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CONCURRENT APPLICATIONS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: COORDINATED SETTLEMENT OF MASSIVE LITIGATION FROM SEPARATIST AREAS

ANTAL BERKES*

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I. INTRODUCTION

The Council of Europe (CoE) Parliamentary Assembly in 2003 prepared a report on the “areas where the European Convention on Human Rights cannot be applied,” which aimed to identify the difficulties that hinder the effective application of the European Convention on Human Rights and Fundamental Freedoms (ECHR or the Convention) in certain geographic regions. The report presents a panorama of mostly political situations related to areas “where the application of the Convention comes up against insurmountable obstacles . . . either because of internal conflicts or as a result of the occupation of part of a member state’s territory by another state” and where the State is unable to fully implement its international obligations under the Convention. The report mentioned cases decided or pending before the European Court of Human Rights (ECtHR or the Court) from Northern Cyprus, Transnistria, Abkhazia, and Chechnya. While the armed conflict in Chechnya has not resulted in any permanent loss of effective territorial control by Russia, the other conflicts have produced an area outside the effective control of the State having sovereign title over the territory (territorial State) and not recognized by the overwhelming majority of the international community as an independent State or part of a State other than the territorial State. Those areas can be termed “separatist areas” in the

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3. Id.
4. Id.
5. While the “Turkish Republic of Northern Cyprus” (TRNC) is recognised only by Turkey, and both the “Republic of Abkhazia” and the “Republic of South
sense that as a consequence of an armed conflict, they fall outside the “effective control” of the territorial State, understood as “actual authority” under the Hague Regulations concerning the Laws and Customs of War on Land. Almost fifteen years after the Parliamentary Assembly’s report, the number of separatist areas has increased considerably in the territory of the Council of Europe: this is the case for Northern Cyprus (Republic of Cyprus), Transnistria (Republic of Moldova), Nagorno-Karabakh (Azerbaijan), Abkhazia and South Ossetia (Georgia), and Crimea and Eastern Ukraine (Ukraine).

All of those separatist areas are different apropos the causes of the underlying territorial conflict, the existence and intensity of armed hostilities, and the diplomatic negotiations that have taken place. However, the nature of the human rights violations presents certain similarities. People living in the concerned areas are exposed to “persistent vulnerability” as a consequence of various factual

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Ossetia” by four States (Russia, Venezuela, Nicaragua, and Nauru; two other States, Tuvalu and Vanuatu having granted, but subsequently withdrawn recognition), the other de facto entities controlling separatist areas (the “Moldovan Republic of Transnistria,” the “Nagorno-Karabakh Republic,” the “Donetsk people’s republic” and “Luhansk people’s republic” or the “Republic of Crimea” as annexed to the Russian Federation) are not recognised as States by any State.

6. See Convention (IV) Respecting the Laws and Customs of War on Land Annex art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (providing the same definition for “effective control” over a territory as used by the ECtHR; see also Chiragov v. Armenia, App. No. 13216/05, Eur. Ct. H.R. ¶ 96 (2015), http://hudoc.echr.coe.int/eng/?i=001-155353 (demonstrating the ECtHR’s use of the same definition for “effective control” over a territory).

7. Thomas de Waal, Enhancing the EU’s Engagement With Separatist Territories, CARNEGIE EUR. (Jan. 17, 2017), http://carnegieeurope.eu/2017/01/17/enhancing-eu-s-engagement-with-separatist-territories-pub-67694. While the present paper does not analyse Kosovo as a separatist area due to its recognition by about three-thirds of the UN member States as an independent State (115 recognitions through the end of 2017), and due to the fact that no single outside State had effective control over the local administration, some reference will be made to the period of its international administration where it was still universally recognised as part of Serbia (2001-2008) but outside its effective control.

elements. First, reliable reports detail extensive and serious violations committed against residents of those areas. Second, authorities of the territorial State are physically absent and unable to offer effective remedies to the victims on the spot, whereas individuals wishing to turn to the de facto authorities must confront procedures that lack due process and fair trial guarantees. In other words, domestic remedies available in the separatist region are typically ineffective. Consequently, where individuals from separatist areas find no domestic remedies, international mechanisms and the ECHR operate as a court of first instance. Among international human rights treaty mechanisms, the ECHR provides the most sophisticated and only binding judicial remedy available in the above-mentioned separatist areas, and thus constitutes the major procedural way to claim reparation for past and ongoing human rights violations.

As a binding mechanism, the ECHR has been seized by a mass of applications related to all the above-mentioned areas. As of June 2017, the number of pending applications from separatist areas are as follows: 6 from Northern Cyprus, 12 from Abkhazia, 88 from Transnistria, 1,951 from South Ossetia, 2,175 from Nagorno-Karabakh, and 3,684 from Crimea and Eastern Ukraine. The

10. See id. ¶ 58 (discussing the ineffective investigation initiated by authorities).
14. Information received from the Registry of the ECHR, June 28, 2017 (on file
concurrent applications further increase the Court’s caseload, which is already overburdened by its backlog of pending cases and the annual influx of new applications. Although between 2011 and 2017, the Court managed to reduce its backlog of pending cases from 151,000 to 56,000,\textsuperscript{15} it has been less successful in handling the annual influx that has continuously increased in recent years, with more than 63,000 applications allocated to a judicial formation in 2017.\textsuperscript{16} The challenge posed by the increasing caseload stems partly from widespread violations resulting from separatist conflicts with or without continuing armed hostilities.\textsuperscript{17}

Beyond a large number of applications, a complexity of applicants also characterizes the ECHR’s pending cases. It suffices to refer to the situation in Crimea and Eastern Ukraine, subject to five inter-state applications submitted by Ukraine against Russia,\textsuperscript{18} or the Georgia v. Russia (II) case,\textsuperscript{19} concerning the August 2008 war in Abkhazia and South Ossetia. Beyond the inter-state cases, more than 1,400 individual applications related to the events in Crimea or the hostilities in Eastern Ukraine were submitted as of October 2015\textsuperscript{20} and this

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\textsuperscript{18} Press Release, European Court of Human Rights, Grand Chamber to Examine Four Complaints by Ukraine Against Russia Over Crimea and Eastern Ukraine, ECHR 173 (May 9, 2018).


number may have since tripled.

While facing the difficult question of examining a high volume of both individual and inter-state pending cases concerning the same areas, the ECtHR shall deal with complex factual situations and take into account various parallel procedures of international investigation or settlement concerning the same separatist conflicts. Such parallel proceedings include the mechanisms of the U.N. human rights monitoring bodies, inter-state disputes before the International Court of Justice (ICJ) (the already closed Georgia v. Russia or the pending Ukraine v. Russia cases), situations the International Criminal Court (ICC) has investigated, or pending investment arbitration claims before arbitral tribunals. The international litigations and fact-finding procedures all address human rights violations in the same separatist areas, presenting various overlaps as to the factual and legal questions.

The complexity of disputes before the ECtHR and other international dispute settlement bodies raise numerous procedural questions in regard to the mechanisms of the ECtHR. The body of case law concerning those areas can be called a set of “concurrent applications”—namely parallel dispute settlement forums seized, simultaneously acting applicants, and more than one respondent State multiplying the pending applications concerning the same broader factual background on the separatist conflict. “Concurrent applications” are defined as applications filed with the ECtHR by several individuals and/or a State or States concerning the same factual context, and directed against one or several States, while a substantially analogous matter has already been submitted to one or more other procedures of international investigation or settlement. This definition implies three types of concurring procedural elements: 1) concurrent dispute settlement forums (the ECtHR and other


23. Id.
international adjudicative bodies), 2) concurrent applicants (individuals and States), and 3) concurrent respondent States (two or more States).

Concurrent applications are especially common from separatist areas because the areas’ specificities allow victims of human rights violations to use multiple procedural possibilities to obtain remedies for the same breaches of international law. One such specificity is the international, or at least internationalized, character of the separatist conflict. In all of the above-mentioned separatist areas, the armed conflicts and subsequent territorial disputes broke out between the territorial State and a separatist de facto entity, effectively controlled or decisively influenced by another, outside State. This opens the way to international dispute settlements between two States or between private individuals and each or both of the concerned States. In particular, disputes concerning human rights are likely to give rise to procedures on the same or similar legal questions before diverse concurrent dispute settlement fora—both judicial and quasi-judicial

24. De facto entities and de facto authorities are used as synonyms in the sense of an entity that exercises at least some effective political authority over a territory within a State without being recognized by the overwhelming majority of the international community as an independent State or part of a State other than the territorial State. See Jochen A. Frowein, De Facto Regime, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013); see also Anthony Cullen & Steven Wheatley, The Human Rights of Individuals in De Facto Regimes Under the European Convention on Human Rights, 13 Hum. RTS. L. REV. 691, 694, 700 (2013); Michael Schoiswohl, De Facto Regimes and Human Rights Obligations - The Twilight Zone of Public International Law, 6 AUSTRIAN REV. INT’L & EUR. L. 45, 50-51 (2001).

bodies. 26 A further specificity is the large scale of human rights violations: the concurrence of various applicants’ results from the mass of human rights violations affecting both the territorial State and many individual victims. Finally, another characteristic is the complexity of the actors present in the separatist areas and consequently that of responsibility, as the development of international law has led to the engagement of the responsibility of States, 27 international organizations, 28 individuals (international criminal liability), 29 and potentially de facto entities. 30 Thus, more than one international subject might incur concurrent responsibility for the same violation of international human rights law. 31 The ECtHR case law has recognized the possibility to find multiple States responsible for their own wrongful acts in the same procedure, which gives rise to new applications against concurrent respondent States.

27. ARSIWA, supra note 25, at 41 (examining how federal governments are required to enforce international agreements in separate states).
31. ARSIWA, supra note 25, at 142-43 (discussing State responsibility and individual responsibility); Al-Jedda v. United Kingdom, 2001-IV Eur. Ct. H.R., ¶ 80 (showing that the ECtHR impliedly recognized this possibility (dual responsibility of an international organization and troop-contributing States)).
Facing the proliferation of concurrent applications from separatist areas, the ECtHR has to define its judicial strategy and prioritize some of its often-competing goals. Scholarship often identifies the competing goals as the delivery of individual justice and constitutional justice. The basic concept of constitutional justice is that the Court should only settle the most important applications, either because of their gravity or because of the general and systemic importance of the alleged human rights violation. With respect to individual justice, it is widely defined as the Court’s ultimate goal, namely to remedy individual grievances under Article 34 on the right to individual application. Notwithstanding the huge backlog of cases, States parties and the Court have constantly reaffirmed their commitment.

32. Shai Dothan, Judicial Tactics in the European Court of Human Rights, 12 CHI. J. INT’L L. 115, 117 (2011) (using the notion of “judicial strategy” in the sense of the Court’s principled decision to act in a certain manner in questions where it has discretion).


to individual justice “as a cornerstone of the Convention system.”37 Regarding concurrent applications from separatist areas, the Court has declared that the thousands of applications from the conflict areas of Ukraine “will not be put on hold and will continue to be processed on a case by case basis.”38

Despite the Court’s commitment to examine each application from separatist areas, some scholars doubt whether individual justice is feasible in the case of gross and systematic human rights violations.39 More importantly, the Draft Copenhagen Declaration on the European Convention on Human Rights system recently presented by the Danish Chairmanship of the Committee of Ministers also expressed the intention to create “separate mechanisms or other means” to deal with those concurrent applications.40 While the final version of the Copenhagen Declaration did not include the clause, the proposal is a sign of some States’ willingness to further constitutionalize the settlement of concurrent applications from separatist areas, considering the challenge they pose to the ECHR system that the Copenhagen Declaration and the ECtHR itself recognized.41 Few such “separate mechanisms” had been discussed in the past: some proposed

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37. See, e.g., Draft Copenhagen Declaration, supra note 35, ¶ 1, 48.
40. Draft Copenhagen Declaration, supra note 35, ¶ 54(b) (inviting the Committee of Ministers to consider “the establishment of separate mechanisms or other means to deal with inter-State cases as well as individual communications stemming from a conflict between two or more States Parties”).
to reduce the massive number of applications of victims of armed conflicts by the transformation of the Commissioner for Human Rights into a Public Prosecutor attached to the Court and/or the introduction of an actio popularis,

or by extension of the powers of the Commissioner for Human Rights at the national level in conjunction with national ombudsmen,

or by setting-up a fact-finding mechanism as a chamber of the Court or outside the ECHR.

Yet, none of those mechanisms have been considered as a real alternative to the ECHR and none have been institutionalized. Furthermore, non-governmental organizations (NGOs) rejected the recent proposal to create “separate mechanisms or other means” to settle concurrent applications from separatist conflicts, regarding it as an attempt to “displace such cases from the judicial to the political level” and a threat to the right to individual application. Likewise, academic critics underlined that the proposal would remove from the Court’s jurisdiction concurrent applications from separatist areas in contradiction to the Convention stipulation that its provisions continue to apply in situations of “war or other public emergency” and the opinion of the Steering Committee for Human Rights under which

42. Doc. 9730, supra note 1, ¶ 59; EUR. PARL. ASS., Areas Where the European Convention on Human Rights Cannot be Implemented, Rec. 1606, ¶¶ 10(b)-(c) (2003).


“[t]he Court has a pivotal role” in examining large-scale violations.\(^{48}\) Its defenders, however, emphasized that the Draft Copenhagen Declaration does not suggest the striking of the pending cases out of the list of the Court “but rather it calls for rethinking how justice can better be served in those difficult circumstances.”\(^{49}\)

The present paper submits that the settlement of concurrent applications from separatist areas is feasible through the strategic use of existing procedural tools of the ECtHR without introducing a separate mechanism or further constitutionalizing the Convention to the detriment of individual justice. The Court should settle such concurrent applications in a coordinated way, taking into account the interconnected legal and factual background as well as procedural and substantive law questions of concurrent cases in individual procedures. Each case having its own factual specificities, the broader context and legal background make the concurrent applications interconnected. Taking into account concurrent applications originating from the same factual and legal context does not impair the Court’s function to provide individual justice, as far as particular circumstances of each case are duly examined, while promoting the Court’s other function—the so-called constitutional justice—byremedying gross and systematic violations. As this paper will illustrate, the separatist conflicts in Europe have led to a series of concurrent applications that the Court has decided in various ways and using several procedural tools, to make effective the human rights enshrined in the Convention. The similar procedural steps and conclusions on substantive law show that the Court does not consider those applications isolated from each other, but strives to settle them in a coordinated way, taking into account the related procedural and substantive law issues.

Part II defines the method and principles of coordinated treatment that this paper purports to advocate as the most efficient case-management practice to settle concurrent applications. As the

\(^{48}\) Longer-Term Future, supra note 17, ¶ 88.

subsequent parts explain, the method of coordinated settlement is a particularly welcome technique in the pending concurrent applications from separatist regions. Part III scrutinizes the various international dispute settlement mechanisms that States or individuals have seized from separatist areas simultaneously in parallel with their application to the ECtHR. The precedents clarify that the parallel pending procedures of international investigation or settlement do not necessarily constitute a ground for inadmissibility before the ECtHR under the *lis pendens* rule and that they can strengthen the effective settlement of the ECHR applications. Supposing that the case is admissible, Part IV will elucidate how the Court has to coordinate effectively between the applications of numerous concurrent individuals and/or a State regarding the same factual context and legal problems. Various procedural tools allow the Court to group concurrent applications or prioritize one of them, while facilitating the further settlement of others. Part V explains how the Court should coordinate the treatment of applications against concurrent respondent States, especially the territorial State and an outside State. The precedents and the underlying international character of the separatist conflicts indicate that the Court should coordinate between States by designating a co-respondent *proprio motu*, by deciding on the reparation duties of co-respondents, and by inviting third-party interventions of States factually linked to the underlying separatist conflict. Part VI concludes with recommending the most effective settlement for concurrent applications to the Court. Those recommendations intend to contribute to three ongoing academic debates: 1) the question of the appropriateness of the ECtHR to supervise international human rights law in armed conflicts,


52. See, *e.g.*, Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of
II. THE PRINCIPLES OF THE COORDINATED SETTLEMENT OF CONCURRENT APPLICATIONS

Under “coordinated settlement”, the present paper understands a principled treatment of interconnected applications, in accordance with a judicial strategy developed to address the massive influx of applications and as opposed to the isolated settlement of an individual case without due regard to other cases. This latter concept would be an extreme interpretation of individual justice, requiring the traditional case-by-case adjudication of each application notwithstanding to other applications. However, the Court’s judicial strategy and case management has considerably evolved from this simplistic reading to a coordinated method or “systemic approach” of case management, where it uses a “range of procedural tools to solve a large number of applications resulting from systemic issues.”

In other words, rather than focusing merely on the individual case at hand, the Court will settle procedural and substantive law issues raised in the application by linking them to other concurrent applications.

The coordinated method ensures the coherence of the case law and the effectiveness of the Court and the Convention. “Effectiveness” of the Court is understood as goal-based judicial performance; “the degree to which international courts meet the expectations of relevant constituencies”, especially of their mandate providers. The goals of the ECtHR set in its mandate (the 1949 Statute of the CoE, the travaux préparatoires of the ECHR and to the process of drafting the Statute, the Protocols and CoE documents on the reform of the ECtHR) are norm support, dispute settlement, regime support, and legitimation.

This Part will explain that the coordinated settlement of the mass of


53. Longer-Term Future, supra note 17, ¶ 89 (noting that the Court’s policy has transitioned to a “problem-oriented approach” instead of a case-by-case approach).

54. Id.


56. Id. at 6.
applications from separatist areas serves all of those goals of the Court, while strengthening the effectiveness of the Convention.

The coordinated method of dispute settlement shall comply with some procedural and substantive law principles that the Court has elaborated in its case law: the effectiveness of the Convention (Part II.A), subsidiarity (Part II.B), good administration of justice and procedural economy (Part II.C), and the coherent and harmonious interpretation of the Convention (Part II.D). This Part will explain that while deciding on individual cases, the Court should ease its fact-finding and legal analytical burden by applying these principles.

A. EFFECTIVENESS OF THE CONVENTION

The notion of effectiveness of the Convention is often used by the Court as a “long established principle” under which “the Convention is intended to guarantee rights that are practical and effective, and not theoretical and illusory.” 57 It also refers to the guarantee of the implementation of Article 34 of the Convention on the right to individual petition: the Court shall be “in a position to process applications within a reasonable time, while maintaining the quality and authority of its judgments.” 58 Effectiveness of the E CtHR is closely related to the other above-mentioned principles: it is “contingent on the quality, cogency and consistency of the Court’s judgments.” 59

The massive number of applications, especially the simultaneous submission of concurrent applications from separatist areas presents a challenge for the effectiveness of the Convention, because the more annual influx overburdens the Court, the longer the time lapse between submitting an application to the Court and getting a judgment (commonly referred to as the “Brighton backlog”). 60 Beyond the

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58. EUR. PARL. ASS., Guaranteeing the Authority and Effectiveness of the European Convention of Human Rights, Res. 1856, ¶ 2 (2012).
59. Longer-Term Future, supra note 17, ¶ 96.
Convention’s effectiveness, the huge backlog of cases and the rise of the annual influx both risk compromising “the quality and the consistency of the case-law and the authority of the Court.”

Paradoxically, the saying “the Court became a victim of its own success” has become increasingly true over the last three decades. The effectiveness of the recourse to the Court provokes its own paralysis as individuals increasingly file their applications with the Court. However, the other principles allow some procedural tools that decrease the Court’s adjudicative burden to provide individualized decision: subsidiarity, good administration of justice and procedural economy, and the coherent and harmonious interpretation of the Convention. As the next Parts will explain, the Court can both act under those principles and ensure the effectiveness of the Convention if it takes due account of the specific facts and circumstances of each individual case.

**B. SUBSIDIARITY**

The principle of subsidiarity protects the primary role and relative autonomy of national courts to settle disputes, “by applying international obligations in a specific factual and (national) legal context.” Scholars commonly use “subsidiarity” to refer to “the relationship between certain international human rights treaties and domestic law.” The principle is reflected in human rights treaty

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61. Interlaken Declaration, supra note 35, ¶ 8.
63. Helfer, supra note 62.
65. Carozza, supra note 64, at 39 n.7.

Another practical manifestation of the principle is the exhaustion of domestic remedies as a condition of admissibility before international human rights courts.\footnote{Solomon T. Ebobrah, International Human Rights Courts, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 241 (Cesare Romano et al. eds., 2014).}

Regarding the ECHR, the mechanism of the Convention is “subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.”\footnote{See Handyside v. United Kingdom, App. No. 5493/72, Eur. Ct. H.R. ¶ 48 (1976), http://hudoc.echr.coe.int/eng?i=001-57499 (“Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.”); see also Case “Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium,” 3 Eur. Ct. H.R. (ser A.) ¶ 10 (1967), http://hudoc.echr.coe.int/eng?i=001-57525 (“[T]he Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention.”).}

The Court’s early case law\footnote{See Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies, COUNCIL OF EUR. COMM. OF MINISTERS, ¶ 13 (May 12, 2004), https://search.coe.int/cm/Pages/result_details.aspx} elaborated upon this principle and the States parties\footnote{See Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies, COUNCIL OF EUR. COMM. OF MINISTERS, ¶ 13 (May 12, 2004), https://search.coe.int/cm/Pages/result_details.aspx} reiterated it as a solution to the increasing number of pending
cases. States parties foresaw to amend the ECHR with a preambular paragraph providing that “High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto.”

With regard to concurrent applications specifically, subsidiarity is the key consideration when the Court coordinates between similar cases and settles one prioritized case, while leaving the settlement of the other cases to domestic authorities. Procedural tools like the pilot judgment or leading cases promote subsidiarity, as far as the respondent State is able and willing to cooperate and set up effective domestic remedies. As an exception to the subsidiarity rule, the Court does not require the exhaustion of domestic remedies when unavailable or effective, which has been the case in most human rights disputes submitted from separatist areas. In those cases, the Court operates as a “court of first instance,” turning the subsidiary nature

?ObjectID=09000016805dd18e (“When a judgment which points to structural or general deficiencies in national law or practice (‘pilot case’) has been delivered and a large number of applications to the Court concerning the same problem (‘repetitive cases’) are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system.”); see also Brighton Declaration, supra note 35, ¶ 11 (“The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. . . . The role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.”).

71. Explanatory Report on Protocol No. 15 art. 1, supra note 68.
72. See infra Section IV.B.2.
73. See Practical Guide on Admissibility Criteria, ECHR ¶ 72, (Feb. 28, 2017), https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (stating that applicants are only required to exhaust domestic remedies when those remedies are accessible and capable of providing a reasonable remedy to their complaint).
of the ECHR mechanism “on its head.”

However, where the Court found a domestic remedy effective and available, it required the exhaustion rule and reaffirmed its ultimate supervisory jurisdiction. This was the case with the domestic remedy that the “Turkish Republic of Northern Cyprus” (TRNC) created to settle the mass of disputes of expropriated Greek Cypriot owners and that of the Ukrainian courts relocated from the separatist areas to government controlled territories. The Court considered both of those domestic procedures as effective remedies to be exhausted before seizing the Convention mechanism, in accordance with the subsidiarity principle. Therefore, the Court shall examine on a case-by-case basis whether subsidiarity can be invoked in the given separatist area, as a huge number of applications can be redirected to domestic remedies if effective and available.

C. GOOD ADMINISTRATION OF JUSTICE AND PROCEDURAL ECONOMY

Two closely related principles, good administration of justice and procedural economy, help the ECtHR to rationalize its procedure while dealing with concurrent applications. First, good administration of justice is a principle that enables courts to fill gaps in the regulation

Convention the Court must act as the court of first instance); Chiragov v. Armenia, App. No. 13216/05, Eur. Ct. H.R. ¶ 118-20 (2015), http://hudoc.echr.coe.int/eng?p=i=001-155353 (stating that the respondent Government failed to show a remedy capable of resolving the applicants’ complaints, so the Court dismissed the Government’s objection of non-exhaustion of domestic remedies and then proceeded to hear the case).

75. Paul Mahoney, Speculating on the Future of the Reformed European Court of Human Rights, 20 HUM. RTS. L.J. 1, 4 (1999) (“The subsidiary character of the ECHR has been turned on its head, the ECHR institutions do not have the benefit of fact-finding and an initial assessment by the domestic courts, and the new Court runs the risk of being swamped with work for which it is not presently equipped.”).

76. See Demopoulos v. Turkey, 2010-I Eur. Ct. H.R. 356, 415 (affirming that applicants who have exhausted all available paths in pursuit of a remedy may invoke their rights under the Convention and the Court will have ultimate supervisory jurisdiction).


79. See id. ¶ 69.
of their procedures. When the statute or the rules of procedure of a given tribunal do not address a given scenario, any international tribunal is “at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.” The principle of good administration of justice allows international tribunals, due to their “inherent power,” to mitigate the rigid application of the rule of procedure or to solve an issue of procedure which is not regulated by specific rules of procedure. The ICJ invoked the standard of good administration of justice to disregard the applicant’s initial lack of capacity to seize the Court if the applicant’s deficiency might be overcome in the course of proceedings, to rule on the respective claims and counter-claims of the parties in a single set of proceedings, to order the joinder of preliminary objections to the merits, or in the “interest of the applicant to have its claims decided

81. See Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Joinder of Proceedings, 2013 I.C.J. Rep. 177, ¶ 14 (Apr. 17) (separate opinion by Trindade, J.) (“In my understanding, the Court did not do so pursuant to an ‘implied power’ ensuing from the regulatory texts, but rather, and more precisely, pursuant to an ‘inherent power,’ proper to the exercise of the international judicial function. It is an ‘inherent power’ of the international tribunal concerned to see to it that the procedure functions properly, so that justice is done and is seen to be done. It is an ‘inherent power’ of an international tribunal such as the ICJ to see to it that the procedure operates in a balanced way, ensuring procedural equality and the guarantees of due process, so as to preserve the integrity of its judicial function.”).
83. See id. at 441, ¶ 85.
85. See Barcelona Traction, Light and Power Company (Belg. v. Spain), Preliminary Objections, 1964 I.C.J. Rep. at 42 (July 24); see also Panevezys-Saldutiskis Railway Case (Est. v. Lith.), Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 75, at 56 (June 30) (“Whereas the Court may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it.”).
within a reasonable period of time." This principle serves the adequate functioning of the procedure, so that the international tribunal can be in possession of all elements necessary for the decision in good time and be able to deal with the "totality of a dispute." The ECtHR invokes the "proper administration of justice" for instance to order the simultaneous examination of applications by the same formation of the Court, to join applications in one procedure, to examine an adjourned application within the pilot-judgment procedure, or to invite the third party intervention of a State or any person who is not a party to the proceedings. In those examples, the ECtHR uses its judicial discretion to assess the degree of connectedness between claims, cases, or parties and integrates those connected elements accordingly in its procedure. Thus, where the Court translates interconnected substantial law questions into its procedure, it promotes the adequate functioning of its mechanism and develops the coordinated settlement of disputes.

Second, the ICJ interprets "judicial economy" as "an element of the requirements of the sound administration of justice" which aims "to prevent the needless proliferation of proceedings." The principle of judicial economy grants the courts discretion to simplify their procedure. Judicial economy allows tribunals "to refrain from

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87. See id.; see also ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 1130–31 (2013).
88. Rules of Court of the European Court of Human Rights art. 35(2) (1959) [hereinafter ECtHR Rules 1959].
90. See Rules of Court of the European Court of Human Rights art. 61(6)(c) (2018) [hereinafter ECtHR Rules 2018].
addressing claims beyond those necessary to resolve the dispute,” but it does not compel them to exercise such restraint.93

The Permanent Court of International Justice (PCIJ) applied the principle of judicial economy to preliminary objections for the first time in international case law. The Court concluded that a procedural defect is curable by subsequent action of the applicant or respondent in view of considerations of judicial economy.94 The ICJ similarly confirmed that judicial economy provided a justification for disregarding jurisdictional defects, if they could be easily cured by the subsequent action of the applicant or respondent.95 It also invoked procedural economy to decide on any preliminary objections—for example, jurisdiction or admissibility—before entering into lengthy and costly proceedings on the merits of a case,96 or to exercise its power to join proceedings.97 Other international tribunals used judicial economy as a principle allowing them to exercise discretion to decide not to examine alternative claims if unnecessary for the dispute


96. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 47, 49-50 (joint declaration of Bedjaoui, J., Guillaume, J., and Ranjeva, J.) (“When the Court, in 1972, adopted the text which later became Article 79, it did so for reasons of procedural economy and of sound administration of justice. Court and parties were called upon to clear away preliminary questions of jurisdiction and admissibility as well as other preliminary objections before entering into lengthy and costly proceedings on the merits of a case . . . The interpretation given by the Court in the present case to the notion ‘not exclusively preliminary character’ is, however, so wide and so vague that the possibility of accepting a preliminary objection becomes seriously restricted. Thereby the Judgment acts counter to the procedural economy and the sound administration of justice which it is the intent of Article 79 to achieve.”).

settlement,\textsuperscript{98} to decline “to disrupt the reasonable factual and legal findings of the initial decision-maker in order to promote efficiency in the conduct of adjudicatory proceedings,”\textsuperscript{99} or to determine the logical order in which a court or tribunal considers the various issues before it.\textsuperscript{100}

Human rights courts found that certain domestic norms providing on the connectivity of different cases in one procedure served the legitimate purpose of procedural economy.\textsuperscript{101} For example the Inter-American Court of Human Rights (IACtHR) held the Venezuelan “principle of connection”, which combined the prosecution of several perpetrators of a crime or several interconnected punishable acts in the hands of the same court, as conforming to procedural economy and the right to be tried by a competent tribunal.\textsuperscript{102} Likewise, the ECtHR held it reasonable for the purposes of procedural economy that a high court joined different sets of proceedings so that they may be disposed of


together, or coordinated them for purposes of disposal. 103 The ECtHR further held that in some cases, a domestic high court might leave some applications pending and “await further constitutional complaints in order to rule on them together for reasons of procedural economy . . . for example where a leading decision is sought.”104 It also found useful for procedural economy a law authorizing the domestic courts to take into account in the sentencing process further similar and closely-linked criminal acts105 or the joinder of criminal trials of several accused whose roles were closely interconnected.106 In their own procedure, regional human rights tribunals also justified with judicial economy the joinder of cases or proceedings on provisional measures,107 the rule on exhaustion of domestic remedies,108 or the lack of examination of a specific complaint “either where the judgment has dealt with the main legal issue or where the complaints coincide or overlap.”109 Therefore, in accordance with the ICI’s approach, the ECtHR should act under the principle of judicial economy so as to prevent the needless proliferation of proceedings.

D. COHERENT AND HARMONIOUS INTERPRETATION OF THE CONVENTION

While interpreting a provision of the Convention, the Court must try to achieve “an internal and external harmony, namely, respectively, harmony within the Convention, reading it as a whole, and harmony with the rules of international law.”110

The first level where the coherent and harmonious interpretation of the ECHR operates is in the Court’s own case law as a whole. Beyond the Convention’s reference to undesired inconsistency of its interpretation,111 both the ECHR112 and States parties to the ECHR113 highlight the importance of the clarity and consistency of the Court’s case law. It means that comparable cases shall be “resolved in the light of the same principles” developed by the Court114 and under consistently applied procedural rules.115 On the one hand, the coherent and harmonious interpretation of the provisions of the ECHR provides legal certainty. The Court and States parties recognized that “[w]hile the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeableability and

(dissenting opinion of Serghides, J.), http://hudoc.echr.coe.int/eng?i=001-172460; see also Annual Report 2017, supra note 15, at 25 (“[T]he Court’s approach being to read the Convention as a whole so as to ensure the coherent and harmonious interpretation of its provisions.”).

111. See European Convention on Human Rights art. 30, supra note 2 (“Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.”).

112. See Buishvili v. Czech Republic, App. No. 30241/11, Eur. Ct. H.R. ¶ 44 (2012), http://hudoc.echr.coe.int/eng?i=001-114051 (stating that the Court noted a consistent interpretation was required between Article 5 § 4 of the Convention and Article 5 § 3, as both share a close affinity); see also Stec v. United Kingdom, 2005-X Eur. Ct. H.R. 321, 340-41.

113. See Brighton Declaration, supra note 35, ¶ 12(c)(ii) (“The Conference . . . [w]elcomes and encourages open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and . . . [t]he Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court’s case law.”); see also Interlaken Declaration, supra note 35, ¶ 4; (“[T]he Conference] [s]tresses the importance of ensuring the clarity and consistency of the Court’s case-law and calls, in particular, for a uniform and rigorous application of the criteria concerning admissibility and the Court’s jurisdiction.”); EUR. PARL. ASS., Effective Implementation of the European Convention on Human Rights: The Interlaken Process, Res. 1726, ¶ 7 (2010).


equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases.\footnote{116} As Part III will explain, procedural tools like pilot judgments, leading cases, or Grand Chamber judgments promote legal certainty by a well-settled case law.

On the other hand, consistency of the Convention’s interpretation does not exclude that the Court deviates from an established case law in light of the specific circumstances of a case. In the context of domestic courts, the ECtHR recognized that “the principle of good administration of justice cannot be taken to impose a strict requirement of case-law consistency.”\footnote{117} The same principle applies to the ECtHR too: case law development is not, in itself, contrary to the proper administration of justice. The Court shall follow a dynamic and evolutive approach while interpreting the Convention as a “living instrument,” in light of present-day conditions.\footnote{118}

A second level of the coherent and harmonious interpretation of the Convention operates between the ECHR and other international legal regimes. The Court recognized at various occasions that the Convention shall so far as possible be interpreted in harmony with other obligations of the State parties under general international law\footnote{119} or special treaty regimes such as European Union law,\footnote{120} the law of the


sea,\textsuperscript{121} or international humanitarian law.\textsuperscript{122} This means in practice that while deciding on an individual case, the Court shall take into account and cooperate between its case law as a whole and other norms of international law. The use of the harmonious interpretation “as far as possible” means that the Court must also have regard for the special character of the ECHR as a human rights treaty.\textsuperscript{123}

Coordination among the Court’s own decisions on the one hand, and between its own case law and other regimes of international law on the other hand, facilitates good administration of justice and procedural economy, because its precedents and external sources of international law might prevent the needless proliferation or prolongation of proceedings.

The above-mentioned principles of the coordinated settlement shall endorse the Court’s procedure while facing its massive case law. While deciding on individual cases, the Court should ease its fact-finding and legal analytical burden by applying the principles of subsidiarity, good administration of justice and procedural economy, and the coherent and harmonious interpretation of the Convention. Some of those principles conflict which each other in the sense that their application might limit that of other principles. Especially good administration of justice and judicial economy might threaten individual justice and thus the Convention’s effectiveness if no due consideration is given to each particular case. For instance, judicial economy requires the Court to strike out an application if “it is no longer justified to continue its examination,”\textsuperscript{124} while the effectiveness of the Convention might justify its continued examination if it “would contribute to elucidate, safeguard and develop the standards of protection under the Convention.”\textsuperscript{125} This is a discretionary question that the Court can decide on only if it has a general overview of its

\textsuperscript{123} Demopoulos v. Turkey, 2010-I Eur. Ct. H.R. 365, 410-11 (“It is correct, as the applicants and intervening Government asserted, that the Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part . . . however, the Court must also have regard to its special character as a human rights treaty . . . ”).
\textsuperscript{124} See European Convention on Human Rights art. 37(1)(c), supra note 2.
\textsuperscript{125} Id.; see also Karner v. Austria, 2003-IX Eur. Ct. H.R. 199, 209.
past and pending cases. As a precedent in concurrent applications from separatist areas, several applicants from Eastern Ukraine challenged the abduction and arbitrary detention of their relatives by separatist forces and later, after the release of their relatives, expressly stated that they no longer wished to pursue their application. The Court decided to strike out those applications, given the fact “that a number of cases concerning similar facts and raising similar issues under the Convention have been brought before the Court and is currently pending before it,” and that “[t]he Court will therefore have an opportunity to determine legal issues involved in these cases.” This is an example of prioritization of judicial economy, while protecting the effectiveness of the Convention through other pending cases.

Thus, the coordinated settlement of concurrent applications is based on the application of all the above-mentioned principles. On the one hand, the Court should find the right balance between its main function, individual justice, and effectiveness of the Convention, and, on the other hand, the principles of subsidiarity, good administration of justice and procedural economy, and the coherent and harmonious interpretation of the Convention. As the Part III explains, the first concurring element that challenges the application of those principles is the various international dispute settlement mechanisms that States or individuals have seized from separatist areas simultaneously in parallel with their application to the ECtHR.

III. CONCURRENT PROCEDURES OF INTERNATIONAL INVESTIGATION OR SETTLEMENT

Concurrent applications to different dispute settlement bodies suppose the concurrent jurisdiction of those judicial or investigative bodies over the same facts and legal questions. If there is no


128. See Schreuer, supra note 52, at 511 (“The most obvious cases of concurrent jurisdiction arise in situations in which national and international proceedings are
structural coordination among the different international fora having overlapping jurisdiction, concurrent procedures might result in the substantive fragmentation of international law.\textsuperscript{129} Without coordination between concurrent international investigation or dispute settlement mechanisms in simultaneous proceedings related to separatist conflicts, international adjudicatory bodies risk the adoption of contradictory conclusions on fact or law that would create legal uncertainty. Furthermore, each dispute settlement body would be obliged to reconstruct the legal and factual background of complex and large-scale violations of international law as a first instance court. Therefore, coordination between concurrent international investigation or dispute settlement mechanisms is crucial to ensure legal certainty and to ease the legal analytical and fact-finding burden on dispute settlement bodies.

This Part first argues that the ECtHR should coordinate between concurrent procedures of international investigation or settlement and its own mechanism in the sense that it shall narrowly interpret the identity of the facts, complaints, and the applicant of the concurrent proceedings for the purposes of \textit{lis pendens} and \textit{res judicata} rules (Part III.A). This ensures that individuals submitting concurrent applications have access to the ECtHR if the other forums do not provide effective remedy. Second, this Part explains that even if the \textit{lis pendens} and \textit{res judicata} rules of the ECtHR do not significantly reduce the Court’s backlog, taking into account the substantive conclusions of concurrent procedures of international investigation or settlement assures the harmonious interpretation of the Convention with other rules of international law and eases the Court’s fact-finding burden (Part III.B).

A. COORDINATION OF PROCEEDINGS

Under Article 35(2)(b) of the ECHR, the Court shall find

\textsuperscript{129} See Dupuy & Viñuales, \textit{supra} note 52, at 143 (“The situation in the international legal order is in part similar and in part different to that of domestic systems. Like domestic systems, the areas and issues covered by international law have become increasingly diverse and complex. Yet, no explicit coordination has been developed between the institutions established to implement this growing body of obligations.”).
inadmissible any application submitted under Article 34 on individual applications that “is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”\textsuperscript{130} Thus, the ECHR excludes any re-litigation of identical claims already submitted to \textit{(lis pendens)} or decided by \textit{(res judicata)} another international procedure,\textsuperscript{131} whereas other human rights treaty bodies define \textit{lis pendens} more flexibly, only excluding an identical matter actually pending under another procedure of international investigation or settlement.\textsuperscript{132} The rule aims at preventing the risk of diverging interpretations of similar provisions of international human rights treaties.\textsuperscript{133} Before the ECtHR,

\begin{itemize}
\item \textsuperscript{130} See European Convention on Human Rights art. 35(2)(b), \textit{supra} note 2.
\item \textsuperscript{133} See August Reinisch, \textit{International Courts and Tribunals, Multiple Jurisdiction, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW} ¶ 10 (Apr. 2011), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e41?rskey=AUZMZe&result=1&prd=EPIL.
several respondent States invoked ongoing inter-state court proceedings or status talks about the given disputed area as a preliminary objection precluding the admissibility of the application.\textsuperscript{134}

First, the preliminary objection of \textit{lis pendens} could be raised in inter-state applications. In the \textit{Georgia v. Russia (II)} case, concerning systematic human rights violations allegedly committed by Russian forces and/or by the separatist forces under their control in the August 2008 armed conflict, Russia argued that the application concerned essentially the same dispute as the pending \textit{Georgia v. Russian Federation} case before the ICJ.\textsuperscript{135} It added that the same complaints lodged under Article 14 taken in conjunction with other provisions of the ECHR—concerning alleged discriminatory attacks directed against civilians of Georgian origin—as already subjected to ICJ examination.\textsuperscript{136} Without examining whether the two procedures concerned the same matter, the ECtHR briefly noted that after the ICJ had held in a judgment of April 1, 2011, that it did not have jurisdiction to entertain the application,\textsuperscript{137} the procedure before that international court had accordingly “come to an end.”\textsuperscript{138} Furthermore, the Court held it “clear from the explicit wording of Article 35(2) of the Convention that it applies only to individual applications” and consequently dismissed Russia’s preliminary objection.\textsuperscript{139}

Regardless of the \textit{lis pendens} rule, one might argue on the basis of the preeminent role of the ICJ in the development of international law or the international comity between tribunals\textsuperscript{140} that the ECtHR should


\textsuperscript{140} Dupuy & Viñuales, \textit{supra} note 52, at 144–147.
stay its proceedings and wait for the decision of the ICJ in case of concurrent inter-state applications. However, human rights tribunals, like the ECtHR, could easily reject proposals granting the ICJ prejudicial competence for a case pending concurrently before another international court\textsuperscript{141} on account of their judicial autonomy. This served as the main argument of the IACtHR to a State party’s request to decline its competence to give an advisory opinion in a concurrent contentious case pending with the ICJ, for reasons of “prudence, if not considerations of comity.”\textsuperscript{142} The IACtHR rejected the claim, stressing that the Court is an “autonomous judicial institution.”\textsuperscript{143} Indeed, in the present state of international law there exists no hierarchy between international courts, and the ECtHR has the autonomy for deciding disputes arising out of the interpretation and application of the Convention.\textsuperscript{144} Consequently, similar but not identical claims pending before the ICJ or other international tribunals shall not limit the jurisdiction of the ECtHR to rule on inter-state applications. While procedural economy and comity might incline the ECtHR to suspend its procedure until the decision of the ICJ on similar factual or legal questions,\textsuperscript{145} the procedural autonomy of the Court and the effectiveness of the Convention should prevail: for these reasons, the Court should proceed without suspending or slowing down its procedure.

Second, as for individual applications, Turkey raised the preliminary objection of the \textit{lis pendens} rule in the \textit{Varnava v. Turkey} case before the European Commission of Human Rights (Commission), claiming that the applications on the sort of persons that disappeared in the conflict of Northern Cyprus concerned a matter that had already been submitted to another procedure of international investigation or settlement of the Committee on Missing Persons


\textsuperscript{143} Id. ¶¶ 44, 61.


\textsuperscript{145} Apostol, \textit{supra} note 134, ¶ 102.
(Committee)—a bi-communal body established with the participation of the United Nations. The Commission found *lis pendens* procedures inadmissible under the ECHR as “procedures in which a matter is submitted by way of ‘a petition’ lodged formally or substantively by the applicant.” This was not the case with the Committee on Missing Persons because Turkey was not a party to the procedure, the Committee could not “attribute responsibility for the deaths of any missing persons or make findings as to their cause,” and finally because “the Committee’s investigating capacity is limited.” Consequently, the European Commission of Human Rights concluded that the Committee is not “a procedure of international investigation or settlement” of the “matter” in the *Varnava* case.

Another contested issue concerned whether the identity of the applicant excludes the admissibility of an individual application of which claim has been equally addressed by an inter-state application. Such a scenario has occurred with respect to Northern Cyprus, the Georgian, and the Ukrainian separatist areas, subject to numerous individual and inter-state applications before the Court. The Commission left the question open. First, in the *Donnelly v. United Kingdom* case concerning the alleged ill-treatment of detainees in the context of the armed hostilities in Northern Ireland, the Commission did not find the *lis pendens or res judicata* rule applicable on account of the then pending *Ireland v. United Kingdom* case, even though in the latter case the Government applicant referred to the treatment of some applicants in support of its allegations under Article 3 of the ECHR. The Commission shortly held that the *res judicata* rule could not apply because the examination on the merits of the inter-

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147. *Id.*
148. *Id.*
149. *Id.* at 14.
state case still remained to be carried out.\textsuperscript{153} The Commission drew the same conclusion in the \textit{Varnava} case, where Turkey claimed that the application concerned a matter which the Commission had examined previously in three \textit{Cyprus v. Turkey} inter-state cases.\textsuperscript{154} After the Court adopted its judgment in the \textit{Cyprus v. Turkey} case which included findings of violations under Articles 2, 3, and 5 of the ECHR concerning missing Greek Cypriots and their families, Turkey argued in the \textit{Varnava} case that Article 35(2)(b) barred examination of the individual applications that were “substantially the same.”\textsuperscript{155} The ECtHR did not accept the Turkish position and found that by introducing an inter-state application a Government applicant thereby does not deprive individual applicants of the possibility of introducing or pursuing their own claims.\textsuperscript{156} Therefore, because of the difference of the applicants’ character and interests,\textsuperscript{157} a pending or already decided inter-state case, even if expressly addressing human rights violations against the same individuals, cannot exclude the admissibility of an individual application with the same subject matter.\textsuperscript{158} The \textit{lis pendens} rule excludes the admissibility of an application only if the application concerns substantially not only the same facts and complaints but also introduced by the same persons.

The Court further clarified whether the \textit{lis pendens} rule applies to international status negotiations discussing certain human rights issues addressed in an application before the ECtHR.\textsuperscript{159} In the \textit{Chiragov v.}

\begin{small}
\textsuperscript{156} Id. at 54, ¶ 118.
\textsuperscript{157} LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 173-79 (Pieter van Dijk et al. eds., 4th ed. 2006) (holding that the commission considered the present application as already having been examined regardless of its relevance as an individual application).
\end{small}
Armenia case, Azerbijani Kurds complained of their inability to return to their homes and property in the Lachin area, which belongs to the internationally-recognized territory of Azerbaijan but remains under Armenian occupation, after being forced to leave in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh. The Armenian Government argued that the matters raised in the application had already been submitted to another international institution for settlement, the ongoing negotiations conducted within the Minsk Group of the Organization for Security and Co-operation in Europe (OSCE), which comprised of questions relating to the resettlement of refugees and internally displaced persons as well as compensation issues. Similar to the Varnava case, the Grand Chamber required that “a criterion for finding that the application before the Court is substantially the same as another matter is that the latter has been submitted by way of a petition lodged formally or substantively by the same applicants.” The Court held that OSCE inter-state talks on Nagorno-Karabakh, “where the applicants are not parties and which cannot examine whether the applicants’ individual rights have been violated,” do not constitute a “procedure of international investigation or settlement” of the matters which are the subject of the concrete application.

