergency and adopted a separate climate strategy. The aim is to reduce emissions to mitigate the already inevitable effects of climate change.

12 United Nations 2015.

But Budapest is not the only municipality to have adopted an ambitious – but no doubt necessary – climate strategy. In Hungary, the cities of Balatonfüred, Szentendre, Győr and Békés, among others, have also drawn up climate strategies.

It is worth observing the interaction between the decision-making and action processes of the actors involved (national and urban decision-makers, city residents). It can be shown that the climate strikes carried out by NGOs have greatly contributed to the commitment of the leaders of the municipalities and cities concerned.[13] Subsequently, when a critical mass of municipalities had adopted strategies, targets and programmes for climate neutrality, the time for action at the national level was now ripe. So we can say that local level commitments towards sustainability have indeed helped to accelerate these processes, also at national level.

At any level of government, it is important to emphasise the role of the state in building trust and transparency. Adequate social and economic development can only be achieved if a certain level of trust is established in society towards the leadership and the government. This trust will be the primary guarantee that the public (whether individuals or companies) will be supportive of government initiatives to promote environmental protection and, more broadly, sustainability. It is also the responsibility of governments to ensure that, in addition to the legislative branch, the executive branch (primarily the public administration) has the competence, skills and capacity to implement the necessary reforms, as the expertise of the (central) public administration is essential for the effective implementation of the strategies, action plans and programmes developed by governments.

The question is, however, what tools are available to citizens (or indeed companies) to spur the actors who have made commitments to action. One of these tools is undoubtedly the climate fund, which has recently been gaining in importance and practice.

Climate litigation: Against whom are these lawsuits most often brought?

While climate lawsuits were initially typically brought against public bodies,[14] mostly to force more sustainable economic policies, more recently there has been an increase in cases against large polluting companies, with the aim of seeking compensation for the most affected groups and deterring them from further pollution. These lawsuits are often based on the premise that the big oil companies have been aware of the dangers of fossil fuels since the 1960s at the latest, yet have not tried to mitigate the damage.

An important landmark case in this regard was Kivalina v. ExxonMobil Corp,[15] in which Alaska Natives sued 24 major oil companies, claiming that their villages had been rendered uninhabitable by climate change induced flooding. The trial judge

13 Ingaruca 2022.
14 Sulyok 2020.
15 Native Vill. Of Kivalina v. ExxonMobile Corp., 696 F.3d 849, 853 (9th Cir. 2012).

then concluded that the companies could not be held liable because the government had passed laws to reduce emissions. However, one of the defendants, the giant company AES, asked its insurer to reimburse its legal costs – but the insurance company Steadfast refused, saying the case concerned issues that were "natural and likely consequences" of the energy company's activities. The court agreed with this argument, which climate campaigners say was a clear sign of hope. The so-called Carbon Boomerang report[16] of 2017 had already suggested that not only fossil fuel companies could be sued, but also banks financing coal-fired power plants[17] and private pension funds investing in fossil fuels. What's more, for some time now, several oil companies have been mentioning in their annual financial reports that various climate risks could seriously affect their future profitability.

At the same time, there are still plenty of examples of national governments being condemned. In February 2021, the French government[18] was condemned by a Paris court for failing to do enough to reduce emissions as it had committed to do. In April 2021, the German Federal Constitutional Court[19] ruled that the German climate protection law was unconstitutional because it did not sufficiently curb carbon emissions, jeopardising the freedoms of future generations. Perhaps even better known is the Dutch example of Shell, an oil giant, which was condemned by the court, ordering the company to bring its activities into line with the Paris climate targets. Last September, in Indonesia,[20] the president and other politicians were convicted of failing to reduce air pollution sufficiently. In most of these cases, one or more NGOs representing citizens are on the other side of the case.

Most notably, in the case of Urgenda Foundation v Dutch State,[21] brought by an environmental group and nearly 900 Dutch citizens in 2015, the Dutch Supreme Court ordered the government to reduce greenhouse gas emissions by 25% by the end of 2020 compared to 1990 levels to protect its citizens from the effects of global warming.

Causality

Whether it is litigation to remedy legislative and regulatory inaction, or to compensate for climate damage, the common element in all these proceedings is the need to address the difference between the operating principles of law and science. The innovative nature of natural science is sometimes difficult to understand within the framework of centuries of legal doctrine. The two sciences, for example, have

16 Minter Ellison 2017.
17 Abrahams v. Commonwealth Bank of Australia (2021).
18 Notre Affaire à Tous and Others v. France.
19 Neubauer et al. v. Germany case.
20 Citizen air pollution case (374/PDT.G/LH/2019/PN.JKT.PST).
21 Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment), First instance decision, HA ZA 13-1396, C/09/456689, ECLI:NL:RBDHA:2015:7145, ILDC 2456 (NL 2015), 24th June 2015, Netherlands; The Hague; District Court.

different views on causation and the process of proof. In legal terms, is global climate change caused by a country with relatively low global emissions? If so, to what extent? And what is required if the court answers yes to the above questions?

The issue of causality arises not only in climate damage actions for compensation for damages between the damage caused and the conduct, but also in actions to enforce climate change regulation. In the latter cases, too, the legislator may be obliged to act against risks and conduct that are capable of infringing certain rights that are intended to be protected, in other words, that are causally linked to the scope and content of the protection of those rights. The methodology of natural science and the randomness of natural processes, as well as the complexity of the systems under investigation, make it impossible to achieve absolute certainty.[22]

Climate change attribution science – which investigates the causal links between human activities, global climate change and the impacts of it – plays a central role in many of these lawsuits. Attribution science is evolving rapidly, both in terms of attributing impacts and extreme events to climate change, and in terms of attributing greenhouse gas emissions to specific actors. Armed with mounting evidence linking increases in atmospheric greenhouse gas concentrations to specific adverse effects, plaintiffs are launching more ambitious claims against governments and emitters for their contribution to or failure to act on climate change.[23]

The growing trend of climate change related litigation is also true for the EU, which is a tiered system with an integrated system of legal protection involving the European Court of Justice and national courts. An analysis of one of the leading recent cases, Carvalho,[24] shows that the scope for judicial review of the validity of EU acts by private individuals is very limited, both in the way the rules [Article 263(4) TFEU] are drafted and in the interpretation given by the courts. This conservative approach in case-law is in stark contrast to the active and progressive nature of EU environmental legislation and the gradual emergence of case-law protecting fundamental rights relating to the environment in the various national legal systems.

The European Union's climate litigation perspectives

Climate litigation has become a permanent feature of climate change law and policy. Across jurisdictions, climate litigation takes different forms, based on administrative, civil or criminal proceedings. Human rights are increasingly being incorporated into more and more cases, leading, inter alia, to courts imposing more stringent mitigation obligations on governments and private actors in light of human rights provisions.

Within the European Union, two human rights instruments have played a central role in the development of this jurisprudence: the European Convention on Human

22 Sulyok 2013.
23 Lloyd–Shepherd 2021.
24 Carvalho and Others v. Parliament and Council Case T-330/18.

Rights (ECHR) and the EU Charter of Fundamental Rights.[25] The ECHR is one of the oldest and most influential human rights instruments, having entered into force in 1953 under the Council of Europe. In addition to the EU Member States, its membership includes countries such as Albania, Turkey and Russia. Compared to the ECHR, the Charter is a relatively young instrument. The Charter was introduced as part of the latest EU treaty reforms, which entered into force in 2009.

A number of landmark cases in this area originate from European jurisdictions, and have been argued on the basis of both the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union. An analysis of case law from European Member States shows that the emerging picture is that the Charter plays a secondary role to the ECHR.

Since the 2010s, human rights claims have played an increasingly important role in climate-related litigation.[26] The use of human rights in environmental protection has been primarily through the "greening" of existing human rights law[27] and the various human rights regimes, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention on Human Rights (AmCHR), and the African Charter on Human and Peoples' Rights (AfCHPR), there is a marked convergence and cross-fertilisation of related case law.

In many ways, the application of human rights in climate-related litigation is a logical extension of the application of human rights in the more general context of environmental protection.[28] This development has been problematised in its own particular ways, most prominently the objection that human rights-based protection of the environment reflects a deeply anthropological approach to environmental degradation that fails to reflect the intrinsic importance of the environment in and beyond its relationship to human well-being.[29] Pragmatically, human rights have proven to be one of the most promising tools for environmental protection in the absence of regulation or in the face of regulation deemed inadequate.

In recent European cases – including the Urgenda case law, particularly in appeals, Milieudefensie v. Royal Dutch Shell and the judgment against the German Federal Climate Change Act – plaintiffs have successfully invoked domestic and international human rights to secure more ambitious public and private climate action.

25 European Union 2010.
26 Macchi 2021.
27 Boyle 2012: 613–614.
28 The UN Human Rights Council resolution recognising access to a healthy and sustainable environment as a universal right was a watershed moment in this movement.
29 See e.g. Borràs 2016; Bruckerhoff 2008. In parallel, there has been a call for the elaboration of rights to nature; the creation of "human" rights for ecosystems and species. See: www.therightsofnature.org/what-is-rights-of-nature. Similar arguments have been made for extending other rights, such as the right to property, the right to statehood, and even citizenship to non-human animals. See, accordingly, Bradshaw 2020; Abate 2019; Staker 2017.

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ACTA HUMANA • 2 (2024) 105–121. • DOI: 10.32566/ah.2024.2.7

Identifying Problems of International Investment Law (IIL) and Evaluating the Focus of Reform Initiatives

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The normative structure of international investment law is highly asymmetrical. Generally, current IIAs grant investors significant substantive and procedural rights, while States and affected communities often lack equivalent safeguard. In recent years, scholars have critcised and identified many problems including human rights concerns ingrained in the international investment law framework. The States and other stakeholders also raised many concerns regarding international investment agreements and investor-State dispute settlement. Moreover, there's agreement on the need for comprehensive reform of IIL to make ISDS effective. Yet, issues with ISDS go beyond systemic flaws, also entrenched in substantive deficiencies in existing IIAs. Furthermore, the current legitimacy crisis provides a unique chance to amend the international IIAs comprehensively. However, the WGIII and ICSID reform initiative primarily focuses on procedural aspects of ISDS, avoiding substantive issues raised by various stakeholders. While procedural reforms are essential, resolving substantive issues is equally necessary.

Keywords: international investment law, investor-State dispute settlement, reform, UNCITRAL, WGIII, ICSID

Introduction

In recent years, there has been a significant increase in scholarly interest towards the investment treaty system. This surge in interest has led to the adoption of a broader range of theories and methodologies, pushing the frontiers of knowledge in multiple aspects of the investment treaty system. They have criticised and identified many problems ingrained in the international investment law (hereinafter IIL) framework. The States and other stakeholders also raised many concerns regarding international investment agreements (hereinafter IIAs) and investor-States dispute settlement (hereinafter ISDS).

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The United Nations Commission on International Trade Law (hereinafter UNCITRAL) tasked Working Group III (hereinafter WGIII) to explore potential reform of ISDS. The process is government-led and consensus-based.[2] The process recognises concerns about the democratic accountability and legitimacy of the investment law regime.[3] Criticisms of ISDS include both substantive and procedural aspects. Questions also arise whether the advantages of investment treaties with ISDS provisions, outweigh their costs.[4] These concerns highlight the need for UNCITRAL to take a comprehensive view of the system's effectiveness in realising its goals when considering ISDS reform.[5]

Reform initiatives at the International Centre for Settlement of Investment Disputes (hereinafter ICSID) and UNCITRAL's WGIII are focusing on reforming the ISDS which involves procedural aspects.[6] On the other hand, the United Nations Conference on Trade and Development (hereinafter UNCTAD) is offering amendment guidelines to States.

In this paper, in section 2, the author identifies the problems in IIL by evaluating perspectives of scholars and stakeholders. In section 3, the author, then, identifies the focus of reform initiatives concerning IIL and provides evaluation. In section 4, the author provides the conclusions of this paper.

Identifying the problems in IIL

Foreign investors anticipated and also encountered risks while investing in a host country. Therefore, the target of the capital-exporting States is to establish protective system for the investment, while goal of the capital-receiving States is to protect their regulatory power.[7] It is claimed that initially the international investment law was shaped by unequal military power and later influenced by the US hegemony. After that it has consolidated through investment treaties and contracts. Despite encountering dissent, ongoing efforts seek to adjust its outer features while maintaining the core. Comprehending the strategies utilised to maintain this prevailing system is essential.[8]

One of the oft repeated claims is that international standard of treatment for foreign investors is a customary international law principle.[9] However, Sornarajah opposes this view.[10] In his view, claiming that there existed customary international law concerning the international minimal standard is incorrect as the international community was divided on accepting the international minimum standard

2 UNCITRAL 2017a: para. 264.
3 UNCITRAL 2017b: para. 12. UNCITRAL 2017c: paras. 45–47.
4 UNCITRAL 2018a: paras. 94 and 97. Johnson et al. 2018.
5 UNCITRAL 2018a: para. 97.
6 Alvarez 2021: 254.
7 Wouters et al. 2013: 25–69.
8 Sornarajah 2021a: 2146.
9 Wouters et al. 2013: 25.
10 Sornarajah 2021a: 2148.

as guaranteed under customary international law.[11] Moreover, Latin American States initially resisted the system based on external minimum standards of treatment, followed by African and Asian States. In addition, he dismissed the assertion of existence of customary international law on this issue as a creation of Western international lawyers' imagination.[12] He also emphasises that as the power dynamics shifted, so did the system.

The formal beginning of the existing system can be traced back to the 1959 Germany–Pakistan BIT.[13] However, an alternative view suggests its roots in the United States' Freedom, Commerce, and Navigation Treaties.[14] So far, over 2,800 BITs have been concluded.[15] Under the current international investment law system, foreign investors are empowered with the right to sue governments.[16] While Simmons highlights that the foreign investors' right to sue a government for damages by choosing a forum constitutes the most revolutionary aspect of international law,[17] Professor Gus Van Harten counters by highlighting the institutional biases embedded within ISDS. He asserts that the system favours wealthy claimants, leaving resource-constrained States struggling to put up even a basic defence. He argues further that this imbalance undermines the development of an international rule of law, a concept that remains problematic in itself.[18] Furthermore, Choudhury argues that the IIL can be regarded as a global public good, offering a comprehensive legal framework and creating a system that benefits both States and investors, but its current interpretation and application hinder its effectiveness.[19]

Numerous efforts to conclude a comprehensive multilateral agreement on foreign investment have failed,[20] with notable successes like the International Centre for the Settlement of Investment Disputes (ICSID) Convention.[21] International arbitration became the primary mode of dispute resolution,[22] with ICSID acting as the central institution.[23] However, the significant use of investment arbitration facilitates bypassing national courts.[24] Strikingly, international investment arbitration embodies the unique feature under which only investors can initiate arbitration proceedings and seek compensation for violations of investment protections.[25]

11 Sornarajah 2021a: 2148.
12 Sornarajah 2021a: 2151.
13 UNCTAD 2016.
14 Sornarajah 2021a: 2151.
15 UNCTAD 2023a.
16 Sornarajah 2021b: 18.
17 Simmons 2014: 17.
18 Van Harten 2017.
19 Choudhury 2013: 484.
20 Wouters et al. 2013: 33.
21 UN 1966.
22 Vandevelde 2005: 174–175, 184.
23 ICSID 1966.
24 Subedi 2016: 727.
25 Davitti 2012: 421.

The evolution of investor protection in BITs is seen as revealing conflicts of interest in investment relations between capital-exporting and capital-importing States. Utilising BIT frameworks, developed countries imposed their liberal and protective view on developing countries which weren't available under the customary international law.[26] On the other hand, developing countries have accepted increasingly strong terms in BITs for getting necessary capital and competitive advantages. This lead to significant influence on their regulatory sovereignty.[27] Kate Miles, after employing case studies, contends that international law has been changed to prioritise the interests of foreign investors which neglects interests of local communities and environmental concerns.[28] Moreover, Choudhury's analysis of investor–State arbitration shows a tendency to pay insufficient consideration regarding public interest, favouring investor claims.[29] This imbalance is exacerbated by ambiguous BIT clauses that lacks specifics related to several provisions, such as fair and equitable treatment and expropriation, with arbitral tribunals contributing to the problem through broad interpretation.[30]

Various criticisms have been directed towards ISDS since the 2000s,[31] because of alarming increase in investment disputes[32] and pro-investor climate at the arbitral tribunals.[33] With more than 1,200 investment treaty arbitrations filed by 2023,[34] many concerning sensitive regulatory areas, ISDS has become a contentious element of international economic governance.[35] Recent sensitive cases, including *Vattenfall v. Germany,*[36] *Philip Morris v. Australia,*[37] *Philip Morris v. Uruguay,*[38] and *Lone Pine Resources Inc v. Canada*[39] have engendered public outcry and shaped sentiment against ISDS.[40] Critics question not only the legal merit but also legitimacy of the arbitral tribunals' jurisdiction.

ISDS has drawn criticisms from a diverse range of stakeholders, including academics, jurists, non-governmental organisations, States, citizens, and lawmakers. One of the central criticisms involves the substantive provisions of ISDS, where

26 Wouters et al. 2013: 25.
27 Wouters et al. 2013: 26.
28 Miles 2015: 32.
29 Choudhury 2013: 488.
30 Wouters et al. 2013: 49.
31 Dani–Akhtar-Khavari 2018: 38–39.
32 ICSID 2021.
33 ICSID 2021.
34 UNCTAD 2023b.
35 Jandhyala 2021: 648.
36 Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany 2009.
37 Philip Morris Asia Limited v. The Commonwealth of Australia 2011.
38 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay 2010.
39 Lone Pine Resources Inc. v. The Government of Canada 2013.
40 Víg–Hajdu 2018: 49.

concerns are raised about host States prioritising investors' rights over the public interest.[41]

Another central criticism is related to expansive interpretation of treaties. Scholars contend that the broad interpretations of jurisdictional principles and substantive rules within the treaties have been exercised. This approach involves establishing jurisdiction through expansive interpretations of corporate nationality,[42] including bonds sold in foreign stock markets in the definition of investment,[43] allowing forum shopping based on corporate nationality,[44] asserting that the State must maintain a climate of confidence by interpreting the full protection of security standard,[45] and upholding the international minimum standard by interpreting fair and equitable treatment.[46] The expansion of legitimate expectations became evident in awards like the four Argentina Gas Cases – *LG&E,*[47] *CMS,*[48] *Enron,*[49] and *Sempra*[50] at the beginning of 2000s.[51] Moreover, Mercurio has highlighted particular ways that IIL might violate public policy, like including intellectual property rights in the definition of investment.[52]

Moreover, another focal point in ISDS criticism concerns the independence and impartiality of arbitrators.[53] There is added scrutiny on arbitrators' interpretation, and the limited diversity in their appointments.[54] Empirical studies indicate a handful of arbitrators from Western countries served as both arbitrators and legal counsels, a practice referred to as "double hatting".[55]

Furthermore, another principal criticism involves inconsistency of the awards,[56] especially in the interpretation of the Fair and Equitable Treatment (FET) standard. Unlike the court system, arbitral tribunals are not bound by precedent, leading to varying interpretations.[57] In addition, this inconsistency in the awards has resulted in conflicting decisions on similar factual matters, exemplified by cases like CME v. Czech Republic and Lauder v. Czech Republic.[58]

41 Chaisse et al. 2021: 2133.
42 Sornarajah 2021a: 2154.
43 Sornarajah 2021a: 2154.
44 Sornarajah 2021a: 2154.
45 Sornarajah 2021a: 2155.
46 Sornarajah 2021a: 2155.
47 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic 2002.
48 CMS Gas Transmission Company v. The Republic of Argentina 2001.
49 Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic 2001.
50 Sempra Energy International v. The Argentine Republic 2002.
51 Sornarajah 2021a: 2156.
52 Mercurio 2015: 252–276.
53 Khalique 2024: 94.
54 Giorgetti et al. 2020: 441–474.
55 Langford et al. 2017: 301–332.
56 Nagy 2016: 14–15.
57 Zhu 2018: 319–364.
58 De Brabandere 2018: 2607.