To summarize the precedents, Article 35(2)(b) of the ECHR only excludes admissibility where the application before the Court concerns substantially not only the same facts and complaints but also introduced by the same persons. To find the matter identical, the Court examines the nature of the dispute settlement body, its procedure, and the legal effect of its decisions. Thus, the lis pendens rule clearly does not apply to inter-state applications and applies to individual applications under restricted conditions. The Court should find with sufficient certainty that the finding of the international

161. Id. ¶ 57.
162. Id. ¶ 61.
163. Id.
investigation or settlement also concerned the case of the applicants before the Court and against the same State, that is both the applicant and the same respondent State must be a party to the procedure. Furthermore, the concurrent procedure of international investigation or settlement shall satisfy certain qualitative criteria: it must be able to attribute responsibility for the human rights violations or make findings as to their cause and the dispute settlement body’s investigating capacity must present certain effectiveness.  

In the case of Crimea and Eastern Ukraine, the Ukrainian State and individuals have initiated various concurrent proceedings. As for the dispute settlement procedures initiated by Ukraine, Kiev seized the ICJ alleging several violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) in Eastern Ukraine and of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Crimea by Russia. The ICJ adopted its order on provisional measures on April 19, 2017, and held that it had prima facie jurisdiction to deal with the case, under Article 24(1) of the ICSFT and under Article 22 of the CERD. While the case will remain pending before the ICJ in the coming years, several claims that Ukraine raised may overlap with applications filed with the ECHR. In this regard, the claims submitted in the inter-state applications should not be taken into account because, as explained above, the lis pendens rule does not apply to inter-state applications before the ECHR. However, individual applications before the ECHR do concern the same human rights violations as the ICJ’s Ukraine v. Russia case. In the latter case, Ukraine is requesting the world court to order Russia to make full reparation for the shelling of

166. Varnava v. Turkey, App. Nos. 16064/90 et al., Eur. Comm’n H.R. 1, 15 (1998), http://hudoc.echr.coe.int/eng?i=001-4179 (holding that the Committee is incapable of attributing responsibility for the deaths to Turkey because Turkey is not a party to the procedure before that Committee).


civilians in various cities in the separatist areas of Eastern Ukraine, whereas before the ECHR individual applicants are complaining about the violation of their right to property, their right to life, and the prohibition of torture in the course of military hostilities in Eastern Ukraine. Similarly, Ukraine’s request to order Russia the “full reparation for all victims of the Russian Federation’s policy and pattern of cultural erasure through discrimination in Russian-occupied Crimea” might overlap with the Crimean individual applications before the ECHR. However, even if the ICJ decided in favor of Ukraine and ordered full reparations, the applicants before the ECHR are not parties to the ICJ procedure and the world court cannot examine whether the applicants’ individual rights under the ECHR have been violated. Consequently, the individual applications directed against Russia or Russia and Ukraine would not be inadmissible under Article 35(2)(b) of the ECHR since there is no identical matter.

Another concurrent procedure might be the individual complaints procedures of UN treaty bodies such as the Human Rights Committee, the Committee against Torture, or the Committee on the Elimination of Racial Discrimination (CERD). Currently, eight of the UN human rights treaty bodies may under certain conditions receive and consider individual complaints or communications from individuals. Ukraine is a party to seven of the respective instruments, while Russia is a party to four of them. Whereas Ukraine and Russia have not

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formally seized the CERD with their dispute on Crimea before the ICJ procedure, individuals might direct their human rights petitions to one of the UN human rights treaty bodies under the respective human rights treaties to which Ukraine or Russia are parties. Such a quasi-judicial complaint procedure will constitute a “procedure of international investigation or settlement” under Article 35(2)(b) of the ECHR. However, petitions pending before UN treaty bodies are not communicated until held inadmissible or decided on the merits, and since the outbreak of the Ukrainian armed conflicts, no UN treaty bodies have published a decision concerning Crimea or Eastern Ukraine. Moreover, it is highly unlikely that individuals will submit communications before any of the UN treaty bodies, having only power to make recommendations to the respondent State, before exhausting the “stronger” remedy of the ECtHR, leading to a decision binding the State party.

Beyond UN treaty bodies, individuals may also address claims to the Human Rights Council within its confidential complaints procedure, successor of the former “1503 procedure.” However, unlike the treaty bodies’ individual petition mechanism, the Human Rights Council complaints procedure is not a quasi-judicial procedure leading to a formal decision on the State’s responsibility, but an examination of the case by two working groups cooperating with the

175. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Order, 2017 I.C.J. ¶ 60 (Apr. 19) (“Although both Parties agree that negotiations and recourse to the procedures referred in Article 22 of CERD constitute preconditions to be fulfilled before the Seisin of the Court, they disagree as to whether these preconditions are alternative or cumulative.”).


State concerned. Since the procedure examines the human rights situation in a State and not individuals’ complaints, and because it does not aim at offering direct reparation to victims, the ECHR does not consider it as a “procedure of international investigation or settlement.” The same applies to the CoE Committee for the Prevention of Torture which is particularly active in separatist areas, but also does not offer direct reparation for the victims. Neither can exclude the admissibility of ECHR applications, the so-called communication procedure of the Human Rights Council: in this proceeding, special mandate-holders intervene directly with the State on allegations of violations of human rights that come within their mandates by means of letters which include urgent appeals and other communications. Such communications have been addressed to the Ukraine government with respect to alleged cases of arbitrary arrest, disappearance, and summary executions of civilians in Eastern

179. See generally Human Rights Council Res. 5/1, Annex B.2.4(b) (June 18, 2007).


183. Communications, OHCHR.ORG, http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx (last visited June 16, 2018) [hereinafter Communications, OHCHR.ORG] (explaining that the “communication” process within the Human Rights Council Special procedures “involves sending a letter to the concerned State identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandateholder(s), and a request for follow-up action”).
Ukraine. As the procedure relies on the cooperation of the State and victims do not participate in the proceedings, it cannot constitute “matters” under Article 35(2)(b) of the ECHR. Similarly, the Court did not consider the procedure of the UN Working Group on Enforced or Involuntary Disappearances as “a procedure of international investigation or settlement” of the “matter” which was pending before the Court, because the Working Group does not investigate disappearances, nor does it provide legal means of redress and cannot attribute responsibility for the deaths of any missing persons or make findings as to their cause. However, the Court considered the procedure of the UN Working Group on Arbitrary Detention as constituting “another procedure of international investigation or settlement.” It took into account that the Working Group on Arbitrary Detention examines individuals’ complaints, the authors of the communication can participate in the procedure and are duly informed on the procedural steps, and the Working Group determines in a contentious procedure the State’s responsibility.


185. Communications, OHCHR.ORG, supra note 183.


Other pending disputes concerning Crimea are the investment arbitration proceedings brought by companies owned and controlled by the Ukrainian state against Russia.189 These Ukrainian companies allege that the Russian Federation breached its obligations under the Ukraine-Russia Bilateral Investment Treaty190 by interfering with and ultimately expropriating their investments, which may overlap with similar individual applications claiming the violations of the right to property in Crimea.191 If the matters under the respective bilateral investment treaties are “substantially the same” within the meaning of Article 35(2)(b) of the ECHR, the Court would likely hold that the proceedings may be seen as “another procedure of international investigation of settlement.”192

In sum, the ECtHR considers only a limited number of mechanisms as other procedures “of international investigation or settlement” under Article 35(2)(b) of the ECHR, namely those that the Court considers as judicial or quasi-judicial proceedings similar to those set up by the Convention.193 The procedure of UN treaty bodies, the UN

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191. Press Release, European Court of Human Rights, European Court of Human Rights Deals with Cases Concerning Crimea and Eastern Ukraine, ECHR 345 (Nov. 26, 2014), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4945099-6056223&filename=003-4945099-6056223.pdf (“Property belonging to Ukrainian legal entities was subjected to unlawful control, namely by being taken by the self-proclaimed authorities of the Crimean Republic.”).


Working Group on Arbitrary Detention, or investor-State arbitration proceedings constitute “another procedure of international investigation or settlement,” provided that the “matters” are the same.194 “Matters” are identical only if the application before the ECtHR concerns substantially not only the same facts and complaints but also introduced by the same persons.195 On the one hand, the strict scrutiny of the identity of the facts, complaints, and the applicant for the purposes of *lis pendens* and *res judicata* does not significantly reduce the Court’s backlog. It is unlikely that many of the applications from separatist areas are found inadmissible on account of a decision of a UN individual communication procedure or an investor-State arbitration.

On the other hand, the Court should continue to coordinate between parallel international procedures of international investigation or settlement and its own mechanism, because finding the case inadmissible on ground of *lis pendens* or *res judicata* helps to share its judicial burden with other international dispute settlement mechanisms. Furthermore, the narrow interpretation of *lis pendens* or *res judicata* ensures that individuals submitting concurrent applications have access to the ECtHR if the other forums do not provide effective remedy. This enhances the legitimacy and the effectiveness of the Court and the Convention because the Court remains the ultimate authority deciding on those human rights disputes.

**B. COORDINATION OF FINDINGS**

The concurrent international dispute settlement and fact-finding proceedings do contribute to the ECtHR’s effectiveness, because the Court can rely on the conclusions of other international forums to ensure judicial economy. It is well-known that the ECtHR has engaged increasingly in a “judicial dialogue,” relying on the legal conclusions of other international courts, pronouncements of international bodies.

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carrying out quasi-judicial procedures, and international organizations.\textsuperscript{196} As several international judges recognized, cross-references to the judgments of other international jurisdictions not only provides inspiration for the judge to settle the concrete case, but strengthens the unity of international law and prevents fragmentation.\textsuperscript{197} In cases submitted from areas outside the territorial State’s effective control, the Court cited ICJ case law when it had to decide on a series of questions of general international law such as the primarily territorial notion of jurisdiction,\textsuperscript{198} the lawfulness of acts adopted by unrecognized entities,\textsuperscript{199} the judicial consideration of statements from high-ranking officials,\textsuperscript{200} the concurrent application of international human rights law and international humanitarian law,\textsuperscript{201} the duties of the occupying power,\textsuperscript{202} the obligation to make


\textsuperscript{197} See Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 I.C.J. Rep. 324 (June 19) (Declaration of Greenwood, J.) (formulating that international law “is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions”).


\textsuperscript{200} See, e.g., Chiragov v. Armenia, 2015-III Eur. Ct. H.R. 135, 213-214 (explaining that statements of high-ranking officials that were closely involved with the dispute in question “are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavorable light”).

\textsuperscript{201} See, e.g., Hassan v. United Kingdom, 2014-VI Eur. Ct. H.R. 1, 26-28, 49-50, 60-62 (clarifying that the ICJ has the view that protections under human rights conventions do not cease in situations of international armed conflict, and that the Court will apply human rights law, as well as the \textit{lex specialis}, international humanitarian law, in such situations).

\textsuperscript{202} See, e.g., Al-Jedda v. United Kingdom, 2011-IV Eur. Ct. H.R. 305, 347-348, 376-377 (discussing how Article 43 of the Hague Regulations obliges an occupying power to “take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in
reparation in an adequate form in an inter-state dispute, the legal personality of the UN as international territorial administration, or the attribution of conduct to the State. Even if the Court does not feel bound by the case law of other courts like in the question of attribution of conduct of non-state entities to the State, it cites the relevant case law and tries to follow an interpretation in harmony with other rules of international law. Since many of the above-mentioned questions will arise in separatist conflicts, the Court shall continue to take into account the international case law and interpret the Convention under the principle of harmonious interpretation.

Beyond the legal findings, the Court should take into account the factual conclusions of other jurisdictions and investigative bodies. The factual complexities of the cases submitted from areas outside the territorial State’s effective control, the high number of submitted applications from those areas, and the Court’s overall workload with more than 90,000 pending cases in 2017 all require the Court to have resort to external sources that parties submit, rather than using its own

force in the country,” and that internment should only be used as a last resort in meeting that obligation).

203. See, e.g., Cyprus v. Turkey, 2014-II Eur. Ct. H.R. 245, 264 (explaining that Article 41 of the Convention mirrors the public international law norm under which “an injured state is entitled to obtain compensation from the state which has committed an internationally wrongful act for the damage caused by it”).

204. See, e.g., Behrami v. France and Saramati v. France, App. Nos. 71412/01 & 78166/01, Eur. Ct. H.R. ¶ 144 (2007), http://hudoc.echr.coe.int/eng?i=001-80830 (describing that while the legal personality of the UN is separate from its member states, and it is not a Contracting Party to the Convention, its action and inaction are, in principle, attributable to it).

205. See, e.g., Jaloud v. Netherlands, 2014-VI Eur. Ct. H.R. 229, 278-279, 301 (explaining that the ICJ may equate conduct by a person or entity to that of a state organ, even if such conduct would not be attributable to the state under internal law, if the person or entity “acted in accordance with that state’s instructions or under its ‘effective control’” and if such instructions or effective control were given in respect to the individual operation under which the violations occurred, rather than just in a general sense to the actions of the said person or entity).


investigatory power under Article 38 of the ECHR. The factual findings of other international dispute settlement bodies are increasingly quoted by the ECtHR in the section “background of the case.” Due to the lower workload and the commonly used investigative powers of other tribunals such as the ICJ or international criminal tribunals, the ECtHR can obtain reliable evidence from case law. For instance, in cases concerning Crimea and Eastern Ukraine, the fact-finding of international organizations, dispute settlement bodies, and non-governmental organizations should certainly provide invaluable information that the Court alone could not investigate. To give a specific example, in the pending case concerning the crash of the Malaysian Airlines MH17 flight, the ECtHR should rely on the published reports of internationalized fact-finding bodies established in the Netherlands or the investigations of the ICC.

In sum, with respect to concurrent procedures of international investigation or settlement, the ECtHR should take into account all closed and pending international procedures to decide on the admissibility of individual applications and to contribute to the effectiveness of its own mechanism. The Court shall examine the nature of the dispute settlement body, its procedure, and the legal effect of its decisions to decide whether the case before it constitutes

a *lis pendens* or *res judicata*. In its decision, the Court should also integrate the legal and factual conclusions of other international procedures. Such an integrative approach assures a harmonious interpretation of the Convention with other rules of international law and eases the Court’s fact-finding burden. In other words, the coordination between the Court’s mechanism and other concurrent procedures of international investigation or settlement promotes good administration, judicial economy, and the harmonious interpretation of the Convention.

IV. CONCURRENT APPLICANTS

Applications from separatist areas are often submitted not only by an individual victim but by a high number of victims, numerous relatives of the victims, and/or the State of their nationality, typically the territorial State. A high number of applications from areas outside the effective control of the territorial State concern the same systemic or structural deficiencies in the law or practice of *de facto* authorities in the concerned area.\(^\text{213}\) Whereas the Court shall settle each application individually, “[t]he good administration of justice requires that similar facts be handled in the same way and under the same rules.”\(^\text{214}\)

The major challenges that the huge backlog from the same conflict regions raises are the timely settlement of all cases, the need to elucidate the factual and legal complexities of the underlying armed conflict, the proper division of work between the Chamber and the

\(^{213}\) Such alleged structural deficiencies have been the reparation for the unlawful expropriation of property (Northern Cyprus), the investigation and remedies for enforced disappearance cases, unlawful practices of arrest, detention and criminal procedures (Transnistria), denial of educational rights of linguistic minorities (Transnistria, Crimea), death or injury of civilians and destruction of property in the course of an armed conflict (Nagorno-Karabakh, South Ossetia, Eastern Ukraine), remedies for internally displaced persons (Nagorno-Karabakh, South Ossetia, Crimea, Ukraine), etc. See, e.g., Arabella Thorp, *Property Disputes in Northern Cyprus*, HOUSE OF COMMONS (July 28, 2010) (highlighting the issue of property transfer after the displacement of individuals in Cyprus).

\(^{214}\) Lucius Wildhaber, *Discussion Following the Presentation by Lucius Wildhaber*, in *THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS* 77, 89 (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009).
Grand Chamber, the undefined links between inter-state and individual cases related to the same conflict, and the respect of the proper administration of justice. In the precedents on separatist conflicts, the Court has applied a variety of procedural techniques such as the grouping of cases, namely the joinder or simultaneous examination of applications (Part IV.A), and various techniques prioritizing an individual case that leads to the settlement of numerous similar cases (Part IV.B). As the scrutiny of each of those procedural techniques will demonstrate, their wise combination might lead to a coordinated settlement of the thousands of pending applications from areas out of the territorial State’s effective control.

A. GROUPING OF CONCURRENT APPLICATIONS

The joinder and simultaneous examination of applications serve the objectives of the proper administration of justice and the common treatment of analogous cases: they help to examine independent applications in common or simultaneous procedures, thus easing the legal analytical and fact-finding burden of the Court. However, the difference between the criteria for the application of each of the two procedures is not well-defined in the Rules of the Court; both occur when the applications concern the same or similar factual circumstances.215 A closer look at the precedents shows that their use has been inconsistent and led to highly contestable decisions, especially when joinder grouped legally similar but factually different applications.

As for the first technique, the joinder of two or more cases is common in the procedural rules of international tribunals: this procedural tool allows courts “to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented.”216 Hearing and deciding factually and/or legally similar

cases together has significant advantages as to procedural economy. 217
Under the Rules of the ECtHR, the “Chamber may, either at the
request of the parties or of its own motion, order the joinder of two or
more applications.” 218 Within the mechanism of the ECHR, the States
parties encouraged the grouping of similar applications for a single
decision or judgment, through the settlement of “a small number of
representative applications from a group of applications that allege the
same violation against the same respondent State Party, such
determination being applicable to the whole group.” 219

The ECtHR resorted to the joinder of individual cases that had
“similar factual and legal background,” 220 for example where the
alleged breaches were committed by agents of the international
territorial administration of the same area; 221 where applicants suffered
from the same measures of de facto authorities; 222 where the applicants
were relatives of persons disappeared during the same armed
conflict; 223 or where the applicants complained the deprivation of the
use of their property and/or access to their homes and the
ineffectiveness of the same domestic remedies of the de facto
authorities. 224 The joinder of cases enables the Court to connect

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217 (separate opinion by Trindade, J.).
218 ECtHR Rules 2018, supra note 90, at Rule 42(1).
219 Brighton Declaration, supra note 35, ¶ 20(d).
221 Behrami v. France and Saramati v. France, App. Nos. 71412/01 & 78166/01,
H.R. ¶¶ 7-8 (2016), http://hudoc.echr.coe.int/eng?i=001-166480 (arguing against the
seizure of their cars); Bobeico v. Moldova and Iovcev v. Moldova App. Nos.
eng?i=001-158680 (highlighting teachers, employees of, and pupils of five
Moldovan schools in a pending case on Transnistria); Catan v. Moldova, 2012-V
http://hudoc.echr.coe.int/eng?i=001-110460; Emin v. Cyprus, App. Nos. 59623/08
eng?i=001-4179.
hundreds or even thousands of applicants in one single procedure\textsuperscript{225} and also prevents the risk of diverging judgments,\textsuperscript{226} thus serving both judicial economy and the harmony of the Convention.

If the parties do not request the joinder, for example, because the applicants are unaware of each other, it is the Registry’s responsibility to inform the designated Chamber of the similar factual and legal background justifying a joinder. This can even link applications submitted in different years: for example, in the Demopoulos case, eight individual applications submitted between 1999 and 2004 contested the effectiveness and availability of the same domestic remedy instituted by the \textit{de facto} authorities in 2005.\textsuperscript{227} Consequently, the Court has a major function of reviewing and coordinating the legal and factual background of all pending cases so as to identify the interconnected cases that are likely to be joined.

Another way to coordinate concurrent applicants is the simultaneous examination of cases: under the Rules of the Court, “[t]he President of the Chamber may, after consulting the parties, order that the proceedings in applications assigned to the same Chamber be conducted simultaneously, without prejudice to the decision of the Chamber on the joinder of the applications.”\textsuperscript{228} The precedents where the Court resorted to simultaneous examination of cases concerned somewhat similar factual and legal backgrounds where the applicants were in different situations, often constituting two facets of the same coin. For example, the Axel Springer AG \textit{v. Germany} and Von Hannover \textit{v. Germany (no. 2)} cases related to the media coverage of celebrities’ private lives where one case concerned a court order to publish a daily newspaper’s article about the arrest and

\begin{itemize}
\item \textsuperscript{226} BERTRAND WÄGENBAUR, COURT OF JUSTICE OF THE EUROPEAN UNION. \textit{COMMENTARY ON STATUTE AND RULES OF PROCEDURES} 631 (2013).
\item \textsuperscript{227} Demopoulos, 2010-I Eur. Ct. H.R. at 391-393.
\item \textsuperscript{228} ECtHR Rules, \textit{supra} note 90, at Rule 42(2).
\end{itemize}
conviction of a famous actor, whereas the other concerned the reverse scenario, the refusal of domestic courts to issue an injunction restraining further publication of a famous couple’s photograph that was taken without their knowledge. Contrary to the Chamber, the Grand Chamber decided not to join the examination of those two cases, considering that “the nature of the facts and the substantive issues raised in those cases” were different, while it examined them simultaneously. Indeed, the first case concerned a court decision prohibiting the publication of an article, contested by the publisher, while the second case concerned the court’s refusal to limit the further publication of already published media coverage that was contested by the given celebrity. Different, but “complementary” situations likewise justified the simultaneous examination of the Chiragov v. Armenia and the Sargsyan v. Azerbaijan cases, both related to the denial of access to homes to displaced persons in the context of the Nagorno-Karabakh conflict: whereas the Chiragov case concerned the claim of Azerbaijani citizens displaced from the adjacent territories occupied by Armenia to return to their homes, the Sargsyan case concerned the claim of ethnic Armenians to return to their homes near to the ceasefire line, in the territory and under the effective control of Azerbaijan. The two cases presented two facets of the same highly politicized frozen conflict from the point of view of displaced persons of the two sides and of different ethnicities. These considerations led the President of the ECtHR to assign the Chiragov v. Armenia and the Sargsyan v. Azerbaijan cases to the same composition of the Grand Chamber. While simultaneously examining those cases, the Court intended to be as impartial and balanced as possible, trying to give equal weight to both applications against Azerbaijan and Armenia, so as not to exacerbate the very politicized inter-state tensions between those two States parties.

231. Id. at 427; Axel Springer AG, App. No. 39954/08, Eur. Ct. H.R. ¶ 52.
In other applications examined simultaneously, the factual background of the cases was less “complementary” and much more similar. In the Veselinski and Djidrovski cases, both applicants, former officers of the Yugoslav army, complained that they had a “legitimate expectation” to purchase their apartments at the reduced price provided for under the former Yugoslav legislation, whereas the Macedonian authorities denied this right.\(^{234}\) Although the President of the Chamber decided to examine the two cases simultaneously “in the interests of the proper administration of justice,”\(^{235}\) the facts, the domestic law, and the Court’s conclusions were almost identical in the two cases and the Court could have easily joined the two applications, in accordance with the principle of procedural economy. Similarly, the Court examined simultaneously the Frasik v. Poland and Jaremowicz v. Poland cases “in the interests of the proper administration of justice,” but the domestic law and the Court’s conclusions were identical and even the facts were similar.\(^{236}\) In those cases, the joinder of the applications would have been fully justifiable and would have spared the duplication of factually and legally identical procedures.

However, the simultaneous examination of cases is certainly advisable when the applicants are in “symmetrical” situations where their factual and legal background presents two facets of the same highly politicized territorial conflict. This would arguably lead to different outcomes from that of a procedure where the same


\(^{236}\) The major difference was that in the Jaremowicz case, the authorities dealing with the applicant’s request for leave to marry justified their refusal by reference to grounds related to the nature and the quality of the applicant’s relationship with a female detainee, whereas in the Frasik case, the reason for the denial was the trial court’s conviction that the marriage between the applicant and his former partner whom he had raped would have adverse consequences for the taking of evidence against him. However, the Court found that in both cases the underlying problem was the “arbitrary fashion in which the Polish authorities exercised their decision-making power” on a detainee’s request for leave to marry in prison. See Frasik v. Poland, 2010-I Eur. Ct. H.R. 1, 29; see also Jaremowicz v. Poland, App. No. 24023/03, Eur. Ct. H.R. ¶ 64, (2010), http://hudoc.echr.coe.int/eng?i=001-96455.
applications joined. For instance in the Behrami and Saramati cases concerning acts performed by Kosovo Force (KFOR) and UN Interim Administration Mission in Kosovo (UNMIK) under the aegis of the UN, the Court joined the Behrami and Saramati cases which concerned slightly different factual scenarios.\(^{237}\) While the former concerned an accident that occurred as a consequence of the demining responsibilities of the UNMIK, a special mission and thus a de jure organ of the UN, the latter related to detention that the KFOR multinational brigade ordered.\(^{238}\) In a joined examination of the two cases, the Court concluded that both conduct, demining by UNMIK and detention by KFOR multinational brigades, were performed under the “ultimate authority and control” of the United Nations Security Council (Security Council) and thus attributable to the UN.\(^{239}\) Since the UN had a legal entity distinct from its member states and was not a contracting party to the Convention, the Court declared both applications inadmissible ratione personae.\(^{240}\) As numerous critics of the decision pointed out, the UN retained “ultimate authority and control” over the UNMIK, but not over the KFOR, where the chain of command stopped at the level of the commanders of national contingents and where the Security Council exercised only a superficial a posteriori control.\(^{241}\) Had the Court properly assessed the

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238. Id. \(\|$\) 52-53.
239. Id. \(\|$\) 134-35, 140-41.
240. Id. \(\|$\) 144.
“symmetrical” but different factual background and examined the two applications in simultaneous rather than joined procedures, the outcome could have been different. The procedural decision is all the more important that unlike the simultaneous examination, the joinder of cases does not oblige the Court to consult the parties to the dispute prior to this procedural decision.\footnote{See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 43, ¶ 18 (joint declaration of Bedjaoui, J., Guillaume, J., and Ranjeva, J.) (explaining in its decision not to join the cases that the Court considered the parties had different arguments, even if for the same legal issues, so it would be inadvisable to “effect a joinder leading to a single judgment that would have to rule separately on those various arguments”); see also Fisheries Jurisdiction (U.K. v. Ice), Merits, Judgment, 1974 I.C.J. Rep. 3, 5-6, ¶ 8 (July 25) (deciding not to join cases with identical basic legal issues because of differences in the positions of the parties and the fact that joinder was contrary to the wishes of both parties); Martins Paparinskis, Procedural Aspects of Shared Responsibility in the International Court of Justice, 4 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 295, 304 (2013) (discussing the practice of the ICJ to consider the parties’ interests when deciding whether to join cases).} For instance, the ICJ seems to attribute particular importance to the views of the parties when it decides on the joinder of cases.\footnote{See, e.g., Legality of Use of Force (Serb. and Montenegro v. Belg.), Preliminary Objections, Judgment, 2004 I.C.J. Rep. 287, ¶ 18 (Dec. 15) (highlighting the claim of Serbia against NATO member states); Libya, Preliminary Objections, Judgment, 1998 I.C.J. Rep. at 13, ¶ 9 (referencing two proceedings instituted by Libya against the United Kingdom and the United States of America).} If the joinder opposed the interests of the parties, the ICJ chose to litigate the cases in parallel.\footnote{ECtHR Rules, supra note 90, at Rule 42(1)-(2).} Therefore, an ill-decided joinder can disregard the interests of the parties and lead to improper conclusions.

Finally, a relatively new phenomenon is the submission of several inter-state applications by the same State against another State concerning similar claims. With regard to the situations in Crimea and Eastern Ukraine, the Ukrainian government submitted six inter-state
applications against Russia, one of them being already withdrawn. The Ukrainian Government argues that Russia has exercised and continues to exercise effective control over Crimea and—by controlling separatists and armed groups there—de facto control over the regions of Donetsk and Luhansk and consequently, those areas fall within its jurisdiction. As there might be overlap between the inter-state applications themselves and with individual applications, the Court has to coordinate and logically group those inter-state claims.

It is highly unlikely that the Court examines joint or simultaneous inter-state cases with individual applications, but it might join or simultaneously examine the inter-state cases. Before starting any admissibility procedure, the Court has already used its procedural discretion to coordinate between the different claims of the five pending Ukraine v. Russia applications. As the sort of the armed conflict was unpredictable in 2014, the Ukrainian government submitted an application firstly concerning the situation in the Crimean peninsula (Ukraine v. Russia (I)), secondly on abductions of children in Eastern Ukraine (Ukraine v. Russia (II)), and the later applications concerning both Crimea and Eastern Ukraine (Ukraine v. Russia (IV)-(VI)). As the subsequent applications created a system of overlapping claims, the Court decided to regroup the inter-state cases in a logical way, according to geographical and time criteria. On February 9, 2016, the Court decided “with a view of making the processing of the case more efficient, to divide the first inter-state application according to geographical criteria”—all the complaints related to the events in Crimea up to September 2014 are currently registered under the Ukraine v. Russia (I) case, whereas the complaints concerning the events in Eastern Ukraine up to September 2014 are now registered under the Ukraine v. Russia (V) case. Likewise, on November 25, 2016, the Court decided to register all the complaints related to the events in Crimea from September 2014 under the case

246. Factsheet – Armed Conflicts, supra note 245; ECHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine, supra note 20.
247. Factsheet – Armed Conflicts, supra note 245.
248. Id.
Ukraine v. Russia (IV) and all the complaints concerning the events in Eastern Ukraine from September 2014 under the case Ukraine v. Russia (VI). To comply with the Court’s above-mentioned core principles, the coordination between the geographically and temporarily interconnected claims, the joinder or simultaneous examination of the inter-state cases is a welcome development and should be followed in case of interrelated individual applications too.

B. PRIORITIZATION OF A CONCURRENT APPLICATION

Beyond grouping concurrent applications together, the Court can select one particular case from the concurring applications and prioritize its settlement, while deciding on the other concurrent applications in conformity with the prioritized decision. The underlying consideration of this coordination between concurrent applications is that beyond individual justice, “the Court serves a purpose beyond the individual interest in the setting and applying of minimum human rights standards for the legal space of the Contracting States.” Such a general interest in prioritizing a specific application might operate in the priority decision on the order of the applications, sanctioned in the stricto sensu priority policy (Part IV.B.1), the application of the pilot procedure (Part IV.B.2), or the so-called leading decisions (Part IV.B.3). While grouping of concurrent applications is an existing practice of other international tribunals, the prioritization of cases is a speciality of the ECtHR that the exceptionally high number of applicants has made necessary.

1. Priority Policy

Most human rights treaty bodies having judicial or quasi-judicial functions decide on individual applications in the order in which they have been received by the control body’s secretary. However, the

249. Id.
251. See, e.g., ICJ Rules art. 47, supra note 216 (providing for the joinder of cases).
252. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Rules of Procedure, Rule 111(3), UN Doc. CAT/C/3/Rev.6 (Sept. 1, 2014) (“[U]nless they decide otherwise.”); Comm. on
chronological treatment of applications in the order of their submission date is problematic for a court with 50-60,000 applications per year, because it does not allow for the prioritization of the most important or urgent cases where judicial delay would cause significant harm. Thus, to enhance the effectiveness of the Convention, the ECtHR defined a priority policy in its Rules of the Court. Under those rules, when determining the order in which cases are to be dealt with, “the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it.” To take into account the importance and urgency of the issues raised in the cases filed with the Court, the Court has fixed certain criteria which enable it to give some cases priority over others. Among the seven main categories of cases, the first two categories are:

I. Urgent applications (in particular risks to the life or health of the applicant, the applicant being deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights, or other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue (application of Rule 39 of the Rules of the Court)).

II. Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system).254

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253. ECtHR Rules supra note 90, at Rule 41.
The second category is especially likely to cover applications coming from separatist areas, representing a conflict situation having an impact on the effectiveness of the Convention system, serious structural problems such as the systematic violations of human rights or the lack of effective domestic remedies, an important question of general interest for an inter-state case. Therefore, concurrent applications from those areas should be prioritized and treated in a timely manner. The ECtHR seems to prioritize the cases submitted from separatist areas such as Transnistria, Nagorno-Karabakh, Crimea, or the eastern separatist regions of Ukraine. For example, the Court decided two applications from Eastern Ukraine within two years,255 NGOs representing Transnistrian victims reported that none of their applications had been found inadmissible,256 and many of the highly politicized cases were referred before the Grand Chamber. This was the case for the Loizidiou,257 Cyprus v. Turkey (IV),258 Demopoulos,259 Varnava,260 Iliașcu,261 Catan,262 Chiragov,263 Sargsyan,264 Mozer v. the Republic of Moldova and Russia265 and the pending Georgia v. Russia (II)266 cases; all of which were referred before the Grand Chamber. Moreover, the Grand Chamber held two

256. Interview with Ian Manole, NGO Promo-Lex (Sept. 6, 2012) (discussing Chisinau) (on file with the author).
hearings—one on the admissibility and another on the merits—in such politicized cases: the *Catan*, *Chiragov*, and *Sargsyan* cases all had two hearings—a unique case law in the history of the Court.267

However, the practice of the Court is not entirely consistent with respect to the use of its priority policy. For instance, the ECtHR communicated to respondent governments some cases complaining of the Transnistrian *de facto* authorities’ detention practice after a decade had passed,268 while the applicants remained deprived of liberty during the two years after the filing of their application, thus falling under category I of the priority cases.269 Furthermore, even if some South Ossetian cases were prioritized,270 none of the almost 2,000 applications from the Georgian separatist areas and the *Georgia v. Russia* case have been settled for ten years.271 One can speculate about the reasons for the lack of progress in the Georgian cases, as discussed below, but as a matter of principle they should be prioritized over less important cases. Under the maxim “justice delayed is justice denied,” the lack of progress in those concurrent applications weakens the Convention’s effectiveness.

It must be admitted that the prioritization of cases alone is not sufficient to effectively settle several thousand concurrent applications if most of them are of equal priority.272 Hence, further coordination is necessary between the applications: it will be explained that through pilot judgments or leading cases, the Court should identify some model cases that it settles first, while giving lower priority to similar cases and resolving them on the model of the leading decision, unless

271. *But see* Press Release, European Court of Human Rights, Witness Hearing in the Inter-State Case of Georgia v. Russia (II), ECHR 211 (June 17, 2016).
272. *See Madsen, supra* note 51, at 206 (noting that the Court has an estimated backlog of 10,000 priority cases).
they need high priority on account of their individual substance.\textsuperscript{273}

2. Pilot Judgments

The Court may initiate a pilot procedure and adopt a pilot judgment “where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.”\textsuperscript{274} Under a doctrinal definition, the pilot procedure must have three mandatory elements: the EChr must “identify a structural or systemic problem or other dysfunction, point out the type of domestic remedies the respondent is required to develop and indicate such measures in the operative parts of the judgment.”\textsuperscript{275} The instrument is an appropriate means to prioritize a case representing a high number of analogous cases concerning the same region. Cases selected for this procedure “shall be processed as a matter of priority.”\textsuperscript{276} The procedure reflects the principles of subsidiarity and judicial economy, considering that the Court’s supervisory role over the Convention and the Protocols thereto “is not necessarily best achieved by repeating the same findings in a large series of cases.”\textsuperscript{277} Furthermore, once the Court renders a pilot judgment, it falls to the national authorities, under the supervision of the Committee of Ministers, to take the necessary remedial measures so that the Court does not have to repeat its finding in a lengthy series of comparable cases.\textsuperscript{278}

In concurrent cases from separatist areas, the pilot procedure has

\begin{itemize}
\item \textsuperscript{274} ECtHR Rules, \textit{supra} note 90, Rule 61(1).
\item \textsuperscript{276} ECtHR Rules, \textit{supra} note 90, Rule 61(2)(c).
\item \textsuperscript{278} Broniowski v. Poland, 2004-V Eur. Ct. H.R. 1, 76-77.
\end{itemize}
been effectively applied in the *Xenides-Arestis v. Turkey* case, contributing to the radical decrease of the Court’s workload from Northern Cyprus. The case was filed by a Cypriot national of Greek-Cypriot origin who had been prevented from living in her home or using her property in Northern Cyprus since 1974, since the invasion of the region by Turkey—an archetypal case of hundreds of disputes concerning Northern Cyprus. In its judgment on the merits, the Court indicated, under Article 46 of the ECHR, that the respondent State “must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it.” This conclusion has led to the creation of a domestic remedy by the “TRNC,” the so-called Immovable Property Commission. With the decision, the Court took into account the fact that, at that time, approximately 1,400 property cases were pending before it brought primarily by Greek Cypriots against Turkey and sought to “identify general measures the State ought to take in order to comply with its judgment.”

Similarly, after applicants filed more than 3,300 applications with the ECtHR to seek redress against either Georgia or Russia for alleged human rights violations in the context of the armed conflict of August 2008, the Court addressed the question to the applicants whether their application was suitable for the “pilot judgment” procedure. The

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281. Id. ¶ 40.
282. Id. ¶ 38.
major criterion of its instigation is that the application reveals “the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications” in the concerned State party. Consequently, the Court should coordinate its pending cases from separatist areas so that it could identify the existence of a structural or systemic problem or other similar dysfunction in the respondent State. The applicability of the procedure is the most compelling in repetitive cases, but it can also be of use in cases which may serve as a model for similar future applications.

However, the pilot procedure is not the only and most adequate coordinating tool for concurrent applications from separatist areas, as most root causes of the challenged human rights violations either cannot be classified as “a structural or systemic problem or other similar dysfunction” or there is no prospect of their domestic settlement. As for the nature of human rights violations, it is difficult to see how the Court could apply the criteria “structural or systemic problem or other similar dysfunction” for violations in separatist areas, where the main problems arise not from a domestic law problem, but from administrative practice and violence. The only case from a separatist area in which the Court arguably applied the pilot procedure was the Xenides-Arestis v. Turkey case concerning the domestic remedy for the expropriation disputes. Nevertheless, in cases of massive violence such as extrajudicial killing, abductions, enforced disappearance, arbitrary detention, or shelling of houses, the Court might be tempted to identify the core “structural or systemic” root causes of the human rights violations at the national level and apply the pilot procedure. While very case sensitive, it is perhaps not impossible that the Court could choose this approach to settle numerous concurrent applications from separatist areas.

As for the prospect of the domestic settlement of those human rights violations, especially in ongoing international or non-international

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285. ECTHR Rules, supra note 90, Rule 61(1).
287. ECTHR Rules, supra note 90, Rule 61(1).
288. Id.
armed conflicts, where high State interests are at stake (the precondition of the success of the pilot judgment), the respondent State’s willingness to cooperate is unlikely.\textsuperscript{290} While the Court held that the use of the pilot judgment procedure is not conditional on a Government’s compliance with the previous judgments,\textsuperscript{291} its efficacy requires the respondent State and the Committee of Ministers in its supervisory function to duly execute the judgment.\textsuperscript{292} Where the State is unwilling or unable to fully implement the pilot judgment, all other related and suspended applications will be “frozen.”\textsuperscript{293} Pilot judgments might redress repetitive cases arising from a systemic problem in domestic law or practice and order the implementation through the establishment of a given effective and available remedy, but they seem inadequate to address gross and large-scale violations in separatist areas where legislative solutions in themselves might not provide adequate answers.\textsuperscript{294} Nevertheless, legislative solutions are not the only general measures pilot judgments can lead to. While there is usually a regulatory basis that the respondent State shall adopt, the Court can order, for example, the establishment of effective civilian control over state security forces or human rights and international humanitarian law training programs for law enforcement officials, military, and security forces.\textsuperscript{295}


\textsuperscript{291} Demopoulos, 2010-I Eur. Ct. H.R. at 400-01.


\textsuperscript{293} Id.

\textsuperscript{294} See generally Kurban, supra note 275, at 767 (discussing the pilot judgment mechanism and empirical research demonstrating the ineffectiveness of the pilot judgment when applied to cases where ethno-political disputes are the underlying issues).

\textsuperscript{295} See Montero-Aranguren v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. ¶¶ 148, 11 (July 5, 2006) (“The State must adequately educate and train the members of armed forces to effectively secure the right to life and avoid a disproportionate use of force. Furthermore, the State must develop and implement a training program on human rights and international standards regarding individuals held in custody aimed at police and prison agents, as set forth in paragraphs 147 to 149 herein.”); Blanco-Romero v. Venezuela, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. ¶¶ 106, 11 (Nov. 28, 2005) (“The State is to include, as part of the education and training
3. Leading Decisions

Some CoE documents vaguely mention “judgments of principle” while referring to the interpretative authority (res interpretata) of certain individual judgments of the ECtHR within the legal orders of States other than the respondent State in a given case, without defining the scope of those “judgments of principles.”296 The Evaluation Group to the Committee of Ministers on the European Court of Human Rights spoke about “constitutional judgments” of the ECtHR, defining them as “fully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law.”297 Some authors speak about “judgment of principle” when they refer to a decision of the ECtHR that “may well settle the issue for many other persons in a similar situation.”298 A more precise scholarly definition of the notion “judgment of principle” or “leading decision” is a judgment in which “the Court decides a Convention question on a level of generality that makes it possible to apply the decision to

courses for the officers of the Armed Forces and the Office of the Sector Director General of the Intelligence and Preventive Services Bureau, a program regarding the principles and rules of human rights protection, particularly the prohibition against forced disappearance, torture and disproportionate use of force, taking into consideration the case-law of the Inter-American System for the Protection of Human Rights, as a mechanism to prevent the recurrence of events such as the ones in the instant case, as per paragraphs 106 and 116 of the instant Judgment.”); Caracazo v. Venezuela, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. ¶ 127, 4(a) (Aug. 29, 2002) (“[T]hat the State must take all necessary steps to avoid recurrence of the circumstances and facts of the instant case, in accordance with paragraph 127 of the instant Judgment, pursuant to which it will . . . take all necessary steps to educate and train all members of its armed forces and its security agencies regarding principles and provisions on protection of human rights and the limits to which the use of weapons by law enforcement officials is subject, even under a state of emergency.”); G.A. Res. 60/147, ¶ 23 (Mar. 21, 2006).

298. Anne Peters, Discussion Following the Presentation by Lucius Wildhaber, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS 77, 78 (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009); Paul Mahoney, Discussion Following the Presentation by Lucius Wildhaber, in THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS 77, 86-87 (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009).
comparable pending applications.”299 Recently, the Court expressly identified certain “leading cases,” understood as individual applications for which settlement serves as a model for hundreds of similar follow-up cases.300 After a “leading case” decides a generalized problem, the Court will refer to this earlier case law as authoritative precedent while deciding later cases of similar legal and factual background. It serves the Court’s effectiveness because after a leading case, the Court does not have to deal any longer with the same question of admissibility or merits in similar cases but can summarily decide on it. The Court is likely to choose mainly priority cases to be treated as judgments of principle.301

From separatist areas, individual decisions decided both admissibility and merits questions that have served as points of reference for subsequent decisions in similar cases. Several admissibility questions of major importance were decided in such leading decisions and systematically applied in subsequent cases as to the admissibility. From the early Northern Cyprus case law, the Court decided on the difficult question of the respondent State’s jurisdiction with regard to facts that occurred outside its territory, within a region of another (territorial) State in an individual application, the Loizidou v. Turkey case, whereas in subsequent cases the Court reiterated the same principles adopted in Loizidou.302 In the concrete case, the applicant had no access to her property situated in Northern Cyprus and claimed for remedies; however, Turkey, the respondent State, argued that the question of access to property in Northern Cyprus was

outside the realm of its “jurisdiction” and only the “TRNC,” recognized as a State only by Turkey, had jurisdiction over life and property in the region.\textsuperscript{303} The Court refused Turkey’s arguments about the restriction of the notion of “jurisdiction” under Article 1 of the Convention to the national territory and held:

the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.\textsuperscript{304}

In the Loizidou case, for the first time in an admissibility decision, the Court generally recognized that “effective control” over a subordinated \textit{de facto} administration might entail “jurisdiction” \textit{ratione loci} under Article 1 of the ECHR over individuals in the entire separatist area.\textsuperscript{305} The same conclusion, that the Grand Chamber later called “a broad statement of principle,” served as a basis for deciding about Turkey’s general responsibility under the Convention for the policies and actions of the ‘TRNC’ authorities in the inter-state \textit{Cyprus v. Turkey (IV) case}\textsuperscript{306} and in all subsequent cases where Turkey raised the same preliminary objection \textit{ratione loci} or \textit{ratione personae}.\textsuperscript{307}

A second admissibility question of major importance in separatist conflicts is the admissibility \textit{ratione temporis} in enforced disappearance cases. In the Varnava case, Turkey argued that even in a continuing situation of disappearance, the six months rule applies under Article 35(1) of the Convention.\textsuperscript{308} It added that in the concrete

\textsuperscript{303} \textit{Id. ¶ 56.}
\textsuperscript{304} \textit{Id. ¶ 62.}
\textsuperscript{305} \textit{Id. ¶¶ 62-63.}
\textsuperscript{308} \textit{Varnava, 2009-V Eur. Ct. H.R. at 64-65.}
case, the applicants had waited too long, for more than four years, before bringing their cases before either the authorities and before the ECtHR.\textsuperscript{309} The Court had to rule on this issue for the first time: it held that in cases of disappearances, it is indispensable that the relatives of missing persons do not unduly delay bringing a complaint about the ineffectiveness or lack of such investigation before the Court.\textsuperscript{310} The Court concluded that an application could be rejected as out of time “in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future.”\textsuperscript{311} Based on this principle, the Court rejected several subsequent applications in disappearance cases as out of time claims.\textsuperscript{312}

A third example for leading cases at the admissibility stage is the Court’s decision to qualify a national mechanism as effective domestic remedy that has to be exhausted. For instance, the Grand Chamber held in its admissibility decision \textit{Demopoulos v. Turkey}, concerning deprivation of access to property, that Northern Cyprus had an effective domestic remedy which the applicants failed to exhaust.\textsuperscript{313} As a consequence of the decision, the Court declared inadmissible all similar applications.\textsuperscript{314} The Steering Committee for Human Rights of Council of Europe welcomed this leading decision as “[one] particular variant of the pilot judgment procedure,” capable of responding to concurrent applications.\textsuperscript{315} As a result of the \textit{Demopoulos} decision,

\textsuperscript{309} \textit{Id.}
\textsuperscript{315} \textit{CDDH Report on a Representative Application Procedure, supra} note 273, ¶ 9.
while the number of pending applications radically decreased by 1,400 cases before the ECTHR, the same litigants directed their claims to the domestic “IPC” established in the “TRNC” (Table 1). While the decision has been strongly contested as to the effectiveness of the local remedies, the procedural technique intended to ensure to all applicants individual justice and undoubtedly decreased the Court’s backlog.

**Table 1**

<table>
<thead>
<tr>
<th>Year of application</th>
<th>Number of pending applications concerning property in northern Cyprus</th>
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<tbody>
<tr>
<td>2010</td>
<td>6000</td>
</tr>
<tr>
<td>2011</td>
<td>5000</td>
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<tr>
<td>2012</td>
<td>4000</td>
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<td>2013</td>
<td>3000</td>
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<td>2014</td>
<td>2000</td>
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<tr>
<td>2015</td>
<td>1000</td>
</tr>
<tr>
<td>2016</td>
<td>0</td>
</tr>
</tbody>
</table>

A fourth example of leading cases concerns documentary evidence from a separatist region under ongoing armed conflict. In *Lisnyy v. Ukraine and Russia*, the applicants complained that the shelling of the villages in Eastern Ukraine where they lived “had hindered the peaceful enjoyment of their property and dwelling places.” In its inadmissibility decision, the Court clarified the rules for the production of *prima facie* evidence to substantiate their allegations which could serve as a model for future applications from ongoing

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armed conflicts.\textsuperscript{319}

The admissibility questions decided in leading cases facilitate the prompt settlement of numerous further applications from the same region. If one examines the number of decided cases concerning Northern Cyprus from the Loizidou admissibility decision of 1995 until the end of 2017 (Table 2), one finds that leading cases like Loizidiou, Cyprus v. Turkey (IV) and Demopoulos, contributed largely to the settlement of other similar applications within a short period of time. After the first judgment concerning the region in the Loizidiou case at the end of 1996, the Court rendered forty-one admissibility decisions between 1998 and 2002, citing Loizidou as a leading case for the admissibility ratione loci. A high number of similar applications concerning expropriation of property and denial of displaced persons’ right to return to their homes were settled on the merits in 2009 (thirty-seven judgments) on the model of the Loizidiou and Cyprus v. Turkey (IV) judgments, while the amount of the just satisfaction was settled in separate judgments in 2010 (thirty-three judgments). The effect of the Demopoulos case is also manifest in the increase of the number of inadmissibility decisions: in the same year, in 2010, seven inadmissibility decisions involving forty-eight applications relied on the Demopoulos case. In 2011, the Court considered 875 applicants as no longer wishing to pursue their applications in light of the Demopoulos case.\textsuperscript{320}

\textsuperscript{319} Id. ¶¶ 26-27; see also Apostol, supra note 134, ¶¶ 67-68. 
The number of decisions concerning Transnistria (Table 3) since the first admissibility decision in the Ilașcu case (2001) shows, to a lower extent, the facilitating role of leading cases. After the leading decisions Ilașcu, Catan, and Mozer, all rendered by the Grand Chamber, the capacity of the Chambers to effectively settle applications from the same region has largely strengthened, with seven cases decided in the merits in 2017. To a lesser extent, the first two admissibility and then merits decisions on Nagorno-Karabakh (Table 3), the Sargsyan/Chiragov judgments, seem to simplify the proceedings of later cases from Nagorno-Karabakh: they were largely cited in a Chamber judgment in another case in 2016\(^{321}\) and in the just satisfaction judgments in the Sargsyan/Chiragov cases in 2017.\(^ {322}\)


Table 3

Leading cases decided on the merits could be the solution for the effective settlement of concurrent applications by individuals and a State concerning the same subject matter or region. Ideally, the government should withdraw an inter-state application protecting a concrete individual citizen if the individual’s application concerning the same subject matter awaits a Court decision. This scenario occurred with the third *Ukraine v. Russia (III)* case, concerning the deprivation of liberty and treatment of a Ukrainian national belonging to the Crimean Tatars ethnic group, “in the context of criminal proceedings that the Russian authorities have conducted against him.” However, once an inter-state application is maintained and covers a wide range of human rights violations that individual applications also address, judicial economy and effectiveness of the Convention require that the Court settles the inter-state case as a

judgment of principle, before resolving the individual cases raising similar points. 325 This was the case with the Cyprus v. Turkey (IV) interstate case, which covered a wide range of legal questions not yet resolved in the previous Northern Cyprus cases, such as the Loizidou case. The Court established several conclusions of major importance in the Cyprus v. Turkey (IV) judgment: “remedies available in the ‘TRNC’ may be regarded as ‘domestic remedies’”; 326 the displaced persons’ lack of access to their property and homes is regarded as continuing violations of Article 1 of Protocol No. 1 and of Article 8, respectively. 327

In other words, where a State party files an application on behalf of its citizens from the same region, the inter-state judgment is likely to answer to numerous general questions raised also by the individual applications. This is the case of South Ossetia, Abkhazia, Crimea, and Eastern Ukraine, where thousands of individual applications are cumulated with inter-state applications. In the Georgia v. Russia case, Georgia alleges that the Russian Federation had allowed or caused an administrative practice to develop in violation of Articles 2, 3, 5, 8, and 13 of the Convention, Articles 1 and 2 of Protocol No. 1, and Article 2 of Protocol No. 4, through indiscriminate and disproportionate attacks against civilians and their property in Abkhazia and South Ossetia by the Russian army and/or the separatist forces placed under their control. 328 The subsequently lodged Ukraine v. Russia applications raise similar legal and factual complexities. 329 Those cases are likely to lead to principled conclusions, for example, the alleged violation of the right to free elections under Article 3 of Protocol No. 1 in separatist areas de facto controlled by Russia 330 or Russia’s alleged jurisdiction on account of its “effective control over

325. Copenhagen Declaration, supra note 41, ¶ 45.
329. See ECtHR Press Release, Case Concerning Events in Crimea and Eastern Ukraine, supra note 20.
330. Id.
Crimea and—by controlling separatists and armed groups there—*de facto* control over the regions of Donetsk and Luhansk.*331* However, an interstate case might not be the only case to pronounce a judgment of principle: for example, the *Cyprus v. Turkey (IV)* judgment largely relied on the previous *Loizidou* case, decided by the Grand Chamber in an individual application.*332* In other regions where no inter-state application was submitted like Transnistria or Nagorno-Karabakh, individual cases gave rise to judgments of principle. The *Ilașcu, Chiragov, and Sargsyan* judgments concerned Transnistria and Nagorno-Karabakh, respectively, where no inter-state complaint has been lodged. In all these leading decisions, the Grand Chamber has answered fundamental admissibility questions such as jurisdiction *ratione loci, ratione personae*, victim status, or the availability and effectiveness of domestic remedies in the given separatist area. The fact that in those cases the designated Chambers relinquished jurisdiction in favor of the Grand Chamber, indicated a serious question affecting the interpretation of the Convention or the importance to ensure the consistency with previous case law,*333* and thus, paved the way to a leading decision.

The above-mentioned procedural techniques all serve to coordinate the settlement of cases filed by a mass of applicants from areas outside of the territorial State’s effective control. The choice and combination of the given procedural techniques depend on the factual and legal background of the pending applications. Beyond the pending interstate applications that should lead, on account of their factual complexities and the high number of individual concerned, to leading cases, the pilot procedure and the joined or simultaneous examination of cases might equally rationalize the settlement of the claims of concurrent applicants. Their application is not exclusive, but the Court should combine them as far as possible. For example, the *Lisnyy* case joined three applications, the Court seems to have prioritized its settlement*334* and the decision on admissibility can be regarded as a

331. *Id.*
334. Lisnyy v. Ukraine, App. Nos. 5355/15 et al., Eur. Ct. H.R. ¶ 22 (2016), http://hudoc.echr.coe.int/eng?i=001-165566 (observing that while the applications were lodged between December 2014 and September 2015, the Court gave its
leading case.

V. CONCURRENT RESPONDENT STATES

The litigation of a single claim against multiple respondent States in one procedure is not uncommon in the practice of international tribunals. Good administration of justice and judicial economy might justify the adjudication on the responsibility of multiple States in a single judgment.

Separatist areas present a particular case for attributing wrongful acts to multiple respondent States: instead of a vacuum of authorities, in fact many subjects of international law operate in the given region. The relevant actors might be the territorial State or the subject controlling the area, such as an occupying power or several occupying powers, an outside State controlling a leased territory, an outside State controlling or supporting in various means non-state de facto authorities, an international organization, or various States administering the territory. However, applicants can address their complaints to the ECHR only against human rights violations “by one of the High Contracting Parties” to the Convention. This means that applicants can address their claims against more than one respondent

inadmissibility decision in less than one year on July 28, 2016).

335. See e.g., Panel Report, European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft, WTO Doc. WT/DS316/AB/R (adopted May 18, 2011) (relating to a large-scale case involving multiple members of the European Community and other member states of the WTO); Panel Report, European Communities and its Member States - Tariff Treatment of Certain Information Technology Products, WTO Doc. WT/DS375/R (adopted Aug. 16, 2010) (showing that the WTO responded to three different disputes by including the reports from the three different complainants, U.S., Japan, and China, into one large Panel Report); Monetary Gold Removed from Rome in 1943 (It. v. Fra., Gr. Brit. & N. Ir., & U.S.), Preliminary Question, 1954 I.C.J. Rep. 4, 19, 21 (noting that both Italy and Albania had made applications to the ICJ regarding the same issue of Albania’s claim over the gold and who has priority to receive it in the end).

336. Paparinskis, supra note 243, at 304.


State and if each of those States have jurisdiction under Article 1 of the ECHR over the challenged conduct, the ECtHR will pronounce on their “concurrent jurisdiction.”339 In this case, the Court will determine the responsibility of each of the respondent States and might engage their concurrent (dual or multiple) responsibility.340 Where more than one State contributes to a single human rights violation, the so-called concurrent responsibility arises between independent wrongdoers.341 The Court recognized the jurisdiction, a threshold criterion of the applicability of Article 1 of the ECHR, of concurrent States parties, and their concurrent responsibility in various cases in separatist areas. Concurrent respondent States such as the territorial State, the outside State exercising effective control over the de facto authorities, or even another third State, can be designated either by the applicant (Part V.A) or exceptionally the ECtHR proprio motu (Part V.B). As this Part will explain, coordination is made at the time of the identification of the respondent States: the application can only be made after a pre-determination of the allocation of concurrent jurisdictions, duties and State responsibility among the concerned States parties.

A. COORDINATION BY THE APPLICANT

Concurrent respondent States are normally designated by the applicant who shall evaluate, before filing the application, which States can be responsible for the alleged human rights violations. The first application against multiple respondent States submitted from a separatist area was the Ilășcu v. Moldova and Russia case, concerning alleged human rights violations of four Moldovan nationals while detained in the separatist Transnistrian part of Moldova by de facto


341. See Maarten den Heijer, Shared Responsibility Before the European Court of Human Rights, 60 NETH. INT’L L. REV. 411, 414-416 (2013); see also Besson, supra note 337, at 14-16 (acknowledging that concurrent responsibilities that arise from the same wrongful act are called ‘shared responsibilities,’ or stricto sensu, but that the latter term is used to refer to different types of concurrent responsibilities independently of the same wrongful act).
The applicants argued that “the Moldovan authorities were responsible under the Convention for the alleged infringements of their human rights enshrined in the ECHR, since they had not taken any appropriate steps to put an end to them.” Furthermore, they alleged that the Russian Federation shared responsibility since the territory of Transnistria was under *de facto* Russian control, on account of the Russian troops and military equipment stationed there, and the support allegedly given to the separatist regime by Russia. The applicants also claimed that Moldova and Russia had obstructed the exercise of their right of individual application to the Court (Article 34 of the ECHR). The Court accepted the applicants’ argumentation and held both States individually responsible for their own conduct. Moldova was held responsible for its own failure to discharge its positive obligations under Articles 3 and 5 of the ECHR vis-à-vis individuals within its territory, notwithstanding its lack of effective control over the separatist region, as far as it had the means to take appropriate steps. The Russian Federation was held responsible for the same violations of the applicants’ human rights on account of the effective authority or decisive influence it exerted over the separatist regime. Furthermore, both respondent States incurred responsibility for the breach of Article 34 of the Convention. Because the applicants could effectively establish that both States had jurisdiction over the situation – Moldova on account of its sovereignty over the region out of its effective control, and Russia on the basis of its *de facto* control over the subordinated administration – the respondent States had concurrent obligations under the Convention and the violations led to their independent responsibility. The attribution of conduct of non-state actors to an outside State and the residual positive obligations of the territorial State goes hand in hand with concurrent

343. *Id.* at 192.
344. *Id.*
345. *Id.*
346. *Id.* at 293-96.
347. *Id.* at 290-93.
348. *Id.* at 298-99.
349. See den Heijer, *supra* note 341, at 416 (raising issues about the allocation of damages based on a single harmful outcome that has established independent violations).
jurisdictions and duties, and might be applicable to any comparable situations where the territorial State has lost effective control over a part of its territory and another outside State exercises various forms (military, economic, political etc.) of control over the local authorities.

Since the Ilașcu judgment until the end of 2017, twelve other cases submitted from Transnistria both against Moldova and the Russian Federation have been decided on the merits by the ECtHR. In all but one subsequent cases, only Russia incurred responsibility for the human rights violations directly caused by the Transnistrian de facto authorities, based on its effective control or decisive influence over the subordinated administration. Moldovan authorities, however, have progressed in providing positive measures towards individuals in the separatist region, and the Court found in most cases that Moldova fulfilled its positive obligations. This means that the division of concurrent jurisdictions established in the Ilașcu case not only has been adopted by subsequent applicants as a litigation strategy, but has led to better compliance by the Moldovan authorities with the ECHR. Furthermore, applicants from other separatist regions have started to rely on this litigation strategy and to file their case against both the territorial State and the outside State controlling the de facto


351. See Braga, App. No. 76957/01, Eur. Ct. H.R. ¶¶ 46, 60, 68 (identifying this as the exception case where Moldova was found responsible for the violation of Articles 3, 5, and 34).
administration.\textsuperscript{352}

Arguably, any civil or criminal proceedings conducted in an area out of the territorial State’s effective control might give rise to the concurrent jurisdictions of the territorial State and the State controlling the subordinated administration. This was the case in the recently decided \textit{Güzelyurtlu v. Cyprus and Turkey} judgment,\textsuperscript{353} concerning the simultaneous criminal proceedings of the Republic of Cyprus and the \textit{de facto} “TRNC” against eight persons accused of the abduction of three Cypriot nationals of Turkish-Cypriot origin from Northern Cyprus and their killing in the Cypriot Government-controlled area. The Court found that the suspected perpetrators of the murder of the applicants’ relatives were within Turkey’s jurisdiction, either in the “TRNC” or in mainland Turkey,\textsuperscript{354} whereas the applicants’ relatives’ deaths had taken place in the territory controlled by the Republic of Cyprus and under that State’s jurisdiction; therefore, a procedural obligation arose in respect of Cyprus.\textsuperscript{355} Consequently, as both States have jurisdiction, they had procedural obligations under the right to life (Article 2), especially the duty to cooperate with inquiries or hearings conducted within the jurisdiction of another Contracting State concerning the use of unlawful force resulting in death.\textsuperscript{356} The novelty of the \textit{Güzelyurtlu} was the State party’s obligation to cooperate, even with \textit{de facto} authorities. This means that in cases involving concurrent jurisdictions with an alleged violation of the right to life (Article 2) or the right to physical integrity (prohibition of torture under Article 3, prohibition of slavery and forced labour under Article 4), the concerned States parties have a duty to cooperate in the prevention, and the investigation, of the human rights violations. With this conclusion, the Court went well beyond the independent


\textsuperscript{353} See generally Güzelyurtlu, App. No. 36925/07, Eur. Ct. H.R.

\textsuperscript{354} Id. ¶ 187.

\textsuperscript{355} Id. ¶ 262.

\textsuperscript{356} Id. ¶ 284; see also Rantsev v. Cyprus, 2010-I Eur. Ct. H.R. 65, 120, 126-27 (“Member States are also subject to a duty in crossborder trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.”).
examination of the respondent States’ jurisdiction and responsibility and established a coordination of the States’ positive obligations.

Furthermore, concurrent jurisdictions might be multiplied if the applicant is not a national of the territorial State or the outside State controlling the subordinated de facto administration, but of a third State. Some applications from Transnistria have extended the scope of respondent State beyond Moldova and Russia, and complained that the applicant’s State of nationality breached also the Convention by not complying with its positive obligations towards its national.357 However, the Court’s precedents do not confirm such a third State jurisdiction based only on the victim’s nationality. Whereas citizens of the State might be under the authority of consular and diplomatic agents and might ask for consular or diplomatic protection against alleged human rights violations abroad, this hypothesis does not lead to due diligence obligations because the ECtHR does not recognize a human right to diplomatic protection.358 In a case where the applicant similarly relied on the Ilașcu judgment about the State’s positive obligations under Article 1 of the ECHR, including, inter alia, to take diplomatic measures, the Court held that there was a fundamental difference between the Ilașcu judgment and other claims related to diplomatic protection.359 Contrary to human rights violations occurring abroad, in the Ilașcu case, the Court asserted the territorial State’s jurisdiction over individuals in a part of its territory, out of its effective control, because the State “does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.”360 In another more recent Transnistrian case, the applicants tried to establish the jurisdiction of the victim’s State of nationality (Ukraine), beyond that of the territorial State (Moldova), and the outside State controlling the

360. Id.
territory (Russia), arguably based on the Ilășcu case about Moldova’s positive obligations towards individuals in its territory outside its effective control.\textsuperscript{361} However, the Court held that the applicants did not adduce any evidence in support of the allegation that Ukraine had jurisdiction in the case, so it rejected this complaint with respect to the State of nationality.\textsuperscript{362} Therefore, the difference lies in the territorial State’s sovereignty over the given area; whereas other third States without sovereignty over the area, effective control, or decisive influence over the subordinated \textit{de facto} authorities, do not seem to have jurisdiction, unless the applicant can prove some more direct causality with the human rights violation. Such a direct causality can be, for example, a continuous cross-border act constituting a human rights violation such as human trafficking,\textsuperscript{363} asylum transfer,\textsuperscript{364} custody procedures to restore the bond between a parent and a child being in another country,\textsuperscript{365} abduction or deportation of persons or any incident of unlawful violence leading to loss of life.\textsuperscript{366} Such cross-border cases might involve the jurisdiction of a State party if its domestic conduct produces extraterritorial effects. Under a progressive interpretation of jurisdiction, the State’s jurisdiction might be instigated on account of its omission to take due diligence measures to prevent and mitigate foreseeable violations.\textsuperscript{367}

\footnotesize

\begin{itemize}
\item 362. \textit{Id.}
\item 363. \textit{See} Rantsev v. Cyprus, 2010-I Eur. Ct. H.R. ¶ 207 (finding that “[i]n light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking,” Russia had jurisdiction over the death of the victim, even though it occurred abroad).
\item 364. \textit{See} M.S.S. v. Belgium, 2011-I Eur. Ct. H.R. 255, 336-343 (2011) (asserting that a state deciding on the transfer of an asylum seeker incurs responsibility, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country).
\item 365. \textit{See} Monory v. Hungary, App. No. 71099/01, Eur. Ct. H.R. ¶¶ 89-92 (2005), http://hudoc.echr.coe.int/eng/?i=001-68713 (considering that the overall length of the custody procedures initiated in a country other than the State of residence of the child was excessive and failed to meet the “reasonable time” requirement).
\item 367. \textit{See} Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 101-02 (Nov. 15, 2017) (listing the States’ obligations and responsibilities that are necessary to avoid future violations,
\end{itemize}
The court rejected some later applications directed against multiple respondent States other than the State of nationality, either because the conduct was attributable not to the respondent States, but to an international organization administering the territory,368 or because the applicant failed to challenge a particular action or inaction by those States or to substantiate any breach by the respondent State of its positive duty to take all the appropriate measures with regard to the applicant’s rights.369 For instance, some applicants allegedly used the jurisdictional link based on causality to complain that one of the guarantor States of the Budapest Memorandum on Security Assurances370 (providing security assurances relating to Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons), namely the United Kingdom, was responsible for its omission to prevent human rights violations by Russia in Ukrainian territory.371 In some Northern Cyprus disappearance cases, the application was directed not only against the territorial State, Cyprus, but also against Greece, claiming that in the incidents of 1963-1964 in Northern Cyprus, Greek soldiers or militia were acting under the orders of the Republic of Greece alongside the Cypriot forces and consequently, the case instigated also the jurisdiction of Greece.372 The Court held that

specifically discussing environmental damages); Vassilis P. Tzevelekos and Elena Katselli Proukaki, Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?, 86 NORDIC J. INT’L L. 427, 445-47 (2017) (summarizing that while States’ have the discretion in determining the method they take to offer protection, they still must do the best they can in offering protection).


371. EUR. PARL. ASS., Comm. on Legal Aff. & Hum. Rts., Legal Remedies for Human Rights Violations on the Ukrainian Territories Outside the Control of the Ukrainian Authorities, Doc. 14139, ¶ 57 (2016) (discussing the potential difficulty in establishing “that the United Kingdom not only had a legal duty to intervene against Russia [. . . ] but also somehow exercised ‘effective control’ over the conflict zone by merely failing to intervene in the conflict” under the Budapest Memorandum).

it lacked temporal jurisdiction over those acts, because Greece ratified the ECHR only on November 20, 1985.\footnote{373} All these instances show that the creative designation of concurrent respondents States if concomitant with a proper jurisdictional basis for each co-respondent is likely to enhance the applicant’s chances of obtaining remedy at the ECtHR. Various past cases submitted against a single respondent State could have been directed against other co-respondents too.\footnote{374}

Once the applicant directs the application against multiple respondent States, the Court’s final judgment on concurrent State responsibility of independent wrongdoers will influence the subsequent applicants’ litigation strategy. After the Ilaşcu, Catan, Mozer, and recently the Güzelyurtlu judgments, individuals are encouraged to direct their applications against both the territorial State and the State controlling the separatist area, or even a third State on the basis of a properly identified jurisdictional link. Those concurrent respondent States are likely to have concurrent jurisdiction, concurrent positive obligations, and therefore arguably concurrent State responsibility.\footnote{375} The Court’s engagement not to leave any area of the European “legal space” in a vacuum, without the applicability of the Convention,\footnote{376} also confirms this likely scenario.

\begin{center}
\textbf{B. COORDINATION BY THE ECtHR PROPRIO MOTU}
\end{center}

All the above-mentioned precedents show that it is the applicant rather than the Court who decides on the concurrent respondent States. Where the applicant failed to do so and designated only one respondent State, the Court did not consider it entitled to direct \textit{ex officio} the application against another State party involved in the

\footnote{374} See, \textit{e.g.}, Ravlo v. Moldova, App. No. 31747/03, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-148043 (nothing the facts clearly revealed human rights violations by the \textit{de facto} “MRT” authorities whose conduct was attributed to Russia in later cases).
\footnote{375} Besson, \textit{supra} note 337, at 2.
\footnote{376} Sargsyan v. Azerbaijan, App. No. 40167/06, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-155662 (Yudkivska, G., concurring) (“It is a long-standing approach both by the Court and by the Council of Europe that no \textit{de facto} black holes are allowed to exist in Europe.”).
situation. This shows that in the past, procedural economy prevailed, and the Court examined only the claims against the respondent State that the applicant designated. However, the effectiveness of the Convention, and the intention to eliminate a vacuum of responsibility, might justify the re-direction of the application against a co-respondent State not designated by the applicant. Such a judicial activism has already appeared in the case law: in the recent Transnistrian case Kireev, filed by the applicant against Russia, the Court decided that “the application also needs to be examined in respect of Moldova.” However, the re-direction of an application against a new co-respondent State by the Court is problematic for two reasons. First, it can run against the procedural autonomy of the applicant under which principle the individual has the choice against which Contracting Party he or she wishes to introduce an application. One can foresee situations where the applicant voluntarily did not designate a State party as co-respondent, for example, out of fear of retaliation or because he or she is public servant of the same State. This is the reason why the draft agreement on the

377. See Jaloud v. Netherlands, 2014-VI Eur. Ct. H.R. 229, 302 (focusing on the jurisdiction of the Netherlands in this case, and not of the United Kingdom); see also Khlebnik v. Ukraine, App. No. 2945/16, Eur. Ct. H.R. ¶ 16 (2017) (directing the scope of the Court’s examination to Ukraine and not the concurrent international mechanisms of Ukraine and another High Contracting Party); Sargsyan, App. No. 40167/06, Eur. Ct. H.R. (Yudkivska, G., concurring) (stressing that “the Court is obviously unable to examine proprio motu the issue of responsibility of a State which was not party to the case at hand”).


accession of the European Union (EU) to the ECHR, which empowered the Court to designate and hold responsible the EU or a State Party as co-respondent, provided that before such a decision the Court shall seek the views of the applicant.382 Thus, the Court shall designate *ex officio* a new co-respondent State, only after duly taking into account the interests of the applicant. Where the applicant did not consider or simply forgot the possibility of directing the application against the co-respondent State, the judicial activism to do so might most often serve his or her interest.

Second, as commentators observed regarding the proposal to grant the Court power to designate *proprio motu* the EU or a Contracting Party as co-respondent, such a re-direction of the application would often involve a pre-judgment as to the responsibility for a violation,383 and could render inoperative certain admissibility criteria in respect of the new co-respondent (for example, the 6 months rule).384 In the recent Transnistrian *Kireev* case, the Court did not need to decide whether the exhaustion rule was satisfied with regard to Moldova, but did not exclude that the rule applied.385 Examining the exhaustion rule with regard to an *ex officio* designated co-respondent State seems like a reasonable guarantee against improper judicial activism, while the criticism on the predetermination of the responsibility for the alleged violation is a necessary condition rather than a consequence of this judicial technique. In fact, coordination between concurrent respondent States requires that the Court, especially its Registry, assesses the likely outcome of the Court’s procedure on the merits. Only with the possible outcome in mind, can the Court decide on the *proprio motu* designation of a concurrent respondent State.

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384. *CDDH Study of Technical and Legal Issues, supra* note 382, ¶¶ 59, 61; see *Final Report for the CDDH – Fifth Negotiation Meeting, supra* note 378, app. 1 art. 3.1 (stating “[t]he admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings”).
Another closely related coordinating function of the Court is the invitation of third party interventions. The Convention empowers the President of the Court, “in the interest of the proper administration of justice,” to “invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”386 The third party intervention serves to allow the third party intervenor to defend its interests, or one of its nationals, and to help the Court in establishing the facts.387 Third party interventions by the State of nationality of the applicants are especially common in individual applications from separatist areas, also called “quasi interstate applications,”388 due to the underlying inter-state territorial conflict between the respondent State and the third party intervenor. Third party intervention was allowed, for example, in the Chiragov v. Armenia and Sargsyan v. Azerbaijan cases wherein each case, the other State made use of its right to intervene under Article 36(1) of the Convention.389 Similarly, in various Northern Cyprus cases, the Cypriot Government participated in the proceedings against Turkey as third party intervenor,390 while the Turkish Government did the same when Turkish-Cypriot applicants complained about their right to property in the government controlled area or the investigation by Cypriot authorities into the disappearance of their relative and/or the discovery of the remains.391 The evidence and arguments that the intervening

387. den Heijer, supra note 341, at 415-16.
governments provided facilitate the legal analytical and fact-finding burden of the Court in legally and factually complex cases such as “quasi inter-state applications,” even if the case is not directed against concurrent respondent States. The coordinating role of the Court is to identify and inform the interested States parties of the proceedings.\textsuperscript{392}

Therefore, one can say that the coordinating method between concurrent respondent States plays its main role in the designation of the respondent governments by the applicant or by the Court \textit{proprio motu} on the basis of a properly identified jurisdictional link. Furthermore, the Court should coordinate between concurrent interested States by inviting third party interventions of States factually linked to the underlying separatist conflict. These types of coordinations favor judicial economy, good administration of justice, and the effectiveness of the Convention in the sense that concurrent jurisdictions and responsibilities will help to eliminate a vacuum of responsibility in separatist areas.

\textbf{VI. CONCLUSION}

The method of coordinated settlement in the procedure of the ECtHR is likely to enhance the efficiency of the Court’s working methods and allocate its scarce resources in a manner that allows it to effectively respond to the most pressing general issues arising from concurrent applications. The procedural techniques and substantive law conclusions in precedents from separatist areas have shown that the Court does not consider those applications isolated from each other, but tries to settle them in a coordinated way, taking into account the related procedural and substantive issues.

Facing the tendency towards forum shopping by applicants from areas out of the territorial State’s effective control, the Court should continue to interpret the \textit{lis pendens} and \textit{res judicata} rules in a restricted manner. Article 35(2)(b) of the ECHR only excludes admissibility where the application before the Court concerns

\footnotesize{\textsuperscript{392} E.g., Joannou v. Turkey, App. No. 53240/14, Eur. Ct. H.R. ¶ 5 (2017), http://hudoc.echr.coe.int/eng?i=001-179420 (observing that since the application was submitted by a British and Cypriot national, the Court informed the British Government and the Cypriot Government of the proceedings).}
substantially not only the same facts and complaints but also introduced by the same persons. Concurrent procedures of international investigation or settlement should only exclude the admissibility of individual, rather than inter-state applications, and only if those procedures are conducted by judicial and quasi-judicial bodies. Furthermore, while deciding on the individual circumstances of the cases before it, the Court should rely on the legal and factual conclusions of other international bodies on the broader factual and legal background of the underlying circumstances in the conflict area.

To treat concurrent applications submitted by numerous applicants in a coordinated, rather than isolated way, the ECtHR should join cases with identical legal and factual backgrounds and examine applications simultaneously, whenever the cases present “symmetrical” situations—when they are factually similar but slightly different. The Court should moreover identify the existence of a structural or systemic problem, or other similar dysfunction, so as to treat them in a pilot procedure. For instance, the pilot procedure would be advisable in matters of compensation procedures for lost property or the reform of the investigation by de facto authorities on disappearance. Representative individual applications or the pending inter-state cases should serve as the major leading decisions to address general problems such as jurisdiction ratione loci, ratione personae, victim status, or the availability and effectiveness of domestic remedies in the given separatist area.

Facing concurrent respondent States, the Court should continue to rely on general international law and recognize concurrent State responsibility of independent wrongdoers for their own conduct leading to the same injury. Its coordination role should encompass the designation of the co-respondent State(s) as an exception and the invitation of third-party intervention. This eases the legal analytical and fact-finding burden of the Court in legally and factually complex cases.

The three different concurring elements require coordination at different stages of the procedure: while concurrent procedures of international investigation or settlement shall be assessed for the sake of the Court’s proceedings at the time of rendering its decision on the admissibility (coordination of procedures) or the merits (coordination
of findings), the concurrence of applicants and respondent States requires a coordination at an earlier stage of the proceedings. As explained, the grouping or prioritization of concurrent applications from several applicants requires a principled decision and the designation of the responsible Court formation at the early stage of the case. This procedural decision will be strategic as it may determine the outcome of the concurrent cases. Furthermore, the choice of the concurrent respondent States operates at the litigation strategy level of the applicant before submitting the application. Precedents show that the Court will likely establish multiple State responsibility in separatist areas, where an outside State has effective control or decisive influence over the de facto authorities. Thus, it is in the applicants’ interest to prepare a litigation strategy against multiple States involved in the territorial situation.

The coordinated method of settling concurrent applications has various examples in the procedural tools used by the Court in recent years: the coordination of procedures and findings of other dispute settlement bodies, the grouping of similar applications for a single judgment or decision, the prioritization of individual cases (the stricto sensu priority policy, the pilot judgment procedure, and leading cases), as well as the designation of co-respondent States. While all of those procedural tools might be considered as further steps towards constitutional justice, coordination should be followed by procedural guarantees evaluating the specific circumstances of each individual application. If coupled with such a principled caution, coordination can be considered as a method fitting in the framework of individual justice. Therefore, coordination as a method is confirmation for those commentators who claim that individual and constitutional justice do not exclude each other, but are interdependent functions.

393. Doc. 13719, supra note 60, ¶ 65; Greer & Wildhaber, supra note 33, at 671-72 (analyzing that the Convention must select and adjudicate cases effectively, in order to follow through with the concept of constitutional justice and recognizing that this is already slowly occurring).

All coordination techniques between concurrent applications require that the Court assesses the likely outcome of the Court’s procedure with regard to the merits. Decisions on the joined or simultaneous examination of applications, the prioritization of cases, the selection of a leading case, the relinquishment of jurisdiction in favor of the Grand Chamber, or the exceptional case of designation of the co-respondent State *proprio motu* all suppose some preliminary assessment of the likely outcome as to the admissibility and the merits of the concurrent applications. Arguably, this is a task delegating power from the judges to the Registry: it is at the phase of the registration and classification of the applications that the method of coordination is primarily operated. Therefore, the Registry staff should link together the interconnected legal and factual background along with procedural and substantive law questions of concurrent cases, which suppose some prejudgment on the merits of the case. The consequence of this method is “secretarization” beyond the already widely recognized “judicialization” of international relations and especially of human rights, i.e. the increased importance of the registry of international courts in the adjudication.

In sum, the Court should act in its coordinator function in settling thousands of pending applications from separatist areas outside the territorial State’s effective control. Coordinating between concurrent applications ensures the coherence of the case law and the effectiveness of the Convention, while easing the Court’s workload from the same conflict-torn regions.

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395. I am grateful to Jean d’Aspremont for introducing this notion in the discussion about the topic.

INDIVIDUAL CRIMINAL LIABILITY AND STATE RESPONSIBILITY FOR GENOCIDE: BOUNDARIES AND INTERSECTIONS*

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I. INTRODUCTION

Criminal responsibility and state responsibility have different purposes and evidentiary standards. While the former aims at punishing individual perpetrators, the latter provides a means of reparation. 1 The evidentiary standard for criminal responsibility should require a higher threshold of proof, while international state responsibility should maintain a less strict evidentiary baseline. 2 Customary international law accepts the coexistence of both forms of responsibility. This coexistence is recognized both in the Statute of the International Criminal Court 3 and in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts identify criminal and state responsibility. 4 The International Court of Justice


2. Id. at 371; Berglind H. Birkland, Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide, 84 N.Y.U. L. REV. 1623, 1641-42 (2009) (noting that although the Genocide Convention imposes a civil standard, in practice, the ICJ has imposed a stricter criminal standard for state responsibility); André Nollkaemper, Concurrence Between Individual Responsibility and State Responsibility in International Law, 52 INT’L & COMP. L.Q. 615, 630 (2003) (arguing a stricter standard for state responsibility for genocide is appropriate because of the seriousness of the allegations).


(ICJ) also acknowledged this “duality of responsibilities” in cases of genocide.\(^5\)

The interaction between these two forms of responsibility presents additional challenges in genocide cases. Genocide is typically a complex criminal enterprise in which different agents participate with varying degrees of contribution and create an entanglement of acts and omissions to achieve a particular result. The legal definition of genocide requires the “intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.”\(^6\) This article focuses on the construction of genocidal intent under international criminal law and under the law on state responsibility.

This study argues these two areas of law use opposite methodologies when determining responsibility for genocide. This methodological divergence is particularly apparent in the way international courts have construed genocidal intent. This article identifies a systemic distortion and suggests international criminal law’s approach to determining responsibility for genocide is more appropriate for determining state responsibility, and vice-versa. This study aims to demonstrate this disparity and propose strategies to overcome it.

What does this divergence of methodologies consist of? Part II of the article will concentrate on this question. In summary, international criminal law follows a realist approach, in which policy considerations are prominent (Part II.A.1). It has developed, through dialectical reasoning, an expansive legal framework that is appropriate for its policy purpose: ending impunity by punishing the genocide’s mastermind (Part II.A.2). With this victim-centered approach in mind, international criminal law tends to adopt inductive methods of fact-

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finding (Part II.A.3) that cluster and generalize specific conduct to establish a general criminal context. The gravity of the crime of genocide is often raised to justify this policy purpose and methodology.

By contrast, the law on state responsibility has been widely construed in a formalist manner (Part II.B.1) and is based on analytical reasoning that largely ignores policy considerations (Part II.B.2). Fact-finding tends to be established through deductive methods, by descending to the specific conduct of an agent (Part II.B.3). Due to the gravity of the crime of genocide, the attribution of acts or omissions to a particular state must strictly follow previously established legal premises. This approach leads to a legally unsatisfactory result, as state intent is more stringently construed than an individual’s dolus specialis.

How can this divergence be overcome? As explained in Part III, this divergence can be overcome by revisiting the methods used to assess individual and state intent. In sum, dolus specialis has both a volitional and cognitive dimensions, which ought to be weighed differently under each realm of law. The appropriate method for establishing an individual’s genocidal intent is based on volitional elements, with cognitive elements being of secondary consideration. Conversely, a state’s genocidal intent should be established using a nuanced, objective, and cognitive elements-based approach that allows for a refined assessment of state conduct during a genocidal campaign.

II. BOUNDARIES

Part II compares the methodologies developed in international criminal law and in the law on state responsibility used to assess responsibility for genocide, with emphasis on genocidal intent. The analysis occurs in three stages. First, it argues that each realm of law has its own point of departure: a realist approach, in the case of international criminal law, and a formalist one in the case of state responsibility. The second level of analysis discusses how the legal premises applied to a particular case are construed under both criminal and state responsibility, focusing on the interpretation and reasoning judges employ to extract abstract norms that will be applied to the facts of the case. The third level of analysis deals with the construction of a
factual narrative, based on the totality of the evidence before the judge (or fact-finding).\textsuperscript{7}

The separation between the second level of analysis, establishment of the legal premise, and the third level, fact-finding, is useful for analytical purposes, but is also artificial. In practice, these two tasks are intertwined. When confronted with what Larenz calls a “raw factual situation” (“Roh-Sacheverhalt”), the interpreter tends to select legally relevant elements through a mental operation that results in the creation of a “final factual situation” (“endgültige Sacheverhalt”), a process in which a legal assessment (“rechtliche Beurteilung”) has already been anticipated.\textsuperscript{8} The judge will always select those elements of conduct that are of legal significance, based on the legal premise he or she has construed.

Although the separation of these levels of analysis may be artificial, it is instrumental in showing the methodological divide between international criminal law and the law on state responsibility. Part II aims to point to a possible systemic distortion created by this methodological divergence that makes international criminal law’s approach better suited to the law on state responsibility, and vice-versa.

A. INTERNATIONAL CRIMINAL LAW: REALISM, DIACRETIC REASONING, INDUCTIVE FACT-FINDING

1. Realism

Individual criminal responsibility developed under an essentially realist approach. For the purpose of this work, realism is defined as the method of “deciding a case so that its outcome best promotes

\textsuperscript{7} In this article, the term “fact-finding” signifies the method of effective search of legal information and evaluation of evidence by a judicial authority or an interpreter. It does not refer to the crucially important task of investigation and data collection the prosecutor undertakes in international criminal tribunals. See Vern R. Walker, A Default-Logic Paradigm for Legal Fact-Finding, 47 JURIMETRICS J. 193, 208 (2007) (stating that after translating the content of legal rules into a logic model of “implication trees,” fact-finding can be defined as “the process of ‘linking’ admitted evidence to those terminal propositions (issues of fact) of a legal implication tree to which the evidence is relevant”).

\textsuperscript{8} Karl Larenz, Methodenlehre der Rechtswissenschaft 279 (6th ed. 1991).
public welfare in non-legalistic terms,” embedding a “policy analysis.”” Realism is a critique of what is considered an excessive reliance by positivist, Cartesian legal methodology, on certainty and logical coherence. Holmes, one of the early exponents of legal realism, stated the “notion that the only force at work in the development of the law is logic” is a “fallacy.” He argued, “behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment” that goes to “the very root and nerve of the whole proceeding.” The root and nerve of international criminal law has been victim-centered and aimed at avoiding impunity of the main perpetrators of heinous crimes. The gravity of the crime of genocide justifies the purpose of avoiding impunity.

International criminal law was founded with the post-Second World War trials. The purpose of these trials was to punish the individuals responsible for the large-scale atrocities committed during the War. Since international criminal law’s inception, its main concern has been to prioritize the prosecution of those who bear greater responsibility for the design and command of the atrocities committed. The Chief Prosecutor at the International Military Tribunal stated:

[the common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.]

10. Edgar Bodenheimer, Perelman’s Contribution to Legal Methodology, 12 N. Ky. L. Rev. 391, 400-01 (1985) (“The chief medium through which the critique of the Cartesian approach expressed itself in American legal theory was a movement called ‘legal realism.’”).
12. Id.
The prosecution in Nuremberg explicitly excluded persons in “purely clerical, stenographic, janitorial, or similar unofficial routine tasks” and instead focused on officials holding certain positions. The International Military Tribunal also acquitted individuals that, despite being high-level officials, were “not one of the inner circle around Hitler.”

When international criminal law was resuscitated in the 1990s after almost fifty years of dormancy, two modes of criminal responsibility were adopted: the joint criminal enterprise (JCE) and the “control over the crime theory” (Part II.A.2). These forms of attribution are fundamentally different and were interpreted by international criminal tribunals inspired by realist, policy-oriented methodology. For example, in construing JCE, the International Criminal Tribunal for the Former Yugoslavia (ICTY) relied on the words of the U.N. Secretary-General, who mentioned the importance of bringing to justice “all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations.” This justification, which does not come from the Tribunal’s statute, indicates the expansive scope of JCE and the policy underlying it: to reach the main perpetrators of atrocities. Furthermore, the Prosecutor of the ICTY gradually dropped indictments against low-ranking officials to concentrate on the “big

June 21, 2018).

15. Göring at 267-68 (noting the only positions the prosecution focused on included the “Amter III, VI, and VII of the RSHA and all other members of the SD, including all local representatives and agents, honorary or otherwise”).

16. See id. at 307, 325 (examining the cases of Schacht, former president of the Reichsbank and Minister of Economics, and Von Papen, former Chancellor and representative in Turkey, Russia, and Austria).


fish.”

Something similar can be said about the adoption of the “control over the crime theory,” in particular its variation of “control over the organization” (“Organisationsherrschaf”), developed by Claus Roxin.20 The concept of “offenses by virtue of organized power apparatus”21 has the confessed objective of reaching the “criminal behind the desk” (“Schreibtischtäter”). Roxin emphasized “the immediate cause . . . was the recently finished process in Jerusalem against Adolf Eichmann, a main perpetrator of murder against Jews in the Nazi era.”22 Designed to reach the masterminds of crimes perpetrated through complex organizations, Roxin’s theory was useful to avoid impunity in certain high-profile political cases in jurisdictions that accepted “Organisationsherrschaf.” These cases include: the trial of Argentina’s military Junta by the Buenos Aires Court of Appeals in 1985;23 the famous Mauerschützen24 trial in Germany in 1994; the Peruvian Supreme Court’s conviction of former President Alberto Fujimori;25 and more recently, the Brazilian Supreme Court’s conviction of an ex-presidential Chief of Staff in a high-profile

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22. Roxin, El Dominio de Organizacion, supra note 20, at 242.
corruption case in 2012.\textsuperscript{26} All these decisions share a common policy purpose of ending impunity of high-level individuals who perpetrated grave crimes. These cases also involved large numbers of victims and the need to identify concrete criminal acts within a wider pattern of organized criminality.

International criminal law pursued the goal of ending impunity even to the point of justifying limitations to a defendant’s rights. In \textit{Tadić}, the ICTY analyzed claims of a breach of the right to a fair trial under Article 14 of the International Covenant for Civil and Political Rights, Article 6 of the European Convention of Human Rights, and Article 21 of the Statute of the ICTY, and it observed the European Court of Human Rights (ECHR) and the ICTY operate in “different circumstances.”\textsuperscript{27} Unlike the ECHR, which deals with ordinary criminals, the ICTY “is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction . . . the International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.”\textsuperscript{28} While it would be unfair to generalize this statement to the whole of international criminal law, it would be unwise to ignore that there is an intrinsic tension between the rights of a defendant to a fair trial, and a criminal procedure that answers to impunity as a main concern.

This international criminal law approach lies in contrast to the ICJ’s jurisprudence on state responsibility.\textsuperscript{29} Few judicial documents have expressed this opposition more eloquently than the separate opinion of Judges McDonald and Vohrah in \textit{Erdemović}:

There is the view that international law should distance itself from social policy and this view has been articulated by the International Court of Justice in the South West Africa Cases, where it is stated that “[l]aw exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.” We are of the opinion that this separation of law from social policy is inapposite [in

\textsuperscript{27} Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 28 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995).
\textsuperscript{28} \textit{Id}.
\textsuperscript{29} See \textit{infra} Part II.A.2.
relation to international criminal law] . . . at the municipal level, criminal law and criminal policy are closely intertwined. There is no reason why this should be any different in international criminal law.30

In sum, international criminal law bases its policy to end impunity on the gravity of international crimes—a tendency that has not been immune to criticism.31 The following section will explore the reasoning behind two critical international criminal law innovations: JCE and the “control over the crime theory.”

2. Establishing the Legal Premise: Dialectic Reasoning

Given international criminal law’s realist nature, what kinds of legal premises would appropriately respond to its policy objectives? Certainly, an expansive legal premise that allows criminal conduct to be ascribed to its mastermind, just as it is ascribed to its direct perpetrator. Two legal innovations were introduced to achieve this goal: the joint criminal enterprise and the “control over the crime theory.”

a. Joint Criminal Enterprise (JCE)

When the ICTY introduced the notion of JCE or common criminal purpose,32 its main objective was to characterize more conduct as principal perpetration. Applied to genocide, JCE offered a portal to generalize specific intent and apply it to all participants in the common plan.

31. See Badar, supra note 18, at 301-02 (arguing that the purpose of international criminal trials is adjudicative in nature—to determine whether someone is innocent or guilty—rather than political); see also Jenia I. Turner, Defense Perspectives on Law and Politics in International Criminal Trials, 48 VA. J. INT’L L. 529, 529 (2008) (highlighting the adjudicative (as opposed to political) nature of international criminal tribunals).
32. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 210-16 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (differentiating between criminal liability for acting with a common criminal purpose and aiding and abetting). The concept of JCE was explained and its scope was expanded in Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 373 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).
The ICTY Appeals Chamber detailed the notion of JCE in Tadić. Tadić was a member of paramilitary forces who at the village of Jaskići when five men were killed. While the Trial Chamber found there was not enough evidence to establish that Tadić had participated in the killings, the Appeals Chamber disagreed. It stated “the only reasonable conclusion” was “the armed group to which the Appellant belonged killed the five men in Jaskići.” Tadić’s liability emerged from his participation in a criminal enterprise. Three categories of JCE were devised: (i) JCE I, “where all co-defendants, acting pursuant to a common design, possess the same criminal intention;” (ii) JCE II, or “concentration camp’ cases;” and (iii) JCE III, concerning “cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose,” – precisely the basis on which Tadić was convicted.