Another point of contention centres on the absence of standardised criteria for awarding damages.[59] This allows tribunals to employ diverse valuation methods, leading to inconsistent decisions.[60] The case of *CME Czech Republic B.V. v. Czech Republic*[61] illustrates this concern, as the awarded compensation substantially surpassed the actual value of the investment.

Another concern involves the intervention into a host State's domestic proceedings, challenging its sovereignty.[62] For instance, in the *Puma Energy Holdings v. Benin* case, the emergency arbitrator directed Benin's executive authority to prevent its judiciary from enforcing a judgment until the resolution of the arbitral dispute.[63] Additionally, critique affirms the restriction of States' regulatory authority through regulatory chill, where evidence may be limited but indicates its existence.[64]

Moreover, ISDS is criticised for its bias toward foreign investors, providing them the right to initiate proceedings while restricting direct access for States.[65] The *Ubraser Case*[66] at ICSID showcases this bias, with States expressing that counterclaims is the available remedy. Another criticism asserts that ISDS primarily protects resourceful investors due to the significant legal and administrative costs.[67] This affects both claimants and respondent States.

Furthermore, criticism is raised for its lack of transparency, with no limited public access to proceedings. The historical context illustrates that this issue wasn't a significant consideration during the peak period of IIA signings.[68]

In addition, another source of concern is high cost and duration of a case, which may continue to exist.[69] Moreover, winning party often find itself with substantial bills as arbitral tribunals typically avoid issuing orders for the reimbursement of its legal expenses. According to the findings of Zamir, the average costs in investor–State arbitration amount to approximately 10–11 million USD for both claimant and respondent.[70] This is one of the central issues for the UNCITRAL WGIII.

Mounting concerns and criticisms have prompted reform efforts within UNCITRAL and ICSID. ICSID began the process of updating its rules and regulations in October, 2016.[71] Meanwhile, UNCITRAL's WGIII was tasked with

59 Marboe 2018: 2.
60 UNCITRAL 2018.
61 CME Czech Republic BV v Czech Republic 2000.
62 Goldhaber 2012: 374.
63 Touzet – Vienot De Vaublanc 2018.
64 Bonnitcha 2014: 154.
65 Pauwelyn 2014: 373.
66 Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic 2007.
67 Caplan 2009: 297.
68 Maupin 2013: 151–152.
69 Zárate et al. 2020: 309.
70 Zamir 2021: 1456.
71 ICSID 2019.

discussing and recommending potential ISDS reforms at its 50th Session in 2017.[72] In reality, stakeholders hold diverse views on how to approach the reform. Research categorises them into three main groups: incrementalists, systemic reformers, and paradigm shifters.[73]

The above-mentioned international investment law climate has certainly prompted some actions by the States. Some States opted out, e.g. Indonesia, India,[74] South Africa,[75] from the BITs and some withdrawn from the ICSID Convention, e.g. Bolivia, Ecuador, Venezuela.[76] Moreover, the growing concerns about international investment law, the criticisms of ISDS, and the ongoing reform initiatives have provided the space for further research to delve into the ISDS system's weaknesses and explore possible solutions.

It is against this backdrop of heated discussions and ongoing reform efforts, the question arises about the need for reforming the international investment dispute settlement system, specifically the ISDS. Moreover, considerations include examining the viability of the reforms proposed by UNCITRAL WGIII and the necessary elements that should be integrated into any reform process.

Evaluating the focus of reform initiatives

Identifying the focus of reform initiatives

The focus of the UNCITRAL Working Group (WGIII)

United Nations Commission on International Trade Law (UNCITRAL) delegated the following broad mandate on the WGIII:

> To work on the possible reform of investor–State dispute settlement. In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led, with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (a) first, identify and consider concerns regarding investor–State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[77]

72 UNCITRAL 2017b.
73 Roberts 2018: 410.
74 Business Line 2017.
75 Chidede 2017.
76 Markert–Titi 2015: 427.
77 UNCITRAL 2017a: para. 264.

It can be observed that the very mandate to the WGIII limited its scope to issues related to the ISDS mechanism. At the 34th Session of the WGIII, it was again reiterated that "the mandate given to the working group focused on the procedural aspects of dispute settlement rather than on the substantive provisions".[78] Moreover, it was also mentioned that the recommendations of WGIII would also consider relevant works from other international organisations. Furthermore, each State would have the opportunity to select from a range of solutions.[79] Therefore, Diamond and Duggal thinks that this reform initiative has shifted its focus away from the substantive aspects of IIL.[80] The WGIII's preliminary focus was on evaluating the consistency, coherence, predictability, and accuracy of arbitral decisions.[81] Additionally, they examined the costs and duration of arbitration proceedings,[82] along with the independence and impartiality of arbitrators.[83]

The WGIII currently preparing and receiving comments on drafts related to various important issues. So far, there are draft proposals on procedural and cross-cutting issues,[84] draft guidelines on prevention and mitigation of international investment disputes,[85] draft statute of an advisory centre,[86] Draft provisions on mediation,[87] Draft code of conduct for arbitrators in international investment dispute resolution,[88] Draft code of conduct for judges in international investment dispute resolution,[89] selection and appointment of ISDS tribunal members and related matters,[90] Appellate mechanism.[91]

A close observation to these drafts showcases that the focus of the WGIII is on procedural aspects. Currently, with a deadline of 2026 in mind, the focus is on drafting legal text, and securing political consensus with an urgency. The WGIII could complete anywhere from six to twelve legal instruments intended for inclusion in a multilateral convention focused on procedural reform.[92]

78 UNCITRAL 2017d: para. 20.
79 UNCITRAL 2017a: para. 264.
80 Diamond–Duggal 2021: 141.
81 UNCITRAL 2018a.
82 UNCITRAL 2018b.
83 UNCITRAL 2018c.
84 UNCITRAL 2023a.
85 UNCITRAL 2024a.
86 UNCITRAL 2024b.
87 UNCITRAL 2023d.
88 UNCITRAL 2023b.
89 UNCITRAL 2023c.
90 UNCITRAL 2022.
91 UNCITRAL 2023e.
92 Roberts – St John 2022c.

The focus of the ICSID

ICSID has initiated its rules amendment process in October 2016.[93] It has invited proposals from all member States regarding potential amendments to the rules.[94] Between 2017 and 2018, ICSID opened the floor to wide-ranging discussions about possible changes to its rules for handling investment disputes through conciliation, arbitration, and fact-finding.[95] In August 2018, ICSID proposed major amendments to its rules in a working paper.[96] The consultation found 16 areas for amending ICSID rules, echoing concerns raised by UNCITRAL WGIII about inconsistent awards, limited transparency, potential conflicts of interest, and high costs and delays.[97]

Proposed changes to the ICSID rules include improving drafting and language,[98] reducing time and cost, clearer instructions for filing a case,[99] obligation to disclose third-party funding,[100] enhancing transparency,[101] new rule on security for costs,[102] disqualification of arbitrators,[103] timing of awards,[104] expedited proceedings.[105] After reviewing proposed changes submitted in January 2022, ICSID member States endorsed amended rules in March 2022 and became effective on July 1st of the same year.[106]

Upon closer scrutiny, it becomes apparent that the amendments made by ICSID focused on procedural matters, reinforcing its role as an institution of arbitration facilities. Moreover, these amendments didn't deal with any substantive matters related to international investment agreements.

The focus of the UNCTAD

UNCTAD did not initiate any reform process, however, it contributes to the ISDS reform debate by offering comprehensive guidelines, prioritising areas, and suggesting phases for IIA reform. In its 2018 reform package,[107] key recommendations include reviewing BITs, promoting responsible investment, addressing procedural aspects, and safeguarding consistency across agreements and policies. Moreover,

93 ICSID 2017: 4.
94 ICSID 2017: 4.
95 ICSID 2018a: 3.
96 ICSID 2018b.
97 Keller 2021: 152.
98 ICSID 2021: 1–2.
99 ICSID 2021: 1–2.
100 ICSID 2021: 1–2.
101 ICSID 2021: 1–2.
102 ICSID 2021: 1–2.
103 ICSID 2021: 1–2.
104 ICSID 2021: 1–2.
105 ICSID 2021: 1–2.
106 ICSID 2022.
107 UNCTAD 2018.

it advocates for a transparent, inclusive reform process to improve the multilateral support structure for ISDS. UNCTAD's investment reform suggestions focuses on modernising outdated treaties. It assists states in changing investor-friendly BITs with more balanced ones.[108] It recommends updating treaty provisions with global standards, maintaining similar treaty standards, reinterpreting treaty provisions where necessary.[109] It also supplies essential database of modern IIAs.[110]

UNCTAD's recognises broader critiques of IIAs, however, it addresses them incrementally rather than through a unified approach.[111] Moreover, UNCTAD aims to balance States' regulatory rights with safeguarding FDI.[112] Although multilateral engagement remains a possibility, UNCTAD isn't leading any efforts for a multilateral investment agreement. Alvarez thinks that UNCTAD promotes a liberal structure for foreign investment. Moreover, it maintains the current framework of protecting foreign investment.[113]