The ICTY has been criticized for the Tadić decision on many grounds, but it inaugurated an expanded mode of legal liability with far-reaching consequences, as demonstrated by other ad hoc tribunals’ adoption of JCE. At the Special Court for Sierra Leone, the prosecution used JCE in every single indictment it presented to the Court, even describing a common purpose that was not criminal per se—an innovation that was also criticized.

33. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 373.
35. Id. ¶ 196.
36. Id. ¶ 202 (including cases in which the accused held a position of authority within a hierarchy, usually involving those running concentration camps).
37. Id. ¶ 204 (introducing in practice, dolus eventualis as a form of international criminal responsibility).
38. Id. ¶ 232.
41. See BOAS ET AL., supra note 39, at 132; see also John R.W.D. Jones et al.,
The International Criminal Tribunal for Rwanda (ICTR) also adopted JCE, though the prosecution took time to incorporate the legal novelty. This time lag is understandable, as the fact-finding completed for the Tribunal’s first case clearly established a case of genocide; therefore, the ICTR did not have a pressing need to creatively expand the law.\textsuperscript{42} However, since the Tribunal first recognized JCE as a form of criminal liability in 2004, prosecutors have invoked it in 20 of their 26 indictments.\textsuperscript{43} JCE had undoubtedly fallen into the taste of prosecutors in the \textit{ad hoc} tribunals.

In genocide cases, JCE facilitates establishing genocidal intent by allowing \textit{dolus specialis} to be inferred from the activities of the group as a whole. Proving specific intent is a difficult task. It is unlikely that such intent will be clearly expressed by an accused or openly discussed in an official manner, such as in the case of the Nazis during the 1942

\textit{The Special Court for Sierra Leone: A Defence Perspective,} 2 J. INT’L CRIM. JUST. 211, 225 (2004) (arguing that the actions of the defendants were not in furtherance of a joint criminal enterprise).

\textsuperscript{42} \textsc{Beatrice I. Bonafé, The Relationship Between State and Individual Responsibility for International Crimes} 131 (2009).

Wannsee Conference. If an accused can be characterized as one of many gears in the machinery of a genocidal enterprise, the prosecution might be spared a detailed incursion into his state of mind. As Bonafè stresses,

[T]he accused charged under joint criminal enterprise needs to have had genocidal intent, but the psychological element is shared by the members of this enterprise. Thus, it is much easier to demonstrate that the accused shared the specific intent with other perpetrators than to prove he alone intended to destroy the targeted group by his actions.

b. Control Over the Crime

The International Criminal Court (ICC) adopted a different mechanism of attribution in cases with multiple perpetrators: the “control over the crime” theory. It was introduced to differentiate principal and accessory liability, allowing for a remote agent in an organized criminal apparatus to be treated as a principal offender rather than an accessory.

According to Roxin’s theory, four main conditions establish a perpetrator has control over a crime. These conditions can be divided into two levels: objective and subjective. At the objective level, the

44. But see Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 522 (Nov. 28, 2008) (noting an exception when the defendants, as a result of the nature of their activities, expressed genocidal intent in an unusually clear manner that placed the case in the eye of the media). For the Wannsee Conference and a competent compilation of documents containing de facto confessions of genocidal intent, see Jeremy Noakes & Geoffrey Pridham, Nazism 1919-1945: Foreign Policy, War and Racial Discrimination 1103, 1125 (1991).

45. See also Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 633 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (concluding that Krstić “participated in a joint criminal enterprise to kill the Bosnian Muslim military-aged men from Srebrenica”). The decision was controversial given the absence of elements to demonstrate specific intent. In fact, the Appeals Chamber reversed this finding and concluded Krstić merely had knowledge that a genocidal criminal enterprise was underway (aiding and abetting). See Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 135-38 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (reversing the controversial trial court decision).

46. Bonafè, supra note 42, at 135-36.


48. Id. ¶ 317.
conditions are: (i) the perpetrator must have the power of command; and (ii) the organization must be detached from the legal order. The first condition is crucial to establish dominance over the functions of the organization and the second is vital to consolidate that control. Together, they constitute "the basic support that will allow the strategic superior level (indirect perpetrator) to edify and consolidate the dominance over the totality of the criminal structure."50

The subjective level includes (iii) the fungibility of the direct perpetrator and (iv) the high level of availability or readiness of the direct perpetrator to actually commit the crime.51 These subjective conditions deal with the "consequences of the automaticity of the criminal apparatus," according to which "the conduct of the direct perpetrator will ultimately depend on his/her own will."52 However, if he or she decides not to execute the act, it will lead to a "substitution with [an]other person with a larger predisposition to carry out the conduct."53 In summary, the "control over the crime" theory is an apparatus with a "peculiar functioning:" it is "at the disposal of the 'man behind'" and constitutes "an organization [that] therefore unfurls a life that is independent from the variable identity of its members. It works 'automatically,' in a manner that the identity of the actual executor is irrelevant."54

c. **Dialectic Reasoning**

International criminal law adopted JCE and the "control over the crime theory" to help achieve its policy purpose of criminalizing remote perpetration of genocide.

The legal premise of "perpetration" has been mainly expanded through dialectical reasoning—which is "necessary when the judge, by thorough and often complex arguments, must creatively establish a
major premise serving as a proper rationale for a legal conclusion." Dialectical reasoning acknowledges that sometimes the tension between what is legal and what is reasonable requires a balanced solution between the two. It rejects the proposition that only through the shackles of formalism can a decision be “rational” or “logic[al].” Dialectical reasoning provides that not all knowledge is demonstrative, but “reasoning often proceeds from opinions that are believed to be true or probably true.” This method of reasoning consists of “the search for a convincing solution, that can establish judicial peace because it is, at the same time, reasonable and in accordance with the law.”

JCE and the “control over the crime theory” are quintessential examples of dialectical reasoning: efforts to reconcile what is strictly legal (the text of a statute) with what is reasonable (reaching the “person behind”). In the absence of clear textual provisions, the judge takes a position “neither completely subordinated, nor simply opposed” to the legislator, but aimed to complement the law. This is not only a legal task, “but also political, that of harmonizing the legal order of legislative origin with the dominant ideas of what is equitable in a given environment.” Application of the law becomes not merely a deductive process, but a “constant adaptation of the legal provisions to values that are in conflict in judicial controversies.”

In its dialectical construction of JCE, the ICTY recognized that “the Tribunal’s Statute does not specify (either expressly or by implication)” the elements of this new “category of collective criminality.” The Tribunal had to resort to:

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56. *Id.* at 404.
58. *Id.*
59. *Id.*
60. *Id.*
(i) A teleological interpretation of the Statute (specifically Article 1);\textsuperscript{62}

(ii) The U.N. Secretary General’s report, in which it is stated “the Secretary-General believes that all persons who participate in . . . serious violations of international humanitarian law . . . are individually responsible for such violations”;\textsuperscript{63}

(iii) “The moral gravity” of the acts of the masterminds;\textsuperscript{64}

(iv) The need not to “understate the degree of their criminal responsibility” by holding them liable as mere aiders and abettors;\textsuperscript{65}

(v) The “inherent characteristics of many crimes perpetrated in wartime,”\textsuperscript{66} which usually indicate a plurality of perpetrators with a common design; and

(vi) The study of “case law” and “a few instances of international legislation” with a view to infer customary international law.\textsuperscript{67}

As in the case of the ICTY in introducing JCE, the ICC complemented and adapted the positive legal order when it adopted the theory of “Tatherr schaft.”\textsuperscript{68} The ICC embraced this theory, not because it had any textual basis in the Rome Statute, but based on the Court’s investigation into approaches to differentiate between principal and accessory perpetration. According to the objective approach, the level of contribution is the defining criterion in determining accessory or principal liability. In contrast, the subjective theory is based on the mental state of the criminal. Finally, “Tatherr schaft” (literally dominance over the fact), was presented as a synthesized form\textsuperscript{69} of the previous approaches, which was already being “applied in numerous legal systems.”\textsuperscript{70} The Chamber’s

\textsuperscript{62} Id. ¶ 189.

\textsuperscript{63} Id. ¶ 190 (emphasis in original).

\textsuperscript{64} Id. ¶ 191.

\textsuperscript{65} Id. ¶ 192.

\textsuperscript{66} Id. ¶ 193.


\textsuperscript{68} ROXIN, AUTORÍA Y DOMINIO, supra note 54.

\textsuperscript{69} See Prosecutor v. Katanga, Case No. ICC-01-04-01/07, Decision on the Confirmation of Charges, ¶ 482-84 (Sept. 30, 2008) (highlighting Tatherr schaft).

\textsuperscript{70} Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the
argumentation related to the adoption of “Tatherrschaft” bears some structural resemblance to Chapter 2 of Roxin’s seminal book.71

Just as in the case of JCE, the ICC’s reliance on the “control over the crime” theory has been controversial. It is not a universally recognized mode of liability, and the Chamber’s justification for its adoption is the subject of much debate. Essentially, the Chamber adopted an approach by exclusion: because the Rome Statute neither adopted the objective theory, nor the subjective one, the Chamber concluded the Statute must have opted for control over the crime.72 Weigand critically observed that “[i]t is likely that the concept of ‘domination through an organization’ owes its existence more to policy considerations than to strict theoretical consistency.”73 He opines that “[i]ts invention can best be understood as a reaction to the phenomenon of ‘systemic’ crime—a phenomenon that has massively spread since the 1930s.”74

In adopting Roxin’s theory, the ICC responded to a policy problem similar to the one before the ICTY: the need to ensure that international criminal law is equipped with legal rules that embrace large-scale criminality to reach the main perpetrators. The ICC has not yet dealt with the merits of a genocide case, but the Prosecutor invoked control over the crime to characterize Omar al Bashir as main perpetrator of genocide in Darfur.75 The Prosecutor’s Application offers insight into how Roxin’s theory might expand the legal premise of perpetration to facilitate the establishment of genocidal intent. Rather than primarily relying on Bashir’s words and deeds,76 the

Confirmation of Charges, ¶ 330 (Jan. 29, 2007).
71. ROXIN, AUTORIA Y DOMINIO, supra note 54 (addressing the objective theory (divided into objective-formal and objective-material), subjective theory, and mixed theories (among which is control over the crime) in chapter two)).
72. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 338.
73. Thomas Weigend, Perpetration through an Organization: The Unexpected Career of a German Legal Concept, 9 J. INT’L CRIM. JUST. 91, 101 (2011) (criticizing Roxin’s theory, noting that adding empirical criteria is arbitrary in nature).
74. Id.
75. Situation in Darfur, ICC-02/05-157-Annex A, Prosecutor’s Application Under Article 58, ¶¶ 244-48 (July 14, 2008).
76. Id. ¶¶ 270-79.
prosecution devoted considerably more attention to an easier task—determining the unquestionable position of Bashir vis-à-vis every instance of military or paramilitary apparatus in Sudan.\textsuperscript{77} The focus shifted from determining Bashir’s *mens rea*, to establishing that Sudanese government forces and the militias it controls perpetrated genocide and that Bashir had control over the whole apparatus as a main perpetrator.

3. Inductive Fact-Finding

The predominant method of fact-finding in international criminal law is one that achieves its policy purpose by enabling a direct connection between the specific criminal act and the general role of the remote perpetrator. Moreover, the trend within international criminal law has been to evaluate “raw factual situations” so as to generalize the specific conduct and contextualize it within a larger pattern of conduct (the “final, legally relevant factual situation”).\textsuperscript{78}

Fact-finding is generally a strenuous challenge in genocide cases. The scope of atrocities and the intricacy of acts and omissions usually involve hundreds of witnesses and thousands of pages of evidence. In undertaking the arduous task of screening such a large inventory, international criminal law has relied primarily (though not exclusively) on an inductive method, in which “the direction appears to be from the particular to general” and “the general finds its meaning in the relationship between the particulars.”\textsuperscript{79} When applied to genocidal intent, this means that *dolus specialis* can be reasonably inferred from a pattern of conduct and/or a general context. Individual instances of conduct are treated as building blocks of a “pattern of conduct” that constitutes part of a larger “general criminal context.” Although the ICTR has stated that it is preferable to deduce genocidal intent from the accused’s own actions, the reality is that “almost all of the accused before the ICTR . . . convicted for genocide . . . [had] their *dolus specialis* . . . established [through the general criminal

\textsuperscript{77} Id. ¶ 250-69. 
\textsuperscript{78} LARENZ, supra note 8, at 279. 
\textsuperscript{79} EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 27 (2013) (discussing the difference between case law and legislation and finding that the latter’s wording must be more strictly adhered to).
context].”

Genocidal intent is construed by generalizing the conduct in an *a posteriori* analysis of an individual’s actions. It is a holistic, *backward-looking* approach where a person’s conduct is assessed by an observer that has the privilege of already knowing the conduct’s implications. Moreover, the observer taking this approach looks to the factual circumstances of the case or, more generally, to

[A] number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.

Applying JCE to an alleged genocide perpetrator as well as evaluating the “general criminal context” in which the genocide took place significantly impacts the ability and means of determining the individual’s genocidal intent. The generalization of an individual’s conduct from the fact that he participated in a JCE creates a tension with the principle of individual liability, which guides criminal law and requires a careful individualization of conduct. Jurisprudence of the *ad hoc* tribunals demonstrates that applying and analyzing the “general criminal context-joint criminal enterprise” has led to considerable flexibility in the attribution of genocidal intent. The accused’s *dolus specialis* does not have to be directly determined from his own acts, but can be inferred from the conduct of other members of the JCE and the context in which the group operated.

This method of inferring genocidal intent is apparent in the case law of the ICTR, more so than in the jurisprudence of any other court. While recognizing that “[w]here the underlying crime requires a


83. See BONAFÊ, supra note 42, at 131.
special intent, such as discriminatory intent, the accused, as a member of the joint criminal enterprise, must share the special intent,”

84 the ICTR has avoided the daunting task of determining genocidal intent based solely on an individual’s criminal conduct. 85 The logic is that, in a well-established general context of genocide, like that which existed in Rwanda, a member of a JCE can easily predict or realize that his actions are likely to produce the genocidal result. For instance, in *Simba*, the ICTR determined,

 Giov en the *scale of the killings and their context*, the only reasonable conclusion is that the assailants who physically perpetrated the killings possessed the intent to destroy in whole or in part a substantial part of the Tutsi group. This genocidal intent was *shared by all participants* in the joint criminal enterprise.”

86

In a similar vein, the Tribunal in *Akayesu* stated, “[o]n the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine.”

87 Ultimately, to determine the individual’s specific intent, the Tribunal made inferences “from a certain number of presumptions of fact,” namely: “the general context of the perpetration of other culpable acts systematically directed against that same group;” the persons who committed those acts, whether by the same offender or by others; the scale of atrocities; the “general nature” of the atrocities “in a region or a country;” and “the fact of deliberately and systematically targeting victims on account of their membership [in] a particular group, while excluding the members of other groups.”

88

The ICTR has been accused of focusing so much on the general context, that it has not “ascertain[ed] the accused’s genocidal intent sufficiently.”

89 Heller criticized the Tribunal for creating a “potentially
lethal pair.” On the one hand, it decided a nationwide campaign of genocide is “a fact of common knowledge of which trial chambers must take judicial notice;” on the other, it has also established that genocidal intent can be inferred from a general context and from the acts of others. As a result, the prosecution could, in fact, prove “specific intent without introducing any evidence of that intent at all.”

The ICTY adopted a similar inductive, generalizing fact-finding methodology in Karadžić. The Trial Chamber observed that the intent of the accused “is intrinsically connected to all of the evidence on the record” and, therefore, “conducted a holistic and contextualized assessment of this evidence.” Accordingly, the Chamber proceeded to aggregate a number of pieces of evidence to conduct a “bottom-up analysis” of the events in Srebrenica. The Trial Chamber evaluated specific conversations Karadžić had with his subordinates (Mladić, Deronjić, Bajagić, Vasić, and Živanović) and concluded it would be unreasonable to suppose Karadžić and his subordinates did not discuss certain genocidal acts. As Ambos noted, the Trial Chamber “only found—quite plausibly—his [Karadžić’s] knowledge and inferred from this his shared intent,” but “this intent could be limited to the [forced] removal of Bosnian Muslims, perhaps also including some killing, but this does not necessarily amount to the intent to destroy

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(2014) (discussing the difficulty the Courts have had when evaluating individual actions to establish genocidal intent, leading them to look at the broader context).


91. Id. at 162 (explaining that Karemera changed the way the Court looks at nationwide campaigns of genocidal acts and that proof that it actually occurred is no longer required; the Court may assume that it occurred).


93. See Kai Ambos, Karadžić’s Genocidal Intent as the ‘Only Reasonable Inference’?., EUR. J. OF INT’L L. BLOG (Apr. 1, 2016), https://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference/ (discussing the Chamber’s method for analyzing genocide in this case, noting that they began by looking at the crimes first and then determining whether they had acted with genocidal intent).

this group as such.”95 The Trial Chamber again inferred to establish that, as a whole, the acts perpetrated in Srebrenica revealed Karadžić’s intent to destroy Bosnian Muslims. The Trial Chamber reasoned, “[v]iewing the evidence in its totality . . . the Bosnian Serb Forces must have been aware of the detrimental impact that the eradication of multiple generations of men would have,” and it found, “beyond reasonable doubt that these acts were carried out with the intent to destroy the Bosnian Muslims in Srebrenica as such.”96

a. ICC and the Criminal Context

Although the ICC has not dealt with the merits of a genocide case,97 it has not been indifferent to discussions about how to infer genocidal intent from concrete facts. During the 1999-2000 negotiations of the Elements of Crimes related to genocide, flexibility in assessing the mens rea of the crime was at the heart of the deliberations.98 There were multiple proposals to lower the evidentiary threshold of dolus specialis. First, the Preparatory Commission for the International Criminal Court dealt with a proposal to include, in the Elements of Crimes, the following provision: “The accused knew or should have known that the conduct would destroy, in whole or in part, such group or that the conduct was part of a pattern of similar conduct directed against that group.”99

The inductive approach embedded in this proposal is clear. It aimed at reducing dolus specialis to a cognitive, rather than volitional element, thus avoiding a detailed analysis of the accused’s mental state and her conduct in isolation. The debates that ensued resulted in three

95. See Ambos, supra note 93.
96. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 5671; Ambos, supra note 93.
97. See, e.g., International Criminal Court, Situations Under Investigation: Darfur, Sudan, https://www.icc-cpi.int/darfur (noting that Sudan’s president Omar Al Bashir was the first person charged of genocide, although the arrest warrants against him have not been enforced and he is not in the Court’s custody).
changes related to the fact-finding methodologies used to infer genocidal intent.

The first change is the role of circumstances in proving genocidal intent. While some parties to the negotiations deemed the negligence (“should have known”) standard in the original proposal to be too low to satisfy the mens rea requirement of the crime, a number of countries insisted on a more flexible approach to assessing specific intent. The result of the negotiations was the current Elements of Crimes text, which excluded the “should have known”, standard, but incorporated a reference to “knowledge of circumstances” and left it to the Court to decide, on a case-by-case basis, the relevance of these circumstances when defining genocidal intent.

The second change is the introduction of the element of “general context” in a new paragraph of the Elements of Crime. According to this element, when evaluating mens rea, judges should also consider if the actions “took place in the context of a manifest pattern of similar conduct.” Third, changes were incorporated to clarify that, for genocide to be committed, the intended result needed not materialize (“would destroy”). It would be enough to assess the suitability (“could destroy”) of criminal conduct to achieving the intended result. In sum, the current text reads:

Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could [instead of

102. Id.
103. Id.
104. Schense, supra note 100.
“would” in the original proposal] itself effect such destruction.  

Though the original proposal was diluted, the Elements of Crimes currently in force incorporates and acknowledges the importance of an inductive fact-finding method and the determination of a general criminal context in devising genocidal intent—thereby following the trend started by the ad hoc tribunals in their jurisprudence.

Undoubtedly, proving genocidal intent is an intricate task, and a tension exists between the inferential method of proof described in the preceding paragraphs and the principle of individual liability. This tension is heightened by the comprehensive jurisdiction of international criminal courts, which, in the absence of specific intent, allows for a conviction under less serious offenses corresponding to the actus reus of genocide. Still, especially when higher-ranking defendants are concerned and the policy purpose of international criminal law is in its full force, it should be recognized that the establishment of legal premises by international tribunals has followed a dialectical methodology with an expansive effect on an individual’s responsibility. Likewise, genocidal intent tends to be inferred from generalizing extrapolations. As pointed out by Cupido, the argumentative processes of international criminal courts have been marked by the exercise of a “certain discretion” and by a “casuistic development of the law, through the flexible use of factors,” which entail “a certain risk of abuse:”  

B. STATE RESPONSIBILITY: FORMALISM, DEDUCTIVE REASONING, AND FACT-FINDING

1. Formalism

In sharp contrast with individual responsibility under international criminal law, the law on state responsibility has predominantly been construed in a formalist manner, based on the application of deductive
methods in which analytical arguments outweigh policy considerations. State responsibility for genocide is established by looking to the specific conduct of an agent and verifying if his or her acts or omissions are attributable to the state in accordance with previously established premises.\footnote{See Bonafè, supra note 42, at 25, 31.}

Formalism will be employed to mean “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative.”\footnote{Posner, supra note 9, at 181.} Formalism emphasizes that every judicial decision is a form of syllogistic deduction\footnote{See Edward J. Bloustein, Logic and Legal Realism The Realist as a Frustrated Idealist, 50 CORNELL L. REV. 24, 24 (1964) (discussing the realist school of thought’s opposition to the idea that each judicial decision transcends from previous decisions).} and distrusts any reliance by judges on experience, intuition, or other factors that are not logically formulated.\footnote{See Morris Raphael Cohen, Law and Scientific Method, 6 AM. L. SCH. REV. 231, 237 (1928).} A formalist conclusion is more likely to be “judged sound or unsound,” rather than “correct or incorrect—the latter pair suggest[s] a more demonstrable, verifiable mode of analysis than will usually be possible in weighing considerations of policy.”\footnote{Posner, supra note 9, at 181.} According to formalists, legal reasoning is based on an analytical approach, in which a sound legal decision is derived from a syllogism consisting in the application of a legal premise to descriptive propositions of fact.

The ICJ often takes a formalistic approach, which can be seen in its decisions. Analyzing the Temple Case\footnote{For examples of a formalist approach, see Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, ¶¶ 25, 35 (June 15) (claiming there are no legal grounds in the argument that a state incurred in error when defining a border, and discussing the application of treaty interpretation to define the border line).} and the South-West African Case (2nd phase),\footnote{See South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. Rep. 6, ¶¶ 49-50 (July 18) (“[I]t has been suggested . . . that humanitarian considerations are sufficient in themselves to generate legal rights and obligations . . . [but] [t]he Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that see South-West African, supra note 114, at 767 (Oct. 21, 1966).} Proctor criticized the Court for refusing arguments
that were not strictly based on legal logic, and for deciding these cases in a formalistic manner. The ICJ’s approach to genocide is similarly formalistic. The Court analyzes each factual situation on its own merit, avoiding extrapolations, and opting for a deductive, rather than inductive, generalizing methodology.

Surprisingly, the ICJ seems to view the gravity of crime of genocide as a reason to adhere more closely to its traditionally formalistic approach in evaluating these cases. In essence, while international criminal law views the particular gravity of international crimes as justification for expanding its reach to capture more perpetrators of these crimes, the ICJ sees this gravity as a reason to tighten the shackles of formalism. In both *Bosnia & Herzegovina v. Serbia & Montenegro* and *Croatia v. Serbia*, the ICJ stated the seriousness of genocidal intent required that certain elements be met to attribute genocidal intent to a state. To support this assertion, the Court invoked its decision in the *Corfu* case finding “[a] charge of such exceptional gravity [laying mines in the territorial waters of Albania] against a State would require a degree of certainty that has not been reached here.”

In requiring that a “degree of certainty” be met to attribute genocidal intent to a particular state, the ICJ not only followed a path different from the one forged by international criminal law in establishing individual criminal responsibility, but also departed from principles established in jurisprudence on state responsibility for human rights violations. International human rights courts and

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119. See Sarah Joseph & Adam Fletcher, *Scope of Application, in International Human Rights Law* 119, 119, 124 (Daniel Moeckli et al. eds., 2014) (“An illegal act which violates human rights and which is initially not directly imputable to a State... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention.”); see also Nollkaemper, *supra* note 2, at 630-31.
treaty-bodies have argued that the standard of proof should be more lenient for grave crimes. This call for leniency is based on the assumption that large-scale acts could not take place without some of fault of the State and the policy-based rationale that a victim-centered approach prioritizes reparations.

Indeed, human rights bodies have invoked gravity as a reason to establish a state’s responsibility—and at times aggravated responsibility—for serious crimes. For instance, in Plan de Sánchez Massacre, the Inter-American Court of Human Rights considered the occurrence of genocide when establishing aggravated state responsibility and when requiring reparations. According to the judgment, “facts such as those stated, which gravely affected the members of the Maya achi people . . . took place within a pattern of massacres, [and] constitute an aggravated impact that entails international responsibility of the State.” In its decision on reparations, the Court relied on the “extreme gravity” of the case to establish aggravated state responsibility, and to require the state pay victims reparation. In the ICJ, Judge Cançado Trindade is the main proponent of this victim-centered human rights approach, and is essentially alone in taking this position. In his dissenting opinions, he has pointed to the need to consider the seriousness of the crime and the need to provide reparations as additional reasons to hold states responsible for grave crimes. Table 1 compares examples of each of

120. See Hum. Rights Comm., General Comment No. 31, ¶ 8, CCPR/C/21/Rev.1/Add.13 (May 24, 2004).
121. BONAFÉ, supra note 42, at 78.
122. Plan de Sánchez is a village in Guatemala that was inhabited primarily by people from Mayan indigenous ethnic group. In 1982, Guatemala was governed by a military junta that kept a heavy military presence in the region where Plan de Sánchez is located. The government accused Mayan groups of participation in anti-government guerrillas. In July 1982, a massacre took place in the village, leading to the execution of 268 people. See Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 42 (Apr. 29, 2004).
123. Id. ¶ 51.
126. See id. ¶ 303; Application of Convention on Prevention and Punishment of
the three approaches to “gravity.”

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<th>THREE APPROACHES TO GRAVITY</th>
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<tr>
<td>INTERNATIONAL CRIMINAL LAW</td>
<td>“The International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.”¹²⁷</td>
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<tr>
<td>ICJ</td>
<td>“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”¹²⁸</td>
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<td>HUMAN RIGHTS APPROACH</td>
<td>“The threshold of the gravity of the breaches of human rights and of international humanitarian law removes any bar to jurisdiction, in the quest for reparation to the victimized individuals. It is indeed important that all mass atrocities are nowadays considered in the light of the threshold of gravity, irrespective of who committed them.”¹²⁹</td>
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The ICJ’s approach to gravity has a critical effect on its judgment and permeates its methodology. It reinforces a formalistic tendency both in establishing legal premises (see Part II.B.2 below) and, more crucially, in fact-finding (see Part II.B.3 below).

2. Establishing the Legal Premise: Analytical Reasoning

Contrary to international criminal law, which has resorted to dialectical reasoning to “creatively establish a major premise serving as a proper rationale for a legal conclusion,” the ICJ has predominantly based its arguments on formal, pre-existing legal premises, leading to reasoning that is “analytical rather than dialectical.”130 For a state to be responsible, the conduct in question must strictly fall within pre-established legal rules.

The legal premises for attribution of state responsibility were spelled out by the ICJ in Nicaragua and are included in the Articles on Responsibility of States for Internationally Wrongful Acts (“A.R.S.I.W.A.”).131 The structural and functional tests outlined in Nicaragua and in the A.R.S.I.W.A. require a strict link between the specific conduct and the state. Under the structural test, the conduct of any state organ—meaning any person or entity with that status under the state’s law—is considered an act of that state.132 The functional test applies to a “person or entity . . . which is empowered by the law of that state to exercise elements of the governmental authority”133 even if “only exceptionally and to a limited extent.”134

A State may also be responsible for the conduct of non-state actors that do not exercise elements of governmental authority.135 In genocide cases, this form of responsibility acquired greater importance in the context of the former Yugoslavia. Article 8 of the draft A.R.S.I.W.A. states that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if

131. See G.A. Res. 56/83, art. 4 (Jan. 28, 2002).
132. See id.
133. Id. art. 5.
134. JAMES CRAWFORD, STATE RESPONSIBILITY—THE GENERAL PART 127 (John S. Bell et al. eds., 2013) (explaining that if an individual committing the crime of genocide is doing so within the parameters of State law and government authority, then it shall be considered an act of the State, not just the individual, under international law); see also U.N. OFFICE OF LEGAL AFFAIRS, MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, at 51-53, ST/LEG/SER B/25 (2012).
135. See G.A. Res. 56/83 arts. 5, 7, supra note 131 (explaining that if a State gives an individual the capacity to commit the crime of genocide, then that crime will be an act of the State, not just the individual).
the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

In *Nicaragua*, the ICJ articulated the ways in which a non-state actor’s acts could be attributable to a state in a two-tier test evaluating whether the non-state actor was: (i) completely dependent on the state and (ii) under the state’s effective control. The Court used this test to determine whether the *Contras’* humanitarian and human rights law violations could be attributed to the U.S. Government. In the end, the ICJ found that the *Contras* were not completely dependent on, or under the effective control of the United States. Importantly, the Court evaluated each separate violation when verifying whether the United States directed the group.

Although the Court did not attribute the specific conduct performed by the *Contras* to the United States, it assessed whether the support that the United States provided the group complied with international law. However, there is a major difference between *Nicaragua* and the genocide cases: the ICJ in *Nicaragua* had jurisdiction under customary law and was able to provide a nuanced analysis of the United States’ conduct. The Court addressed each act and subsumed it under specific legal categories: the United States was found in breach of obligations: (i) not to intervene in the affairs of another State; (ii) not to use force; (iii) not to violate the sovereignty of another State; (iv) not to interrupt peaceful maritime commerce; (v) to inform the location of mines; and (vi) under general principles of humanitarian law. In other words, in the seminal case in which rules of State responsibility were spelled out, the Court had broad jurisdiction *ratione materiae*, enabling it to descend to each particular act and subsume it under a specific legal premise. The same option was not available in the ICJ’s genocide cases, in which the Court simply concluded that a state was either responsible for genocide or that it was not—even where the state’s

136. *Id.* art. 8.
138. See *id.*
139. See *id.* ¶ 115.
140. See *id.* ¶ 292.
actions constituted other breaches of international law.\textsuperscript{141}

The ICTY took a more flexible approach than the ICJ did in \textit{Nicaragua}, when attributing the acts of non-state actors to states in Tadić. The Appeals Chamber in Tadić highlighted the rigidity of the \textit{Nicaragua} test, and devoted a section of its decision to explaining the “grounds on which the \textit{Nicaragua} test does not seem to be persuasive.”\textsuperscript{142} The Chamber contended “[t]he principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria.”\textsuperscript{143} In analyzing the A.R.S.I.W.A., the Appeals Chamber concluded that “[t]he rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks”\textsuperscript{144} that could be undertaken by a state organ.\textsuperscript{145} The A.R.S.I.W.A.’s goal is to prevent states from “shelter[ing] behind, or us[ing] as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.”\textsuperscript{146} The Appeals Chamber concluded that “the whole body of international law on State responsibility is based on a “realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.”\textsuperscript{147} While the multiplicity of actors and acts being considered by the ICTY merited a broader, more relaxed assessment of whether the state had control over non-state actors, in \textit{Nicaragua}, there were fewer actors and acts to consider, and this may have contributed to the Court’s application

\begin{footnotesize}
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143. \textit{Id.} ¶ 117. \\
144. \textit{Id.} \\
145. \textit{Id.} \\
146. \textit{Id.} ¶ 123. \\
147. \textit{Id.} ¶ 121 (emphases added). \\
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\end{footnotesize}
of a restrictive test for effective control. Accordingly, the ICTY found that the Bosnian Serb armed forces were under the “overall control” of the Former Republic of Yugoslavia (FRY).  

In Tadić, the ICTY outlined a plan that would significantly narrow the gap between criminal and state responsibilities. The Tribunal (i) proposed to introduce flexibility in the attribution criteria of state responsibility, adapting them in accordance with the context; (ii) argued that the policy purpose of the law on state responsibility is to prevent states from escaping their responsibility; (iii) defended a realistic concept of accountability, in which legal formalities have a lesser role; and (iv) considered that complex criminal contexts require a less strict rule of attribution.

Nevertheless, the ICJ did not adopt Tadić’s overall control test. In defending the effective control test it developed in Nicaragua, the ICJ stressed that the fundamental tenet of international responsibility is that “a State is responsible only for its own conduct, which is to say the conduct of persons acting, on whatever basis, on its behalf.” To find otherwise would be stretching “too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.”

The concrete question before the ICJ in Bosnia v. Serbia, was whether the acts of the VRS in Srebrenica were attributable to Belgrade. The Court acknowledged the close links that existed between the FRY and the VRS, but nevertheless (and mindful of the exceptional gravity of the conduct to be attributed to the state), it decided “to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires a particularly great degree of State control over them.” Then, in assessing whether Belgrade had effective control over the

149. See id. ¶¶ 125, 131.
150. See id. ¶ 117.
152. Id.
153. Id. ¶ 393 (emphases added).
VRS, the Court required that the “state’s instructions were given in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions.”\textsuperscript{154} Ultimately, after applying this restrictive effective control test and the aforementioned parameters, the Court found the VRS’s actions were not attributable to the FRY.\textsuperscript{155}

These extracts demonstrate the fundamental difference in how legal premises are construed in international criminal law and in the law on state responsibility. In Part II.A.2, it was argued that international criminal law developed a legal framework that allowed the attribution of conduct to remote perpetrators. The ICJ took the opposite approach, and strictly applied pre-established legal premises that, at least with regard to non-state actors, narrowed the possibility of attribution.

3. Deductive Fact-Finding

As described in Part II.A.3, international criminal law adopted an inductive method clustering and generalizing specific conduct to form a general criminal context from which genocidal intent can be inferred. In contrast, state responsibility for acts of genocide requires the establishment of genocidal intent through deduction, applying either the exacting “effective control,” or less strict “overall control” test.

In principle, a “general plan” to carry out genocide is required to demonstrate a state’s genocidal intent.\textsuperscript{156} The ICJ recognized that, absent that plan, dolus specialis (the Court used the criminal law terminology) could be inferred from a pattern of conduct. However, given the special gravity of the conduct (Part II.B.1), the state’s genocidal intent should be the only possible conclusion one could derive from the pattern of conduct:

Turning now to the Applicant’s contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a

\textsuperscript{154} Id. ¶ 400 (emphases added).
\textsuperscript{155} Id. ¶ 424.
\textsuperscript{156} See id. ¶ 373.
general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent. 157

By requiring virtual certainty that a state possessed intent to commit grave crimes, the ICJ has added yet another layer of rigidity to hinder its ability to properly assess a state’s genocidal intent. In requiring virtual certainty, the ICJ departed not only from the international criminal law approach, but also from some of its own precedent. Indeed, the Court imposed additional burdens on fact-finding, instead of building on previously recognized flexibilities stemming from its own case law, dealing with situations where a state could be held responsible for acts it did not directly perpetrate. 158 One example of the Court’s flexibility in attribution is the Corfu case. 159 Although the charges were serious, as in the aforementioned cases, the Court ultimately found Albania liable for the “laying of mines in its territory by an unnamed third party (most likely Yugoslavia) on the basis of its officials’ knowledge of the activity and their corresponding failure to warn shipping in the area.” 160

A revealing exercise is a comparison between the ICJ’s evidentiary standards (i) in the genocide cases and (ii) in Corfu. As already mentioned, the Court based its “only possible inference” rule on a

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158. See CRAWFORD, supra note 134, at 117-18 (recalling two main precedents in this regard: Corfu, which will be discussed further, and the C.S.S. Alabama arbitration of 1871); see also Tom Bingham, The Alabama Claims Arbitration, 54 INT’L & COMP. L.Q. 1, 15 (2005) (quoting Article VI of the Treaty of Washington of 1871, which established the arbitration “rules to be taken as applicable to the case, and by such principles of International Law” included that “[a] neutral Government is bound . . . to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace”).


160. CRAWFORD, supra note 134, at 118.
passage in the *Corfu* decision. However, in this passage, the ICJ was determining the reliability of specific testimony, not establishing parameters for assessing state liability.\(^{161}\) In the part of the judgment in which the ICJ *did* address state responsibility, it stated that the acts could not have been perpetrated without Albania’s knowledge. It also argued:

[b]y reason of this exclusive control [over the waters], the other State, the victim of a breach of international law, is often unable to furnish direct proof . . . [and] should be allowed a *more liberal recourse to inferences of fact and circumstantial evidence* . . . [such indirect inferences carry] special weight when it is based on a series of facts linked together and leading logically to a single conclusion.”\(^{162}\)

In *Bosnia v. Serbia*, the Court refused any “recourse to inferences,”\(^{163}\) both when verifying if the actions of the VRS in Srebrenica were directly attributable to the FRY (which would mean that Belgrade shared genocidal intent) and when determining if the FRY was an accomplice under Article III(e) of the Genocide Convention (which would mean the FRY had knowledge of VRS’s intent). In deciding whether Serbia (FRY) was responsible for the violence in Srebrenica, the ICJ stated:

[u]ndoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events . . . however, the sole task of the Court is to establish the legal responsibility of the Respondent, a *responsibility which is subject to very specific conditions*. One of those conditions is not fulfilled, because it is *not established beyond any doubt* . . . [that FRY] authorities were *clearly aware that genocide* was about to take place or was under way; in other words that not only were massacres about to be carried out or already under


\(^{162}\) Corfu Channel, 1949 I.C.J. at 18 (emphases added).

way, but that their perpetrators had the specific intent characterizing genocide.164

Regarding complicity, the Court demanded that it should be established “beyond any doubt” that the FRY supplied aid to the VRS “in full awareness” that it would be used to further a genocidal intent.165 As Gattini noted, not even the “possible knowledge by Serbian authorities that massacres were about to be carried out in Srebrenica, or even that it was already happening, was deemed sufficient by the Court in order to demonstrate actual knowledge of the specific genocidal intent of the perpetrators.”166

In a separate opinion that pursued a more inductive method of fact-finding, Judge Bennouna resorted to a “more liberal recourse to inferences and circumstantial evidence,” as in the Corfu case.167 Based on the totality of the evidence he concluded that the “manifold ties” between the political and military echelons of both sides meant “Serbia therefore had full knowledge of the genocide, which makes it an accomplice.”168 Judge Keith applied the same approach, basing his argument on the 1999 Report of the U.N. Secretary-General “The Fall of Srebrenica,” in which the events in Srebrenica were “understood in the context of more general information about the very close relationships between the leaderships in Belgrade and in Pale and especially between President Milošević and President Karadžić.”169 Judge Keith also emphasized that the FRY was “fully aware of the climate of deep seated hatred” in Srebrenica and that the international community as a whole understood the deteriorating situation in the enclave before the massacre.170 Judge Al-Khasawneh, who found the FRY did share genocidal intent, also complained about the “methods

164. Id. ¶ 422 (emphases added).
165. Id. ¶¶ 422-23.
168. See Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. at 359, 364 (declaration by Bennouna, J.) (referencing Wesley Clark’s testimony, the continuous contact between Mladić and Milošević, the links between the Scorpions and the Ministry of the Interior in Belgrade, and the close military links between the officers of the VRS and Belgrade).
169. Id. at 352, ¶¶ 9-10 (declaration by Keith, J.).
170. Id. ¶ 10.
and techniques” of the majority, which through their rigidity “could only lead” to the conclusion that Serbia lacked genocidal intent.\textsuperscript{171}

For the purpose of assessing genocidal intent, the majority aimed to determine what the state knew and wanted at the precise time the campaign in Srebrenica turned from ethnic cleansing into genocide.\textsuperscript{172} It adopted an approach that is forward-looking in the sense that the analysis is based on the particular circumstances surrounding the conduct of the state at the moment the genocidal campaign began. This approach lies in stark contrast to international criminal law’s holistic, backward-looking approach, in which the judge has the benefit of knowing the results of a criminal enterprise and the part the accused played in it.

The Appeals Chamber’s decision regarding Tadić’s participation in a JCE (mentioned in Part II.A.2), is a useful example for distinguishing these different approaches. The Trial Chamber found the killing of five men in Jaskici was not an expected result of participation.\textsuperscript{173} By contrast, the Appeals Chamber held Tadić had the intention to further a criminal purpose in which the deaths were, under the circumstances, foreseeable.\textsuperscript{174} If a forward-looking approach, like the ICJ’s, was to be adopted to Tadić’s benefit, would it be possible to conclude that, on the basis of the information he possessed, he actively pursued or at least reconciled himself with the deaths of the five men in Jaskici? Another pertinent question would be: is it not generally the case that a state, with its intelligence, diplomatic, and military apparatus, is in a better position to gather information on the general criminal context in which its actions are undertaken and predict the consequences of its conduct?

The current state of affairs, summarized in Table 2, is not ideal. It is counterintuitive that an individual’s genocidal intent can be ascertained by reference to participation in a common plan and a general criminal context, whereas a state’s intent is rigidly construed

\textsuperscript{171} Id. at 241, ¶ 62 (dissenting opinion of Vice-President Al-Khasawneh).
\textsuperscript{172} Id. at 122, ¶ 190.
\textsuperscript{173} Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 759-65 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).
by avoiding extrapolations and evaluating particular acts and circumstances. Given that a state is an abstract entity that can better calculate the effects of its actions, it is reasonable to allow the purpose of its actions to be inferred more liberally. Part III will try to address some of these concerns.

<table>
<thead>
<tr>
<th>Table 2</th>
<th>CRIMINAL RESPONSIBILITY</th>
<th>STATE RESPONSIBILITY</th>
</tr>
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</table>
| **PREDOMINANT APPROACH** | Realist:  
• Policy purpose for a correct result | Formalist:  
• Logical reasoning for a sound decision |
| **PREDOMINANT REASONING** | Dialectical:  
• Balancing legal and reasonable | Analytical:  
• Logic syllogism based on formal premises |
| **FACT-FINDING**         | Inductive:  
• Elevating specific conduct | Deductive:  
• Descending to particular act |
| **INFERENCE OF GENOCIDAL INTENT** | Effects, backward-looking based:  
• “General criminal context”  
• Gravity suggests the need to punish | Aims, forward-looking based:  
• “Convincingly shown by particular circumstances”  
• ICJ: Gravity recommends certainty  
• Human rights tribunals: gravity recommends protection of victims |

**III. INTERSECTIONS**

*Dolus specialis* was not devised with state responsibility in mind. The introduction of state responsibility for acts of genocide in an essentially criminal law-based treaty (Article IX of the Genocide Convention), was not an ideal legislative solution. It is thus not surprising that in both *Bosnia & Herzegovina v. Serbia & Montenegro* and *Croatia v. Serbia*, the ICJ had difficulties establishing the state’s genocidal intent. Part III concentrates on how to translate a subjective criminal law element into the law on state responsibility.

Responses to this legal challenge vary dramatically. Some commentators and judges have questioned whether the Genocide Convention actually encompasses the state obligation not to commit genocide and have defended the view that the text merely establishes
the duty of the state to prevent and punish individual perpetrators. Others have proposed the revival of the concept of crimes of the state and of delicta imperii as a possible mode of liability.

This article suggests another approach. It proposes a methodological cross-fertilization between international criminal law and the law on state responsibility to more appropriately evaluate the intent of a state. A state’s intent should be construed in a nuanced, objective, holistic way, benefitting from methods developed under international criminal law. Conversely, recourse to inductive extrapolations to establish an individual’s genocidal intent requires prudence. In sum, based on the diagnosis that international criminal law and the law on state responsibility seem to counterintuitively follow inverted methodological directions, this study proposes a methodological re-balancing between these two realms of law.

A. ELEMENTS FOR A UNIFIED METHOD FOR GENOCIDAL INTENT

1. Nuanced Assessment of Gravity: Intent’s Extent and Intensity

Why is dolus specialis a recurrent legislative technique in Roman-continental criminal systems? It serves the purpose of aggravating a

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177. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 518 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998). Given that dolus specialis is a technique typical of Roman-continental legal systems, references in this article to national legislations and case law concentrate on countries from this legal tradition.
criminal offence when the criminal entertains a specific objective or motive considered to be particularly grave.\textsuperscript{178} The legislator is concerned with the “resoluteness of the will”\textsuperscript{179} of an agent, an intent that is “something more than the usual, simple willingness.”\textsuperscript{180}

Therefore, the legal definition of specific intent always embeds an element of gravity. Furthermore, for a criminal to have genocidal intent, a threshold of intensity (\textit{destroy}) and extent (\textit{a group, in whole, or in part}) needs to be established.\textsuperscript{181} If that threshold is not met, the individual might either have committed other crimes, not requiring specific intent, or might have committed genocide through an accessory form of liability (Part III.A.3). In other words, it is doubtful whether different degrees of genocidal intent can be envisaged for an individual.\textsuperscript{182}

By contrast, under the law on state responsibility, nothing prevents the adoption of a more nuanced approach to crimes, based on a sliding scale of seriousness. Under Chapter III of the A.R.S.I.W.A., breaches of obligations that constitute peremptory norms are to be considered serious, “having regard to their scale or character.”\textsuperscript{183} Article 40 envisages an aggravated form of responsibility for breaches of an obligation under a peremptory norm, which must involve “a \textit{gross

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\textsuperscript{178} Typical examples are found in articles 584 and 598 of the Spanish Criminal Code. \textit{See} arts. 584, 589 CÓDIGO PENAL [C.P.] (Spain). Both crimes contain a very similar \textit{actus reus}: to obtain, reveal, falsify, or destroy classified information that can undermine (article 584) / that is related to (article 598) national security or defense. Article 584 (the more serious crime) requires that the individual act with the aim of favoring a foreign power, while article 598 is directed against an agent not sharing that purpose. Another example is article 141(2) of the Portuguese Penal Code, entitled aggravated abortion. \textit{See} art. 141(2) CÓDIGO PENAL [C.P.] (Port.). It prescribes aggravated criminal responsibility if the agent practices abortion (already defined as a criminal act in Article 140) with the intent of obtaining profit.

\textsuperscript{179} The expression is borrowed from ERIK WOLF, \textit{LAS CATEGORÍAS DE LA TIPICIDAD} 50 (2005).

\textsuperscript{180} SCIPIONE PIACENZA, \textit{SAGGIO DI UN’INDAGINE SUL DOLO SPECIFICO} 13 (1943).

\textsuperscript{181} Genocide Convention, \textit{supra} note 6.

\textsuperscript{182} \textit{See} ROGER MERLE & ANDRÉ VITU, \textit{TRAITÉ DE DROIT CRIMINEL - PROBLÈMES GÉNÉRAUX DE LA SCIENCE CRIMINELLE} 726 (1988) (admitting the possibility of \textit{dolus indeterminatus} in crimes with special intent are inconclusive on \textit{dolus eventualis} and deny the possibility of \textit{praeter dolus}).

\textsuperscript{183} A.R.S.I.W.A., \textit{supra} note 4, at 110.
[intensity] or systematic [extent] failure” to fulfill the obligation.\(^{184}\) The International Law Commission explained that a violation is systematic if carried out in an organized and deliberate way and “the term ‘gross’ refers to the intensity of the violation or its effects.”\(^{185}\) It also recognized that not every violation of \textit{jus cogens} entails aggravated responsibility. On the contrary, the Commission defended a nuanced approach that avoids trivializing breaches of peremptory norms. The Commission stated “relatively less serious cases of breach of peremptory norms can be envisaged,” even though these breaches are still inexcusable.\(^{186}\) In other words, different levels of seriousness can be attributed to breaches of \textit{jus cogens} norms—including acts of genocide by a state.

This approach is not different from the ones that the ICJ has adopted in the past. In \textit{Diplomatic Staff in Tehran},\(^{187}\) the Court based its conclusions about Iran’s “true intentions” on the fact that it was “fully aware” of the urgent US Embassy situation and yet did nothing to protect the Embassy.\(^{188}\) Indeed, the ICJ considered the case “unique” and of “very particular gravity” because “the receiving State itself” disregarded the inviolability of a foreign embassy.\(^{189}\) Such conduct, Dupuy argues, implicitly helped the Court establish “not only the existence of wrongfulness and its attribution to the state, but also its level of gravity.”\(^{190}\)

Applied to a state, genocidal intent is key in determining how serious a breach of the Genocide Convention is (and, accordingly, if aggravated responsibility should attach). In determining a state’s genocidal intent, what needs to be established is the \textit{extent} and \textit{intensity} of state intent.\(^{191}\) Instead of determining “if” a state has \textit{dolus

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\(^{184}\) \textit{Id.} at 112 (emphases and comments added).

\(^{185}\) \textit{Id.} at 113.

\(^{186}\) \textit{Id.}


\(^{189}\) U.S. v. Iran, 1980 I.C.J. ¶ 92.

\(^{190}\) Dupuy, \textit{supra} note 188, at 35.

\(^{191}\) Arangio-Ruiz, \textit{supra} note 176, at 25 (writing in 1991 when the debates on state crimes in the ILC were still active, and noting the possibility of assessing the degree of fault to define the consequences of crimes).
specialis, the focus shifts to the question “does the state have any genocidal intent and, if so, to what degree?” The next section will argue a holistic, objectified analysis should guide the answer to this question.

2. Individual and Holistic Approaches to Genocidal Intent

In establishing specific intent, an interpreter can adopt an individual approach that reconstructs the perpetrator’s state of mind at the time of the act. The analysis is forward-looking, based on the information available to the perpetrator in her particular circumstances. As mentioned in Part II.B, this has been the predominant approach in cases of state responsibility for genocide.

Another approach to establishing specific intent is holistic. This approach interprets the conduct of the perpetrator in light of the conduct’s general context, in a backward-looking analysis that assumes “intentions are typically grounded on prior deliberation.” This holistic approach is predominant in international criminal law (Part II.A).

This article argues these methodologies should be inverted. A general criminal context is construed ex post facto, on the basis of information that was not necessarily available to the individual at the time of the act. This does not mean that, in conjunction with other factors, the context of an individual’s conduct might not be relevant to infer dolus specialis. But, inferring dolus specialis should entail a careful analysis of an individual’s decision-making process and of the role genocidal intent plays in it—an approach that is forward-looking and would better uphold the principle of individual liability.

By contrast, the presumption that a state had enough information to, through a process of “prior deliberation,” comprehensively evaluate a given criminal context is more defensible. A state is an organized, abstract entity formed by officials with different sources of military, diplomatic, and intelligence information. Therefore, it is, in principle, in a better position to calculate its own conduct in light of ongoing

193. Id. at 152.
194. Id.
events and to modulate the effects of its choices to act. A person, by contrast, tends to react in a less predictable manner, as her intentions are influenced by a changing environment. Therefore, contrary to the current tendency, a holistic approach is preferable in assessing states’ intent, whereas an individualized evaluation is appropriate under international criminal law.

An individual’s intent is not always irrelevant to state responsibility. The state of mind of a state official could have probative value: if Milosević were to be found guilty of genocide, it would probably affect findings on state genocidal intent. However, this simplistic view should be applied with caution as governments are not purely homogeneous entities formed by officials with a single state of mind.195 Genocidal intent could be the attitude of an isolated official. Gaeta presents the problem in the following manner:

[L]et us imagine that a state official of a country, say Italy, acting in his official capacity, participated in the perpetration of the terrorist attacks of 11 September 2001 . . . can anybody argue that Italy as such is responsible for having perpetrated the 11 September attacks and therefore for being ‘a terrorist state’?196

On the other hand, when a non-state actor is responsible for acts of genocide (Part II.B.2), the result tends to disregard the role of the State. In these cases, the rules governing attribution of state responsibility as formally applied by the ICJ are draconian. By requiring the interpreter to descend to the particular conduct (Part II.B.3), it becomes almost impossible to find a state responsible for acts of genocide.

A holistic analysis of intent avoids these unsuitable problems of attribution. For example, in Bosnia & Herzegovina v. Serbia &

195. The approach herein proposed is objective and casts doubts on the opinion of those who argue that a state’s genocidal intent is ultimately established by the act of an individual. But see Sam Clearwater, Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ’s 2007 Decision in Bosnia v. Serbia, 15 AUCKLAND U. L. REV. 1, 22 (2009); Nollkaemper, supra note 2, at 634.
196. Gaeta, supra note 175, at 636-37 (explaining that the intent of an individual official agent of a state does not represent the intent of the entire entity and, therefore, the entire entity cannot be held responsible for the individual agent’s intent).
Montenegro, Bosnia submitted a number of general arguments aimed at establishing the FRY’s dolus specialis. Allegations included: (i) the existence of a general plan for a “Greater Serbia;” (ii) the close military ties between JNA and the VRS, whose officers were even paid by Belgrade; (iii) the high proportion (up to 90%) of the military material of the VRS supplied by Belgrade; (iv) the FRY, Republika Srpska, and Republika Srpska Krajina formed one single economic entity and the FRY constituted the primary source of income of Republika Srpska and Republika Srpska Krajina; and (v) massive killings in detention camps throughout Bosnia, carried out using similar methods, and targeting the same group. The Court (except for separate and dissenting opinions) refused to holistically interpret the facts, and insisted on determining what state authorities actually knew in a given moment (Part II.B.3) through an individual assessment of each allegation.

This article proposes the point of departure to evaluate state genocidal intent is to objectively consider the degree of anticipation by the state of the genocidal result, based on the totality of information available to it. Such a solution would avoid two problems. First, it would prevent a simplistic attribution of the acts of a lone, rogue state agent, whose actions would only begrime the state to the extent they are part of a larger, holistic and nuanced analysis of state conduct. Second, it would permit a state’s active contribution to third parties carrying out a genocidal enterprise to be adequately evaluated, attaching to the conduct the proper level of intent it displays.

3. Volitional and Cognitive Elements of Genocidal Intent

For a long time, the theory of dolus in continental systems has devoted attention to the dichotomy between its volitional and its cognitive elements. The very evolution of the concept in continental systems can be traced back to theories that privilege a volitional

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198. Id. ¶ 422.
199. See PIACENZA, supra note 180, at 14 (noting the importance of distinguishing purpose in a “subjective sense,” with a psychological and emotive content, and what the purpose “would be objectively”).
approach (a person that wants a result acts with *dolus*) or a cognitive one (*dolus* means that the agent mentally envisioned the result). Welzel, founder of the influential finalist theory of *dolus* in Germany, famously defined it as “know and want the realization of a crime” or, more appropriately, the “realization of the legal description of the facts” (“Tatbestandsverwirklichung”). Welzel explains that an act with intent is carried out in “two moments:” an intellectual moment, or the consciousness of what one wants (“Bewußt sein davon, was man will”); and a volitional moment, or determination to perform the act (“Entschlossenheit dazu, daß man es durchführen will”). *Dolus* requires both a volitional (want a result) and a cognitive element (anticipate the result through a previous mental representation).

Commentators of international criminal law have revived this dichotomy with regard to genocidal intent. However, instead of recognizing that *dolus* is composed of these two elements, there is a tendency to rely either on volitional or cognitive standards to define genocidal intent. The volitional standard considers that a

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202. Id. at 25.

203. Id. at 40-41.


perpetrator “acts because he wants the destruction” of a protected group, whereas “under the cognitive standard, the perpetrator acts in the knowledge that destruction would be the (likely) consequence of his conduct.”²⁰⁶ Both standards merely reduce dolus specialis to one of its constitutive elements, as recognized by the general theory of dolus since Welzel.

While genocidal intent combines both cognitive and volitional dimensions, it is suggested that they assume different significances under international criminal law and under the law on state responsibility. In short, the volitional element is the predominant element in construing an individual’s genocidal intent, whereas the cognitive dimension is the point of departure for a state’s intent. Suppose the following scale that combines these two variables, presented under the formula [volitional/cognitive]:

<table>
<thead>
<tr>
<th>TABLE 3 (R=result)</th>
<th>Levels of cognitive representation of results:</th>
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<tbody>
<tr>
<td>Levels of volition:</td>
<td>1. R will happen</td>
</tr>
<tr>
<td>a. Direct will that . . .</td>
<td>a1</td>
</tr>
<tr>
<td>b. Indirect will that . . .²⁰⁷</td>
<td>b1</td>
</tr>
<tr>
<td>c. Foresaw and reconciled that . . .²⁰⁸</td>
<td>c1</td>
</tr>
<tr>
<td>d. Awareness that . . .²⁰⁹</td>
<td>d1</td>
</tr>
<tr>
<td>e. Inexcusable unawareness that . . .²¹⁰</td>
<td>e1</td>
</tr>
</tbody>
</table>

²⁰⁷. Id. at 77 (meaning the standard usually employed for dolus directus 2nd degree).
²⁰⁸. Id. at 77-78 (understood as the traditional elements for dolus eventualis: that of an individual that foresaw a result and accepted it or at least reconciled oneself with it).
²⁰⁹. Id. at 77 (defined as a loose impression or perception).
²¹⁰. Id. at 78 (understood as the standard of “should have been aware that,” usually employed to define negligence in criminal law and lack of due diligence for the purpose of state responsibility).
Under international criminal law, *dolus specialis* requires a high level of volition, which should be met with a certain level of cognitive anticipation of the act’s results.\(^{211}\)

In principle, direct will (a1 to a4) is the most important test for individual genocidal intent, even if the results anticipated are not deemed likely. A génocidaire pessimistic about chances of success still has genocidal intent. Theoretically, the anticipation of results might not be irrelevant: if an agent clearly hated an ethnic group and wanted its elimination (“a”) but only foresaw a very remote possibility (“4”) that her actions would foster the criminal result, one might question whether she actually had any intention to act on her hatred. Direct motivation also appears to be the volitional element of *dolus specialis* required in certain cases of accessory liability. That is the case of aiding and abetting according to the ICC (Article 25 (3)(c) of the Rome Statute), although not in the jurisprudence of the *ad hoc* tribunals.\(^{212}\) In one of the hypotheses about complicity in a crime by a group of persons acting with a common purpose, the Statute also requires the accomplice to share the intent of the group, under Article 25(3)(d)(i).

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\(^{211}\) Anticipation of the results refers to a mental representation by the criminal of the intended result. It does not mean a crime aggravated by the results, which would not find basis in the Genocide Convention. In the travaux préparatoires, the USSR, supported by France, suggested a totally results-based standard for genocide, substituting genocidal intent for “that resulted in the destruction of groups.” The proposal has been rejected, with fierce resistance by the US. See Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 Am. J. Int’l L. 369, 371 (1984); Hans Vest, *A Structure-Based Concept of Genocidal Intent*, 5 J. Int’l Crim. Just. 781, 781 (2007) (arguing that genocidal intent should be based “on a volitional (‘intent’) and/or cognitive (‘certain knowledge’) element;” and treating “intent” and “certainty” (consequences must be virtually certain) as two separate forms to satisfy genocidal intent, whereas the approach herein proposed acknowledges that genocidal intent should combine both volitional and cognitive dimensions).

Indirect will (b) might be enough for genocidal intent in cases of *dolus directus* in the second degree, when a criminal has full knowledge that a result will occur as part of her actions. Although, that would require a stricter cognitive element (it is doubtful whether hypotheses “b3” or “b4” would suffice as specific intent for the purposes of *dolus directus* in the second degree).

As a crime with specific intent, the possibility of genocide being committed with *dolus eventualis* (c) has been controversial.\(^\text{213}\) The ICTY has recognized the applicability of *dolus eventualis* in genocide cases.\(^\text{214}\) In continental legal systems, there is no *a priori* incompatibility between *dolus eventualis*\(^\text{215}\) (as opposed to *dolus directus*) and *dolus specialis* (as opposed to *dolus generalis*).\(^\text{216}\) Using genocidal intent as an example, a person can aim to destroy a protected group (*dolus directus* first degree), act in full knowledge that the group’s destruction will occur as part of her actions (*dolus directus* second degree) or be reconciled with the foreseeable risk of causing the group’s destruction (*dolus eventualis*).\(^\text{217}\)

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216. Examples of specific references to *dolus eventualis* can be found in CÓDIGO PENAL [C.P.], art. 141(2) (Port.); CÓDIGO PENAL [C.P.], art. 18(I) (Braz.); STRAFGEBETZBUCH [STGB] [PENAL CODE], § 5 (Ger.); CODE PÉNAL [C. PÉN.] [PENAL CODE], art. 121-23 (Fr.); Taylor, *supra* note 215, at 108-15.

217. In support of *dolus eventualis* in genocide cases, see Kress, *supra* note 205, at 577.
In principle, an individual’s *dolus specialis* could never be envisaged under hypotheses “d” and “e.” However, it might be argued that these hypotheses (“d” and “e”) are contemplated in command responsibility under Article 28 of the Rome Statute, which establishes separate crimes of omission by the superior for a failure of proper supervision and control of subordinates. 218 However, under Article 28, the commander is responsible for her own omission, not for the acts perpetrated by subordinates acting as *génocidaires*. 219 In other words, even if responsibility might ensue, it does not lead to the conclusion that the commander entertained genocidal intent.

In sum, an individual’s genocidal intent can be envisaged under limited situations in which a high volitional tendency meets a minimum cognitive threshold. This approach is better when it comes to upholding the principle of individual liability, and avoids overreliance on generalizations and extrapolations emphasizing the cognitive aspect of *dolus specialis*.

This study proposes that a less strict, more nuanced, and primarily cognitive-based test should be applied when determining a state’s genocidal intent. In principle, a state could be found responsible for genocide under any of the described headings in Table 3 (“a” to “e,” “1” to “4”). Here, the weight shifts to the cognitive side of the balance. The point of departure is an objective consideration of the results of state acts, with a view to reaching a nuanced conclusion that could, taking into account *actus reus*, place the state’s conduct on a scale ranging from “failure to prevent” to “aggravated responsibility” (with non-aggravated responsibility also being an alternative, as seen in Part III.A.1).

This approach recognizes the intent of an abstract entity is challenging to construe and ought to be viewed objectively. 220 The point of departure here is different from that used when determining individual intent, because of the priority given to cognitive dimensions

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when determining a state’s genocidal intent. This exercise is not an inquiry into whether the state had the direct will to destroy a protected group. Instead, it is primarily an assessment of what the state could anticipate as the results of its actions.

This approach is supported and practiced in other realms of law, which have abandoned any consideration of a personal or psychological nature in establishing state intent. The Inter-American Court of Human Rights, for instance, has refused to find violations “upon rules that take psychological factors into account in establishing individual culpability” and declared “irrelevant” the “intent or motivation of the agent who has violated the rights.” International labor law also offers some examples. In construing state intent, the International Labor Organization (ILO) supervisory system has consistently opted for an objective approach, without attempting to infer the ulterior “state of mind” of the concerned government, but rather shifting to an objective consideration of governmental conduct. Under ILO Convention 87 on freedom of association, legislation should not be enacted or applied with the purpose of hampering rights contained therein. Another example is ILO Convention 169, which, Interestingly, introduces not a forbidden intent, but a required one: consultations with indigenous and tribal peoples should be carried out with the purpose of reaching agreement or consensus. To extract its conclusion on a state’s purpose under Convention 169, the supervisory system verifies, for instance, whether enough consultations were

221. This seems to be the standard preferred by Judge Koroma who argued that if from the use of nuclear weapons the destruction of a protected group could be foreseen, that should be enough to characterize genocide. See Legality of the Threat or Use of Force of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 577 (July 8) (dissenting opinion by Koroma, J.).


224. This particular purpose is introduced as a measure of a state’s good faith in engaging with indigenous and tribal peoples in negotiations of their interest. See ILO, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 6(2), June 27, 1989, 1650 U.N.T.S. 383.
held, if all interested parties participated in consultations, and if appropriate institutional mechanisms were in place.

Similarly, the purpose or intent of state conduct has been addressed in World Trade Organization (WTO) dispute settlement cases. When assessing whether a measure was enacted or implemented “so as to afford protection to domestic production,” the Appellate Body has consistently stressed that it is not necessary to “sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent.” It further added that the “subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters”—a position that has been described as an “objective analysis of regulatory purpose.”

The comparison between the ILO and the WTO’s interpretation of intent and the way dolus specialis is interpreted in assessing state responsibility for genocide requires evident caution. Not only is the nature of state obligations remarkably different, but also the ILO and the WTO confine their analysis to internal legislative acts, whose structure and design can be more easily ascertained than the behavior of a state in a case of genocide. Furthermore, there are important textual differences between these legislative acts and texts used in determining dolus specialis. Yet, these examples serve to illustrate the

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229. Chile Taxes, supra note 228, ¶ 62.
difficulty in adopting a strictly volitional standard to establish state intent—and the tendency to avoid it.

This article proposes that when assessing the genocidal intent of a state one should rely primarily on the cognitive element of *dolus specialis*. If result “R” in Table 3 was going to happen (I), a high degree of genocidal intent can be established. The volitional side of the equation becomes less important—albeit not irrelevant in a determination of the degree of genocidal intent exhibited. In any case, even in the lowest standard on both sides of the scale (“e4”), it is conceivable under the nuanced approach submitted herein that a state could still be considered in breach of a due diligence obligation to prevent genocide.

Under the proposed approach, the further right or down one is in the matrix contained in Table 3 (towards “e4”), the greater the possibility of concluding that a state’s intent corresponds to failure to prevent genocide. The further to the left and the top (in the direction of “a1”), the greater the likelihood that a high level of genocidal intent can be inferred, leading to higher levels of responsibility.

Applying this nuanced approach to the factual elements in *Bosnia & Herzegovina v. Serbia & Montenegro*, it would be possible to properly value the FRY’s critical contribution to the VRS military campaign, including by the time genocide started. This contribution (described in Part III.A.2) suggests a level of responsibility that is more than a “failure to prevent” and a level of intent that is more than what the ICJ concluded was an “absence of *dolus specialis*.” This approach also avoids attributing a level of genocidal intent that would seem excessive in light of the circumstances. There is evidence to suggest that Belgrade accepted the fact that massacres were a real possibility. The concretely verifiable effects of the FRY’s actions, in light of the context as a whole, suggests that some form of genocidal intent was tolerated, if not entertained. It might not have been widespread inside the state apparatus and it might not even have been the primary objective of the FRY’s campaign. Most likely, though, Belgrade’s conduct before and during the massacre, considered as a whole, permits the conclusion that it at least reconciled itself with the high probability genocide would occur. Whether that amounts to aggravated or non-aggravated responsibility would depend on a
judicious weighing and balancing exercise, taking into consideration other elements of the case.

In summary, in its un-nuanced analysis constrained by the shackles of its methodology (Part II.B), the ICJ did not find what would probably be a more accurate depiction of Belgrade’s conduct: that the state provided essential contributions to a perpetrator of genocide in a situation in which it was or should have been aware that a genocide would likely be or was about to be committed.

IV. CONCLUDING REMARKS

Remarkable differences in methodology exist between international criminal law and the law on state responsibility. The methodological oppositions explored in Part II—realist versus formalist, dialectical versus analytical, inductive versus deductive methods—are not mere theoretical, inconsequential observations. They are symptomatic of a systemic distortion, according to which an individual’s genocidal intent is more liberally construed than a state’s faulty behavior. This work suggests a different approach, one that strives to strike a methodological re-balancing. It proposes that a volitional-based analysis relying on the accused’s state of mind is the method that better preserves an individual’s rights. By contrast, a nuanced, holistic, and cognitive-based analysis of a state’s intent permits a more refined evaluation of a state’s conduct during a genocidal campaign. In short, on the one hand this study advocates the need to understand the boundaries currently separating these two realms of law; on the other, it proposes a methodological cross-fertilization that fosters systemic coherence.
THE HUMAN RIGHT TO ENVIRONMENT IN THE 21ST CENTURY: A CASE FOR ITS RECOGNITION AND COMMENTS ON THE SYSTEMIC BARRIERS IT ENCOUNTERS

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I. INTRODUCTION

The debate regarding the existence of a human right to environment under international law is already reaching the mid-century mark. As early as 1968, United States’ Senator Gaylord Nelson proposed a constitutional amendment providing “[e]very person has the inalienable right to a decent environment.”1 In the ground-breaking National Environmental Policy Act of 1969 the United States’ Congress and President Richard Nixon recognized that “each person should enjoy a healthful environment.”2 The Works of the Preparatory Committee of the 1972 U.N. Conference on the Human Environment reveal that the draft Stockholm Declaration was “based on the recognition of the rights of individuals to an adequate environment.”3 More specifically, the 1972 Stockholm Declaration announces in its first principle, “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”4 Shortly after the Stockholm Conference, Harvard Law School Professor Louis B. Sohn, one of the founding fathers of international environmental law and a participant in the Stockholm conference, contributed this bit of wisdom regarding the above-quoted Principle 1 of the Stockholm Declaration: “[p]erhaps this phrase is meant to convey the existence of the right to an adequate

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environment.” Since then, the human right to environment has been the subject of much study and analysis. Professor Burns H. Weston and David Bollier recently highlighted that numerous environmental and human rights scholars have grappled with this issue during the past several decades “with acuity and at length.” A considerable

5. Louis B. Sohn, The Stockholm Declaration on Human Environment, 14 Harv. Int’l L.J. 423, 455 (1973). Professor Sohn served as Counselor on International Law at the U.S. Department of State during the initial stages of the preparatory works for the Stockholm Conference and was present during the conference as an observer for the Commission to Study the Organization of Peace, a non-governmental organization. See id. at 423.

6. Burns H. Weston & David Bollier, Green Governance – Ecological Survival, Human Rights, and the Law of the Commons 30 (2013). Weston and Bollier listed an impressive sample of approximately 60 books, book chapters, articles and draft papers written during the past five decades which are representative of both the amount and quality of the debate regarding the existence of a human right to environment under international law:

number of these scholars support the position that an environmental human right is recognized under the international legal order. I count myself among this group having first studied and published on the issue approximately twenty years ago.\(^7\)

On the flip side of this debate, skeptics of the human right to environment have historically argued against the existence of the right relying on several arguments, among them: (1) the inherent indeterminacy of an environmental human right due to its uncertain or ambiguous definition; (2) the redundancy such a right would create for environmental protection, as well as, for environmentalists’ efforts as a whole given the existence of other environmental legal regimes, strategies and instruments, both at the national and international levels, including the derivative use of other recognized and applicable human rights; (3) the non-justiciable and non-enforceable nature of an environmental human right; (4) the inherent anthropocentric bias of a human right to environment; (5) the devaluation or debasing of human rights currency if an environmental human right were prematurely recognized; and a catch-all category that I will call, (6) an “environmental human right is conceptually just a bad idea” argument. It should not surprise us that these criticisms mirror those raised against other new or emerging human rights. Fortunately, these criticisms to a human right to environment also have been evaluated thoroughly and rejected in the past with both “acuity and at length.”\(^8\)

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\(Id.\) at 30 n.6. Of course, many more examples exist as the debate regarding the human right to environment continues to inspire the research of new generations of international law and human rights scholars around the globe.


8. For examples of some of the direct responses made to the skeptics’ criticisms discussed in this paragraph, see, e.g., WESTON & BOLLIER, supra note 6, at 27-49 (rejecting the criticisms regarding non-justiciability, indeterminacy and anthropocentrism); Rodriguez-Rivera, supra note 7, at 29-37 (addressing all of the above criticisms made by traditionalists); ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 24 (1991) (providing that tribunals can solve any uncertainty or ambiguity related to definition of a human right to environment); François Du Bois, Social Justice and the Judicial Enforcement of Environmental Rights and Duties, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 153 (Alan Boyle & Michael Anderson eds., 1996) (discussing the conflicting views amongst courts regarding environmental rights, and how the branches of government should seek to be impartial in establishing the
Hence, I will merely restate the accurate responses already posed to the same:

(1) the alleged uncertainty or ambiguity related to the content of a right to environment is easily overcome through international, regional and national tribunals who are at this stage more than capable of providing content to said right; 9

(2) the alleged redundancy criticism is misguided in that, (a) the right to environment serves to fill a very significant gap within international environmental law – that is, the protection of human life and dignity from threats related to environmental degradation caused by the acts or omissions of an individual’s own state government, 10 and (b) there is no particular strategy that can address by itself all of the complex problems related to the environment, therefore, additional complementary strategies,

rights); A.A. Cançado Trindade, The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 302-03 (Edith Brown Weiss ed., 1992) (asserting that existence of human rights institutions for the implementation and supervision of states’ compliance with its human rights obligations is sufficient to satisfy the enforceability requirement); Cançado Trindade, supra note 8, at 304 (“[f]ormal justiciability or enforceability is by no means a definitive criterion to ascertain the existence of a right under international human rights law”); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 99-100 (1994) (providing that formal justiciability or enforceability not a definitive criterion to establish or prove existence of a human right); Melissa Thorne, Establishing Environment as a Human Right, 19 DEN. J. INT’L L. & POL’Y 331-33 (1991) (stating that the existence of human right to environment would make pertinent forum more willing to hear claims; and proposes that the right to environment, or parts of it, have jus cogens status); Dinah Shelton, What Happened in Rio to Human Rights?, 3 Y.B. INT’L ENVTL. L. 75, 91 (1992) (categorizing as flawed the argument that it is difficult to conceptualize a human right to environment as an inalienable or non-derogable right when confronted with others, since it establishes the conclusion as a criterion); Theodor Meron, On a Hierarchy of International Human Rights, 80 AM. J. INT’L L. 1, 22 (1986) (suggesting it is inaccurate to rely on hierarchical terms when discussing the existence of human rights); PAUL GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION 43 (1976) (proposing that the right to environment, or parts of it, have jus cogens status); R.S. Pathak, The Human Rights System as a Conceptual Framework for Environmental Law, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 211-14 (Edith B. Weiss ed., 1992) (proposing that the right to environment would qualify as a human right pursuant to the delineation of minimum criteria established for human rights in general).

9. KISS & SHELTON, supra note 8, at 24.
10. Cançado Trindade, supra note 8, at 302-04.
such as a rights-based approach, should be welcomed;\textsuperscript{11}

(3) the alleged non-justiciability of the right to environment lacks merit given that human rights are as a matter of fact implemented, supervised and enforced by an extensive system of international, regional and national tribunals and commissions, and, more importantly, enforceability is not a definitive criterion in establishing and recognizing the existence of a human right;\textsuperscript{12}

(4) the alleged anthropocentric bias of the right to environment is overstated in light that the intrinsic value of the environment has been incorporated into the definition of an expansive right to environment (both substantively and procedurally), and that the implementation of said expansive right would result in benefitting nature;\textsuperscript{13}

(5) the alleged devaluation or debasing of the human rights currency is always a persuasive argument, but should not curtail \textit{a priori} the evaluation of new rights as each proposal must measure to human rights standards to gain international recognition;\textsuperscript{14} and

(6) the “bad idea” argument is anachronic and outdated as it relates to environmental issues.\textsuperscript{15}

In this paper, I will revisit in more depth what I consider has been

\textsuperscript{11} \textit{Id.} (asserting the individual right to be informed of projects and decisions that threaten to harm the environment and the right to participate in making decisions that may affect the environment).

\textsuperscript{12} \textsc{Higgins}, \textit{supra} note 8, at 99-101 (comparing the argument that human rights are found in various international instruments with the argument that these instruments merely serve as a way to express the obligations of providing human rights without actually creating the rights themselves).

\textsuperscript{13} \textsc{Erin Daly}, \textit{Constitutional Protection for Environmental Rights: The Benefits of Environmental Process}, 17 INT’L J. PEACE STUD. 71, 72 (2012) (describing the difficulties in defining substantive environmental rights compared to procedural rights, and explaining that facilitating public participation could benefit not only the environment, but also civil society).


\textsuperscript{15} \textsc{Contra J.B. Ruhl, An Environmental Rights Amendment: Good Message, Bad Idea}, 11 NAT. RESOURCES & ENV’T 46 (1997) (arguing that including an amendment to the U.S. Constitution to create the right to environmental protection is a bad idea).
the strongest objection raised by classical or traditional international law scholars—namely, the alleged dearth of formal hard law sources to support environmental human rights scholars’ claims regarding the existence and recognition of a human right to environment under international law.

Traditionalists argue that since states have not accepted a new human right to environment through a formal treaty, they are not legally bound to this illusory new right. For example, Günther Handl adopted this position some twenty-five years ago while labelling the evidence presented at the time as “indirect, normatively ‘soft’, or exceedingly limited in scope.” Professor Handl reasoned then that the human right to environment could not exist since it “had not found express affirmation in any binding or effective international legal instrument.” Moreover, Handl concluded:

In sum, international practice does not support the claim of an existing generic human right to a healthy environment. The evidentiary basis that proponents of such a right relie[sic] upon is simply too narrow or normatively too weak to lend itself to that major normative extrapolation that a human right to a healthy environment would undoubtedly represent.

Relying on a more progressive approach to the source’s doctrine, in which so-called soft law instruments may evince as much of a state’s consent as hard law instruments, I previously responded to Handl’s evidentiary argument as follows:

There are many instruments that serve as unmitigated sources for the

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16. My use of the term “classical or traditional international law scholars” is intended to refer to those that espouse the view that international law is strictly statist, positivist, and consensual, and that a state’s consent is explicitly or implicitly required as a pre-condition for an international norm’s binding effect over said state.

17. My use of the term illusory is done with a degree of sarcasm. In the past, I have rejected classical or traditional international law scholars’ paternalistic and condescending tone when criticizing the more progressive views of the proponents of new human rights. See Rodriguez-Rivera, supra note 7, at 29-31.


19. Id. at 122.

20. Id. at 128.
recognition of the human right to environment in the international legal order, including: the thousands of international environmental soft law instruments; the many national constitutions and legislative acts; the dozens of international, regional and national court decisions; the hundreds of non-governmental organizations; the thousands of local or “grass-roots level” community organizations, and, more importantly, the overwhelming and sweeping transformation in the valuation of environmental concerns in all levels of society. To ignore this voluminous evidence of the will of the people would be to ignore the evolution of international law during the last half-century.\(^{21}\)

The increased use and reliance on soft law agreements by states is an important development in modern international law and, particularly, in international environmental and human rights law. The vital role and effectiveness of soft law instruments in the management and resolution of complex and difficult global problems is positively acknowledged in contemporary legal scholarship.\(^{22}\)

Approximately thirty years ago, Judge Bruno Simma wisely foresaw the vital role that soft law instruments would assume in the development of new human rights, as well as, in the resolution of global standard-setting issues:

Even a hard look at the role that soft law plays in the development of international human rights will reveal a decidedly positive picture. Soft law is used regularly for international human rights standard setting, designed either as a final or as an intermediate reflection of international consensus. In the process of development of human rights law at the universal level, a soft-law stage is certainly the rule now. In other instances, soft-law instruments or processes do not play merely a preliminary role, but are here to stay and assume functions that go well beyond that of preparing and

\(^{21}\) Rodríguez-Rivera, supra note 7, at 44-45.

maybe testing the text of later human right treaties. I would go as far as saying that it is probably the more important part of international human rights that is manifesting itself within the soft-law processes and mechanisms of standard setting, or maybe I should say that part where the political action is. 23

Many scholars have accepted the premise that soft law instruments are important sources of modern international law and agree that most international actors comply with the duties and obligations agreed upon in said instruments. Professor Edith Brown Weiss explains:

The common assumption is that countries comply much better and more fully with binding international agreements than with nonbinding legal instruments. Experience suggests an alternative hypothesis: that countries under some circumstances may comply with legally nonbinding instruments as well as they do with binding ones. 24

The reality is that most states comply with a considerable number of soft law instruments in modern international law subject areas. 25

24. Weiss, supra note 22, at 1.
Why would it be otherwise? As Professor David Kennedy has expressed, “there is no a priori reason to divide either the ‘sources’ of law or persuasive reasons for compliance into these two categories.”

II. INITIAL CODIFICATION OF “BINDING HUMAN RIGHTS” AND THE ADVENT OF MODERN INTERNATIONAL LAW


26. See DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 29 (1987) (explaining that the sources doctrine’s “hard” and “soft” law categories are arbitrary). Id. at 99 (“[t]he authority of various sources, their limitations, and the hierarchical relationship among sources do not depend upon the content of the norms they originate . . . argument about the authority of various norms, when conducted in the rhetoric of sources doctrine, proceeds independent of the norm’s particular content or application.”).

27. See generally U.N. Charter.


treaties are considered the “International Bill of Rights.”

Convincing states to accept the inherent limitations imposed upon their sovereignty by the nascent human rights system was no small feat, and its contribution towards the planet’s future survival is immeasurable. But, are the human rights contained in the International Bill of Rights a finite list of rights? May the list be expanded? If so, how may the list be expanded? What effect does the inclusion of individuals as subjects of international law have on the future development of human rights? How will international norm creation change with modern developments in science, technology and communications? How do we account for social developments affecting religious, cultural, moral, and ethical values? Was a human rights Pandora’s box opened by the states’ formal adherence to the International Bill of Rights? As we can surmise, these and many more questions become relevant today as “new” or “emerging” human rights continue to blossom well into the twenty-first century.

Scientific and technological breakthroughs that took place after the development of the International Bill of Rights have altered dramatically the notion and concept of time within the international legal order. We must remember that just a few years after the signing of the covenants on civil, political, economic, social, and cultural rights, a human walked on the Moon! International travel that once took weeks and months has been reduced to hours and minutes. The evolution of computers and the internet has made access to information both universal and instantaneous, thus, giving new meaning to freedom of information. In turn, this new reality has affected how scholars currently evaluate the existence and recognition of international norms. Traditionally, state practice required decades, if not centuries, before crystallizing into customary law, as the


34. See Grear, supra note 28.


compilation and analysis of evidence conducive to establishing uniformity and *opinio juris* was an extremely slow process. This fact was generally understood and tolerated under the premise that the very information needed for a proper evaluation of the elements of customary law travelled very slowly around the world, so to speak. Today, evidence of state practice can be recollected and studied quickly and accurately, making the process of the crystallization of customary law potentially much faster than in the past.

The very essence of sovereignty as a concept also transformed in the modern age of globalization. For example, participation and access to the global economy significantly restricts a state from taking protectionist economic actions, while also opening its fiscal and monetary policies to scrutiny by the global financial market. As Robert McCorquodale and Richard Fairbrother explained:

Globalization has thus been transformative in terms of a reconceptualizing of state sovereignty within both international relations and international law.

Of course, states have never had exclusive control over their economic, legal, political, and security affairs. However, the current trend of globalization differs from past transnational influences on state sovereignty in the scale and speed of its operation.

... [T]he fact that the economic decision-making process is being taken away from governments and put in the hands of financial “experts” in globalized economic institutions also means that the people and the governments of developing states are not effectively involved in decisions affecting their lives. This has an impact on both state sovereignty and human rights.

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Moreover, states currently acknowledge “the Internet is incubating a different type of economics and governance, one that recognizes the human propensity to cooperate and the right of everyone to participate in managing shared resources.” 40 Hence, we cannot ignore that modern global developments continue to impact and transform the very core of international law, including how international norms are developed and recognized in the modern era. Modern international law requires a novel and innovative approach to the source’s doctrine; one that incorporates technological developments, as well as, the new values that modern societies are adopting.

The International Bill of Rights has been supplemented since 1966 by a handful of “binding” treaties focused on specific rights (such as, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment41) or on specific rights-holders (such as the Convention on the Elimination of All Forms of Discrimination against Women42). 43 However, the development of new human rights in modern international law has relied mainly on soft law instruments.44 This should not surprise us. As I explained some two decades ago:

[M]odern international law has evolved into a more political and diplomatic order, and less of a legal order. Thus, the role of international organizations and of non-governmental organizations has gained greater importance in the formulation of international norms. Further, it is undeniable that soft law instruments have become the preferred legislative approach in the international community, particularly in the field of human rights. The factors that explain the exponential growth of soft law instruments in

40. WESTON & BOLLIER, supra note 6, at 16.
43. See Grear, supra note 28, at 20.
modern international law must be considered.

The attractiveness of soft law instruments stems from the flexibility they provide. The form of these instruments is not the important element; what is important is “the manner in which the obligations, if any, created by them are expressed.” Soft law instruments are generally produced by lengthy, and often controversial, negotiations. The fact that states are careful in the drafting of soft law documents is evidence that these ‘are perceived to have political consequences of a serious sort.’ States may continue to defend their actions under the doctrine of sovereignty, but it is clear by the proliferation of soft law documents that states understand that mutual interdependence in the world necessitates cooperation. Global cooperation, in turn, requires the narrowing of the sovereignty doctrine.45

Experience has also proven that states comply with soft law documents to the same degree as they do other binding international agreements, making soft law documents even more attractive as an effective instrument for the management and resolution of complex international problems.46

III. HUMAN RIGHTS AND THE ENVIRONMENT

Global awareness of environmental problems began during the 1970s. Depletion of the ozone layer, acid rain, deforestation, desertification, reduction in the world’s biodiversity, and the disposal of hazardous materials were among the difficult issues tackled by the international community during the last three decades of the twentieth century. However, during the period when human rights were discussed and identified in the International Bill of Rights (1945-1966), environmental knowledge and sensibilities had not yet developed. Therefore, the argument that the human right to environment does not exist because it is absent from those initial documents misses the point. Current U.N. Human Rights Council’s Special Rapporteur on Human Rights and the Environment (formerly the Council’s Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and

45. Rodriguez-Rivera, supra note 7, at 41-42.
46. See Weiss, supra note 22, at 1 (“Experience suggests . . . that countries under some circumstances may comply with legally nonbinding instruments as well as they do with binding ones.”).
sustainable environment), John H. Knox, expounded on this very issue:

The drafters of the seminal human rights instrument, the 1948 Universal Declaration of Human Rights, did not include environmental rights. Nor, at the time, did the national constitutions to which the drafters looked for inspiration. The silence was understandable. Although humans have always known of our dependence on the environment, we were only beginning to realize how much damage our activities could cause to the environment and, as a result, to ourselves. Efforts to mitigate environmental degradation were then still in their infancy. 47

The fact that as early as 1972, the international community met during the United Nations’ Conference on the Human Environment held in Stockholm, Sweden, and agreed that humans had the inalienable right to live “in an environment of a quality that permits a life of dignity and well-being”48 should not be trivialized or dismissed merely because the states involved chose to recognize this new right using a soft law document. On the contrary, this strategy—that is, the use of a non-binding or soft international legal instrument—set the standard for future dealings in the global community concerning the environmental problématique, as well as other complex modern international problems.49 The lesson that remains clear from the Stockholm Conference is that ever since the very first international meeting concerning the human environment, it was obvious to all present that the human right to environment existed and was recognized by the international community.50 The human right to


48. Stockholm Declaration, supra note 4, art. 1.

49. See Weiss, supra note 22, at 1.

50. Paolo Galizzi, From Stockholm to New York, via Ria and Johannesburg: Has the Environment Lost its Way on the Global Agenda?, 29 FORDHAM INT’L L.J. 952, 960 (2005) (claiming the Stockholm agenda included the topic of the human right to environment at the forefront, reflecting a common outlook on the need for the
environment was initially expressed in terms of a linkage between human rights and the environment and subsequently articulated in terms of a linkage between human development and the environment.51

Today, the existence and recognition of the human right to environment is more obvious and necessary than ever before. First, the catastrophic risks and threats to the environment and to human rights presented by the climate change phenomena, as well as other environmental conditions, are widely understood and recognized.52 Second, the exponential growth of international environmental instruments, documents, and actions adopted by states, international, and regional organizations, non-governmental organizations, academic and research institutions, experts of all related disciplines, grass-roots and community movements, and environmental activists confirms the international recognition of the human right to environment.

With regard to the catastrophic risks and threats to the environment and human rights brought upon by climate change, the Fifth Assessment Report of the Intergovernmental Panel on Climate Change indicates:

SPM 2. Future Climate Changes, Risks and Impacts

Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing


the likelihood of severe, pervasive and irreversible impacts for people and ecosystems . . .

SPM 2.3 Future Risks and Impacts Caused by a Changing Climate

Climate change will amplify existing risks and create new risks for natural and human systems. Risks are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development.53

Climate change threatens water availability, food security and infrastructure, as well as, the deterioration of people’s health and the increased displacement among the poor.54 John H. Knox recently described the dreadful effects from climate change already evidenced around the globe:

In what has become a tragic annual event, a deadly typhoon struck the Philippines. Record floods inundated Chennai in India, as well as towns across the United Kingdom of Great Britain and Northern Ireland and along the Mississippi River in the United States of America, parts of Argentina, Brazil, Paraguay and Uruguay experienced their worst flooding in 50 years, forcing the evacuation of tens of thousands of people. Other areas suffered from too little water. UNICEF warned that 11 million children in eastern and southern Africa were at risk of hunger, disease and lack of water because of drought conditions. Lake Poopó, the second-largest lake in the Plurinational State of Bolivia, was reported to have dried up as a result of changing weather patterns. As 2016 began, scientists reported that 2015 was the hottest year in modern history, about 1° C warmer than the pre-industrial average.55

I must confess that as I draft this section of the paper, I cannot help but recall the natural disasters recently experienced in the Caribbean Region. On September 20, 2017, Puerto Rico and the U.S. Virgin Islands were ravaged by Hurricane Maria, a Category 5 hurricane that hit the islands with sustained winds between 150 and 170 miles per

53. Id. at 8, 13 (emphasis added).
54. See id. at 15-16.
hour.\textsuperscript{56} Not since 1928 had a storm landed on these U.S. territories with such ferocity.\textsuperscript{57} The loss of life, property, and infrastructure caused by Hurricane Maria is historic and cataclysmic. After a brief visit to Puerto Rico, Speaker of the U.S. House of Representatives, Paul Ryan, described the devastation caused by this storm as a “game changer.”\textsuperscript{58} Yet, unfortunately, this was not an isolated event.

Two weeks prior to Hurricane Maria, Hurricane Irma carved its own deadly path of destruction through the Caribbean Region.\textsuperscript{59} Hurricane Irma became the most powerful hurricane ever recorded to date in the area (Category 5 with maximum sustained winds registered at 185 miles per hour).\textsuperscript{60} This devastating and life-transforming hurricane left behind intense human suffering and desolation as it forced its way through Antigua and Barbuda; St. Martin and St. Marteen; St. Kitts and Nevis; Anguilla, Peter Island and Tortola; St. Croix, St. John and St. Thomas; Puerto Rico and Cuba; Turks and Caicos; and the Florida Keys and Florida, U.S.A.\textsuperscript{61} Hurricane Irma was itself preceded two weeks prior by Hurricane Harvey, which caused massive flooding and destruction in Texas, U.S.A.\textsuperscript{62}

In between Hurricane Maria and Hurricane Irma, the previously Irma-stricken Leeward Islands were impacted again by Hurricane

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\textsuperscript{57} Id.


\textsuperscript{59} Haas, supra note 56.


José, which became the longest-lived Atlantic hurricane since 2012, and the Mexican coast was struck by Hurricane Katia, also leaving substantial loss of lives and property. Shortly after Hurricane Maria left the Caribbean waters, Hurricane Nate caused widespread destruction and death through Central America, Cuba, Cayman Islands, Mississippi and other southern states of the U.S.A. Together, these tropical storms left millions of people throughout the Caribbean Region in an anarchic state of deprivation, with widespread looting and piracy. No water, no food, no electricity, no communications, and no hope for millions of people. Hundreds of lives lost; millions of souls battered and irreversibly impoverished for generations. Extensive migration in the region is making any meaningful recovery extremely difficult, at best.

Dramatic changes in the climatological patterns, brought upon by global warming, have been experienced during the past decades by the approximately forty million people who reside in the Caribbean Region. Tropical storm systems, such as hurricanes, have increased


67. Willingham, supra note 65 (detailing the impacts of each storm including lives lost and property damage).

68. Id.


70. D.J. Wuebbels et al., Highlights of the Findings of the U.S. Global Change Research Program Climate Science Special Report, U.S. GLOB. CHANGE RESEARCH
in occurrence and intensity; rain patterns have altered dramatically resulting in unseasonal floods and droughts. In the Caribbean, we not only understand climate change, we live it!

Simply explained, climate change is caused by the increase in carbon dioxide (CO₂) and other greenhouse gas emissions around the world. In turn, the increase in CO₂ and other greenhouse gas emissions is the direct result of governments around the world promoting and implementing policies that increase or allow the increase of these emissions, therefore, exposing vulnerable communities, even their own, to the risks associated with climate change. To make matters worse, climate change is only one in an extensive list of environmental degradation and human rights violations that states’ actions are responsible for.

Although international environmental law developed an impressive corpus intended to ameliorate global environmental degradation during the last five decades, one obvious gap not included in this body of law involves the protection of human life and dignity from threats related to said environmental degradation, specifically when a government’s actions or inactions directly cause such threats. This is the fundamental reason why a human right to environment is needed and why during the last fifty years the international community has moved towards the recognition and implementation of the human right to environment. More importantly, it is time to accept that “[w]ere the Universal Declaration to be drafted today, it is easy to imagine that it would include a right recognized in so many national constitutions and regional agreements.”