Critique of the focus reform initiatives

There's agreement on the need for comprehensive reform of IIL to make ISDS effective.[114] Yet, issues with ISDS go beyond systemic flaws also entrenched in substantive deficiencies in existing IIAs.[115] Indonesia contends that both the substantive and procedural aspects of IIAs are interconnected and require same attention.[116] However, South Africa questions the rationale behind granting businesses the ability to initiate legal action against governments.[117] Singla argues that achieving effective and sustained ISDS reform needs substantive changes to existing IIAs within a multilateral framework.[118] She stresses that problems related to ISDS derive from the language and provisions of IIAs.[119] Moreover, Alvarez warns against only tackling procedural issues in investment arbitration reform. He thinks that overlooking substantive concerns weakens not only immediate but also long-term reform objectives. Simply improving arbitration and enforcement mechanism without addressing fundamental legitimacy issues won't stabilise or legitimise the legal regime.[120] Furthermore, Shan thinks that the current legitimacy crisis provides

108 Alvarez 2021: 262.
109 UNCTAD 2017a.
110 UNCTAD 2015: 73–88.
111 Alvarez 2021: 262.
112 UNCTAD 2015: 73–88.
113 Alvarez 2021: 262.
114 UNCTAD 2018.
115 Singla 2020: 134.
116 UNCITRAL 2019b: para. 1.
117 UNCITRAL 2019a: para. 37.
118 Singla 2020: 133.
119 Singla 2020: 133.
120 Alvarez 2021: 254.

a unique chance to amend the international IIAs comprehensively.[121] A multilateral investment law framework would be coherent and would provide the legal clarity.[122] In addition, this would end fragmented nature of current IIL.[123]

In the approach of the investment arbitration, there is considerable conflict when it comes to deal with other fields of international law.[124] This aspect is crucial for international community. Without harmonisation, this aspect cannot be properly dealt with.[125]

Previous efforts to create a multilateral investment treaty were not fruitful.[126] Despite shifting attitudes backing a unified approach, reaching consensus at the multilateral level remains uncertain.[127] Singla sees incremental routes to multilateral consensus,[128] while Sauvant highlights challenges due to opposing views on multilateral framework.[129]

Conclusion

The normative structure of IIL is highly asymmetrical.[130] Generally, current IIAs grant investors significant substantive and procedural rights, while States and affected communities often lack equivalent safeguard.[131] Therefore, fixing this structural imbalance warrants a holistic approach, rather than incremental or regional solutions. However, the WGIII and ICSID reform initiative primarily focuses on procedural aspects of ISDS, avoiding substantive issues raised by various stakeholders.[132] While procedural reforms are essential, resolving substantive issues is equally necessary.[133]

Based on the amended ICSID Rules and Regulations effective on July 1, 2022,[134] it can be concluded that the amendments represent incremental changes to the procedural aspects of ISDS. On the other hand, analysis of WGIII's drafts[135] suggests a focus on systemic changes to the procedural aspects of ISDS. Although the WGIII plays a vital role as a platform for State discussions, but its current mandate complexity makes adding substantive reform agenda unlikely.[136]

121 Shan 2015: 1.
122 Shan 2015: 2.
123 Sauvant 2016: 34.
124 UNCTAD 2017b: 129.
125 UNCTAD 2017b: 130.
126 Supnik 2009: 357.
127 Wouters et al. 2009: 288.
128 Singla 2020: 162.
129 Sauvant 2016: 33.
130 Garcia et al. 2015: 869.
131 Arcuri–Montanaro 2018: 2793.
132 Khalique 2022: 64.
133 Khalique 2022: 64.
134 ICSID 2022.
135 UNCITRAL 2024c.
136 Alvarez 2021: 260.

There are continued concerns from various stakeholders.[137] They maintain that solely focusing on procedural aspects would not be ideal utilisation of the current reform opportunity.[138] Scholar likens this approach to cosmetic changes on a fundamentally flawed system.[139]

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137 Montineri 2021: 158.
138 UNCITRAL 2019a.
139 Alvarez 2021: 276; Sachetim–Codeco 2019: 58.

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ACTA HUMANA • 2 (2024) 123–135. • DOI: 10.32566/ah.2024.2.8

STUDIES

Conceptual Difficulties in the Transformation of Human Rights to the Realm of Artificial Intelligence

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Artificial intelligence has been seeping into various fields of international law for some time, affecting fields such as international humanitarian law – especially regarding the legality of autonomous weapon systems, but also intellectual property law and the legal profession as a whole. A conflicting zone encompassing many subfields is human rights, where an already sensitive subject that is open to debates and interpretation is met with rough questions. For instance, should and could human rights norms be transferred into pre-programmed entities? What relevance can human rights have to a non-human being that has been created, programmed and assembled by humans? Vast regional differences exist between the European, African and Inter-American systems with a lack of coherent structure in the Asia-Pacific region. Our understanding of human rights has also developed substantially over the decades, especially regarding norms on slavery, free speech, the prohibition of discrimination and the rights of women, of disabled persons and indigenous peoples to name a few examples. Furthermore, a vast array of international documents on human rights are political manifestos utilising expressions such as "respecting" and "ensuring" human rights as obligations for members of the international community. Since these provisions deliberately leave a lot of room for interpretation, it seems almost an impossible task to translate them to "binary code", to a format that is digestible for an artificial entity. The article aims to answer these questions by analysing the abovementioned line of thought and combining it with various attempts at international regulation by states, international organisations as well as non-governmental organisations and think-tanks. The fundamental focus of this paper is to ascertain whether human rights and AI can be made compatible under the current framework of international law at today's level of development.

Keywords: artificial intelligence, human rights, international regulation, transfer, compatibility

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Introduction

A major achievement of the 20th century can be found in the adoption, codification and dissemination of human rights. This civilisational achievement stands for a guarantee so that individuals will not be treated as objects, no matter where they live or which societal group or construct they belong to, they will enjoy certain rights by virtue of being humans. The development of human rights norms is far from over, with many pertaining issues plaguing the system, ranging from lack of enforcement, regional differences, and criticism by authoritarian regimes, general disputes on the acceptance of new human rights, etc. Out of the current challenges faced by human rights norms, the dilemmas brought by the advance of artificial intelligence is a key concern for decision-makers. For simplicity's sake, a working definition of human rights will be used as the following: unalienable rights that benefit each individual human being, foundational norms and achievements of the human civilizations which can be traced back to human dignity.[2] The aforementioned definition merges elements from some of the leading scholars of international law who explain that the beneficiaries of human rights will always be humans. The obligation to respect human rights and refrain from violation in this context will affect the artificial intelligence (AI). However, since AI does not currently possess legal personality, other humans and abstract subjects of law are addressed such as companies responsible for development and dissemination of AI along with states whose role is to assure protection of humans from possible human rights violations through AI.[3] The goal – and the easiest way to transfer human rights to AI and regulate AI-related conduct – shall remain in the hands of the states.

Therefore, the main aim of this article is to observe what major challenges may arise when we attempt to transfer human rights norms to artificial intelligence-based systems, and then to find solutions based on the current toolkit of international law. As a result, this article does not tackle the issue of ethical or moral questions nor programming aspects but merely the transference of human rights to artificial intelligence.[4] It will not define what it means to be human, nor will it analyse transhumanist movements which would bring machine and human closer by integrating artificial systems into the human body.[5]

Difficulties of the current human rights regime

Contrary to how several decision-makers are referencing them, human rights are not a homogenous and well-defined set of norms that would be beyond and above debate

2 Shaw 2003: 247–249. Aust 2007: 215–216; Alston–Mégret 2020: 8.
3 Hárs 2022: 320–344; Bryson et al. 2017: 273–291; Chesterman 2020: 819–844.
4 Floridi et al. 2018: 689–707; Opderbeck 2021: 470–472.
5 Bostrom 2005; Livingston–Risse 2019: 151–153. See also the attempts by Neuralink (https://neuralink.com/approach/), or the prognosis by Ray Kurzweil (www.kurzweilai.net/the-transhuman-singularity).

regarding their content and extent. Therefore, a preliminary question arises before we can deliberate on harmonising the two fields: how are human rights affected or possible hindered by AI? The short answer – as referenced by several international organisations – lies in possible infringement by states and multinational companies resulting in mass surveillance, loss of privacy, adverse decisions without human control or interference, and generally, handing over decision-making to AI.[6] Of course, in certain cases, reliance on AI can be beneficial as for instance instead of waiting for days or weeks for a simple application for official documents, AI can almost instantly "decide" the case and issue the requested certificates.[7] However, in case of applying for a loan from a bank – with most banks using AI as of this moment to decide loan applications – if the process is not coupled with human oversight or the possibility to appeal to a stage where a human decides the fate of the application, the future of the individual will rest in the hand of an algorithm which can be quite problematic. As a result, making sure that certain human rights, especially the right to human dignity is observed, shall remain of paramount importance. However, putting this noble tenet to practice is not as easy as it sounds. In this chapter, the difficulties will be addressed, whereas potential answers by international organisations and possible theories in resolving them will constitute parts of the two following segments.