71. Id.
72. Id. (stating country announcements regarding emissions of greenhouse gasses are currently above levels necessary to combat climate change).
73. Id.
IV. DEVELOPMENT OF THE HUMAN RIGHT TO ENVIRONMENT: FIFTY YEARS OF RECOGNITION

Reflecting on the approximately twenty years that have passed since I started researching the subject of the human right to environment, provides a clear example of the effect that time has had over the study of international law. The access to primary and secondary legal sources provided by current research tools is now much easier, faster, and thorough than twenty years ago. The proceedings and documents of international and regional organizations are readily available on any laptop. International, regional, and national case law are literally at fingertips away. Book chapters and law review articles are quickly retrieved through the internet. More importantly, I have witnessed how the volume and quality of the scholarship on the right to environment has grown exponentially during the last twenty years. For example, recent work published by Burns H. Weston and David Bollier (2013)\textsuperscript{75} and Alan Boyle (2011)\textsuperscript{76} represent important contributions in the study of the human right to environment and inspire new voices researching and writing on the subject.

The human right to environment is best understood as a compendium or bundle of rights developed to protect human life and dignity, as well as, the environment.\textsuperscript{77} This compendium or bundle of rights can be subdivided into three distinct categories:

1) a substantive and autonomous right to environment, which I define as a human right to live in an environment of such a baseline quality as to allow for the realization of a life of dignity and well-being (also includes elements of the right of environment that flow from the environment’s own intrinsic value and independent from human use of the environment, of sustainable

\textsuperscript{75} See generally WESTON & BOLLIER, supra note 6.


\textsuperscript{77} Rodriguez-Rivera, supra note 7, at 9.
development and of intergenerational equity).\(^78\)

2) a substantive and derivative right to environment generated by the reformulation or expansion of existing civil and political rights (such, as the right to life and respect for private and family life),\(^79\) and economic, social and cultural human rights (such as, rights to a standard of living adequate for health and well-being, to the highest attainable standard of mental and physical health, to safe and healthy working conditions, among others)\(^80\) – or as Professor Boyle suggests the “greening of human rights”;\(^81\) and,

3) procedural human rights (also called environmental rights) derived from the reformulation or expansion of existing civil and political human rights, which are indispensable for the effective implementation of the substantive right to environment in both its autonomous and derivative forms (“e]nvironmental rights include: access to environmental information, participation in the decision-making process of environmental policies, availability of legal remedies to redress environmental harm, and due process rights in general”).\(^82\)

\(^78\) For an in-depth discussion on the contents of the autonomous right to environment, including its right of environment component, see Rodríguez-Rivera, supra note 7, at 9-15.

\(^79\) See Weston & Bollier, supra note 6, at 285.

\(^80\) See generally R.R. Churchill, Environmental Rights in Existing Human Rights Treaties, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 89 (Alan E. Boyle & Michael R. Anderson eds., 1996). I previously identified the following economic, social and cultural rights as having potential to be reformulated or expanded to incorporate environmental protection:

[T]he right to safe and healthy working conditions; the right to an adequate standard of living and the continued improvement of living conditions; the right to food; the right to the highest attainable standard of physical and mental health; the right to improvement of all aspects of environmental and industrial hygiene; the right to education; the right to enjoy benefits of scientific progress; and the right to participate in cultural life.

Rodríguez-Rivera, supra note 7, at 19; see also International Covenant on Economic, Social and Cultural Rights, supra note 33, at 7.

\(^81\) Boyle, supra note 76, at 1.

\(^82\) Rodríguez-Rivera, supra note 7, at 15. Professor Philippe Sands summarized the civil and political rights contained within the concept of environmental rights as follows:

[T]he right to life; prohibition against cruel, inhuman or degrading
The human right to environment, in the above three formulations, “is today officially recognized juridically” under modern international law. As I explained in the previous section, the international community has produced an overwhelming number of international environmental instruments and actions that evince the recognition and implementation of the human right to environment. States have expressed their consent to an environmental human right in a myriad of ways. International and regional treaties, as well as state constitutions, laws, and court opinions, have explicitly and implicitly adopted and implemented the human right to environment in all three of its formulations (autonomous, derivative, and procedural). International, regional, and national declarations, expressions, and statements in general have been issued by states, international, and regional organizations, non-governmental organizations, academic and research institutions, experts of all related disciplines, grass-roots and community movements, and by environmental activists confirming the international recognition of the human right to environment. The United Nations’ General Assembly, as well as many of the United Nations’ organs, programs, funds, and specialized agencies, have aggressively promoted and recognized the human right to environment in all or some of its manifestations; as have also, regional organizations around the world, including those in Africa, the Americas, Asia, the Middle East, the South-Pacific, and Europe.

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treatment; the right to equal protection against discrimination; the right to an effective remedy by competent national tribunals for acts violating fundamental rights; the right to receive information; the right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations; the right to protection against arbitrary interference with privacy and home; prohibition against arbitrary deprivation of property; and the right to take part in the conduct of public affairs.

PHILLIP SANDS, 1 PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 229 (1995). Inter-American Human Rights’ Commissioner Dinah Shelton would also include freedom of association in the context of environmental rights. See Dinah Shelton, supra note 8, at n.2. See generally International Covenant on Civil and Political Rights, supra note 34, art. 1 (declaring that every person should have the right to political freedom).

83. WESTON & BOLLIER, supra note 6, at 285.
I will proceed to list some examples of the sources of law that promote or recognize the human right to environment under each of the above categories. I include both explicit and implicit sources as well as “hard law” and “soft law” sources, as I understand they all are acceptable and persuasive sources of modern international law. Moreover, pursuant to a more progressive approach to international law, I highlight the value behind the diversity of cultural, philosophical, legal, and political ideologies associated with the following sources of law as well as the importance of including the voices of institutions that are accessible to underrepresented individuals and communities. Substance should always be more important than form.

A. AUTONOMOUS RIGHT TO ENVIRONMENT

1. International Level

- In 1968, the United Nations’ General Assembly recognized the link between the degradation of the human environment and the enjoyment of basic human rights.84

- In 1969, the United Nations’ General Assembly called for the implementation of international and national legal and administrative measures for the protection and improvement of the environment.85

- In 1972, the Stockholm Declaration recognized in its first principle: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears the solemn responsibility to protect and improve the environment for present and future generations.”86

• The works of the Preparatory Committee of the 1972 U.N. Conference on the Human Environment reveal

84. G.A. Res. 2398, supra note 51, at 2 (noting how scientific advancement impacts the relationship between man and his environment, while expressing concern about the accelerating degradation of the environment and its impact on basic human rights).


86. Stockholm Declaration, supra note 4, art. 1 (emphasis added).
that the draft Stockholm Declaration “was based on the recognition of the rights of individuals to an adequate environment.”

- After participating in the 1972 U.N. Conference on Human Environment held in Stockholm, Professor Louis Sohn commented about the above-quoted Principle 1 of the Stockholm Declaration: “[p]erhaps this phrase is meant to convey the existence of the right to an adequate environment.”

- In 1974, the United Nations’ General Assembly approved the Charter for the Economic Rights and Duties of States which raised the protection, preservation, and enhancement of the environment for the present and future generation as an international duty of states.

- In 1979, the United Nations’ General Assembly called for multi-sectoral international environmental cooperation.

- In 1979, the Convention on the Elimination of All Forms of Discrimination against Women implicitly recognized the autonomous right to environment.

- In 1980, the United Nations’ General Assembly issued a resolution titled Historical responsibility of States for the preservation of nature for present and future generations, which concluded that preservation of nature “is a prerequisite for the normal life of man.”

- In 1982, the United Nations’ General Assembly adopted the World Charter for Nature, which proclaimed among its conservation principles the protection of nature, ecosystems,

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87. Works of the Preparatory Committee, supra note 3.
88. Sohn, supra note 5, at 455.
species, and organisms.\textsuperscript{93} 

- In 1982, the United Nations’ General Assembly promoted an international effort to list banned products harmful to health and the environment.\textsuperscript{94}

- In 1986, the Legal Principles on Environmental Protection and Sustainable Development, adopted by the Experts Group on Environmental Law of World Conference on Environment and Development and later made part of the Brundtland Commission Report, declared: “[a]ll human beings have the fundamental right to an environment adequate for their health and well-being.”\textsuperscript{95}

- In 1987, the United Nations’ General Assembly endorsed The Environmental Perspective to the Year 2000.\textsuperscript{96}

- In 1987, the World Commission on Environment and Development issued a report (commonly referred to as the “Brundtland Commission Report”) that gave birth to the concept of sustainable development and adopted the above-discussed 1986 Legal Principles containing express reference to the human right to environment.\textsuperscript{97}

- In 1989, the Convention on the Rights of the Child implicitly recognized the autonomous right to environment.\textsuperscript{98}

- In 1989, the United Nations’ General Assembly called for the implantation of warning systems and assistance mechanisms for environmental emergencies.\textsuperscript{99}


\textsuperscript{95} Our Common Future, \textit{supra} note 51, at 339.


\textsuperscript{97} Our Common Future, \textit{supra} note 51, at 339.

\textsuperscript{98} Convention on the Rights of the Child art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3 (“[T]he right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”).

In 1989, the twenty-four heads of state governments or their representatives adopted the Declaration of the Hague declaring that environmental degradation, including, among others, ozone depletion and climate change, “involve not only the fundamental duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.”

In 1990, the United Nations’ General Assembly recognized: “all individuals are entitled to live in an environment adequate for their health and well-being.”

In 1990, the United Nations’ Commission on Human Rights reiterated the link between the preservation of the environment and the promotion of human rights and applauded the Sub-Commission on Prevention of Discrimination and Protection of Minorities’ decision to study the problems of the environment and their relation to the realization of human rights.

In 1992, in Principle 1 of the Rio Declaration the United Nations’ Conference on Environment and Development recognized: “[h]uman beings are at the centre [sic] of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” “In the aftermath of the Rio Summit, virtually every major international convention


concerning multilateral cooperation added environmental protection as one of the goals of the state parties. Areas of international action that developed during earlier periods, including human rights, began evolving in new directions to take into account environmental considerations. The result was an infusion of environmental norms into most branches of international law, including free trade agreements that mention environmental cooperation as an aim.”

- In 1994, the United Nations’ Commission on Human Rights’ Sub-Commission on Prevention and Protection of Minorities’ Final Report concluded that there presently exists “universal acceptance of the environmental rights recognized at the national, regional, and international levels.” The Ksentini Final Report also indicated: “it is impossible to separate the claim to the right to a healthy and balanced environment from the claim to the right to ‘sustainable’ development.”

- In 1994, the International Group of Experts prepared Draft Principles on Human Rights and the Environment expressing: “[a]ll persons have a right to a secure, healthy and ecologically sound environment.” This Draft Declaration was incorporated into the Ksentini Final Report and recommended for subsequent adoption by the United Nations.

- In 1996, the International Court of Justice issued an advisory opinion requested by the United Nations’ General Assembly on


the Legality of the Threat or Use of Nuclear Weapons. In this opinion, the Court recognized:

[T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.\(^{108}\)

- In 1997, the International Court of Justice delivered several opinions in the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Case. The majority opinion recalled the above quoted language from its advisory opinion in Legality of the Threat or Use of Nuclear Weapons, and explained that with this language it had “occasion to stress . . . the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind.”\(^ {109}\) The majority opinion also acknowledged that Hungary’s natural environment concerns raised to the level of “essential interest of that State.”\(^ {110}\) Although the majority opinion understood it could resolve the questions posed by the parties without the need of expounding on environmental human rights, the Court’s vice-president, the late Judge C.G. Weeramantry, drafted a separate opinion focusing precisely on the environmental issues raised in this case. Weeramantry’s separate opinion remains an important contribution to the recognition of the human right to environment:

When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases - the right to development and the right to environmental protection - are important principles of current

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110. Id.
international law.\textsuperscript{111}

....

The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment.\textsuperscript{112}

....

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a \textit{sine qua non} for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.\textsuperscript{113}

....

The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community. The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law - human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighborliness - to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be

\textsuperscript{111} \textit{Id.} at 89 (separate opinion by Weeramantry, J.).

\textsuperscript{112} \textit{Id.} at 90.

\textsuperscript{113} \textit{Id.} at 91-92.
neglected.\textsuperscript{114}

In sum, Judge Weeramantry’s separate opinion, while determining the existence of sustainable development in modern international law, clearly recognizes that the right to development and the right to environment are also part of modern international law.

- In 1997, the Institute of International Law asserted: “[e]very human being has the right to live in a healthy environment.”\textsuperscript{115}

- In 1999, the United Nations’ Educational, Scientific, and Cultural Organization (UNESCO) and the United Nations’ High Commissioner for Human Rights organized the International Seminar of Experts on the Right to the Environment which issued the Bizkaia Declaration on the Right to the Environment. Article 1 of the Bizkaia Declaration stated: “[e]veryone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment . . . [which] may be exercised before public bodies and private entities, whatever their legal status under national and international law.”\textsuperscript{116}


[A] growing body of case law from many national jurisdictions is clarifying the linkages between human rights and the environment, in particular by: (a) recognizing the right to a healthy environment as a fundamental human right; (b) allowing litigation based on this right, and facilitating its enforceability in domestic law by liberalizing provisions on standing; (c) acknowledging that other human rights recognized in domestic legal systems can be violated as a result of

\begin{footnotesize}
\item[114] *Id.* at 95.
\item[115] Inst. of Int’l L., *Resolution on the Environment*, art. 2 (1997), http://www.idi-
\end{footnotesize}
environmental degradation.\textsuperscript{117}

The Seminar of Experts also recommended that additional support be provided to “[t]he growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed entitlement/right or as a guiding principle of national and international law.”\textsuperscript{118}

- In 2002, the United Nations’ Commission on Human Rights’ Sub-Commission on Prevention and Protection of Minorities’ Preliminary Report, prepared by Special Rapporteur El Hadji Guissé, asserted that the right to a drinking water supply and sanitation is already an existing human right, and necessarily impacts the right to a healthy environment, also recognized under international law.\textsuperscript{119}

- In 2002, the United Nations’ World Summit on Sustainable Development held in Johannesburg, South Africa adopted the Johannesburg Declaration on Sustainable Development, which reiterated the commitment to sustainable development made in the 1992 Rio Declaration.\textsuperscript{120}

- In 2002, the Global Judges Symposium adopted the Johannesburg Principles on the Role of Law and Sustainable Development that provided:

> We recognise that the people most affected by environmental degradation are the poor, and that, therefore, there is an urgent need to strengthen the capacity of the poor and their representatives to defend environmental rights, so as to ensure that the weaker sections of society are not prejudiced by environmental degradation and are enabled to enjoy their right to live in a social and physical environment that


\textsuperscript{118} Id. at 16.


respects and promotes dignity.\textsuperscript{121} 

- In 2007, the United Nations’ General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which proclaimed:’’”indigenous people have the right to the conservation and protection of the environment.”’’\textsuperscript{122} 

- In 2007, the Alliance of Small Island States (AOSIS) approved the Male’ Declaration on the Human Dimension of Global Climate Change, which recognized “the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights.”\textsuperscript{123} 

- In 2008, the United Nations’ Human Rights Council adopted a resolution on Human Rights and Climate Change, which acknowledged that the “international community has a role in addressing the serious threat that climate change currently poses in undermining existing human rights or likely to undermine in the future.”\textsuperscript{124} More importantly, this resolution urged states to act appropriately by pledging to target “the poorest and most vulnerable in their own countries, ensuring transparency and accountability of the finance, ensuring wide participation and integration of civil society and affected groups into development strategies.”\textsuperscript{125} This is very much akin to implementing the existing right to environment (or the


\textsuperscript{123} All. of Small Island States, Male’ Declaration on the Human Dimension of Global Climate Change, at 1, (Nov. 14, 2007), \url{http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf}.


\textsuperscript{125} Id.
sustainable development component of an expansive substantive right to environment).

- In 2010, the United Nations’ Human Rights Council published a Report, prepared by Special Rapporteur Okechukwu Ibeanu, that commented on an Indian Supreme Court opinion and noted “with satisfaction that the Supreme Court has on a number of occasions recognized the right to a safe and healthy environment as being implicit in the fundamental right to life.”  

- In 2011, the United Nations’ Human Rights Council endorsed the Guiding Principles on Business and Human Rights which adopted a three-prong approach for the implementation of States’ human rights and environmental obligations: 1) protection against human rights abuses by third parties, including corporations; 2) the taking of appropriate measures to prevent, investigate, punish, and redress against said abuse; and 3) the provision of remedies for human rights abuses caused by third parties, including corporations. This framework for business and human rights also applies to all environmental human rights abuses.  

- In 2012, the United Nations’ Human Rights Council issued a preliminary report, prepared by then Independent Expert John H. Knox, which concluded: “[s]ome fundamental aspects of that relationship [of human rights and the environment] are now firmly established, but many issues are still not well understood.” The preliminary report also “urges States and other stakeholders to remember that the lack of a complete understanding as to the content of all environmentally related


human rights obligations should not be taken as meaning that no such obligations exist. Indeed, some aspects of the duties are already clear.”

- In 2013, at the United Nations’ Human Rights Council, a mapping report prepared by Independent Expert John H. Knox explained: “States have obligations to protect against environmental harm that interferes with the enjoyment of human rights.” This includes: “obligations (a) to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights; and (b) to regulate private actors to protect against such environmental harm.”

- In 2015, the United Nations’ Human Rights Council reiterated in a report compiling good practices prepared by then Independent Expert John H. Knox that “States have substantive obligations to adopt and implement legal frameworks to protect against environmental harm that may interfere with the enjoyment of human rights.”

- In 2016, the United Nations’ Human Rights Council distributed a report prepared by its Special Rapporteur John H. Knox on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment. In the context of providing a framework for the implementation of the right of environment, the report explained:

In applying their duty to protect against environmental harm that interferes with the enjoyment of human rights, States have discretion to strike a balance between environmental protection and other societal

130. Id. at 13, ¶ 46.
goals, such as economic development and the promotion of other human rights. But the balance struck cannot be unreasonable or result in unjustified, foreseeable infringements of human rights.\textsuperscript{132}

\begin{itemize}
  \item In 2018, the Framework Principles on Human Rights and the Environment as presented by John H. Knox, the Special Rapporteur on Human Right and Environment in his a report to the United Nations Human Rights Council in March 2018, “set out the basic obligations of States under human rights laws as they relate to the enjoyment of a safe, clean, healthy, and sustainable environment.”\textsuperscript{133}
  \item In 2018, Special Rapporteur John Knox submitted his Final Report to the United Nations General Assembly stating: “There can be no doubt that the right to a healthy environment is a moral right, essential to health, well-being, and dignity of all human beings.”\textsuperscript{134}
\end{itemize}

2. \textit{Regional Level}

\begin{itemize}
  \item In 1981, the African Union (formerly Organization of African States) adopted the Charter on Human and Peoples’ Rights (Banjul Charter), which recognizes in Article 24: “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.”\textsuperscript{135}
  \item In 1988, the Organization of American States adopted a protocol to the 1969 American Convention on Human Rights (San Salvador Protocol), which recognized in Article 11: “[e]veryone shall have the right to live in a healthy environment. . . . The States’ Parties shall promote the protection, preservation and improvement of the
\end{itemize}

\begin{flushright}
\textsuperscript{132} Special Rapporteur’s Report 2016, \textit{supra} note 55, ¶ 65.
\end{flushright}
environment.”

- In 1998, the United Nations’ Economic Commission for Europe sponsored the drafting of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which referred in Article 1 to “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”

- In 2000, the Council of Europe adopted the Charter of Fundamental Rights for the European Union which provided in Article 37: “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.” This language subsequently became binding on the European Union in 2009, with the entry into force of the Lisbon Treaty.

- In 2001, the African Commission on Human and Peoples’ Rights issued an important opinion in the Ogoniland Case enforcing the human right to environment as provided for in the 1981 African Charter on Human and Peoples’ Rights. The Commission determined:

  The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.


Government compliance with the spirit of Article 16 and Article 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising [sic] environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.\textsuperscript{140}

- In 2003, the Council of Europe’s Parliamentary Assembly called on the Council’s member states to “recognize a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level.”\textsuperscript{141} The Council further recommended that the Committee of Ministers to prepare additional protocols to the European Convention on Human Rights guaranteeing environmental rights.\textsuperscript{142}

- In 2003, the African Union adopted the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, which stated in Articles 18 and 19 that women “shall have the right to live in a healthy and sustainable environment . . . [and] shall have the right to fully enjoy their right to sustainable development.”\textsuperscript{143}

- In 2004, the League of Arab States adopted a new Arab Charter on Human Rights which declared in Article 38: “[e]very person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a

\begin{footnotes}
\textsuperscript{142} \textit{Id.}
\end{footnotes}
In 2004, the European Court of Human Rights issued its opinion in Taskin v. Turkey which primarily legitimized the right to respect for family, life, and privacy as a derivative form of protecting the environment; however, by relying on Turkish cases affirming the constitutionally protected right to a healthy and balanced environment and international documents recognizing the right to environment, the court in Taskin effectively accepted the existence of the same.¹⁴⁵

In 2005, the European Court of Justice emphasized: “it is common ground that protection of the environment constitutes one of the essential objectives of the Community.”¹⁴⁶

In 2007, the Asia Pacific Forum of National Human Rights Institutions issued a Final Report and Recommendation prepared by its Advisory Council of Jurists which advocated for the “adoption and implementation of a specific right to an environment conducive to the realization [sic] of fundamental human rights.”¹⁴⁷

In 2012, the Association of Southeast Asian Nations adopted the Human Rights Declaration which incorporated in paragraph 28(f) a “right to a safe, clean and sustainable environment” as an element of the right to an adequate standard of living.”¹⁴⁸

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¹⁴⁵. See Taskin v. Turkey, 2004-X Eur. Ct. H.R. 22-23 (2005) (following Turkish Supreme Court opinions and international law instruments, the European Court of Human Rights concluded that the government violated applicants’ human rights by failing to enforce existing local environmental laws); see also Okbay v. Turkey, 2005-VII Eur. Ct. H.R.
¹⁴⁸. Ass’n of Southeast Asian Nations [ASEAN], ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), ¶ 28(f) (Nov. 18, 2012).
Regarding the European Convention of Human Rights, Alan Boyle suggests:

So extensive is [the European Court of Human Rights’] growing environmental jurisprudence that proposals for the adoption of an environmental protocol have not been pursued. Instead, a Manual on Human Rights and the Environment adopted by the Council of Europe in 2005 recapitulates the Court’s decisions on this subject and sets out general principles.149

3. National Level

The dramatic development of environmental rights can best be witnessed at the national or local level. Since the 1970s, when knowledge of and sensibility to environmental issues became manifest, the protection and conservation of the environment has become truly universal at the national level.

- Of the 192 states recognized by the United Nations, 130 national constitutions contain language raising the protection of the environment or natural resources to the constitutional level as either a human entitlement or a state duty, including the overwhelming majority of those written or amended after 1970.150

- In 1976, Portugal was the first state to adopt a constitutional “right to a healthy and ecologically balanced human environment.” More than ninety states have subsequently adopted similar rights in their national constitutions.151

- Of the 117 state constitutions identified by Earthjustice in 2005 as making a reference to the protection of the environment, “[109] of them recognize the right to a clean and healthy environment and/or the state’s obligation to prevent

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149. Boyle, supra note 76, at 13.
environmental harm.”152 “[I]t is clear that the trend is toward greater and more widespread constitutional recognition of the human right to a clean and healthy environment as an autonomous right.”153 More importantly, national courts around the globe are recognizing constitutionally-mandated rights to environment in all its variations: autonomous, derivative, and procedural.154

Most states without a constitutionally-protected right to environment nonetheless have national laws that protect the environment, government agencies charged with implementing and enforcing said laws, and citizen access to courts and legal remedies designed to protect the environment from illegal government or private actions.

- As clearly detailed in a joint report issued in 2012 by the United Nations’ Environment Programme and the United Nations’ Office of High Commissioner for Human Rights:

  Environmental protection laws in many, if not most states, provide for citizen lawsuits as a means of enforcing legislative and regulatory standards. Such suits have played a significant role in enforcing clean air and water acts, as well as endangered species laws. As with human rights litigation, citizens sue the government to secure its performance of mandatory duties under the law; in addition, however, suits may be brought against the regulated industries and other polluters in order to halt environmental harm. Courts have upheld citizen suit provisions and enforced substantive limits on permissible activities. In general, government officials are held to a due diligence standard.155

B. DERIVATIVE RIGHT TO ENVIRONMENT

1. International Level

- In 1966, the United Nations’ Covenant of Civil and Political Rights allows the following civil and political rights may be reformulated in order to derive environmental protection: the right to life; the right against cruel, inhuman, or degrading
treatment; the right to liberty and security of person; the right to privacy; the right to freedom of thought, conscience, and religion; the right to freedom of expression; the right to peaceful assembly; the right of the child; the right against discrimination and to the equal protection of the law; cultural and indigenous rights; the right to political participation; the right to information; and the right to legal redress.156

- In 1966, the United Nations’ Covenant of Economic, Social and Cultural Rights allows the following economic, social, and cultural rights may be reformulated in order to derive environmental protection: the right to safe and healthy working conditions; the right to an adequate standard of living and the continued improvement of living conditions; the right to food; the right to the highest attainable standard of physical and mental health; the right to improvement of all aspects of environmental and industrial hygiene; the right to education; the right to enjoy benefits of scientific progress; and the right to participate in cultural life.157

- In 1972, the Stockholm Declaration derived environmental rights by re-interpreting and expanding existing and recognized human rights stemming from a narrow reading of the Stockholm Declaration: “The reasoning behind this strategy is that an adequate measure of environmental protection can be obtained by the reformulation of existing human rights, thus taking advantage of existing international and regional monitoring and enforcement mechanisms.”158

2. Regional Level

The European Court of Human Rights has in many instances derived environmental obligations from the European Convention of Human Rights Article 2 (right to life) and Article 8 (right to private and family life). A sample of these cases include:

158. Rodriguez-Rivera, supra note 7, at 18.
In 1994, the court in López Ostra v. Spain found “severe environmental pollution affects individuals’ well-being and prevents them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”

In 1998, the court in Guerra v. Italy found a violation of the right to private and family life (Article 8).

In 2004, the court in Öneryildiz v. Turkey found a violation of the right to life (Article 2). The Court stated: “[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative system framework designed to provide effective deterrence against threats to the right to life.”

In 2004, the court in Moreno Gómez v. Spain found a violation of the right to private and family life (Article 8).

In 2004, the court in Taskin v. Turkey found a violation of right to a fair hearing (Article 6.1) and the right to private and family life (Article 8).

In 2005, the court in Fadeyeva v. Russia found a violation of the right to private and family life (Article 8).

In 2005, in the case, Marangopoulos Foundation for Human Rights v. Greece, the European Committee of Social Rights found a violation of the right to health.

In 2008, the court in Budayeva v. Russia found a violation of the right to life (Article 2), in both substance and procedure, as

the state government failed to implement land-planning and emergency relief policies despite the area’s vulnerability to mudslides and failed to investigate the accident.166

- In 2009, the court in *Tatar v. Romania* found a violation of the right to private and family life (Article 8).167

After reviewing the above cases and others issued by the European Court of Human Rights, Burns H. Weston and David Bollier concluded: “[o]n the basis of these cases alone, the right to a clean and healthy environment may be understood to be accepted as law, however implicitly, in the European human rights system.”168 Even if some traditionalists would challenge this conclusion, I believe it is irrefutable that these cases prove that a derivative right to environment exists in the European Human Rights System as part of a reformulated right to life and right to private and family life.

The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have also issued important opinions that reformulate existing rights contained in the American Declaration of Rights and Duties of Man, the American Convention on Human Rights, and the San Salvador Protocol to include environmental rights as part of existing human rights. A sample of these opinions include:

- In 1985, in *Yanomami v. Brazil*, Commission determined that highway construction on lands occupied by the Yanomami that resulted in the loss of diversity and other environmental degradation violated the “following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).”169

- In 1997, the Report on the Situation of Human Rights in Ecuador explained:

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168. WESTON & BOLLIER, supra note 6, at 294.
The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.¹⁷⁰

- In 2001, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Commission on Human Rights noted the Nicaraguan Government had violated Article 4 (right to life), Article 11 (right to privacy), and Article 17 (right to family) of the American Convention on Human Rights.¹⁷¹

- In 2004, in *Maya Indigenous Community of the Toledo District v. Belize*, the Inter-American Commission on Human Rights concluded that logging and oil concessions granted by Belize violated the communities’ right to property, right to equality before the law, to equal protection of the law and to nondiscrimination, as well as the right to judicial protection under the Inter-American Declaration of Human Rights.¹⁷²

- In 2005, in *Indigenous Community of Yakye Axa v. Paraguay*, the Inter-American Court of Human Rights found violations to the right to property.¹⁷³

- In 2007, in *Saramaka People v. Suriname*, the Inter-American Court of Human Rights found violations to the right to property.¹⁷⁴

The African Commission on Human and Peoples’ Rights, while

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analyzing the previously mentioned *Ogoniland* case, also took the opportunity to set a bridge between the right to environment and the right to life (Article 4), and the right to health (Article 16), in addition to the right to environment (Article 24) of the African Charter on Human and Peoples’ Rights.\textsuperscript{175}

3. National Level

National courts around the world have actively validated the right to environment contained in national constitutions, and have reformulated other constitutional rights, such as the right to life, the right to health, and the right to privacy, while protecting and enforcing environmental rights and duties.\textsuperscript{176}

Weston and Bollier illustrated that several other rights have also been reformulated to protect against environmental degradation affecting individuals and communities:

Also invoked for this purpose in national fora, and generally with the same or similar logic, are the rights to habitat, livelihood, culture, dignity, equality and nondiscrimination, and sleep. Clearly, the spectrum of substantive human rights claimed as surrogates for protection of environmental harm or as a substitute for the autonomous right to a clean

\textsuperscript{175} See Ogoni Decision, supra note 140.

and healthy environment is a broad one.177

C. PROCEDURAL ENVIRONMENTAL RIGHTS

Among the bundle of rights contained within an expansively defined right to environment are the procedural human rights whose implementation are vital to substantive environmental policymaking. “In general, these are rights whose free exercise makes policies more transparent, better informed and more responsive. They include rights to freedom of expression and association, rights to receive information and participate in decision-making processes, and rights to legal remedies.”178

Weston and Bollier described the procedural environmental rights as “[a]rguably the most widely recognized and entrenched of environmental rights.”179 Boyle added that “their role is one of empowerment, facilitating participation in environmental decision-making and compelling governments to meet minimum standards of protection for life, private life and property from environmental harm.”180 I would add that environmental rights are necessary for the implementation of the substantive right to environment, in both its autonomous and derivative forms. The international legal community, including most traditionalists, has been more receptive in recognizing the existence of procedural environmental rights.181 This can be

177. WESTON & BOLLIER, supra note 6, at 307.
179. WESTON & BOLLIER, supra note 6, at 328 (delineating the elements of procedural environmental rights as “(1) a right to prior knowledge of [potential environmental harm], with a corresponding state duty to inform; (2) a right to participate in decision-making; and (3) a right to recourse before competent administrative judicial organs”).
181. See, e.g., WESTON & BOLLIER, supra note 6, at 328-36 (“procedural environmental rights appear to enjoy authoritative recognition and support applicable of law everywhere”); Alan E. Boyle, The Role of International Human Rights Law in the Protection of the Environment, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43, 50 (Alan Boyle & Michael Anderson eds., 1996); James Cameron & Ruth Mackenzie, Access to Environmental Justice and
explained by the fact that procedural environmental rights are
descendants of Western-centric civil and political human rights.

1. International Level

- The 1948 Universal Declaration of Human Rights recognizes
  procedural environmental rights in Articles 7, 8, 19, 20, and
  21.\(^{182}\)

- The 1966 United Nations Covenant on Civil and Political
  Rights recognizes procedural environmental rights in Articles
  2, 19, 21, 22, and 25.\(^{183}\)

- The 1982 World Charter for Nature provides in Principle 23:
  “All persons, in accordance with their national legislation, shall
  have the opportunity to participate, individually or with others,
  in the formulation of decisions of direct concern to their
  environment, and shall have access to means of redress when
  their environment has suffered damage or degradation.”\(^{184}\)

- The 1992 Rio Declaration provides in Principle 10:

  Environmental issues are best handled with participation of all
  concerned citizens, at the relevant level. At the national level, each
  individual shall have appropriate access to information concerning the
  environment that is held by public authorities, including information
  on hazardous materials and activities in their communities, and the
  opportunity to participate in decision-making processes. States shall
  facilitate and encourage public awareness and participation by making
  information widely available. Effective access to judicial and
  administrative proceedings, including redress and remedy, shall be
  provided.\(^{185}\)

\(Procedural Rights in International Institutions, in Human Rights Approaches to
Environmental Protection 129 (Alan Boyle & Michael Anderson eds., 1996);
Patricia W. Birnie & Alan E. Boyle, International Law and the
Environment 194-95 (1992); Kiss & Shelton, supra note 8, at 25-26; Shelton,
supra note 178, at 117-21.

182. Universal Declaration of Human Rights arts. 7, 8, 19, 20, 21, supra note 29
(establishing that certain political and civil rights are inalienable).

183. International Covenant on Civil and Political Rights arts. 2, 19, 21, 22, 25,
supra note 32 (declaring that the rights listed are inherent in human dignity).

184. G.A. Res. 37/7, supra note 93, ¶ 23.

The 1992 United Nations’ Framework Convention on Climate Change (UNFCCC), Article 6, provides similar information and participatory rights.\textsuperscript{186}

The 1992 United Nations’ Convention on Biological Diversity provides similar information and participatory rights in various articles.\textsuperscript{187}

The 1994 United Nations’ Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly, in Africa, Article 5(d), provides specific procedure for the provision of information and participatory rights.\textsuperscript{188}

The 1994 International Atomic Energy Agency’s Convention on Nuclear Safety provides specific procedure for the provision of information and participatory rights.\textsuperscript{189}

The 1997 International Atomic Energy Agency’s Convention on Safety of Radioactive Waste Management provides specific procedure for the provision of information and participatory rights.\textsuperscript{190}

The 1997 Kyoto Protocol to the UNFCCC, Article 10(e), provides similar information and participatory rights.\textsuperscript{191}

The 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in


\textsuperscript{187} Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (recognizing the importance of biodiversity in the protection of human life).

\textsuperscript{188} G.A. Res. 241/27, Convention to Combat Desertification (Sept. 12, 1994) (noting the importance of participation by local populations with non-governmental organizations to mitigate the effects of drought).

\textsuperscript{189} Convention on Nuclear Safety, Sept. 20, 1994, 1963 U.N.T.S. 293 (mandating that each party to the convention shall submit a report detailing its efforts to ensure compliance with the measures in the convention).


International Trade provides specific procedure for the provision of information and participatory rights.\textsuperscript{192}

- The 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity provides specific procedure for the provision of information and participatory rights.\textsuperscript{193}

- The 2001 United Nations’ International Law Commission adopted the Draft Preamble and Articles on Prevention of Transboundary Harm from Hazardous Activities, which in Article 13 provides: “States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.”\textsuperscript{194}

- The 2001 Stockholm Convention on Persistent Organic Pollutants, Article 10, provides similar information and participatory rights.\textsuperscript{195}

- The 2002 United Nations’ World Summit on Sustainable Development adopted the Johannesburg Implementation Plan, which reaffirmed Principle 10 of the 1992 Rio Declaration.\textsuperscript{196}

- The 2002 Global Judges Symposium adopted the Johannesburg Principles on the Role of Law and Sustainable Development, which called for a work program that includes: “The improvement in the level of public participation in


\textsuperscript{196} Johannesburg Declaration, \textit{supra} note 120.
environmental decision-making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information.”

2. Regional Level

Numerous regional environmental treaties contain information and participatory rights similar to Article 10 of the Rio Declaration.

The most influential regional treaty that articulates procedural environmental rights is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Aarhus Convention presents a comprehensive system of procedural environmental rights that includes:

[Information concerning the physical elements of the environment, such as water and biological diversity, as well as information about activities, administrative measures, agreements, policies, legislation, plans, and programmes likely to affect the environment, human health, safety or conditions of life. Cost benefit and other economic analyses and assumptions used in environmental decision-making are also included. Rights of access are extended to NGOs ‘promoting environmental protection’ in accordance with national law. There are detailed provisions, consistent for the most part with [European Community] law, on access to and collection of environmental information.]

The Aarhus Convention has influenced judges at the international, regional, and national levels, and served as a template for numerous environmental treaties and national laws.

197. Johannesburg Principles, supra note 121.
198. See WESTON & BOLLIER, supra note 6, at 331 n.205.
199. Aarhus Convention, supra note 137.
201. The EU & the Aarhus Convention: In the EU Member States, in the Community Institutions and Bodies, EUR. COMM’N (Aug. 6, 2016), http://ec.europa.eu/environment/aarhus/studies.htm (highlighting the Aarhus Convention’s training and support afforded to the judiciary).
V. CONTINUED SKEPTICISM DESPITE OVERWHELMING EVIDENCE OF THE CRYSTALLIZATION OF THE HUMAN RIGHT TO ENVIRONMENT

After approximately fifty years of development, we can safely conclude that the human right to environment (in its three forms: autonomous right, derivative right, and procedural rights) has effectively crystallized into a recognized modern international norm. States simply cannot, by act or omission, degrade the environment to the point where individuals and communities can no longer live a life of dignity or pursue other recognized human rights.202 Pursuant to the human right to environment, states have the duty to implement and enforce environmental protection and sustainable development policies, as well as to promote and facilitate information and participatory rights.203 In turn, these substantive and procedural environmental policies must guarantee all people the ecosystem conditions necessary for the fulfillment and enjoyment of other recognized civil, political, economic, social, and cultural human rights. Such policies are desired by humanity, as evidenced by the countless international, national, and regional instruments which are all intended to be binding expressions of the international community’s recognition of a human right to environment. As I stated before, there is no doubt that if the Universal Declaration of Human Rights were drafted today, it would include the human right to environment.

More evidence and support of the existence and recognition of the human right to environment is constantly added to that outlined above. Scholars around the world continue uncovering additional proof evincing the universal recognition, adoption, and implementation of the right to environment, in its three forms. This voluminous evidence


includes: resolutions, declarations, reports, and studies from United Nations organs, programs, funds, and specialized agencies; judicial decisions from international, regional, and state tribunals; writings and conference proceedings from academic experts; constitutional provisions, laws, practices, declarations, and other forms of expression from an overwhelming number of states; and demands and claims raised by civic groups, non-governmental organizations, communities, and individuals. As discussed above, these sources of international law are representative of all geographical regions of the world and of a wide diversity of cultural, philosophical, legal, and political traditions.

Notwithstanding the above reality, skeptics of the human right to environment continue rejecting the existence of a binding right to environment. However, these arguments generally are unimaginative as they merely restate those previously dismissed in Part I of this article. Examples of some skepticism recently shared with me by traditionalist colleagues on the right to environment include:

(1) Lack of uniformity in the language used and contained in the thousands of documents, expressions, and actions previously identified as evincing the international community’s recognition of the right to environment. For example, I have been confronted by skeptics who point to the fact that although some states recognize an environmental right or entitlement exists under international law, others recognize instead that only an environmental duty is owed by states as a matter of law. Other colleagues propose that a lack of uniformity exists between the substantive right to environment adopted and implemented by some states and the procedural environmental rights universally recognized and put into practice. Yet others reject that the universally recognized concept of sustainable development is related or derived from the right to environment. In my view, these criticisms are easily rebutted. For every right, there is also a duty. If states prefer to highlight one over the other, so be it. Under either system the end result should be the protection of individuals and communities from state-caused environmental degradation. The possessors of the right include all individuals and protected communities whose right to live or exist in a healthy, clean, safe, sustainable, adequate, etc., environment or habitat is violated by an act or omission of its own state government. The assignees of the duty are the state governments. That states use different languages while adopting and implementing the right to

204. See, e.g., id. (“Many human rights instruments are based on the 1948 Universal Declaration of Human Rights, which does not mention the environment.”).
environment does not limit their recognition of said right; it merely reflects the existence of diverse cultural and legal traditions within the international community.\textsuperscript{205} Therefore, different states may incorporate their own moral, social, and legal accents into the language and concepts chosen in adopting and implementing the right to environment. Tribunals at the state, regional, and international levels have the ultimate task of interpreting the content of the right to environment within the particular context in which it was adopted. What is most important is that states recognize and implement, as a matter of fact, both substantive and procedural environmental protections.

(2) Lack of state practice or uniformity based on the varied legal implementation strategies adopted to guarantee the right to environment.\textsuperscript{206} This argument also is unpersuasive. Some states have adopted a constitutionally-based environmental protection approach, while others have opted for legislative or administrative approaches.\textsuperscript{207} What matters is that states indeed have adopted and implemented environmental safeguards in recognition that a right to environment exists under international law, and that national and regional courts have validated said approaches.\textsuperscript{208}

(3) The human right to environment is a creation of the United Nations and has gathered support only in the developing regions of Africa, Asia, and Latin America. Hence, skeptics reason that the developed nations in North America and Europe are not bound by said right until a formal treaty is signed by them on this subject. This argument ignores that both North American and European states have solid and long traditions of protecting the environment through legislation, regulations and court opinions.\textsuperscript{209} The

\textsuperscript{205} Id. (noting that states have implemented different measures in various economic sectors but they are still nonetheless environmental standards).

\textsuperscript{206} Org. of Am. States [OAS], \textit{ENVIRONMENTAL RULE OF LAW: TRENDS FROM THE AMERICAS, INTER-AMERICAN CONGRESS ON THE ENVIRONMENTAL RULE OF LAW 5} (2015) (recognizing the varying perceptions of the term rule of law).

\textsuperscript{207} Id. at 38-40 (identifying three approaches, varying among jurisdictions, to environmental protection including the human rights approach, the watershed approach, and the ecosystems approach).

\textsuperscript{208} Id. at 167 (“[A]s part of the rule of law, we generally recognize that one of the central duties of governments is to protect and safeguard the rights and interests of vulnerable parties and minorities . . . this duty ought to extend to the environment as well; ecosystems hold valuable, yet vulnerable interests that are inadequately represented in the legislative process or in administrative decision-making”).

fact that their approach to environmental protection favors procedural, legislative, and administrative approaches merely reflects their cultural and legal affinity to civil and political human rights. Moreover, as presented in Part IV above, tribunals in Europe have routinely enforced claims brought against states for violating substantive environmental rights—albeit, derivatively by reformulating other substantive rights. In my appreciation, states in North America and Europe have adopted and implemented the expansive right to environment and are bound by the environmental duties emanating from said right. Moreover, the fact that the United Nations’ organs and developing states in Africa, Asia, and Latin America expressly recognize the right to environment serves as further proof of its existence.

(4) Human rights, by definition, cannot be used to protect non-human entities like the environment because they exclusively reflect anthropocentric values. Thus, a right of environment or nature (or animals, etc.), including its integration as part of an expanded right to environment, is rejected outright. Some traditionalists find a proposed right of environment more questionable than the right to environment. I also find this argument unpersuasive. First, the protection of the environment based on its own intrinsic value has long been recognized as an essential element necessary for the enjoyment of all human rights. The link between nature and humans was first recognized in the 1972 Stockholm Declaration and further articulated in the 1982 World Charter for Nature, both discussed in Part IV. The emphasis of incorporating elements of the right of nature based on its intrinsic value serves as an objective standard within the conceptualization of an expanded right to environment. Second, incorporating the value of nature within a rights-based approach ultimately

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210. See supra text accompanying notes 159-167.
213. See supra text accompanying notes 86 and 93.
benefits both humans and nature. Thus, the purported human/nature theoretical dichotomy rejected by traditionalists is no more than a game of semantics.

VI. OVERCOMING THE SYSTEMIC BARRIERS ENCOUNTERED BY THE HUMAN RIGHT TO ENVIRONMENT

The recognition of the human right to environment certainly is a positive step in global efforts to address the environmental problématique. However, now we need to face a stark reality: violations of the human right to environment are prevalent around the world.\(^{214}\) As explained above, states have recognized the right to environment and have structured constitutional, statutory, and regulatory frameworks to implement this right. Nonetheless, many of these same states violate, by act and omission, the very legal framework set up to guarantee the right to environment. “Evidence of this government failure can be seen in the rapid decline of so many different ecosystem elements: atmosphere, biodiversity, desertification, glaciers, inland waterways and wetlands, oceans, coral reefs, and more.”\(^{215}\) As a result of violations to their right to environment, people around the globe are also denied the full enjoyment of their rights to life, health, privacy, food, and water, among many others.\(^{216}\) This brings us to the next stage of a rights-based approach to environmental protection: overcoming the systemic barriers inherently encountered by the right to environment in the context of a globalized economy.

\(^{214}\) See, e.g., Anne Van Schaik & Lucia Ortiz, Violations of Human and Environment Rights Continue, FRIENDS OF THE EARTH INT’L (June 16, 2016), https://www.foei.org/news/5-years-failure-un-voluntary-measures-arent-stopping-bad-business-behavior (arguing that international agreements have not been able to keep multinational corporations accountable for acts that damage the environment).

\(^{215}\) See Weston & Böllier, supra note 6, at 20 (identifying the environment as a platform to undermine the governments’ credibility as evidenced by the surge in environmental protests in recent years demanding not only for environmental reform but also questioning the authority of the government).

\(^{216}\) See Schaik & Ortiz, supra note 214 (detailing government failure to hold corporations accountable for environmental damage and the damage such failure has caused to other human rights).
First, I pose an example concerning a pressing global environmental issue: climate change. This is an issue that has received much attention in recent decades, culminating with the 2015 Paris Agreement.\textsuperscript{217} Nonetheless, many jurisdictions have failed to implement measures directed at ameliorating this global phenomenon. One such case is Puerto Rico, a densely populated (approximately 3.5 million inhabitants) small island (one hundred miles long by thirty-five miles wide) territory of the United States, which does not have specific legislation that establishes an official climate change policy. The United States under Donald Trump’s presidency has announced that it will cease all participation in the Paris Agreement.\textsuperscript{218} Moreover, President Trump has revoked executive orders previously issued by President Barack Obama that had established and implemented policies meant to address climate change.\textsuperscript{219} Making matters worse, both the United States and Puerto Rico governments have promoted the island’s dependency on fossil fuels during the past century and neither has engaged in any significant measures to decrease Puerto Rico’s vulnerability to climate change.\textsuperscript{220} The net result is that at present the entire population of Puerto Rico is extremely vulnerable to the effects associated with climate change, such as sea-rise, increases in temperature, changes in climatological patterns, floods, droughts, and hurricanes, among others. These effects expose Puerto Ricans and the island’s ecosystems to a deteriorated environment, thus violating many human rights including: the right to life, the right to health, and the right to environment. These human rights violations have become more pervasive in the wake of Hurricane Maria, as explained above in Part III.