The first issue is *what to transfer?* As stated before, human rights are not a homogenous entity, and there are various catalogues of human rights exist which name, characterise and define human rights differently. Indeed, it is quite rare that an international treaty does all three. Which one of these documents do we accept as "the" catalogue or primary document? The International Bill of Rights (the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights and the International Covenant of Economic Social and Cultural Rights) has the benefit of having the largest legitimacy by virtue of being one of the earliest adopted, with the majority of the international community accepting (at least tacitly) their contents.[8] It could also be argued that some international human rights treaties have since become *ius cogens*[9] and therefore serve as the ultimate basis reflecting the values of the international community such as Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment or the Convention on the Prevention and Punishment of the Crime of Genocide. Relatively newer international treaties also merit mentioning here, such as the 1989 New York

6 Broadbent 2021: 2; Cataleta 2021: 4; Gromova et al. 2022: 191; Burri 2017: 101; Nash 2019: 4–5.

7 We have to bear in mind that such a software might not be AI or a vastly simplified version.

8 It needs to be taken into consideration that out of the 58 member states at the General Assembly of the United Nations, 48 voted in favour of adopting the Universal Declaration of Human Rights in 1948, while the ICCPR and the ICESCR have 173 and 171 state parties respectively according to the UN's treaty database; UNTC 14531, 14668.

9 Or to be more precise, it can be argued that some of the content of international human rights treaties have since the time of adoption have not only become customary law but also peremptory norms of international law.

Convention on the Rights of the Child, as it seems to stir the least amount of debates and benefits from a wide, general acceptance from members of the international community.[10] In contrast, the 1979 Convention on the Elimination of All Forms of Discrimination against Women lies at the forefront of debates both domestically and as a source of conflict between states either preferring the norms enshrined in the treaty or because of a special interpretation and practice of those norms.[11] The abovementioned treaties merely represent directions the international community can take when deciding where to start but since there are dozens of human rights treaties on the universal level, choices are abound to begin with.

The second question is *how to transfer* human rights. Since human rights treaties are aiming for broad support, their provisions are formulated as to reflect a political compromise and operate with expressions such as "respect for human rights" is needed,[12] that human rights need to be "observed"[13] and "every step must be taken to make sure they are not violated".[14] From an international law standpoint, this is quite understandable as these constructs leave them open for various interpretations and incorporation into domestic rules as reflecting the dual regulatory nature of human rights: international norms manifest themselves as frameworks and directions, whereas domestic norms are defining their exact contents as per the other norms of the state in question. During the transfer of these norms to a binary equivalent, ambiguity has to be eradicated for the algorithm so as to provide clear results. If the treaty itself is not clear regarding its contents, if the contents can vary from state to state, then it can be argued that human rights norms exist on the level of principles, and coding principles might not be feasible at this stage of technological development.[15]

On a very relevant side note, other sources of human rights also deserve to be mentioned here. Some of these norms exist as customary law – a set of rules derived from state practice and its accompanying *opinio juris sive necessitatis* – which is either not defined or parts of it take on the form of non-binding documents such as United Nations General Assembly resolutions. Since there is no hierarchy between international treaties and customary law provisions, it is extremely hard to balance treaty-based norms (which at least take on a written form where coding can start) with provisions that can be deducted from state practice and supported by judicial decisions. The process of proving the existence and applicability of a customary

10 Some peculiarities of the 1989 New York Convention will be addressed at later points as the situation is not as simple as described here.

11 See the "cultural war" debates in many countries and the strained foreign relations between several nations as a result of the implementation of women's rights.

12 United Nations 1948: Art. 28.

13 United Nations 1966a: Preamble.

14 United Nations 1966b: Art. 6.

15 This is only possible in science fiction, where advancements in technology have allowed for programming a human-like, complex brain with the capacity to understand a hierarchy of abstract concepts. See for instance the works of Isaac Asimov, where the so-called positronic brain represents the technological innovation allowing for the inclusion of binding principles.

law norm to a specific instance is the task of highly trained lawyers and such a process before a court can take years – something that as of this stage cannot be replicated artificially.[16]

The third question to be addressed is whether the *instruments of international law can be incorporated into the programming of AI.* If we take the example of the creation of treaties and the various stages of signature and ratification, the system of reservations and declarations which are abound in the context of human rights treaties – we see a complex web of connections which are currently deciphered by lawyers and courts leading to a highly complicated framework. This would not be a Gordian knot by itself, but some of the reservations attached to international treaties are hard to interpret and understand. A prime example can be observed regarding the 1989 Convention on the Rights of the Child. A seemingly simple and widely accepted international treaty, but several Muslim states have made a reservation to the part describing the freedom of thought and religion of the child.[17] Among others, Afghanistan[18] and Somalia[19] have made reservations, stating that they will accept these provisions in accordance with sharia, the Muslim code of law. Without going into the debate on cultural relativism, from a purely structural standpoint, this brings a completely new set of norms into the equation. These are seemingly similar provisions concerning sharia by these two countries, but while Afghanistan applies sharia in all personal matters for non-Muslims as well including criminal matters, Somalia uses sharia solely for Muslims, and mostly for family matters and inheritance.[20] Further complicating the issue is that these two countries belong to different schools advocating different understanding of sharia with Afghanistan belonging to the Hanafi and Jafari Schools and Somalia following Shafi'i teachings.[21] Overall, if we add a system of law without which international human rights norms cannot be interpreted between many members of the international community to an already hard-to-define system, we arrive to a stage of almost insurmountable difficulties during the transference of these norms to an AI system.

Fourth, we arrive at the issue of *regional differences.* Human rights are layered, meaning that they not only operate on the level of universal treaties and domestic norms, but some continents have a well-developed regional human rights protection regime. The three most notable are the Council of Europe, the African Union and the Organization of American States. These have their own regional treaties, court

16 Xu–Wang 2019: 871, 884.
17 Ali 2007: 147.
18 "The Government of the Republic of Afghanistan reserves the right to express, upon ratifying the Convention, reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari'a and the local legislation in effect."
19 "The Federal Republic of Somalia does not consider itself bound by Articles 14, 20, 21 of the above stated Convention and any other provisions of the Convention contrary to the General Principles of Islamic Sharia."
20 Alotabi 2021: 1–13.
21 See also Coulson 1994.

system and judicial practice creating a unique set of norms.[22] They possess their own understanding of human rights,and in some cases push states towards heightened protection, whereas other continents lacking such a regional cooperation or where the regional organisation does not have a court system (such as Asia, the Middle-East, Australia, and the Pacific) are missing this layer of protection entirely. Should AI-based technologies reflect this regional difference, and if so in what way?

Last but not least, it is widely understood that the *development* of human rights is not over. New treaties are being adopted, customary norms are forming, and judicial practice is changing. Human rights are a relatively new phenomenon, deriving from the 17th and 18th centuries, gaining momentum during the American War of Independence and the French Revolution of 1789. Since then, major developments have occurred, such as the abolition of slavery worldwide, the gradual reduction of discrimination of women and the protection of societal groups (minorities, indigenous people, people with disabilities, etc.) among others. Progress does not stop here. Society can agree on new norms, and previously achieved consensus can be called into doubt and reopened as societal and political dialogue providing lawyers and decision-makers with a plethora of tasks.[23] Is it possible from a technological standpoint to incorporate development and furthermore, could we and should we outsource this task to an AI system?

Current regulatory attempts

Concerns of states and individuals have not gone unnoticed by international organisations, and several of them, namely the European Union (EU), the United Nations Educational Scientific and Cultural Organization (UNESCO), the Organization for Economic Cooperation and Development (OECD), as well as the Council of Europe (CoE) have begun harmonising the conduct of states and proposed regulations that significantly affects human rights.

One of the earliest regulators was the OECD, which, in its Recommendation of the Council on Artificial Intelligence in May 2019 has emphasised the importance of a "trustworthy and responsible" approach towards AI by states. The document's approach is based on "respect [for] human rights and democratic values" deriving from the Universal Declaration of Human Rights and the United Nations' Sustainable Development Goals. Highlighting the importance of a human-centric development, the OECD has also promoted a toolkit for states who want domestic regulation and at the same time, the recommendation aspires to form the basis for all future negotiations.[24]

2021 was a particularly fruitful year in terms of international regulatory attempts as in April, the EU has discussed the first version of its AI Act, followed by the

22 Çalı et al. 2018: 130.
23 See the re-igniting debate on abortion in the United States for instance.
24 OECD 2019: Art. 1.2. a).

UNESCO recommendation on ethics and principles in November, and the year ended with the CoE *ad hoc* working group's outcome document in December. The EU's AI Act is somewhat unique in that once it gets adopted, it will be the first binding source of law for EU Member States when it comes to AI regulation with a great effect on states attempting to have economic and financial deals with the European common market.[25] The EU is attempting to create a regulation that is human-centric, safe, and transparent, possesses human oversight and has adequate tools to mitigate risks arising from the use of AI-systems. Its human rights approach is based on the European Charter of Human rights and it requires norms to be "in accordance with EU values, fundamental rights and principles". A novelty can be found in the classification of AI systems based on the risks they posed in violating human rights and it is exactly in these "high-risk" systems that the EU takes an adamant position concerning its regulation.[26]

Compared to the EU's robust approach, UNESCO is a bit more generalised in nature, albeit with 193 member states, the organisation is aiming at a large-scale consensus which can only be achieved through significant compromise. UNESCO's recommendation references the largest array of human rights norms, such as the UN Charter, a wide scope of international treaties adopted under the aegis of the United Nations and the work of universal institutions like the UN's Human Rights Council. It relies on the central tenet of human dignity and the freedom from harm and subjugation – echoing strong societal fears of losing control of AI systems. Its uniqueness can be found in the policy actions it presents to states attempting further harmonisation, seeking good practices or a strong domestic regulation.[27]

Arriving in late 2021, the outcome document of the Ad Hoc Committee on Artificial Intelligence (CAHAI) is peculiar because it paves the way for a regional human rights treaty to be adopted in the following years specifically addressing the human rights concerns of AI-based systems. It echoes UNESCO's reliance on human dignity as a foundational norm and the EU's approach regarding risk assessment along with the OECD's reference of the Universal Declaration of Human Rights. It connects human rights with the concepts of democracy and the rule of law, and presents them as inseparable tenets that can only be realised together. It is unclear, in which way the CoE will develop these notions or when will a new international treaty be created, but even in its current form, the CoE outcome document shows the interest of member states in a strong, human rights-based cooperation for the years to come.[28]

Besides international organisations, states have also been active in adopting national AI policies – close to 200 by 2022 – which handle the question of human rights very differently to one another. Depending on the state's approach, economic, scientific and research potential along with the measured or perceived attitude of

25 Franke 2019: 4.
26 European Commission 2021: Art. 2.2, 2.4, 3.3.
27 UNESCO 2021: Art. 8, 50–52.
28 CAHAI 2019: Art. 4, 7, 16, 19, 21.

voters, a great degree of variety can be observed.[29] Overall, it can be stated that human dignity appears to be the cornerstone of all regulatory attempts, which nonetheless either remain non-binding and somewhat vague (OECD, UNESCO) or currently under debate and deliberation and prone to change before taking on their final forms.

Towards possible solutions

With the currently existing (and proposed) international regulations providing little help in answering the questions raised in the previous chapters, it falls to science to untangle the web. This part aims at finding common ground between the international framework of human rights and the methods used by artificial intelligence.

The first two questions should be merged and extrapolated in one segment in order to better understand the proposed solutions: *what and how to transfer?* It is safe to say that at our current level of technological development, transferring the entirety of human rights material to AI would be an impossible task. Therefore, it should be seen, whether a certain portion of the human rights law can be transferred. International treaties – universal or regional ones in particular – are a good place to start as their text is certain, finalised, and not likely to change. They also benefit from larger legitimacy deriving from broad support by members of the international community. As a result, treaty texts can be used as a primary document which serves as the initiation point for later reference. Commentaries and academic articles can be used by language analysis AI for the algorithm to better define the meaning of statements and concepts found within the treaties. One of the solutions is to start small, select an international treaty which has a judicial mechanism such as the European Convention on Human Rights and extensive judicial practice such as that of the European Court of Human Rights, and use deep learning to predict human rights violations. So far, this is nothing new as similar systems have been used to predict court decisions.[30] The novelty lies in the modular developments that can be applied. For instance, joining this system with national databases could predict human rights violations on the domestic level, resulting in dozens of sub-databases. Creating a similar system to other regional levels and compare the level of human rights protection would also be possible almost instantaneously. As a following step, deep learning or reinforcement learning can be used in a controlled environment (commentaries, interpretations, state practice) to advance the understanding of human rights by the AI. This would serve a dual purpose: new state policies and detailed descriptions of new AI systems could be run on this AI which would analyse the document, then spot and signal possible human rights violations, so that these could be avoided. As can be seen, the

29 This has been widely analysed with a major study examining the growing domestic policies almost every year. See also Fjeld et al. 2020; Fukuda-Parr–Gibbons 2021: 33.

30 Medvedeva et al. 2020. 256–257; Aletras et al. 2016.

initial model would be very limited in its applicability, as it would have to be narrowed down along the lines of international human rights law to only binding norms that have a background in judicial practice, such as treaties, and this would severely limit the application of the model, but it would nevertheless be workable.

Difficulties arise when we attempt to use the method above a treaty without a judicial mechanism, as it would not have a database that reflects practice, and it is doubtful whether special constructs which do not work as judicial mechanisms – such as the universal periodic review of human rights by the United Nations[31] – would work.

The third question was for the possibility of the *toolkit of international law be transferred* to an AI system. In this respect, AI is a highly adaptable system which can learn the hierarchy of norms easily.[32] If we teach it the meaning of peremptory norms through treaty texts, state practice, court decisions and the "meaning" of certain terms such as torture or genocide, it could use those terms quite well. It could even apply a priority scale to differentiate between treaty-based obligations and soft law. The same is true for declarations and reservations concerning international treaties if they apply to a certain, well-defined section of the treaty text. Using broader terms, such as applying the treaty through the lens of sharia as the example in previous chapters, would prove to be an insurmountable challenge to the system. It is also unclear if competing norms or those that can collide, for instance the freedom of speech and the freedom of religion or personal self-determination, and the rights to life could be resolved, even if it has some judicial practice.

The question of having *regional systems* also merits some reflection. Since regional human rights systems have effective judicial control mechanisms, they are to be given priority. As there is no hierarchy between universal and regional human rights, with the universal level lacking a court structure, this is not a problem. Nor is there any overlap between regional systems, as states belonging to one of the three major systems (Africa, America, and Europe) are not members of the other.

Lastly, the possibility for *societal development to be incorporated* deserves to be tackled. Human rights are a developing concept, and with the advancement of human civilization, our understanding of what it means to be human and how humans are to be protected changes also.[33] We do not even know where the future of human rights lies, as for instance the debate on abortion and in general the right to life was once again brought to the forefront of attention as the Supreme Court of the United States changed the 50-year consensus established in Roe v. Wade.[34] Theoretically, it is possible to predict and guide the development of human rights as in economics and

31 Universal Periodic Review: www.ohchr.org/en/hr-bodies/upr/upr-main
32 Akin to Isaac Asimov's three (later four) laws of robotics.
33 Santow 2020: 13.
34 Roe v. Wade 410 U.S. 113 (1973) and Dobbs v. Jackson Women's Health Organization No. 19-1392 (2022).

marketing, predictive models and algorithms are abound. In due course, a similar system operating on a much larger scale can be envisioned. However, if we wish decisions to be left in the hands of mankind, this should not be made possible, as the discussion to guide the direction of human rights development should remain in the hands of human and not "outsourced" to AI.

Concluding remarks

When it comes to international organisations, the way they understand AI and human rights has two sides: they either see the risks and possible human rights violations or they observe that in general, the use of AI can benefit humans, provided that certain safeguards and accountability mechanisms are put in place. The human rights provisions found in these recommendations and draft documents are vague, relying on either principles, fundamental concepts such as human dignity or calling for a "respect of human rights" without elaborating on the tasks of the international community and its members. Naturally, it can be assumed that decisions in this context will be made by states on the domestic level, and international law has little part to play.

This article took on a different approach, and tried to illustrate what are the exact problems and dilemmas when we attempt to use two systems that were designed independently, decades (or centuries) apart by people with vastly different mindset and for different problems. In this paper it is argued that some of the concerns can be resolved by AI-based technologies even at the current level of development such as the creation of an algorithm predicting human rights violations based on an international treaty, and its accompanying judicial practice that can be modularly improved to handle domestic practice as well. A much larger scale system could also be developed in the future, as AI can handle many aspects of international law such as the court structure, reservations and declarations, and the hierarchy of norms. Other parts of public international law would be very hard to fit into this system such as customary international law, competing opinions in science and the relation between "soft" and 'hard' law. It can also be stated that some questions such as the directions of societal and the ensuing legal development could theoretically be predicted and outsourced to AI, but it is not in our interest as humans to lose control in such a manner. In essence, the proposal enshrined here is to use AI in order to predict human rights violations by AI, and through modular development, it can be expanded in many directions. Nonetheless, this is merely a thought experiment which was created to form the theoretical basis for future research. The next step lies in the creation of such a model, attaching the first extensions, and then testing it on a domestic policy or an AI system's detailed description, so that violations can be spotted, signalled and then prevented.

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ACTA HUMANA • 2 (2024) 137–148. • DOI: 10.32566/ah.2024.2.9

STUDIES

Human Rights and Sovereign Debt Restructurings: Considerations on States' Legal Arguments in Disputes under Public International Law

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This article delves into the intersection of sovereign debt restructurings with human rights. It emphasises that, in disputes under international law, States often omit to raise arguments concerning how adverse judgments could potentially harm the economic, social, and cultural rights of their citizens. The article also draws attention to the applicable law approach of some arbitral tribunals and the behaviour of certain holdouts, explaining how they can also contribute to this ecosystem. Ultimately, it is argued that the current hard-law international architecture is neither optimal nor encouraging to robustly link sovereign debt restructurings and human rights.

To this end, the article recommends that these processes be guided by certain general principles of law. These principles, considered sources of international law, should be infused with international human rights law nuances. Rather than advocating for an overhaul, suggestions are made to refine the existing international legal framework and better suit human rights in sovereign debt restructurings.

Keywords: sovereign debt, debt restructuring, human rights, social, economic and cultural rights, vulture funds

Introduction and terminology

Global dynamics are in a constant state of evolution. This phenomenon is rooted in various factors, including the active engagement of States in international capital markets. These entities often participate in this domain to acquire debt, commonly referred to as "sovereign debt" owing to their public nature as borrowers.

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Sovereign debt generally serves as a tool for implementing domestic economic and social policies aimed at fostering growth and development. Yet, inadequate management, especially leading to a debt crisis, holds the potential to thrust millions of people into poverty, impacting not only financial stability and economic growth matters but also the realisation of economic, social, and cultural rights.[2] In such instances, sovereign debt can inevitably lead to both international as well as domestic complications when faced with sustainability challenges.

In the international capital markets scenario, it is commonly acknowledged that creditors are becoming more numerous, hard to identify, and challenging to coordinate. The variety of debt instruments and the different jurisdictions at play, coupled with the absence of a singular applicable legal framework, also motivates some creditors to litigate in various venues for better outcomes. This procedural behaviour has led to increasingly complex and aggressive sovereign debt restructuring processes in the early 21st century, evidenced from both bondholders, as was the case with Argentina during 2001 and 2002, as well as sovereign debtors, as seen with Ecuador in 2009.[3]

Traditionally, the solution for an unsustainable sovereign debt has often been restructuring it. This process typically involves undertaking complex negotiations with a diverse range of creditors, aiming for a voluntary trade of their original debt instruments for new ones with different terms. The new bond classes usually include an extension of the maturity period, a reduction in the nominal value, and a lower interest rate, or a combination of these mechanisms. The objective is to provide economic relief, allowing sovereign debtors to address payment difficulties and meet new financial obligations.