\textsuperscript{217} Paris Agreement, \textit{supra} note 211.
Second, I present two examples regarding local environmental issues. Puerto Rico has an environmental protection clause in its 1952 Constitution,\(^221\) thousands of substantive and procedural environmental laws and regulations (at both the United States federal and local levels), and several federal and local government agencies charged with implementing, supervising, and enforcing this voluminous body of environmental protection policies.\(^222\) However, communities in Puerto Rico are frequently forced to challenge environmentally harmful actions that are illegally approved or undertaken by the federal and state governments. Currently, a community in Arecibo is battling against the illegal permitting and construction of a solid-waste incinerator,\(^223\) while a community in Peñuelas is fighting against the illegal and harmful use of coal ash as cover in a nearby landfill.\(^224\) The environmental and health risks in both examples have been scientifically proven and reported to government officials.\(^225\) Yet, the United States and the Puerto Rico governments continue promoting both projects to the detriment of

\(^221\) P.R. CONST. art. VI, § 19 (“It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community.”).


vulnerable communities and to the benefit of special interests.\textsuperscript{226}

Compliance with human rights, particularly economic, social, and cultural rights, has been difficult to achieve due to state governance flaws and global economic interests. Scott Leckie expressed:

Current political, social, and especially economic trends are not at all conducive to the prevention of violations of economic, social and cultural rights, or even the preservation of rights already in place. . . . Even when human rights bodies take action or other criticism of violators is forthcoming, this action is frequently no match for what are increasingly perceived as larger state interests, in particular those linked to trade, market share, and misplaced notions of national security.\textsuperscript{227}

Similar barriers exist in the implementation of a rights-based approach to environmental protection. As highlighted in a 2012 joint report issued by the United Nations’ Office of the High Commissioner on Human Rights and the United Nations’ Environment Programme:

Governance: The inappropriate institutional and governance arrangements mentioned above, as well as the presence of corruption and weak systems of regulation and accountability limit the effective integration of environment and human rights into economic planning and activities. Weak human and institutional capacity related to the assessment and management of ecosystems and their services, underinvestment in regulation and management, lack of public awareness, and lack of awareness among decision-makers of both the threats and opportunities that more sustainable management of ecosystems and public participation could provide hinder the green economy.

Economic: Economic and financial interventions provide powerful regulatory instruments; however, market mechanisms and most economic instruments can only work effectively if supporting institutions are in place, and thus there is a need to build institutional capacity to enable more widespread use of these mechanisms. A related program could support investment in the development and diffusion of clean technologies that could reduce the harmful impacts of various drivers of ecosystem change,

\textsuperscript{226} Id. (challenging the proposal in the United States Court of Appeals for the D.C. Circuit).

while also producing new industries and employment opportunities.\textsuperscript{228}

Weston and Bollier have concluded that the governance system for environmental issues is profoundly broken.\textsuperscript{229} They further elaborated on the above barriers facing the right to environment (i.e., governance and global economic interests):

It is an open secret that various industry lobbies have corrupted if not captured the legislative process. The regulatory apparatus, for all its necessary functions, has shown itself to be essentially incapable of fulfilling its statutory mandates, let alone pioneering new standards of environmental stewardship. Furthermore, regulation has become ever more insulated from citizen influence and accountability as scientific expertise and technical proceduralism have come to be more and more the exclusive determinants of who credibly participate in the process. Given the parameters of the administrative State and the neoliberal policy consensus, we have reached the limits of leadership and innovation.

The State will not of its own provide the necessary leadership to save the planet. Nationally, where most environmental problems first arise, regulatory systems are captive to powerful special interests much if not most of the time. Internationally, where authority and control rests heavily on the will of coequal sovereign states, governments jealously guard their claimed territorial prerogatives . . . It has become abundantly clear that the State is too indentured to Market interests and too institutionally incompetent to deal with the magnitude of so many distributed ecological problems.\textsuperscript{230}

Some scholars, such as Professor Mary Christina Wood, understand that the legal frameworks used to implement the right to environment are systemically flawed for the same reasons:

The Modern environmental administrative state is geared almost entirely to the legalization of natural resource damage. In nearly every statutory scheme, the implementing agency has the authority – or discretion – to permit the very pollution or land destruction that the statutes were designed to prevent. Rather than using their delegated authority to protect crucial resources, nearly all agencies use their statutes as tools to affirmatively sanction destruction of resources by private interests. For example, two-thirds of the greenhouse gas pollution emitted in [the United States] is

\begin{itemize}
\item \textsuperscript{228} Human Rights and the Environment, \textit{supra} note 104, at 35-36.
\item \textsuperscript{229} W\textsc{eston} \& B\textsc{ollier}, \textit{supra} note 6, at 4.
\item \textsuperscript{230} Id. at 4, 20.
\end{itemize}
pursuant to government-issued permits.231

Once we understand and recognize these and other barriers that prevent people and communities from enjoying their human right to environment to the fullest, we can begin the path towards eliminating said barriers. Professor Wood has called for a change in governance and economic paradigm based on the Public Trust Doctrine,232 while Professors Weston and Bollier have proposed the implementation of a new paradigm based on the cooperative management principle of the Commons.233

The next step for the rights-based approach to environmental protection is the development of more scholarship evaluating all barriers faced by the right to environment (i.e., social and behavioral factors and accountability have been suggested),234 and presenting alternative governance and economic paradigms. Only with such a paradigm shift will states structure international, regional, and national strategies that will honor the moral and legal commitments they have made by recognizing the existence of an expansively defined right to environment under modern international law.

VII. CONCLUSION

After approximately fifty years of development, the case for the recognition of the human right to environment under modern international law is robust, to say the least. The evidence of the human right to environment’s crystallization into a binding international norm is overwhelming. Numerous treaties, resolutions, declarations, reports, studies, judicial decisions, scholarly writings and conferences, constitutional provisions, laws, regulations, and statements and claims from international actors have been made at the international, regional, national, community, and individual levels. These sources of modern

232. See id.
233. See WESTON & BOLLIER, supra note 6, at 30 (explaining this concept, which was inspired by Garrett Hardin’s The Tragedy of the Commons).
international law emanate from all geographical regions of the world and incorporate a wide diversity of cultural, philosophical, legal, and political traditions.

During the last half century, states have adopted and incorporated substantive and procedural environmental policies, as well as sustainable development, information, and participatory policies, into their legal systems in response to their recognition of the human right to environment. These policies serve to guarantee to their constituents the minimum ecosystem conditions necessary for their fulfillment and enjoyment of other recognized civil, political, economic, social, and cultural human rights. However, states also are blatantly violating the right to environment by ignoring the very guarantees and protections they have adopted. This is the result of state governance flaws and global economic interests, which have provoked the development of systemic barriers that have allowed special interests to capture the governmental decision-making process. We must study this phenomenon and propose new governance and economic paradigms in which a rights-based approach to environmental protection can be successfully implemented and enforced.
PREPARING TO COMMIT DOMESTIC TERRORIST ACTIVITY: DOES THE UNITED STATES HAVE ADEQUATE TOOLS TO STOP THIS?*

DIANE WEBBER**

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Imagine this scenario: someone tells the FBI about a conversation overheard in a café in which two people were laughing and praising a recent terrorist attack where a man drove a truck into a group of people in furtherance of a terrorist cause. They both boasted of their postings on social media about the attack. One of the two said he had been raising money for the cause, had recently acquired a commercial

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license to drive a heavy-duty truck, and wanted to replicate the incident in Washington, D.C. in furtherance of the same terrorist cause. The other said that he had a cache of automatic weapons that he was itching to use. Does this conversation signify an imminent terror attack? What can the FBI do, and at what stage?

Preparation to commit terrorism is not a federal crime under United States (U.S.) law. This article compares the United Kingdom (U.K.) law of preparation to commit terrorist acts with the U.S. material support statute. This analysis demonstrates that, apart from one U.S. case, arrests for domestic terrorist activity in the U.K. appear to take place at an earlier stage of plotting than in the U.S.

This article also reveals that the scope of U.S. law to investigate and prosecute suspected terror suspects with a connection to international terrorism (connected to ISIS or Al-Qaeda), is broader than in cases of suspected domestic terrorist activity (right-wing, left-wing, animal rights, anti-abortion, etc.). Arrests generally occur at a later stage in cases of non-Islamist terrorism because law enforcement does not have the same legal tools or resources to thwart this type of terrorist activity. This article concludes with recommendations to add preparation to the current roster of counter-terrorism legislative tools and to ensure that law enforcement agencies are equipped to thwart all varieties of terror activity with one set of tools that fits all crimes.

I. THE U.K. LEGISLATION

The U.K. has had anti-terrorism legislation for many years. The legislation was initially enacted to deal with Irish terrorist activity that caused 3,500 fatalities in the U.K. between 1969 and 1998¹ and Islamist terrorism since the 1990s.² The U.K. has proscribed the preparation of acts of terrorism for over four decades. The relevant statutes simply list preparation as one of the elements of the crime.³

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1. HM Gov’t, Pursue, Prevent, Protect, Prepare: The United Kingdom’s Strategy for Countering International Terrorism §1, at 22 (TSO 2009) (U.K.).
2. Id. ¶ 0.8.
3. See, e.g., Prevention of Terrorism (Temporary Provisions) Act 1974, c. 56, § 7(1)(b) (U.K.) (stating “[A] constable may arrest without warrant a person whom he reasonably suspects to be— (b) a person concerned in the commission, preparation or instigation of acts of terrorism”).
The crime of preparation of terrorism has been repeated in all subsequent legislation without attracting public or political criticism. Two examples of this are found in sections 57 and 58 of the Terrorism Act 2000.⁴

After the London terror attacks of July 7, 2005, the government decided that counter-terrorism legislation needed to be made more robust and further measures were enacted. The Terrorism Act 2006 added crimes of encouraging terrorism⁵ and specified more detail about the crime of preparation.⁶ Since these developments took place, section 58 of the Terrorism Act 2000 and section 5 of the Terrorism Act 2006 have been used very frequently, although section 57 of the Terrorism Act 2000 is rarely used. For example, in 2016, out of twenty-four terror prosecutions, ten involved section 5 of the Terrorism Act 2006 and two involved section 58 of the Terrorism Act 2000.⁷ None of the prosecutions involved section 57 of the Terrorism Act 2000.

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⁴ Terrorism Act 2000, c. 11, §§ 57(1)(2), 58(1)(2) (U.K.) (stating under § 57 that “[P]ossession for terrorist purposes. (1) A person commits an offense if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. (2) It is a defense for a person charged with an offense under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism . . . .” and stating under § 58 that “Collection of information. (1) A person commits an offense if—(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind. (2) In this section “record” includes a photographic or electronic record . . . .”).

⁵ Terrorism Act 2006, c. 11, §§ 1-4 (U.K.).

⁶ See id. § 5 (stating on its relevant part that “(1) A person commits an offence if, with the intention of—(a) committing acts of terrorism, or (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention. (2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally . . . .”).

It should be emphasized that U.K. anti-terror legislation is used to deal with terrorist activity from all sources. This includes, but would not be limited to, Islamist, Irish Republican Army (IRA), and right-wing terrorism.

A. EXAMPLES OF CONDUCT AMOUNTING TO “PREPARATION” IN U.K. TERRORIST CONVICTIONS

Preparation to commit terrorist activity covers a wide range of activity. The examples that follow are cases where the defendants have appealed against either a conviction or sentence. In Roddis, the defendant visited former employers, showed them replica bullets and railway fog signal detonators, and told them that the bullets were live and the detonators were landmines.\(^8\) He returned to the offices a week later and his employers, who were sure that Roddis was planning a terror attack, called the police.\(^9\) Roddis was arrested and in a search of his home, police found nineteen video clips of beheadings and evidence on his computer that he had researched how to make bombs, together with ingredients and recipes for making explosives.\(^10\) Roddis appealed his conviction under section 5 of the Terrorism Act 2006.\(^11\) One of the grounds for appeal was that the trial judge had insufficiently directed the jury that the intent to commit the act of terrorism had to coincide with the conduct.\(^12\) The appellate judge agreed with the trial judge’s conclusion that “collecting information needed to manufacture explosives and acquiring the necessary materials for bomb making would on the face of this case suffice.”\(^13\) The appellate judge commented:

The [trial judge’s] directions] made it clear that the coincidence of conduct and intention was essential. They also made it clear that the conduct in which the defendant was alleged to have engaged was that he had researched how to make home-made explosives from the internet and purchased two of the ingredients so that he could manufacture his explosives and use it in an improvised explosive device (that is to say a

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9. Id.
10. Id. at [6].
11. Id. at [1].
12. Id.
13. Id. at [10].
bomb) along with the nails he had also purchased for that purpose and the fuse that he had obtained from fireworks. It follows that the conduct left to the jury was not simply the acquisition of the ingredients, but extended to what the judge described as research and what the indictment described as acquisition of knowledge, which was on the facts of this case a continuing process.\textsuperscript{14}

Thus, the actual charges related not to the fake ammunition Roddis took to his former employers’ office, but to the bomb making ingredients and evidence of research that were found at his home. There was nothing to indicate what the target might be or how imminent an attack might be. One might therefore conclude that Roddis was arrested at a very early stage of preparing to commit terrorist activity.

In \textit{Dart}, three defendants pleaded guilty under section 5 of the Terrorism Act 2006, but appealed their sentences.\textsuperscript{15} The three defendants (Dart, Alom, and Mahmood) had travelled to Pakistan in 2011.\textsuperscript{16} Once back in the U.K., they began to plan their return to Pakistan, where they hoped to obtain training so that they could join the fight in Afghanistan and kill coalition soldiers.\textsuperscript{17} The defendants made preparations to obtain visas, they conversed with each other via a “silent conversation” on the computer concerning who they might contact in Pakistan, how to manufacture explosives, what might be legitimate targets, and how they would communicate once they arrived in Pakistan.\textsuperscript{18} The trial judge concluded from the evidence that although Dart and Mahmood had not identified a target, whether at home or abroad, he was sure that neither had ruled out an attack of some sort in the U.K.\textsuperscript{19} The trial judge emphasized that he was not sentencing Dart “on the basis that he had intended to carry out terrorist activities in this country, but rather upon the basis that his immediate objective had been to go to Pakistan for training, with a view to carrying out subsequent (albeit not yet crystallized) terrorist

\begin{footnotes}
\item[14] \textit{Id. at [10]-[11].}
\item[15] \textit{Dart v. The Queen [2014] EWCA (Crim) 2158 [1]-[6] (Eng.).}
\item[16] \textit{Id. at [27].}
\item[17] \textit{Id. at [29]-[30].}
\item[18] \textit{Id. at [31].}
\item[19] \textit{Id. at [62].}
\end{footnotes}
operations there.”20 Although the appeal concerned the severity of the sentence, the appellate judge reiterated that section 5 “requires proof that an individual had a specific intent (albeit that it may have been general in nature) to commit an act or acts of terrorism (as defined) in this country or abroad, or to assist another to do so, and that he or she engaged in conduct in preparation for giving effect to that intention.”21 Thus, although the offense calls for specific intent, there is no requirement that the defendants must have settled on the exact act or time or place of the act. This indicates that a crime is committed at a very early stage in the continuum from planning to carrying out a terrorist act.

In *Iqbal*, two defendants were arrested at Manchester Airport, on their way to Finland.22 In *Iqbal’s* baggage authorities found blank cartridges, booklets and images, files of speeches, videos of the defendant holding weapons, graphics of explosive devices, and videos of how to slit throats and how to conceal weapons on aircraft.23 A search of his home yielded, among other terrorism related paraphernalia, a cabinet filled with weapons and a book entitled “Jihad.”24 *Iqbal* was charged with a number of offenses, including section 5 of the Terrorism Act 2006.25 The prosecution alleged that the defendants were readying themselves to use violence in the future, in pursuit of their ideology.26 *Iqbal* appealed against his conviction.27 On appeal, the judge explained the rationale of section 5:

Section 5 casts the net wide. It is an offense which was intended to add to existing common law offences of conspiracy to carry out terrorist acts and attempting to carry out such acts. Conspiracy demands that there be an

20. *Id.* at [60].
21. *Id.* at [12].
23. *Id.* at [4].
24. *Id.* at [8] (detailing that the items that the police found in the search included knives, machettes, crossbows, BB guns, air rifles, a poster of Osama Bin Laden, a live rifle cartridge, a shotgun cartridge, balaclavas, berets, a book entitled “Jihad,” a handwritten document entitled “Urban Combat,” a binder containing documents on guerilla warfare printed from the internet, and a green exercise book which had “Islam, Jihad, Resistance, Justice” written on the cover).
25. *Id.* at [2].
26. *Id.* at [9].
27. *Id.* at [1], [9].
agreement, and the law of attempts requires something more than acts which are merely preparatory. The offense created by this section goes further and catches acts of preparation, when coupled with the relevant intention. In our view, there was no reason for the behavior of the applicant in this regard not to be charged under section 5.28

This was despite the fact that no concrete target, time, or place had been identified for the attack. *Iqbal* is therefore another example of how section 5 of the Terrorism Act is designed to catch activity at the earliest stage of the continuum between planning and committing a terrorist act.

In *Sarwar*, two defendants were charged under section 5 of the Terrorism Act 2006, for preparing to attack President Assad’s forces in Syria.29 The defendants took a number of preparatory steps while in the U.K. to launch this attack, which could have resulted in substantial military and civilian losses.30 Although they pleaded guilty, the defendants appealed the length of their sentences, on the grounds that the trial judge had made an incorrect assessment of their dangerousness.31 Sarwar had been arrested on return from Syria.32 His luggage contained a lot of jihadist literature, and photos that showed him with weaponry.33 Extreme material was found on his computer and traces of explosives were found on his clothes and in his luggage.34 Sarwar and his co-defendant contended that:

[Offenses] contrary to section 5 can vary from a case involving preparing to commit a terrorist act of mass murder in his country to an intended use or threat of force abroad in the belief that it would assist the people in that foreign country against a tyrannical regime that was condemned as such by Her Majesty’s Government.35

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28. *Id.* at [11].
30. *Id.* at [12].
31. *Id.* at [1]-[3].
32. *Id.* at [3].
33. *Id.* at [5]-[8].
34. *Id.* at [8]-[9].
35. *Id.* at [16].
Sarwar’s counsel submitted that the instant case fell into the latter category and that it was, thus, less blameworthy. Furthermore, his counsel argued that the facts favored the defendants because “when the relevant preparatory acts were carried out, there was no prospect that [the defendants] would end up fighting against Western forces.” Ultimately, the Court of Appeal held:

It [is] perfectly clear to us that [the defendants] had become heavily radicalized in a dangerous way and that their commitment to such a cause could not simply be disregarded by reason of untested and asserted good intentions for the future. The fact that the target of their intentions was, on the occasion in question, not within the U.K. was not something which meant that the criteria for a consideration of dangerousness did not apply. The combination of extensive planning and premeditation, coupled with repeated expressions of alignment with radical Muslim fundamentalism, followed by [the defendants] acting on such views, satisfies us that the judge was correct in making a finding of dangerousness and passing [this] sentence. . .

Thus, the fact that the preparations in the U.K. were being made for terrorist activity abroad did not mitigate the offense.

In Abdalraouf, the defendants, Junead Khan and Shazid Khan were charged and convicted under section 5 of the Terrorism Act 2006 for planning to go to Syria and join ISIS. The preparatory steps in this case included discussing plans in messages with each other and members of ISIS in Syria, preparing lists of kit, researching online, and ordering military clothing. Junead Khan was also charged and convicted of preparing to kill a U.S. serviceman in East Anglia, a region of eastern England. His preparatory steps for this offense included opening a file on his phone with bomb-making instructions, researching online about buying knives and putting a combat knife into his Amazon shopping basket, and driving near U.S. military bases in East Anglia during his rounds as a deliveryman.

36. Id.
37. Id. at [17].
38. Id. at [29]-[30].
39. Regina v. Abdalraouf [2016] EWCA (Crim) 1868 (Eng.).
40. Id. at [65].
41. Id.
42. Id. at [87].
appealed their sentence. This case is referenced because it highlights the level of conduct that will prompt the preferment of charges that can yield a guilty verdict. In the first case concerning both defendants, they made lists, researched online and ordered clothing. In the case of the plan to kill the serviceman, Junead Khan did not take any steps to make a bomb, did not buy the knife, and nothing happened during his journey in East Anglia. The appellate court reduced the sentence, but still issued relatively long sentences (by U.K. standards) designed to protect the public.

In *Kahar*, the defendant was found guilty of a number of terrorism offenses, including conduct that violated section 5 of the Terrorism Act 2006. The conduct that formed the subject of the charge of preparing to travel to fight in Syria included seeking and downloading information about travelling to Syria on his computer, including ‘44 ways to support jihad’, asking a travel agent about obtaining visas for Turkey and seeking guidance about the appropriateness of travelling while he was in debt and whether to take his pregnant wife and children with him. He had not purchased tickets, nor had he set out for Syria. This was conduct at the bottom of the scale for sentencing, but he was also sentenced with regard to other counts for which he was convicted. These included offering to fund terrorism, urging others to fight for ISIS, and disseminating terrorist materials. The Court of Appeal acknowledged the wide range of conduct that can fall under section 5 activity and explained the sentencing principles that had emerged over recent years:

As the range of conduct, both in terms of culpability and harm caused, is so broad, the levels in to which we have divided the criminality that may be encompassed within the offence must be regarded as points on a scale of offending which can merit a life sentence with a very long minimum term to offending which may properly be marked with a relatively short determinate sentence. In accordance with the principles that we have identified, the [six] levels which we set out are differentiated by two principal factors:

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43. *Id.* at [65].
44. Regina v. Kahar [2016] EWCA (Crim) 568 (Eng.).
45. *Id.* at [37].
46. *Id.* at [35], [37]-[38], [58].
i) the culpability of the offender principally by reference to proximity to carrying out the intended act(s) measured by reference to a wide range of circumstances including commitment to carry out the intended act(s); and

ii) the harm which might have been caused measured in terms of the impact of the intended act (or series of acts) or the intended number of acts, including not only the direct impact intended on the immediate victims, but also the wider intended impact on the public in general if the act had been successful.47

Thus, U.K. legislation criminalizes a very wide range of terrorist activity from the earliest stage and will impose periods of custody ranging from twenty-one months in appropriate circumstances for the lowest level of activity in level six. At the other end of the scale in the level one most serious cases, offenders can expect sentences of life imprisonment for up to thirty or forty years.

B. REQUIREMENTS FOR ARREST

Persons reasonably suspected to be terrorists, (i.e. persons who are or have been concerned in the commission, preparation, or instigation of acts of terrorism),48 may be arrested without a warrant.49 As a previous Independent Reviewer of Terrorism Legislation commented, “(i)t is a notably wide power of arrest, in particular because the arresting officer need have no specific offense in mind. It is enough, under section 40(1)(b), for there to be a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. The acts need not have been identified at the time of arrest.”50 An example of this is the Roddis case, discussed above.51 The police were called on Roddis’ second visit to his former employer’s offices. No one knew exactly what he was

47. Id. at [26].
49. See id. § 41.
51. See Regina v. Roddis [2009] EWCA (Crim) 585 (Eng.).
planning to do, but the police had a reasonable suspicion from his conduct that he was preparing to commit some terrorist act.

The requirement of reasonable suspicion plays a significant part in facilitating arrests at an early stage. Part II of this article will demonstrate that the probable cause needed in order to obtain a warrant to arrest under U.S. law mandates a higher evidentiary standard to be met and may be one reason why in some cases U.S. arrests take place further along the continuum between planning and action.

II. PREPARATION TO COMMIT TERRORIST ACTS UNDER U.S. LAW

A. MATERIAL SUPPORT STATUTES

The U.S. has federal legislation that deals with international terrorism, but domestic terrorism is not an independent federal crime. The closest comparison to the U.K. section 5 of the Terrorism Act 2006 can be found in the two U.S. federal offenses of providing

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material support found in 18 U.S.C § 2339A\(^6\) and § 2339B.\(^7\)

Although the word “preparation” appears in §§2339A and 2339B, some U.S. prosecutors do not believe they have a crime of “preparation to commit terrorist activity” as such.\(^8\) The “preparation” that the statute refers to seems to be encompassed in the concept of “attempt.” However, attempt cannot comprise “mere preparation” – a

\(^6\) 18 U.S.C. § 2339A (2002) (stating “(a)Offense.—Whoever provides or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law. (b) Definitions.—As used in this section—(1) the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious material(2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and (3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.”)

\(^7\) 18 U.S.C. § 2339B(a)(1) (1996) (stating “(1) Unlawful conduct.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989”).

\(^8\) Interview with two Washington, D.C. Federal Prosecutors of Terrorist Crime (Feb. 20, 2018), in confidential file held by author.
substantial step is required. The prosecutors with whom the author spoke indicated that they believed an offense of preparation to commit terrorist activity would be a useful and desirable tool in the U.S., as it would give investigators more latitude.

Since 2014, the majority of ISIS-related cases have included material support charges. Three states, Alabama, Arizona, and New York, have some anti-terrorism legislation, much of which is based on the federal material support statutes. However, most of the documented prosecutions in these states are for violations of the federal statutes.

Section 2339A criminalizes material support “only where the defendant acts with actual knowledge or intent that the support will be used to prepare for, or carry out, certain terrorism-related crimes.” The intent requirement in § 2339A is that the defendant must have provided support or resources with the knowledge or intent that such resources will be used to commit the specific listed violent crimes.

56. See 2 Substantive Crim. L. § 11.4 (LaFave, Westlaw through 2017) (explaining that arrests can be made for attempting to commit a terrorist act, provided there has been sufficient activity. Attempt generally involves the intent to do a bad act coupled with an act. The precise definition of what that act must be has been the subject of much debate, and includes “an act sufficiently proximate to the intended crime” or “an act which in the ordinary course of events would result in the commission of the target crime except for the intervention of some extraneous factor,” or “an act of such a nature that it is itself evidence of the criminal intent with which it is done,” or “an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor’s] commission of the crime.”).


59. In re Chiquita Brands Int’l Inc., 284 F. Supp. 3d 1291, 1309 (S.D. Fla. 2018) (citing United States v. Ghayth, 709 F. App’x 718, 722-23 (2d Cir. 2017) (holding that the “underlying crime defined by § 2339A involves (1) knowingly (2) providing material support or resources (3) knowing or intending that such resources are to be used in the preparation for or in carrying out (4) an offense identified as a federal crime of terrorism . . . .”).

60. See 18 U.S.C. § 2339A(a) (2002) (noting that these crimes include killing or harming U.S. government personnel, foreign officials, damaging government property, public utilities, pipelines, communication and transport systems, using
These are offenses that are connected to international terrorism. “[T]he mental state in § 2339A extends to both the support itself and to the underlying purpose for which the support is given.”61 Furthermore, it is possible to violate § 2339A “by providing one’s self as personnel to others with the goal of assisting in the commission of, or simply preparation for the commission of, a predicate offense (including an offense in the nature of a conspiracy).”62

Prosecution under § 2339B has a narrower scope. It is predicated on providing support to a designated international terrorist organization. Not only must the defendant have the intent to provide support, he or she must also have knowledge that the support is to be given to a named terrorist organization, but need not have a particular named crime in mind. In other words, knowledge is required about the organization’s connection to terrorism, but a specific intent to further its terrorist activities is not mandated.63

The Center on National Security at Fordham Law has noted that “[o]ne of the unique attributes of terrorism investigations and prosecutions is the establishment of ideological motivation as an element of criminal conduct.”64 This was observed in all the material support cases reviewed for this article.

firearms or explosives in public places, banning violence at airports, banning biological and chemical weapons, and conspiring in the U.S. to kill, kidnap, or injure persons abroad).

61. United States v. Mehanna, 735 F.3d 32, 43 (1st Cir. 2013) (citing United States v. Stewart, 590 F.3d 93, 113 n.18 (2d Cir. 2009).


63. See In re Chiquita Brands Int’l Inc., 284 F. Supp. 3d at 1309.

64. Greenberg, supra note 57, at 24 (stating that “Communications and conduct indicating an alignment with ISIS often involve religious and political speech, coupled with conduct that is prohibited if undertaken in order to provide support to ISIS. The FBI affidavits filed with the criminal complaints often draw upon contextual evidence to support claims of ideological alignment and engagement with ISIS, including expressions of admiration for Abu Bakr al-Baghdadi, Anwar al-Awlaki, or Osama bin Laden, as well as expressions of approval regarding past acts of terrorism. The affidavits also highlight signature activities that are often interpreted by law enforcement to signal one’s status as an ISIS supporter, including the habitual consumption of ISIS-generated media, online contact with foreign ISIS members, and the recording of religious oaths of allegiance to Abu Bakr al-Baghdadi.”).
1. Examples of Conduct Amounting to Preparation in Material Support Convictions

Publicly available U.S. Government information does not provide a clear sense of the scope of domestic terrorist threats. A search of four databases related to terrorist convictions since 9/11, which were compiled by universities and non-profit NGOs, showed that only two of the databases have analyzed Islamist cases, mainly related to ISIS. One hundred and fifty-seven ISIS related cases have been reviewed from 2014 to date. Two of the databases focus on domestic, right wing, and hate crimes. The cases involving preparation to commit terrorist activity have been analyzed to establish the type of activity that has been prosecuted and the stage of the plot at which arrests were made. Additional information has been supplied from off the record conversation that the author had with two federal prosecutors of terror crimes.

In many cases the inchoate crime of conspiracy is also charged either alone, or together with the crime of providing material support. Conspiracy is easier to prove because the crime is committed as soon as an agreement between parties can be established and this may occur sooner than waiting for the attempted material support to crystallize. Out of forty persons convicted under § 2339A, twenty-nine were charged with conspiracy as well. Of course, conspiracy charges cannot be brought in cases involving a “lone wolf.”

In Brown, the defendants, Avin Marsalis Brown and Akba Jihad Jordan, were convicted of conspiracy to provide material support and

68. See Interview with Federal Prosecutors, supra note 55.
resources, knowing and intending that they would be used in preparation for, and in carrying out, a violation of 18 U.S.C. § 956 (conspiracy to kill or maim persons outside the U.S.).\(^69\) Over a period of six months, Brown communicated with the FBI’s “Confidential Human Sources” (CHS) and indicated his desire to go to Syria or Yemen to fight.\(^70\) Brown and Jordan discussed wanting to go to fight in Syria, and using weapons both in and outside the U.S. with the CHS.\(^71\) They discussed the need for, and applied for, passports to travel overseas to Syria and Yemen for the purposes of violent jihad.\(^72\) Brown and Jordan handled weapons, got themselves fit for fighting, and discussed the difficulties of getting to Syria.\(^73\) The deponent in the affidavit supporting the complaint noted that Brown was always further along with his travel plans than Jordan.\(^74\) Brown was arrested at Raleigh Durham Airport on his way to Turkey.\(^75\) Jordan was arrested later at his home and both were charged with conspiracy to provide material support, on the evidence of the CHS.\(^76\) The factual situation in this case is quite similar to the U.K. \textit{Iqbal}\(^77\) case, as these plots were disrupted the moment when the defendants were at the point of leaving their home countries.

Keonna Thomas was charged with attempting to provide material support under § 2339A.\(^78\) Her preparations included communicating with a cleric to find a jihadist to marry in Syria, researching travel routes, and obtaining an electronic visa to visit Turkey.\(^79\) She was arrested shortly after purchasing a ticket to fly to Barcelona.\(^80\) The

\(^{71}\) \textit{Id.} ¶ 7.
\(^{72}\) \textit{Id.} ¶¶ 9, 17-18, 24.
\(^{73}\) \textit{Id.} ¶¶ 8, 23.
\(^{74}\) \textit{Id.} ¶ 15.
\(^{75}\) \textit{Id.} ¶ 27.
\(^{76}\) \textit{Id.} ¶ 28.
\(^{77}\) \textit{See} Regina v. \textit{Iqbal} [2010] EWCA (Crim) 3215 (Eng.).
\(^{79}\) \textit{Id.} at *1-2.
\(^{80}\) \textit{Id.} at *1; Jeremy Roebuck, \textit{North Philly Mom Admits to Planning to Abandon Kids for ISIS}, \textit{The Phila. Inquirer} (Sept. 21, 2016),
facts of this case might look similar to the U.K. Dart case, but in fact Thomas had taken one more significant step, Thomas had purchased a ticket, whereas Dart had merely made preparations to obtain a visa.

Mufid Elfgeeh expressed support for various terrorist groups, sent funds overseas to persons associated with ISIS, attempted to recruit persons to travel to Syria, and plotted to kill U.S. armed forces. He was arrested after taking possession of handguns and ammunition. According to the FBI:

Elfgeeh approached an individual he believed was a fellow jihadist—who was cooperating with the FBI—and wanted to buy weapons. ‘He had debts and little money, but he came up with $1,000 to buy two handguns and two silencers, money that should have gone to paying his next month’s restaurant bills. At that point, the investigation changed—from a guy who was providing financial support and attempting to recruit people, to someone who was planning an attack. In our minds he was in the final stages of an operation. Nobody gets two guns with silencers for personal protection.‘

Compare this to the U.K. Abdalraouf case. In that case, the police did not wait for Junead Khan to be in possession of any weapons, but arrested him before he had made the purchase of a combat knife.

Akram Musleh posted three videos of Anwar Al-Awlaki on YouTube and was interviewed by the FBI. Nine months later he bought an ISIS flag online and was photographed in front of it. He asked people if they wanted to join ISIS and he tried to buy tickets to

81. See Dart v. The Queen [2014] EWCA (Crim) 2158 (Eng.).
83. Id.
85. See Regina v. Abdalraouf [2016] EWCA (Crim) 1868 (Eng.).
86. See id. at [89].
88. Id. ¶¶ 11, 15.
get to Iraq via Turkey. 89 Musleh was stopped trying to board a flight to Rome and a journal with ISIS materials was found in his luggage. 90 This arrest was comparable to the U.K. Iqbal case. 91

Haris Qamar drew the attention of the FBI with his tweets supporting ISIS and terrorism. 92 A confidential informant befriended Qamar in September 2015. Qamar told the confidential informant that he wanted to go to Syria to join ISIS. 93 In 2015, he drove by local landmarks and discussed possible targets in Washington, D.C. taken from an ISIS-published “kill list” with the informant. 94 On June 3 and 10, 2016, at Qamar’s suggestion they drove around various locations in Washington and to Arlington so that Qamar could make an ISIS video containing potential targets for attack. 95 The arrest warrant was issued for Qamar’s arrest on July 7, 2016. 96 Compare this with the U.K. Abdalraouf case, 97 where Junead Khan was arrested after driving around various U.S. military bases in East Anglia in the course of his work as a deliveryman. Qamar’s arrest warrant was issued a month after making the potential target video for ISIS.

Everitt Aaron Jameson was an ex-marine who told an undercover agent that he supported the New York attack on October 2017, where a truck driver drove into and killed eight people. 98 He said he wanted to plan and carry out something similar in San Francisco in furtherance of the same ISIS cause. 99 Jameson applied for a license to drive a tow truck and was seen driving one around Modesto California in

89. Id. ¶ 17(c).
90. Id. ¶ 21.
91. See Regina v. Iqbal [2010] EWCA (Crim) 3215 (Eng.).
93. See id. ¶ 35-36.
94. Id. ¶ 32.
95. Id. ¶¶ 57-60, 65.
97. Regina v. Abdalraouf [2016] EWCA (Crim) 1868 (Eng.).
99. Id.
December 2017. He also indicated that he knew how to make explosives, was trained to use weapons, had money to give to support ISIS, and wanted to travel to Syria. Jameson told an undercover agent that he wanted to build devices in a remote location and later said he had found a storage unit. Although two days later he told the agent that he did not think he could do these acts after all, a search warrant was issued for Jameson’s home. The police found firearms and ammunition, a will, and a farewell letter confessing to having done “these acts” in the name of ISIS. The criminal complaint was issued on December 22, 2017. In this example, the planning quickly escalated into a situation of potentially very serious danger and resulted in a prompt arrest.

Hamid Hayat’s case is particularly interesting because it could be characterized as a ‘thought crime’ prosecution, as the available evidence seems to suggest that the highest level of criminal activity identified in Hayat’s case merely involved thinking about committing a crime. He was convicted for material support pursuant to § 2339A and for making false statements. Hayat was a U.S. citizen of Pakistani descent and had returned to the U.S. from Pakistan where there was some dispute as to whether he had attended a training camp.

Hayat’s interviews with the FBI were scrutinized by a leading scholar, Robert Chesney, who questioned how Hayat’s conduct could have been prosecutable. Hayat admitted that he attended a training camp in an interview but it was not clear what he had been doing while

100. Id. ¶¶ 16-18.
101. See id. ¶ 28 (finding that Jameson was actively pursuing to join and support the ISIS organization).
102. Id. ¶¶ 32, 36.
103. Id. ¶¶ 32, 36.
104. Id. ¶¶ 37-38.
105. Id. ¶¶ 39-41.
106. United States v. Hayat, 710 F.3d 875, 880 (9th Cir. 2013).
107. Id. at 880-81.
108. See Chesney, supra note 62, at 487-492 (suggesting that the United States government demonstrated that it has a preference of prosecuting at the earliest plausible moment in the terrorism context; however, under the facts of this case, there was uncertainty as to what constituted Hayat’s criminal conduct).
at the training camp.\textsuperscript{109} Hayat had expressed “sympathy with the global jihad movement’s anti-American perspective and willingness to use violence”; however, it was unclear whether Hayat was likely to act on those views\textsuperscript{110} Hayat’s answers to interview questions about his plans to carry out an attack were extremely vague. Despite this, he was charged under § 2339A with providing and concealing material support (the predicate crime was § 2332b – acts of terrorism transcending national boundaries) and two counts of making false statements relating to his denial of attending the training camp.\textsuperscript{111}

Hayat was found guilty of everything except concealing the provision of material support, although he had not committed or attempted any crime in the U.S. As Chesney puts it, his crime was:

[P]roviding himself as ‘personnel’ in furtherance of his own potential violation of § 2332b in the future. Because § 2339A does not require proof of a substantial step toward the commission of the predicate offense, as would be the case with an attempt charge, it sufficed to show that Hamid knew or intended that his actions would facilitate a future offense even though those actions were of a generalized nature (in this instance, receiving training) and even though the details of that anticipated offense were entirely unspecified. In this way, the § 2339A charge against Hamid functioned as a sweeping form of individual inchoate crime liability.\textsuperscript{112}

Eight years later, in Hayat’s appeal, Circuit Judge Berzon remarked: “No party has questioned the applicability of the statute to such conduct.”\textsuperscript{113}

Out of all the material support cases reviewed in this article, Hayat is the only case that demonstrates a very early stage of arrest and prosecution that is comparable to a number of the U.K. cases. Indeed, the situation in Hayat is not all that different from the fact pattern in the U.K. Kahar case.\textsuperscript{114}

\textsuperscript{109} Id. at 488-90.
\textsuperscript{110} Id.
\textsuperscript{111} See id. at 491 (concluding that although Hayat did not commit or attempt an act of violence, he knew that his actions would facilitate a future offense).
\textsuperscript{112} Id.
\textsuperscript{113} United States v. Hayat, 710 F.3d 875, 880 (9th Cir. 2013).
\textsuperscript{114} See Regina v. Kahar [2016] EWCA (Crim) 568 (Eng.) (noting that Kahar’s case also involves thinking about committing a crime).
B. RIGHT-WING TERRORISM

Domestic terrorism, for the purpose of this article, means acts of terrorism committed in the U.S. that have no international connection. The FBI defines this as criminal acts “[p]erpetrated by individuals and/or groups inspired by or associated with primarily U.S.-based movements that espouse extremist ideologies of a political, religious, social, racial, or environmental nature.”\(^\text{115}\) Therefore, the definition can cover acts by right-wing white supremacists, black separatist extremists, environmental extremists, anti-abortion extremists, anti-government extremists, and anarchists.\(^\text{116}\) The majority of domestic terrorism between 2000 and 2016 has been committed by right-wing white supremacists,\(^\text{117}\) so this article will focus on that variety of domestic terrorism.

By definition, domestic terrorism is not within the scope of § 2339B, and very rarely falls within the scope of § 2339A because the predicate crimes in that statute relate to international terrorism. It should be noted that homegrown violent extremists should not be confused with domestic terrorists, because the former have connections with international terrorism, but the latter do not.\(^\text{118}\) Furthermore, no federal crime of domestic terrorism exists that could be applied to right-wing terrorist activity.\(^\text{119}\) Therefore, with one exception that is discussed below, right-wing terrorist acts are prosecuted under the general criminal law, usually state laws, sometimes under federal law if there is an interstate connection, or


\(^{116}\) See BJELOPERA, supra note 65, at 10 (asserting that the United States government does not officially designate domestic terrorist “organizations”, but rather characterizes these groups as “threats”).

\(^{117}\) Id. at 16 (citing Jana Winter, FBI and DHS Warned of Growing Threat from White Supremacists Months Ago, FOREIGN POLICY.COM, August 14, 2017).

\(^{118}\) See id. at 9 (arguing that homegrown violent extremists are not domestic terrorists because they act independently and do not take direction from foreign terrorist organizations).

\(^{119}\) Mary McCord, Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism, LAWFARE BLOG (Aug. 21, 2017, 1:59 PM), https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism (arguing that although the government does not recognize federal terrorism charges for domestic occurrences, such offenses are the moral equivalent of international terrorism).
under federal hate crime laws. Preparation is only criminalized if it falls within the scope of attempt, and if the particular definition of a crime includes attempt.

1. Examples of Conduct Amounting to Preparation in Right-wing Terror Cases Since 2014

The case of Eric J. Feight is the only example discovered relating to domestic terrorism where one of two Ku Klux Klan (KKK) members who tried to modify a radiation device with the intention of using it to kill Muslims, pleaded guilty to a charge of material support pursuant to 18 U.S.C. § 2339A, knowing or intending that those resources and support were to be used in preparation for violating 18 U.S.C. § 2332a (using or threatening the use of weapons of mass destruction). The usual connection to international terrorism is seen in that statute, but it can apply within the U.S., subject to some very specific conditions. Feight planned how to build a remote radio-


121. 18 U.S.C. § 2332a (2004):

(a) Offense Against a National of the United States or Within the United States.—A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction—

(1) against a national of the United States while such national is outside of the United States;

(2) against any person or property within the United States, and

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce;

(C) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense; or

(D) the offense, or the results of the offense, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce;

(3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States; or

(4) against any property within the United States that is owned, leased, or used by a foreign government,
controlled initiation device.122 He asked his co-defendant Glendon Scott Crawford to purchase items to build the device.123 Feight duly built and tested the device and was arrested shortly after and charged with providing material support.124 One can only speculate as to why he was not charged with conspiring with the co-defendant. Furthermore, it is not clear from the available documents why §2332a applied as opposed to the general criminal law, unless sending a drawing of the device by email to an undercover FBI agent125 fell within (2)(A), or if the fact that Crawford travelled to North Carolina to solicit funding from the KKK126 fell within (2)(C). Crawford was charged and found guilty only of charges relating to using a weapon of mass destruction.127

Curtis Allen, Gavin Wright, and Patrick Stein conspired to use a weapon of mass destruction to kill members of the Somali community in Kansas.128 The FBI commenced their investigation in February 2016 based on a report from a confidential human source (CHS). During August and September 2016, the men conducted surveillance to identify potential targets, researched methods of attack, stockpiled firearms, ammunition and explosive components, and planned to issue a manifesto in conjunction with the planned bombing. The attack, the defendants said, would be intended to “wake people up.” After considering possible targets, the defendants decided in August 2016 to conduct the attack on a Garden City, Kansas apartment complex that houses a mosque and a large number of members of the Somali

shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

123. Id.
124. Id. ¶ 1.
125. Id. ¶ 5.
127. See id. (asserting that Crawford is the first person in the United States guilty of violating the “dirty bomb” statute passed by Congress in 2004).
community. They discussed making explosives, obtaining four vehicles, filling them with explosives, and parking them at the four corners of the apartment complex to create a large explosion. On October 12, they met undercover agents posing as sellers of automatic weapons. Stein tried out the weapons and showed the undercover agent the target. After Allen’s girlfriend informed the FBI on October 11 that Allen was making explosives in his home, a warrant to search Allen’s home was issued on October 12 and the criminal complaint was issued on October 14.129 This arrest took place three months after the defendants decided on their target, and only after they were in possession of the weapons. Contrast this with the timing of arrest in the U.K. Khan case.130

Robert Doggart recruited people online to carry out an armed attack on a Muslim community. Doggart discussed details of his plan to burn down a mosque, a school, and a cafeteria in Islamberg, with a confidential informant.131 Doggart showed the confidential source maps of Islamberg, laid out the number of guns and types of ammunition they would need to destroy the community, and discussed different ways to burn down a mosque and other buildings. On April 10, Doggart told a confidential source that he would travel to Islamberg the next day to undertake reconnaissance and would take his M-4 rifle with him. The criminal complaint was issued later that day.132 This arrest was also made when the attack seemed imminent.

After investigating Jerry Drake Varnell for months, during which time Varnell indicated his support for a right wing group, discussed targets with an FBI informant, and declared he was out for blood, Varnell was arrested for attempting to remotely detonate what he thought was a car bomb outside a bank in Oklahoma.133 In the affidavit

130. See Regina v. Abdulraouf [2016] EWCA (Crim) 1868 (Eng.) (highlighting that Khan’s arrest was a five-year period).
133. TERROR FROM THE RIGHT, supra note 67; Criminal Complaint, United States
supporting the criminal complaint of malicious attempted destruction of a building used in and affecting interstate commerce by means of an explosive contrary to 18 U.S.C § 844(i), the deponent described activity that took place between January and August 2017. In the early months, Varnell indicated his desire to make explosives and discussed targets, but the arrest was not made until Varnell had made what he thought was a bomb, and tried to detonate it.

C. REQUIREMENTS FOR ARREST

Generally, a warrant is required to arrest an individual in material support cases. In urgent cases an arrest can be made without a warrant, provided it is applied for immediately after arrest. Law enforcement officers must show that there is probable cause to arrest. This is a higher standard than the reasonable suspicion required pursuant to U.K. law. In the U.S., reasonable suspicion is required for a stop and search. This means that the police must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

The concept of probable cause has been notoriously difficult to define. It has been discussed in many Supreme Court decisions and is the subject of extensive scholarly debate. Probable cause is present when the facts and circumstances are sufficient to warrant a prudent man in believing that the suspect had committed, or was committing, an offence.