Nevertheless, when certain creditors accept the new the terms, but other bondholders are not persuaded by the exchange offer, a "holdout problem" can arise, rooted in the existence of a group of creditors who refuse to participate in negotiations and decide, instead, to pursue other avenues in a quest to obtain payments in full.[4]

Taking these scenarios into consideration, this article argues that States involved in prominent sovereign debt restructuring processes under international law often omit, at least as a central argument, key considerations regarding the potential impact of adverse judgments on human rights in their domestic sphere. It will also be asserted, among other arguments, that this oversight is largely a result of an unsuitable international architecture that is not able to encourage such linkage. Despite significant progress made under soft-law provisions, a more robust legal framework is deemed necessary to solidify the existing connection between sovereign debt restructurings and human rights.

2 Economic Commission for Latin America and the Caribbean 2023.
3 Olivares-Caminal 2011: 382.
4 Fang et al. 2020: 4.

Evaluation of States' human rights arguments in international disputes

Defining the pool of sovereign debt restructuring cases under international law

Methodologically, this article studies disputes decided under international law, and the cases assessed have been solely sourced from UNCTAD's Investment Dispute Settlement Navigator. The rationale here is linked to the idea that evaluating the interaction between sovereign debt restructurings and international human rights obligations can be done in an effective manner within a unified international legal framework. While analysing each applicable framework and its interplay with human rights obligations in domestic court sovereign debt restructuring cases is certainly important, such evaluation would exceed the scope of this work.

It is also worth noting that, in investment cases, the States' consent is typically limited to the obligations emerging from the investment agreements themselves.[5] However, when these treaties include a provision of applicable law allowing tribunals to resort to other international rules, a window of opportunity opens for them to assess the interconnection of investment obligations with supplementary international obligations. Thus, without exceeding the limits of consent, the tribunal would be able to interpret the investment agreement's obligations in light of complementary standing international obligations.

Abaclat and others v. Argentina

The two cases against Argentina in this section are a consequence of the 2001 crisis which led, among other things, to Argentina's sovereign debt restructuring. Italian bondholders brought two cases against the State claiming breaches of the bilateral treaty between Argentina and Italy.

In the case of *Abaclat and others v. Argentina,* the State raised, as a jurisdictional objection, the argument that the sovereign bonds in dispute, which were later defaulted, did not constitute a protected "investment" in the terms of the Argentina–Italy Bilateral Investment Treaty (BIT) and the ICSID Convention. Indeed, one of Argentina's main arguments was that the bonds did not contribute to its economic development, being this, according to the State, one of the key elements that needed to be present in order to truthfully regard this scenario as an investment. Argentina, however, raised no argument specifically considering human rights: its position only highlighted that the funds raised by the bonds in dispute were used to pay pre-existing debt, and/or general government spending being, thus, not instrumental in fostering the country's economy.[6]

5 Schreuer 2014: 2–3.

6 Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 378.

The tribunal in *Abaclat and others v. Argentina,* on the contrary, understood that because the funds raised by the bonds in question were ultimately made available to the State, the concrete use that the State gave to those funds was irrelevant. Arguably, whichever allocation that these funds were given would still contribute to the economic development of Argentina by the sole reason that they were made accessible to the country.[7]

In this case, Argentina missed the opportunity to present to the tribunal allegations of human rights which could have been a consequence of the debt issuance and later restructuring. While Argentina did explain the social unrest that occurred due to its 2001 crisis,[8] it did not invoke international human rights obligations and standards, nor it invoked their interplay with its sovereign debt. Consequently, Argentina only considered this issue as a factual contention, but neither tied this contention to human rights obligations, nor advanced any human rights arguments because of it. This is considerably relevant as the Argentina–Italy BIT contained a specific provision on applicable law which included principles of international law.[9] This provision allowed the tribunal to resort to international law beyond the agreement itself, and could have potentially opened the opportunity for the State to invoke other sources of international law to be analysed in line with the existent investment obligations under the BIT. In fact, in the case of *Urbaser v. Argentina,* the State had even filed a counterclaim alleging that the investor's failure to provide water constituted a violation of the human right to water.[10] The applicable treaty in that case was the Argentina–Spain BIT, which contained a similar provision empowering the tribunal to apply principles of international law.[11]

Ultimately in *Abaclat and others v. Argentina,* the dispute was settled and finalised by a consent award.[12] The award itself does not reveal arguments in the merits of the

7 Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 378.

8 See e.g., Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 57: "These economic difficulties were accompanied by considerable political and social unrests, leading eventually to the resignation of the then President Fernando de la Rúa and his entire cabinet on 19 December 2001."

9 Agreement between the Argentine Republic and the Italian Republic on Investment Promotion and Protection, signed on 22 May 1990, entered into force on 14 October 1993, Article 8(7).

10 Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 36.

11 Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of investments, signed on 3 October 1991, entered into force on 28 September 1992, Article IX(5): "The arbitral tribunal shall issue its ruling in accordance with the provisions of this Agreement, with those of other agreements existing between the Parties, with the laws in force in the country in which the investments were made and with the universally recognized principles of international law."

12 Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic, ICSID Case No. ARB/07/5, Consent Award under ICSID Arbitration Rule 43(2), 29 December 2016.

dispute, and the settlement terms were not published. Therefore, it is not possible to ascertain the arguments that the State posed on the merits of the dispute.

Ambiente Ufficio and others v. Argentine Republic

The case of *Ambiente Ufficio and others v. Argentina,* postdates that of *Abaclat and others v. Argentina*. This case belongs to the same set of facts, albeit with different bondholders. The applicable treaties were also the Argentina–Italy BIT and the ICSID Convention. In this opportunity, Argentina also raised the same argument as in *Abaclat and others v. Argentina,* being that the sovereign bonds in question did not contribute to its economic development. Argentina argued, in line with this point, that the contribution to the development of its economy had to be substantial. In this regard, it stated that the investors had acquired the bonds in the secondary market, and therefore did not transfer their funds to the State itself, hence making no contribution as such.[13]

Additionally, Argentina posed the argument that, even if there was a contribution, the participation of each bondholder "would still be of too small a magnitude to qualify as a 'contribution' to the economic development of the Respondent" in any relevant way.[14] Finally, Argentina also argued that the bondholders could not "prove if the proceeds of a particular bonds issuance were used to finance increasing interest payments" as these had no lasting value for the country's economic development.[15]

Ultimately, the tribunal rejected Argentina's objection considering that "given the unity of the economic operation" of bond issuance, "the funds generated through the bonds issuance process were ultimately made available to Argentina" and must therefore be deemed to have contributed to the economic development of the country.[16] In *Ambiente Ufficio and others v. Argentina*, the State missed once again the opportunity to raise the matter of human rights against the economic development in the case of sovereign debt restructuring. As seen in *Abaclat and others v. Argentina*, the treaty allowed for the tribunal to resort to other sources of international law, by which the State could have introduced human rights analyses.

Poštová banka and Istrokapital v. Greece

The case of *Poštová banka and Istrokapital v. Greece* involved a sovereign debt restructuring as a result of the 2008 global financial crisis. The bank had filed an

13 Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 369.

14 Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 370.

15 Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 371.

16 Ambiente Ufficio S. p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 487.

international arbitration claim against Greece claiming that the State had adopted measures in breach of the Slovakia–Greece and Cyprus–Greece BITs, depriving the value of their investments in Greek bonds in 2012. In this case, the State also raised the argument that the sovereign bonds had not fostered economic development.[17] However, Greece did not develop the argument much further, not raising, in fact, any human rights arguments regarding its debt restructuring.

Interestingly, the Slovakia–Greece BIT had the following applicable law provision: "[t]he arbitration tribunal shall decide on the basis of respect for the law, including particularly the present agreement […] and the generally acknowledged rules and principles of international law" which granted to the tribunal, accordingly, the power to resort to supplementary rules and sources of international law.[18]

Similarly, the Cyprus–Greece BIT also contained a provision which permitted the tribunal to resort to "[…] other relevant agreements existing between the parties and the generally accepted rules and principles of international law" which include, indeed, general principles of law as sources of international law.[19]

Ultimately, the tribunal upheld the objection raised by Greece but for a completely different reason: the tribunal considered that the Slovakia–Greece BIT, by not expressly including "bonds" in its investment definition, despite including other instruments such as debentures, did not protect sovereign debt as foreign investment.[20] This case also illustrates a missed opportunity for the corresponding State to bring to the arbitration human rights considerations and the links they hold with sovereign debt restructuring litigations under international law, despite the treaties' generous applicable law provisions.

Brief remarks on the role that "vulture funds" play in impacting human rights

Academia and practitioners generally agree that the voluntary nature of debt relief measures has opened avenues for certain creditors to refrain from participating in restructuring negotiations and seek, subsequently, debt recoveries through "predatory" behaviours such as litigation, seizure of assets or political pressure.[21] These creditors, often labelled as "vulture funds" acquire defaulted sovereign debt

17 Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 140.

18 Agreement between the Government of the Czech and Slovak Federal Republic and the Government of the Hellenic Republic for the Promotion and Reciprocal Protection of Investments, signed on 3 June 1991, entered into force on 30 December 1992, Article 9(5).

19 Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, signed on 30 March 1992, entered into force on 26 February 1993, Article 8(5).

20 Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 333.

21 United Nations General Assembly 2014.

at vastly reduced prices, await the concurrence of other creditors to endorse debt cancellations and then aggressively pursue excessive repayments.[22]

In these scenarios, their ultimate goal is to recover the full value of the debt and maximise their returns.[23] Consequently, understanding this concept involves at least three central arguments, which, when combined, shed light on the operation of such funds, the role they play in sovereign debt restructurings and the corresponding repercussions that may be evidenced on human rights.

Firstly, it is crucial to note that, in these cases, sovereign debts are generally acquired in the secondary market when the indebted country is either close to default or has already defaulted on its debt. The purchase of distressed sovereign debt is, thus, a key indicator of dealing with vulture funds.[24] Additionally, these creditors exhibit a clear intention not to participate in orderly and voluntary negotiations that could lead to a potentially successful debt exchange or restructuring. Finally, for these bondholders, litigation is strategically pursued to seek repayment of the full-face value of the sovereign debt together with interests, penalties, and legal fees.[25]

It is worth noting that this opportunistic behaviour contradicts with at least two widely accepted legal principles in most domestic legal systems, also sourced in international law: the principle of good faith and the principle of non-abusive exercise of rights.

Considering the dynamics that vulture funds trigger in the ecosystem of sovereign debt restructurings, it is necessary to analyse the influence and impact their actions have on the human rights scenario, as the excessive claims made by these bondholders against countries with unsustainable debt levels can have direct negative effects on their governments' ability to meet their human rights obligations.

Specifically, the Human Rights Council adopted Resolution No. 27/30 in October, 2014 to consider the effects of the activities of vulture funds on the full enjoyment of all human rights in debtor States and, in particular, the economic, social, and cultural rights. One of the main arguments presented in this document highlighted that vulture funds, through litigation and other means, oblige indebted countries to divert financial resources saved from debt cancellation and diminish the impact of, or dilute the potential gains from, debt relief for these countries, thereby undermining the capacity of governments to guarantee the full enjoyment of human rights of the population. Following this line of thought, the resolution affirmed that the activities of vulture funds highlight certain issues within the global financial system and serve as a reflection of the unjust nature of the existing framework, which directly affects the enjoyment of human rights in debtor States and calls upon nations to consider

22 United Nations General Assembly 2010.
23 United Nations General Assembly 2016.
24 United Nations General Assembly 2010.
25 United Nations General Assembly 2016.

implementing legal architectures to curtail predatory vulture fund activities within their jurisdictions.[26]

This is not the only instrument that has alluded to the activities of the vulture funds. Reviewing prior records, the Human Rights Council adopted Resolution No. 23/11 in June, 2013, which also stated that, from a human rights perspective, the settlement of aggressive vulture fund disputes directly undermines governments' ability to meet their human rights responsibilities, especially with regards to economic, social, and cultural rights.[27]

In July 2012, the Human Rights Council adopted Resolution No. 20/10 essentially underlining the same issues arising under Resolution No. 23/11, clearly portraying that the subject in question has been problematic for, at the very least, a decade.[28]

Overall, all these instruments highlight that the challenges arising from the *modus operandi* of vulture funds stem from the strategies they deploy to gain disproportionate benefits, coupled with the diminished ability of States to respectively fulfil their human rights obligations. Yet, this perspective is not unanimous. Some scholars argue that the ability to litigate the enforcement of obligations arising from sovereign debts optimises the functioning of the international capital market by reducing financing costs for States' while, simultaneously, increasing the yield of debt instruments for creditors. Thus, imposing legal limitations on negotiations in the secondary market or in the possibility of litigating in foreign jurisdictions could negatively impact States' borrowing costs.[29]

This article does not disregard the need for a certain degree of flexibility in these scenarios. Certainly, the criterion advocated in the last paragraph is based on legal and economic logic. However, examining sovereign debt restructurings through the lens of international human rights law holds the potential to unfold an array of often omitted components that are embedded in the system. The baseline objective is, thus, to avoid a derailing international sovereign debt market signed by unnecessary conflicts and costly delays that collectively have a negative impact on human rights.

Current international architecture on sovereign debt restructurings and human rights

The overarching theme of this article has been to highlight that both States as well as certain holdouts play a significant role when considering the lack of human rights arguments presented in disputes under international law. Nevertheless, it could certainly be argued that the main responsibility of clearly illustrating this linkage falls under the States' umbrella, being them the primary "caretakers" of their citizens'

26 United Nations General Assembly 2014.
27 United Nations General Assembly 2013.
28 United Nations General Assembly 2012.
29 Fisch–Gentile 2004: 1112.

human rights and having the duty, as such, of assuming the responsibilities that come with said position.

It is worth noting that the previously cited Human Rights Council Resolution No. 27/30 from 2014, had already underlined that the global financial system lacked a robust legal structure for the systematic and foreseeable restructuring of sovereign debt, thereby exacerbating the economic and social consequences of non-compliance. Following this observation, it encouraged States to participate in negotiations aimed at establishing a multilateral legal framework for managing sovereign debt restructuring processes, while urging them to ensure its alignment with prevailing international human rights law standards and its corresponding obligations.[30]

The same year, in response to the increasing demand for an international framework on the matter, the United Nations General Assembly adopted Resolution No. 68/304 to consider the establishment of a multilateral legal framework for sovereign debt restructuring processes, which is a soft-law piece that called for the creation of a legal structure designed to streamline sovereign debt restructuring processes while dissuading creditors from engaging in disruptive litigation.[31]

In 2015, one of the most significant contributions in this scenario was evidenced with the United Nations General Assembly Resolution No. 69/319, which underscored the basic principles to be considered in sovereign debt restructuring processes. The salient provision in this soft-law piece highlighted the need for sustainability in these processes, implying that sovereign debt restructuring workouts should preserve the outset creditors' rights while promoting inclusive economic growth and development, which necessarily included respecting human rights in this scenario.[32]

During 2019, following the contributions developed in Resolution No. 20/10, Resolution No. 23/11, and Resolution No. 27/30, the Human Rights Council published its final report on the activities of vulture funds and their impact on human rights under Resolution No. 41/51. Interestingly, this document highlighted one of the main aspects presented in this article while evaluating States' human rights arguments in international disputes, assessing that the current international legal system "appears to be manifestly inadequate to solve complex sovereign debt restructuring disputes, as investment tribunals too often tend to ground their decisions in purely economic terms while ignoring the broader human rights implications of such situations" which leads to believe that this is also a problem anchored in the sources of international law that deal with these particular disputes, potentially affecting even *iura novit arbiter* considerations.[33]

While the current international hard-law architecture still seems insufficient to properly address human rights and sovereign debt restructurings, there is still hope: the idea that general principles of law, such as good faith and the non-abusive exercise

30 United Nations General Assembly 2014.
31 United Nations General Assembly 2014b.
32 United Nations General Assembly 2015.
33 United Nations General Assembly 2019.

of rights, are capable of conducting these disputes, must be seriously considered. Indeed, it has been explained in detail how "[g]ood faith has a bearing upon contemporary sovereign debt workouts in at least four respects" evidenced through enabling sustainable sovereign debt restructurings under the obligation to negotiate; ensuring fair treatment of all creditors by the debtor State; exercising voting rights; and imposing a standstill on litigation by holdout creditors, which is also restricted by estoppel and, notably, the abuse of rights principle.[34]

Overall, the principle of good faith, the principle of non-abusive exercise of rights and any other general principle of law applicable in these scenarios should also be enriched by human rights obligations and international standards in order to avoid only targeting creditors' behaviour. This understanding is crucial, as general principles of law structure the backbone upon which treaties and customary international law owe their legal rationale, influencing, undoubtedly, the volitive reasoning of States in the creation process of international hard-law. The underlining objective is, thus, to recognise (or avoid omitting) that States are lacking both in the creation of a solid international law framework as well as in presenting arguments in international disputes that play a crucial role in consolidating this linkage.

Final remarks

This article has briefly reviewed the role that different actors play on a single matter: as human rights concerns remain unaddressed in debt restructuring cases under hard-law provisions in international law, there are several reasons that explain this phenomenon.

Firstly, States have, thus far, failed to develop an appropriate international ecosystem to successfully manage debt restructuring processes. The mechanism as it stands has fostered decentralised litigation in court proceedings and international arbitration, increasing the difficulties for States to implement majority-agreed debt restructuring plans which, at the same time, incentivises "forum-shopping" and interferes with bondholders who had agreed to the terms of such a restructuring plan.

States have also failed, as a rule, to avail of their opportunity to raise human rights implications of debt restructurings in international arbitration cases decided under international law. While in different investment cases States have raised human rights matters, and even filed counterclaims on such bases, cases involving debt restructuring processes have not seen considerations on human rights challenges in light of awards that would potentially be averse to the States involved in the dispute.

In addition, stemming from the publicly available decisions, it is apparent that arbitral tribunals have not resorted to their *iura novit arbiter* to fill the gap created by the States' legal arguments. In general, tribunals are permitted to introduce certain legal rationales within the applicable law also relevant to the corresponding

34 Goldmann 2016: 129.

dispute. However, possibly due to an abundance of caution, the cases reviewed do not provide evidence that arbitrators have effectively exercised their authority to consider potential human rights implications in investment cases.

Finally, the role of vulture funds in attempting to maximise their gains while potentially affecting certain general principles of law, such as good faith and non-abuse exercise of rights, puts the States between a rock and a hard place: with no international hard-law architecture designed to bind a minority to the plan approved by the majority, holdouts are permitted to energetically attempt litigation in different forums to recover the face value of defaulted bonds, ignoring broader human rights implications.

It is of utmost importance that States evaluate human rights implications in debt restructuring processes. The global frequency of debt defaulting calls for immediate action to design an international hard-law framework for sovereign debt restructuring processes besides the existent general principles of law. This design must be guided by the human rights implications that sovereign debt restructuring can have and should, in parallel, empower courts as well as tribunals to rule on any possible disputes with human rights implications as a centrepiece of their assessment.

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