134. See generally Criminal Complaint, supra note 133.
135. Id. ¶ 5.
136. Interview with Federal Prosecutors, supra note 55.
137. See Terry v. Ohio, 392 U.S. 1 (1968) (providing that the police do not have to be certain that the individual is armed in order to search him, but may conduct the search if a reasonable, prudent man in such circumstances would think that he is in danger).
140. Beck v. Ohio, 379 U.S. 89, 91 (1964) (reasoning that the constitutionality of
The U.S. standard appears predicated on belief rather than suspicion: "the crucial determination for determining probable cause is whether the investigative or law enforcement officer had an honest and reasonable belief in the guilt of the accused at the time they pressed charges."\textsuperscript{141}

III. CONCLUSION

Preparation to commit terrorism is not a federal crime under U.S. law. Some U.S. federal prosecutors do not believe that the term "preparation" in the material support statutes means more than conduct envisaged by "attempt," which requires "a substantial step" to be taken. This contrasts with the wording in the British section 5 of the Terrorism Act 2006, relating to "any conduct." The small sample of cases discussed dealing with persons attempting to fight overseas indicate that the arrests in the U.S. were made at the same stage of the activity as in the U.K. cases – at the airport or as they were about to leave. It seems that in the other U.S. cases, arrests were made when suspected attacks were imminent, and that the British arrests took place earlier. This is shown by comparing the U.K. Roddis, where "collecting information needed to manufacture explosives and acquiring the necessary materials" sufficed,\textsuperscript{142} with the U.S. cases where a substantial step had to be taken to amount to attempting the crimes.

Why does U.K. legislation permit arrest at an earlier stage? There are two possible reasons. First, perhaps because the U.K. standard of reasonable suspicion sets a lower evidentiary bar than the U.S. standard of probable cause. If the U.S. is considering finding ways to arrest earlier, it is most unlikely it would consider lowering the evidentiary bar for arrest. Second, perhaps this discrepancy relates to the U.K.’s long history of dealing with terror attacks for well over a century. Several of these attacks have inflicted mass casualties on the British population,\textsuperscript{143} and successive governments have believed there

\textsuperscript{141} Jones v. Soileau, 448 So. 2d 1268, 1271 (La. 1984) (citing Sandoz v. Veazie, 106 So. 2d 202, 213-14 (La. 1951)).
\textsuperscript{142} Regina v. Roddis [2009] EWCA (Crim) 585 (Eng.).
\textsuperscript{143} See HM GOV'T, supra note 1, at 1.02 (highlighting that there are terrorist
to be a need to respond to various terror attacks by adding to the bank of anti-terror legislation to keep the people safe. The U.K. legislation that attracted the most complaints was that relating to ill-treatment of Irish detainees, the duration of detention without charge, and control orders, which restricted the movements of terror suspects who were not actually detained. In all cases the ‘offending’ legislation was either repealed or amended. Legislation to criminalize the early stages of terror activity has not been met with any opposition. The terror threat to the U.K. is now posed by Islamists, the IRA and right-wing groups. It is important to note that the U.K. treats all terrorism in the same way, pursuant to domestic criminal law, irrespective of whether or not there is an international connection. That is something that the U.S. might want to consider.

Other than Hayat, no other examples of “thought-crimes” have been found in the § 2339A material support cases. This may be because, in the case of Islamist terrorism, a shift in the prosecutorial approach has been discernable since ISIS came into being. Prior to 2014, there were a large number of cases unaffiliated with any listed international terror group, so § 2339A prosecutions were often the only option. Since 2014, most of the material support cases have been brought under § 2339B. Between March 2014 and August 2017, there were nineteen prosecutions under § 2339A but more than ninety under


145. See Diane Webber, Preventive Detention of Terror Suspects: A New Legal Framework 99 (Routledge 2016) (mentioning that the duration of detention without charge was twenty-eight days between 2006 and 2011, whereas it had been fourteen days since 2012).

146. Id. at 102-05.

147. Id. at 109.

148. Hill, supra note 7, at 16-17 (highlighting that the U.K. faces a continuing threat of violence and terrorism from extremist groups such as National Action).


150. United States v. Hayat, 710 F.3d 875, 880 (9th Cir. 2013).
§ 2339B. 151 Even though § 2339A does not require a connection with a listed terror group, some prosecutors apparently consider that § 2339A is much harder to use than § 2339B, as a connection to one of the listed predicate offences must be made. 152 As ISIS has openly called for people to commit terror acts in their home countries, if admissions of suspects, reported comments, or contents of computers show sympathy for ISIS, that connection is easily made. 153

Since 9/11 and the formation of ISIS, perpetrators of sixty-six right-wing terrorist plots have been prosecuted. Just over half of these prosecutions related to attempted plots. Since March 2014 twenty-two plots have resulted in prosecutions, but only seven prosecutions were in relation to attempted criminal activity—the rest were prosecutions after completed criminal activity. 154 One reason for this may be that the political will, and consequently most federal resources, have been directed at thwarting international, or ISIS-related terror activity.

If the law were changed to make predicate statutes listed in § 2339A that relate to international terrorism applicable to domestic terrorism, would this assist prosecutors if they wanted to charge suspects with preparation? The answer is no, because the majority of these statutes do not include preparation in their definition. For example, “preparation” is found only in the definition of the crime of causing a terror attack on mass transportation. 155 However, three federal statutes include “making threats” as well as “attempt” 156 and at least twenty-seven include “attempt.” 157 At least four serious offences do not

151. Greenberg, supra note 57, at 28 (explaining that 18 U.S.C. § 2339A is the most commonly used statute to target those who conspire or attempt to provide material supports to foreign terrorist organizations).
152. Interview with Federal Prosecutors, supra note 55.
153. Id.
154. TERROR FROM THE RIGHT, supra note 67.
include “attempt” in their definition, so there is no possibility of a preventive arrest to stop those particular offences before they have taken place.

Returning to the scenario at the beginning of this article, if the two people in the café had been praising an ISIS attack and expressing a desire to replicate an attack in furtherance of that cause, the FBI might be able to seek a warrant to arrest pursuant to 18 U.S.C. § 2339B. But, were enough steps taken on those minimal facts to justify a finding of probable cause? If the two persons in the café had been praising a right-wing terror group, and desirous of perpetrating an attack in that name, it is extremely unlikely that the material support statutes would apply, or that the threshold of a substantial step would be been reached to justify a finding of attempt. Yet, if this set of facts had occurred in the U.K., there may have been sufficient activity to justify a finding of reasonable suspicion of preparation to commit a terrorist act pursuant to section 5 of the Terrorism Act 2006.

The scope of attempt laws in the U.S. is not as broad as the British crime of preparation. Thus, in some cases of activity connected with international terrorism, and most cases of domestic terrorism, it seems that U.S. law enforcement has fewer tools at its disposal to investigate and prosecute than its British counterparts. This article therefore recommends that legislators equip law enforcement more fully to thwart terror attacks.

To that end, some prosecutors might wish to be able to use the material support laws in domestic terror cases. However, currently it seems most unlikely that material support laws will be amended and made applicable to domestic terrorism, mainly because of the major focus on policy and resources invested in combatting Islamic terrorism. Furthermore, domestic organizations such as KKK are not considered to be terror organizations. The law as it stands permits these groups “more space to operate, organize and preach without

2332 (West 1996).
159. See McCord, supra note 120 (arguing that the United States does not charge federal criminal laws to terrorist attacks inside the United States).
heavy surveillance or government interference.” 160 Some believe that the government fears that extending material support to domestic terrorism cases, with the additional investigatory tools that accompany these statutes, might lead to many challenges on the grounds of infringement of the First and/or Second Amendments. 161 In addition, no list or infrastructure exists for compiling a list of Domestic Terror Organizations comparable with the State Department’s List of Foreign Terror Organizations. Compiling such a list, with all that it entails, is likely to be too burdensome for the authorities to contemplate. 162

If there is no political appetite to apply material support laws to domestic terrorism, the least that could be done is to amend criminal legislation to include “preparation” in the definition of crimes. There is no constitutional reason to preclude doing this. If there is political will to legislate in this way it would be a useful additional tool for both federal and state prosecutors to deal with international and domestic terrorism. That step would also bring the tackling of domestic right-wing terrorism closer to the treatment of Islamist terrorism.

161. Byman, supra note 52.
162. See Daniel Byman, Should We Use the ‘T-Word’ for Right-Wing Violence?, LAWFARE BLOG (Oct. 16, 2017, 8:00 AM), https://www.lawfareblog.com/should-we-use-t-word-right-wing-violence (arguing that determining who to put on the list would be challenging since many of the activities held by extremist domestic groups have First Amendment protection).
FALSE HOPES: WHY A RENEGOTIATED NORTH AMERICAN FREE TRADE AGREEMENT WILL VIOLATE CONVENTIONS 87 AND 98 OF THE INTERNATIONAL LABOR ORGANIZATION

CHARLIE LYONS*

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I. INTRODUCTION

The United States is unable to enforce labor violations under its free trade agreements (FTA) that include labor chapters.1 Many FTAs include labor chapters to ensure that parties to the agreement promote internationally recognized labor rights and reaffirm commitments to the International Labor Organization (ILO).2 Although the United States succeeded in implementing labor chapters into its FTAs, it has unsuccessfully enforced these provisions.3

On August 9, 2011, the United States requested an arbitral panel under Article 20.6.1 of The Dominican Republic-Central American-U.S. Free Trade Agreement (CAFTA-DR) to consider whether Guatemala violated its obligations under Article 16.2.1(a) of the CAFTA-DR.4 The CAFTA-DR Panel (Panel) held that, although the


United States provided sufficient evidence to prove Guatemala failed to effectively enforce its labor laws, it did not successfully show that Guatemala’s failure was “in a manner affecting trade between the Parties.”

The Panel’s reasoning is problematic because it violated the Vienna Convention on the Law of Treaties (VCLT). Article 31 of the VCLT requires that a treaty be interpreted “in light of its object and purpose.” The Panel did not interpret the phrase “in a manner affecting trade between the Parties” consistent with the agreement’s object and purpose because the Panel’s interpretation was too narrowly defined and ignored Guatemala’s obligations under ILO standards. The provision, “in a manner affecting trade between the Parties,” which the Panel incorrectly interpreted, exists in several other United States FTAs and the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA). Additionally, the interpretation and application of “in a manner affecting trade between the Parties” violates and undermines the ILO.

Because the decision was the first of its kind interpreting FTA labor provisions, a future panel deciding a labor dispute under a renegotiated NAFTA will likely look to the CAFTA-DR decision for guidance on the meaning of the phrase “in a manner affecting trade between the Parties.” Therefore, if a renegotiated NAFTA includes the provision


“in a manner affecting trade between the Parties,” it will violate the ILO because the Panel’s interpretive jurisprudence violates the ILO.

This Comment discusses the implications of the CAFTA-DR labor dispute. Part II discusses the ILO, its declaration, and the conventions relevant to the dispute. It gives an overview of the dispute, including its origins and ruling. Part III argues that because Guatemala is violating ILO Conventions 87 and 98, the Panel’s ruling undermines Guatemala’s ILO obligations. The United States will continue to unsuccessfully seek enforcement of labor violations, because the provision at issue in the CAFTA-DR labor dispute exists in other FTAs and will be included in a renegotiated NAFTA. Part IV recommends that the United States change its future FTAs so that it will have greater certainty over the provision’s interpretation. This can be accomplished by using a “for greater certainty” clause.

II. BACKGROUND

A. THE ILO, ILO CONVENTIONS 87 AND 98, AND THE COMMITTEE ON FREEDOM OF ASSOCIATION

Founded in 1919, the ILO’s mission is to bring together “governments, employers and workers . . . to set labour standards, develop policies and devise programmes promoting decent work for all women and men.” In 1998, the ILO adopted the Fundamental Principles and Rights at Work, which sets forth a list of fundamental rights that all parties, by signing onto the ILO, must endorse. The rights include: freedom of association, the effective recognition of the right to collective bargaining, and the elimination of discrimination in


respect to employment and occupation. These rights are adopted in subsequent, detailed conventions discussed below.

ILO Convention 87, Freedom of Association and Protection of the Right to Organise, requires parties to allow workers and employers the ability to organize and join organizations for “furthering and defending the interests of workers or of employers.” Furthermore, it states that public authorities should not interfere with the ability to lawfully exercise this right. ILO Convention 98, Right to Organize and Collective Bargaining, requires parties to protect workers by ensuring “adequate protection against acts of anti-union discrimination in respect of their employment.” It emphasizes a worker’s ability to freely join unions without fear that he or she will be dismissed or discriminated against for doing so.

In 1951, to increase compliance with Conventions 87 and 98, the ILO established the Committee on Freedom of Association (CFA). The CFA receives freedom of association complaints from employers and workers against their respective governments. If the CFA decides to receive the case, and subsequently finds a violation, it will report on the violation and provide recommendations for the government. Next, the CFA will request that the government keep the committee informed. If the CFA is not satisfied with the government’s progress to give effect to the committee’s recommendations, it may refer the case to the ILO’s Committee of Experts on the Application of Conventions and Recommendations.

13. *Id.* at 7.
15. *Id.* art. 3.
17. *Id.*
19. *See id.* (recognizing that the ILO could not effectively address freedom of association complaints without the formation of specialized supervisory body).
20. *Id.*
21. *Id.*
B. FREEDOM OF ASSOCIATION CASES AGAINST GUATEMALA

There are over 100 Freedom of Association cases against Guatemala, nineteen of which are active before the CFA. On May 31, 2002, the Trade Union of Workers of Guatemala (UNSIDITRAGUA) brought a complaint against Guatemala to the CFA alleging a multitude of freedom of association violations. Among the allegations included assaults, death threats, and intimidation of union members. Additionally, the complaint alleged a clear lack of respect for collective bargaining agreements and judicial orders to reinstate dismissed workers.

In its first report, the CFA concluded that there was great concern for the death threats received by union members. Additionally, the CFA concluded that employers dismissed their workers for participating in union activity and that judicial reinstatement orders were not respected. The CFA recommended that Guatemala investigate the threats and violence against union members and remedy the dismissal of workers who engaged in union activity.

The CFA examined the complaint brought by UNSIDITRAGUA on eight additional occasions and published a definitive report fourteen years later in 2016. The CFA requested that the government provide responses to the assault and death threat allegations against the union members. The CFA concluded that, because Guatemala provided no evidence to the contrary, the reports of threats and acts of violence

25. Id. ¶ 797.
26. Id. ¶ 806.
27. Id. ¶¶ 816, 823.
28. Id.
29. Id.
31. Id.
against union members were not investigated by the government.\textsuperscript{32} Additionally, the CFA reasoned that there is a “climate of violence” in Guatemala that serves as an obstacle for union activity.\textsuperscript{33} Regarding conditions of violence and anti-union discrimination, the CFA noted that workers’ rights can only be protected in an environment free of violence.\textsuperscript{34}

Reports on Guatemala’s violation of the ILO are not limited to the aforementioned case. Union leader Marco Tulio Ramirez faced anti-union violence and threats for participating in a strike.\textsuperscript{35} Although Mr. Ramirez reported his fears, the Government of Guatemala failed to provide adequate protection and he was subsequently murdered.\textsuperscript{36}

In other cases of anti-union discrimination, the CFA emphasized that it is the governments’ responsibility to ensure the protection of employees’ rights.\textsuperscript{37} In CFA case number 1852, the Trade Union Congress (TUC) complained that the United Kingdom interfered with their right to bargain collectively.\textsuperscript{38} The CFA noted that, although the Government of the United Kingdom stated it has protections in place, it did not supply any information to indicate that in this case, the steel workers did not experience anti-union discrimination and intimidation.\textsuperscript{39}

\textsuperscript{32} Id.

\textsuperscript{33} See id. (noting that the authorities should take adequate steps to reduce the violence and threats perpetrated against union members).


\textsuperscript{36} Id.


\textsuperscript{38} Id. (noting that the employer placed grave intimidation on the workers to sign contract arrangements and threatened to dismiss those who did not agree).

\textsuperscript{39} Id.
C. THE TPA, NAFTA, AND ITS RELATIONSHIP WITH CAFTA-DR

The United States successfully implemented requirements that promote internationally recognized labor rights into its FTAs.\(^{40}\) Despite this, many criticize the United States’ enforcement of these requirements.\(^{41}\)

On May 18, 2017, the United States Trade Representative (USTR), Robert Lighthizer, notified Congress of the Trump Administration’s intent to renegotiate NAFTA.\(^{42}\) The USTR seeks to bring labor rights into the main text of the renegotiated NAFTA because the labor chapter in the original NAFTA is a side agreement.\(^{43}\) Lighthizer’s notification also explained that the Administration will follow the guidelines in the TPA during the course of its negotiations with Mexico and Canada.\(^{44}\) Congress passed the TPA in May 2015 to increase expediency and certainty when negotiating FTAs.\(^{45}\) Under the TPA, if the President negotiates an FTA according to Congress’ objectives and guidelines, in addition to other benefits, Congress will vote on it without subjecting the agreement to an extensive and

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40. See Broken Promises, supra note 1 (stating that the TPP will raise labor standards by adding enforceable requirements for safety and health).
41. Id. (explaining that, despite the political rhetoric that labor chapters in FTAs have become stronger, the United States has failed to enforce apparent labor violations).
43. See NAFTA Renegotiation Objectives, supra note 10, at 12 (“Require NAFTA countries to adopt and maintain in their laws and practices the internationally recognized core labor standards as recognized in the ILO Declaration.”).
44. See 19 U.S.C.A. § 4201; Text of USTR Letters to Congressional Leadership, supra note 42 (“Our specific objectives for this negotiation will comply with the specific objectives set forth by Congress in section 102 of the Trade Priorities and Accountability Act.”).
potentially harmful amendment process.\footnote{Id.}

The TPA requires that parties to an FTA adopt and maintain internationally recognized labor rights.\footnote{See 19 U.S.C.A § 4201(a)(6).} The parties to the agreement should not derogate from implementing internationally recognized labor rights “in a manner affecting trade . . . between the Parties.”\footnote{Id. § 4201(10)(A)(ii)(I).} Additionally, in USTR’s renegotiating objectives for NAFTA, part of the labor chapter’s goal is to ensure that “NAFTA countries do not waive or derogate from their labor laws implementing internationally recognized core labor standards in a manner affecting trade . . . between the Parties.”\footnote{See NAFTA RENEGOTIATION OBJECTIVES, supra note 10, at 12.} Despite their inclusion in the United States Government’s trade agenda for NAFTA, these provisions promoting internationally recognized labor standards had no contextual meaning prior to the CAFTA-DR labor dispute.\footnote{See OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, GUATEMALA - ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE 16.2.1(A) OF CAFTA-DR, INITIAL WRITTEN SUBMISSION OF GUATEMALA 11, ¶ 63 (2015),https://ustr.gov/sites/default/files/enforcement/labor/NON-CONFIDENTIAL%20-%20Guatemala%20-%20Initial%20written%20communication%20-%2002-02-2015.pdf (last visited Aug. 10, 2018) [hereinafter Initial Written Submission of Guatemala] (noting that the labor dispute is only the second dispute under the CAFTA-DR); see also Neal, Pascrell Statements on Guatemala Labor Report, CONGRESSMAN RICHARD NEAL, https://neal.house.gov/media-center/press-releases/Neal-Pascrell-statements-guatemala-labor-report (last visited Aug. 10, 2018) (emphasizing the significance of the United States-Guatemala labor dispute and, consequently, the new challenges faced in enforcing labor provisions in FTAs).}

\section*{D. THE CAFTA-DR LABOR DISPUTE}

On August 9, 2011, former USTR Ron Kirk requested an arbitral panel to consider Guatemala’s compliance with its obligations under Article 16.2.1(a) of the CAFTA-DR.\footnote{In the Matter of Guatemala, supra note 4, at 1.} The provision states: “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.”\footnote{CAFTA-DR art. 16.2.1(a), supra note 2.} The Panel interpreted the scope of each component of
Article 16.2.1(a) according to Article 31 of the VCLT.\textsuperscript{53} According to the VCLT, a treaty shall be interpreted in light of its object and purpose using the text of the agreement and any subsequent agreements signed in connection with the original agreement.\textsuperscript{54} Additionally, the Panel considered Conventions 87 and 98 in its determinations.\textsuperscript{55}

The Panel reasoned that the object and purpose includes a commitment to promote and enforce internationally recognized workers’ rights and to promote competition.\textsuperscript{56} Article 16.8 of the CAFTA-DR defines labor laws as a “Party’s statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively.”\textsuperscript{57}

Guatemala first argued that its obligation under Article 16.2.1(a) is limited to the executive body because Guatemala’s executive branch is responsible for enforcing its statutes and regulations.\textsuperscript{58} The Panel rejected this claim, reasoning that a party under CAFTA-DR is responsible for its enforcement obligation under Article 16.2.1(a) regardless of which agency of government is responsible for enforcement.\textsuperscript{59} After establishing the object and purpose of the agreement, and determining that Guatemala’s obligations apply to all branches of government, the Panel analyzed each provision of Article 16.2.1(a) separately.

First, the Panel interpreted the meaning of “not fail to effectively enforce.” The Panel noted that perfect compliance is not necessary,\textsuperscript{60}

\begin{itemize}
\item\textsuperscript{53} In the Matter of Guatemala, supra note 4, at 54.
\item\textsuperscript{54} VCLT art. 31, supra note 7.
\item\textsuperscript{55} In the Matter of Guatemala, supra note 4, at 35 (“[T]he Panel can take into account relevant rules of international law in interpreting and applying the CAFTA-DR.”).
\item\textsuperscript{56} Id. at 39.
\item\textsuperscript{57} CAFTA-DR art. 16.8, supra note 2.
\item\textsuperscript{58} In the Matter of Guatemala, supra note 4, at 36 (arguing that the judicial branch and other non-executive bodies are not given the power to enforce statutes).
\item\textsuperscript{59} Id. at 39 (reasoning that such a reading of Article 16.2.1(a) would not be consistent with the object and purpose of the agreement).
\item\textsuperscript{60} Id. at 44 (“In our view, interpreting the phrase ‘effectively enforce’ as requiring a Party to achieve perfect compliance by each and every employer would impose an unreasonable burden.”).
\end{itemize}
but that Article 16.2.1(a) requires compliance with labor laws in a manner with which other employers will likely comply.\(^{61}\) The Panel used this interpretation to determine whether the employers violated the ILO.

The Panel reviewed several employers and arranged them into three groups: the shipping companies, the garment manufacturers, and the rubber producer. Beginning with ITM, a shipping company, the Panel concluded that it failed to enforce its labor laws and that it failed to comply with court reinstatement orders.\(^{62}\) ITM unlawfully dismissed workers for participating in a union and a Guatemalan labor court ordered the employees reinstatement.\(^{63}\) However, ITM did not reinstate the workers and the labor court was unable to enforce the orders.\(^{64}\)

The next shipping company, NEPORSA, committed similar violations. A Guatemalan labor court ordered NEPORSA to reinstate workers that it had unlawfully dismissed.\(^{65}\) NEPORSA dismissed the workers for participating in a union and a Guatemalan labor court ordered their reinstatement; however, NEPORSA did not comply and the labor court did not successfully enforce the reinstatement orders.\(^{66}\) In the case of ODIVESA, another shipping company, the Panel determined that, even after six years, it had failed to comply with court reinstatement orders.\(^{67}\) Furthermore, the court did not refer the case for criminal prosecution, as mandated by Guatemalan law.\(^{68}\) The final shipping company, RTM, dismissed workers for participating in union activity and did not pay back wages for the workers it reinstated.\(^{69}\)

\(^{61}\) \textit{Id.} (emphasizing the notion that if the authorities are effectively remediating violations of the law, other employers will be on notice, and will be more likely to comply with the labor laws).

\(^{62}\) \textit{Id.} at 101.

\(^{63}\) \textit{Id.} at 98.

\(^{64}\) \textit{Id.} at 101 (recognizing that six years had passed since the reinstatement orders were issued and yet the labor courts still had not achieved compliance).

\(^{65}\) \textit{Id.} at 109.

\(^{66}\) \textit{Id.} at 113 (rejecting Guatemala’s argument that a worker must appear at a reinstatement proceeding for a court to be obligated to enforce a reinstatement order).

\(^{67}\) \textit{Id.} at 123.

\(^{68}\) \textit{Id.} at 115-16.

\(^{69}\) \textit{Id.} at 128.
Next, the Panel concluded that the garment manufacturers, Avandia, Fribo, and Alianza, also did not comply with court orders of reinstatement.\textsuperscript{70} Avandia reinstated workers to different positions than the ones they were originally working, and Avandia did not pay money owed to the reinstated workers.\textsuperscript{71} Similarly, Alianza did not comply with the court reinstatement orders and the court neglected to enforce Alianza’s compliance with the orders.\textsuperscript{72} The final garment manufacturer, Fribo, dismissed its employees for attempting to negotiate an agreement regarding its concerns with Fribo.\textsuperscript{73} Additionally, although Fribo did reinstate workers, as required by the court, it reinstated the employees to lesser paying positions.\textsuperscript{74} The final employer in the CAFTA-DR labor dispute, Solesa, dismissed workers for initiating a conciliation process.\textsuperscript{75}

The record showed that employers received court orders to reinstate workers who were dismissed for union activity.\textsuperscript{76} The employers also received fines for failure or refusal to comply with court reinstatement orders.\textsuperscript{77} The employers failed to reinstate the dismissed workers and refused to pay court-ordered fines for non-compliance.\textsuperscript{78} The Panel concluded that Guatemala failed to effectively enforce its labor laws because the courts did not effectively enforce the fines or the reinstatement orders, which signaled to other employers that their non-compliance would occur with impunity.\textsuperscript{79} Next, the Panel determined the phrase “through a sustained or recurring course of action or inaction” to mean a “line of connected, repeated, or prolonged behavior by an enforcement institution or institutions.”\textsuperscript{80} Despite this

\textsuperscript{70} Id. at 128, 135-36.
\textsuperscript{71} Id. at 136 (recognizing that Guatemalan courts were unable to enforce reinstatement orders of nine workers for eight months and nine months for two workers).
\textsuperscript{72} Id. at 135.
\textsuperscript{73} Id. at 124.
\textsuperscript{74} Id. (referring to workers’ statements indicating that they had been reinstated into employment but into positions with less pay, before being dismissed again).
\textsuperscript{75} Id. at 137.
\textsuperscript{76} Id. at 142.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 145 (determining that each case must be analyzed on a fact by fact basis).
reasoning, the Panel did not make a determination on this issue so that it could analyze and rule on the third issue.\textsuperscript{81} Moreover, it noted that the issue is not dispositive of the dispute’s outcome.\textsuperscript{82}

The Panel’s conclusion that Guatemala’s failure to effectively enforce its labor laws was not “in a manner affecting trade” hinged on its interpretation of how the phrases in the provision operated.\textsuperscript{83} Furthermore, the Panel based its determination on whether the companies in question exported to another CAFTA-DR party, affected labor law enforcement, and conferred a competitive advantage over other CAFTA-DR parties.\textsuperscript{84}

The Panel emphasized that a failure to enforce labor laws will not necessarily be “in a manner affecting trade.”\textsuperscript{85} It stated that “[a] complainant must demonstrate that labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage.”\textsuperscript{86} Although the Panel concluded that Guatemala’s failure to enforce its laws against one employer, Avandia, “conferred some competitive advantage upon it,”\textsuperscript{87} the Panel held that because this was not a recurring failure, the United States did not show that Guatemala’s failure to effectively enforce labor laws was “in a manner affecting trade.”\textsuperscript{88}

\begin{enumerate}
\item Id. (“[W]e accept on an arguendo basis that the instances of failed enforcement in question constitute a sustained or recurring course of action or inaction.”).
\item Id.
\item Id. at 168-69 (“[W]hichever way [the facts] are viewed, one of the prongs of an Article 16.2.1(a) claim has not been met.”).
\item Id. at 150-51 (“We consider whether (1) at the relevant time the enterprises in question exported to one or more of the CAFTA-DR Parties in a competitive market or competed with imports from one or more of the CAFTA-DR Parties; (2) what effects, if any, failures to effectively enforce labor laws had on any of these enterprises; and (3) whether any such effects conferred some competitive advantage on any such enterprise or enterprises.”).
\item See id. at 62-63 (noting that a failure to enforce labor laws affects trade when an employer engaged in trade gains a competitive advantage over other employers as a result of its failures).
\item Id. at 161.
\item Id. at 167.
\item See id. at 167-69 (“For failure . . . to effectively enforce labor laws to constitute a breach of Article 16.2.1(a), the failure . . . must be through a sustained or recurring course of action or inaction, and in a manner affecting trade . . . . In this case, although we have found . . . that Guatemala’s failures to effectively enforce its
III. ANALYSIS

Because Guatemala is violating Conventions 87 and 98, the CAFTA-DR labor dispute effectively absolves Guatemala from failing to uphold its ILO obligations. Specifically, the Panel’s interpretation of “in a manner affecting trade between the Parties” violates the ILO because Guatemala is bound by the ILO’s declaration and conventions regardless of whether or not Guatemala is engaging in trade.\(^89\) The Panel’s ruling is significant because its reasoning will likely be applied in future labor disputes.\(^90\) Accordingly, because the Panel’s interpretation violated the ILO, any subsequent FTAs that require labor violations to be “in a manner affecting trade” will violate the ILO.

The ILO Declaration and Conventions 87 and 98 are applicable to this analysis because Guatemala is a party to the ILO and ratified both conventions in 1952.\(^91\) Accordingly, Guatemala is obligated to fulfill its commitments regardless of the CAFTA-DR.\(^92\)

Furthermore, the Panel interpreted the provision “in a manner affecting the Parties” incorrectly under the VCLT because it did not accurately define the object and purpose of the agreement.\(^93\) Finally,

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89. *ILO Declaration on Fundamental Principles and Rights*, supra note 12 (declaring that parties have an obligation to promote and protect the internationally recognized rights set out in the declaration and the respective ILO conventions).


93. See *IN THE MATTER OF GUATEMALA*, supra note 4, at 109 (noting that the CAFTA-DR Panel will use the VCLT’s rules of interpretation during its analysis).
the Panel’s decision violates the ILO because it creates an evidentiary standard not required to prove a labor violation.

A. GUATEMALA IS VIOLATING THE ILO BECAUSE IT IS NOT PROTECTING THE FREEDOM OF ASSOCIATION OR THE RIGHT TO COLLECTIVE BARGAINING

Guatemala is in violation of its obligations to the ILO and Conventions 87 and 98 because complaints brought against it clearly demonstrate freedom of association violations. The complaints detail numerous instances of anti-union violence and many workers have been unlawfully dismissed without reinstatement. For example, in many reports workers did not have the opportunity to defend their interests as employees because they were fired for doing so. Furthermore, despite Guatemala’s obligation under Article 2 of Convention 87, workers were dismissed for participating in union activity.

Guatemala violated the ILO because it did not adequately protect union leaders Pedro Zamora’s and Marco Tulio Ramirez’s right to organize and participate in a union. Although the CFA reiterates that union rights can only be protected in an environment free of violence


95. See IN THE MATTER OF GUATEMALA, supra note 4, at 101, 109 (noting that Guatemalan labor courts were unsuccessful in enforcing the reinstatement orders even after six years, and that “NEPORA had wrongfully dismissed 40 stevedores in retaliation for participating in a union”); see also Definitive Report - Report No. 380, October 2016, Case No. 2203, supra note 30.

96. See IN THE MATTER OF GUATEMALA, supra note 4, at 109 (indicating that not only did the NEPORA wrongfully dismiss 40 stevedores in retaliation for their participation in a union, but NEPORA also failed to reinstate the workers).

97. Id. at 101.

98. See Interim Report - Report No. 304, June 1996, Case No. 1852, supra note 37, ¶ 496 (noting that it is the government’s responsibility to ensure respect for the freedom of association).
and threats,\textsuperscript{99} similar to Case No. 1852,\textsuperscript{100} Pedro Zamora faced anti-
union discrimination and reported his concerns to the Government of
Guatemala. However, he did not receive adequate protection and was
murdered.\textsuperscript{101} Additionally, Guatemala violated the freedom of
association when, following Mr. Zamora’s murder, the executive
committee of the union received inadequate protection from the
Government of Guatemala.\textsuperscript{102} Guatemala’s inadequate protection was
evident from the lack of resources it provided.\textsuperscript{103}

Threats of violence and intimidation also occurred against
SITRABI union leader Marco Tulio Ramirez.\textsuperscript{104} The Government of
Guatemala violated Conventions 87 and 98 when it did not adequately

\begin{itemize}
\item \textsuperscript{99} See Interim Report - Report No. 333, March 2004, Case No. 2268, supra
note 34, ¶ 744 (noting that a union can only freely exercise their rights in an
environment in which the authorities are not repressive and where basic human
rights are respected).
\item \textsuperscript{100} See Interim Report - Report No. 304, June 1996, Case No. 1852, supra note
37, ¶ 481; see also Right to Organise and Collective Bargaining Convention art. 2(1),
supra note 16 (“Workers’ and employers’ organizations shall enjoy adequate
protection against any acts of interference by each other or each other’s agents or
members in their establishment, functioning or administration.”).
\item \textsuperscript{101} See OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.), supra note 35 (“The
Solidarity Center wrote letters to President Berger . . . and the Minister of Labor,
Rodolfo Colmenares, specifically requesting measures be taken to guarantee the
security . . . of STEPQ union leaders.”).
\item \textsuperscript{102} See U.S. DEP’T OF LABOR, PUB. REPORT OF REVIEW OF U.S. SUBMISSION
2016-02 (COLOM.), i, 28 (2017), https://www.dol.gov/sites/default/files/
documents/ialab/PublicReportsofReviewofUSSubmission2016-02_Final.pdf (“The
ILO has repeatedly recognized that a failure to effectively and expeditiously address
threats and violence against labor activists and leaders constitutes a violation of the freedom
of association.”).
\item \textsuperscript{103} See OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.), supra note 35, at 8
(providing evidence regarding police delays in arriving and inspecting the crime
scene, as well as failures to properly handle evidence in the case to support the
allegation that Guatemalan authorities failed to conduct serious investigations); see
also Interim Report - Report No. 316, June 1999, Case No. 1773, ILO, ¶ 492,
http://www.ilo.org/dyn/normlex/en/?p=1000:50002:0::NO:50002:P50002_COMP
LAINT_TEXT_ID:2903023 (last visited Oct. 22, 2017) (reinforcing that it is the
obligation of the Government to take all appropriate measures to ensure that the
freedom of association can be exercised).
\item \textsuperscript{104} See OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.), supra note 35, at 10
(“On September 23, 2007, Marco Tulio Ramirez, a SITRABI union leader and
younger brother of SITRABI’s Secretary General, was killed on the Bandegua
company plantation.”).
\end{itemize}
prevent or prosecute anti-union violence against SITRABI.\textsuperscript{105} SITRABI merely exercised its right to peacefully protest the terms of a collective bargaining agreement,\textsuperscript{106} actions that are protected by the ILO; however, Guatemala violated the participants’ rights when the Government of Guatemala did not take the situation seriously.\textsuperscript{107}

Contrary to the protections of Convention 98, workers were dismissed for participating in a union and employers bribed their employees not to join a union.\textsuperscript{108} When a government does not effectively enforce the laws, not only is it violating its obligations under the ILO, it signals to others that rights to freedom of association, to organize, and to collective bargaining will not be enforced.\textsuperscript{109}

\textbf{B. THE PANEL’S INTERPRETATION OF “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES” VIOLATED THE VCLT BECAUSE IT DID NOT CORRECTLY DETERMINE THE OBJECT AND PURPOSE OF THE CAFTA-DR}

The Panel’s interpretation of “in a manner affecting trade between the Parties” violated the VCLT because it did not accurately reflect the agreement’s object and purpose, particularly the agreement’s labor chapter.\textsuperscript{110} The VCLT’s rules of treaty interpretation require that the


\textsuperscript{106} See Right to Organise and Collective Bargaining Convention art. 1, supra note 16 (“Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”).

\textsuperscript{107} See OTLA REVIEW U.S. SUBMISSION 2008-01 (GUAT.), supra note 35, at 10 (providing that the wave of anti-union violence resulted from the Government of Guatemala’s failure to prevent or prosecute the same).

\textsuperscript{108} Id. at 19.

\textsuperscript{109} In the Matter of Guatemala, supra note 4, at 150 (noting that when employers commit violations with impunity, a spillover effect occurs where other employers commit violations with the knowledge that they will not be held accountable).

\textsuperscript{110} Compare id. at 56 (limiting the objective of Article 16.2.1(a) of the CAFTA-DR to “promoting fair conditions of competition in the free trade area”), with CAFTA-DR art. 16.1, supra note 2 (“The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its
treaty or agreement be read in light of its object and purpose and that the whole document and related documents should be considered.\textsuperscript{111} Despite these guidelines, the Panel narrowed its interpretation of the provision to one purpose: “To promote conditions of fair competition in the free trade area.”\textsuperscript{112} This interpretation violates the VCLT because it does not account for the purpose of the labor chapter,\textsuperscript{113} the preamble of the CAFTA-DR,\textsuperscript{114} nor the ILO’s mandate.\textsuperscript{115}

The Panel’s VCLT application is the starting point for explaining why the provision violates the ILO. Had the Panel considered the whole text of the agreement, it would have considered Guatemala’s ILO violations in its ruling. However, the Panel considered Guatemala’s failures only to the extent that it affected the conditions of competition. The Panel’s standard for proving a CAFTA-DR labor violation was not the same for proving an ILO labor violation.

\textbf{C. THE PANEL’S INTERPRETATION OF “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES” CREATES AN EVIDENTIAL STANDARD THAT VIOLATES THE ILO BECAUSE THE ILO DOES NOT REQUIRE LABOR VIOLATIONS TO AFFECT CONDITIONS OF COMPETITION BETWEEN PARTIES}

Each employer in the CAFTA-DR labor dispute engaged in activity that violated Conventions 87 and 98.\textsuperscript{116} If the ILO reported on the

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Follow-Up (1998) (ILO Declaration).”).
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\textsuperscript{111} In the Matter of Guatemala, supra note 4, at 54 (“The rules of interpretation set forth in the VCLT . . . require that the words of the Agreement be interpreted according to their ordinary meaning in context and in light of the object and purpose of the CAFTA-DR.”).
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\textsuperscript{112} Id. at 51.
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\textsuperscript{113} CAFTA-DR art. 16.1, supra note 2 (“The Parties reaffirm their obligations as members of the International Labour Organization (ILO.”)).
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\textsuperscript{114} Id. at Pmbl. (“PROTECT, enhance, and enforce basic workers’ rights and strengthen their cooperation on labor matters” and “BUILD on their respective international commitments on labor matters”).
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\textsuperscript{116} In the Matter of Guatemala, supra note 4, at 142.
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complainants’ allegations, it would rule that Guatemala violated its obligations under the conventions it ratified.\textsuperscript{117} Despite the CAFTA-DR’s labor chapter specifically noting that its purpose is to promote and reaffirm the Party’s ILO obligations,\textsuperscript{118} the Panel’s decision established an evidentiary standard that is not required by the ILO to prove a labor violation.\textsuperscript{119} If the Panel correctly interpreted the provision “in a manner affecting trade between the Parties” in light of the agreement’s object and purpose, it would have held that Guatemala, by virtue of the employers’ actions, violated its obligation under Article 16.2.1(a) of the CAFTA-DR.\textsuperscript{120}

\section{The Shipping Companies}

The first group of employers, the shipping companies, violated Conventions 87 and 98 because they dismissed workers for exercising their union rights.\textsuperscript{121} Guatemala did not adequately protect former ITM employees’ freedom of association and right to bargain collectively because ITM dismissed fourteen employees for participating in a union\textsuperscript{122} and refused to comply with court reinstatement orders.\textsuperscript{123} Guatemala violated its obligations because, under the ILO, it is the government’s responsibility for ensuring and protecting the conventions that the government voluntarily ratified.\textsuperscript{124} Therefore, because Guatemala did not protect the rights afforded under Conventions 87 and 98, it did not comply with its ILO obligations.

Similarly, Guatemala violated Convention 87 and 98 when it did not effectively enforce the reinstatement orders issued to NEPORS.\textsuperscript{125} Although a labor court concluded that NEPORS had

\begin{itemize}
\item \textsuperscript{117} See Complaints Procedures: Freedom of Association Cases (Guatemala), supra note 94.
\item \textsuperscript{118} CAFTA-DR art. 16.1, supra note 2.
\item \textsuperscript{119} In the Matter of Guatemala, supra note 4, at 150-51; Definitive Report – Report No. 330, March 2003, Case No. 2194, supra note 90, ¶ 791.
\item \textsuperscript{120} In the Matter of Guatemala, supra note 4, at 142-43.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 98.
\item \textsuperscript{123} Id. at 101.
\item \textsuperscript{124} See Interim Report - Report No. 304, June 1996, Case No. 1852, supra note 37, ¶ 492 (“The ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.”).
\item \textsuperscript{125} See In the Matter of Guatemala, supra note 4, at 113.
\end{itemize}
dismissed forty workers for participating in union activity and issued reinstatement orders, NEPORS\nA did not comply, which violates the principles of freedom of association.\textsuperscript{126} Despite Guatemala’s argument that its obligation to enforce its labor laws, including the freedoms of association and collective bargaining, is limited to the executive branch,\textsuperscript{127} the CFA held that when a party ratifies an ILO convention, its judicial branch is equally responsible for protecting workers from anti-union discrimination.\textsuperscript{128} Therefore, because the Guatemalan courts did not effectively enforce its orders of reinstatement against NEPORS\nA, Guatemala violated the freedoms of association and collective bargaining.\textsuperscript{129}

In addition, Guatemala violated Conventions 87 and 98 when it did not effectively enforce court reinstatement orders against ODIVES\nA in a timely manner.\textsuperscript{130} Another example of Guatemala’s failure to enforce its labor laws with respect to freedom of association and collective bargaining is a reinstatement order for an ODIVES\nA worker, still unenforced after six years.\textsuperscript{131} Furthermore, although mandated by Guatemalan law, reinstatement orders against ODIVES\nA were not submitted for criminal prosecution or additional fines.\textsuperscript{132} It is the responsibility of the judicial authorities of state parties to carry out the laws as they relate to protecting and implementing ILO Conventions 87 and 98.\textsuperscript{133} Because the Guatemalan courts did not do


\textsuperscript{127} See In the Matter of GUATEMALA, supra note 4, at 36.


\textsuperscript{130} See In the Matter of GUATEMALA, supra note 4, at 123.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 115-16; Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 326, November 2001, Case No. 2027, supra note 105, ¶ 175.

\textsuperscript{133} Report in Which the Committee Requests to be Kept Informed of Development – Report No. 313, March 1999, Case No. 1952, ILO, ¶¶ 295, 299,
so, Guatemala violated the ILO.\textsuperscript{134}

Finally, Guatemala violated the principles of freedom of association when RTM, the last shipping company in the CAFTA-DR dispute, dismissed twelve workers for attempting to form a union.\textsuperscript{135} The ILO holds that anti-union discrimination, including dismissing workers for forming, joining, participating in a union, or participating in union activities, constitutes a violation of freedom of association.\textsuperscript{136} Additionally, despite court orders, RTM failed to reinstate the workers and it did not pay back wages for the unlawful dismissals, as required by the ILO.\textsuperscript{137}

The Panel’s analysis and holding relies on its interpretation of “in a manner affecting trade between the Parties.” Despite the apparent freedom of association and the right to collective bargaining violations, in regards to the shipping companies, Guatemala did not violate its labor obligations under CAFTA-DR. Because Guatemala did not violate its labor obligations under CAFTA-DR, despite the numerous ILO violations, the provision “in a manner affecting trade between the Parties” violates the ILO.

The Panel required the United States to show proof that a shipping company conferred a competitive advantage from Guatemala’s failure to enforce its labor laws;\textsuperscript{138} however, the ILO does not require such a showing.\textsuperscript{139} If the ILO does not permit an employer to violate the freedom of association based on an economic necessity argument,\textsuperscript{140} it

\textsuperscript{134} Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 326, November 2001, Case No. 2027, supra note 105, ¶ 175.

\textsuperscript{135} See IN THE MATTER OF GUATEMALA, supra note 4, at 128.


\textsuperscript{138} IN THE MATTER OF GUATEMALA, supra note 4, at 152.

\textsuperscript{139} Definitive Report – Report No. 330, March 2003, Case No. 2194, supra note 90, ¶ 791.

\textsuperscript{140} See Report in Which the Committee Requests to be Kept Informed of Development – Report No. 335, November 2004, Case No. 2303, ILO, ¶ 1371,
certainly would not permit an employer to discriminate against unionists to evade costs associated with protecting the freedom of association. Furthermore, unlike the ILO, the Panel required the United States to provide evidence that a shipping company’s failure to protect its employees’ union rights would affect the costs of other shipping companies. This evidentiary requirement is not mandated by the ILO because the purpose of Conventions 87 and 98 is to ensure and protect workers’ and employers’ right to establish and join organizations, not to protect the financial losses of a business.

2. The Garment Manufacturers

Similar to the shipping companies, the garment manufacturers violated Conventions 87 and 98 because they did not comply with court reinstatement orders and did not adequately compensate dismissed workers. First, Avandia, in addition to its unlawful dismissal of eleven workers, violated the ILO because of the lengthy delay to carry out the reinstatement orders. The ILO holds that unlawful dismissals should be remedied quickly so that the employees’ union rights are not violated and that the inaction does not constitute a “denial of justice.” Furthermore, when an unlawfully dismissed worker is reinstated, he or she must be reinstated without loss of pay. Regarding the nine workers that the Guatemalan labor


143. The garment manufacturers include Avandia, Frio, and Alianza.
144. See In The Matter of Guatemala, supra note 4, at 128-35.
145. Id. at 156-57.
146. Id. at 136 (noting that when a country takes eight months to reinstate nine workers and nine months to reinstate two workers, it is not effectively enforcing its labor laws).
court ordered to be reinstated, Avandia reinstated two of the workers to lesser paying jobs.\textsuperscript{149} Although Avandia reinstated the workers, it violated the ILO because it did not reinstate the employees in a timely manner nor did it adequately compensate the workers.\textsuperscript{150}

Fribo violated the ILO in numerous ways when it dismissed workers for attempting to form a union and did not give back pay to the dismissed employees.\textsuperscript{151} Furthermore, Fribo violated the ILO when it fired workers for initiating a collective bargaining agreement.\textsuperscript{152} Additionally, because the ILO holds that intimidation serves to threaten one’s freedom to join an organization, Guatemalan officials violated the Right to Organise when it urged workers to accept a lower salary.\textsuperscript{153} Workers’ rights cannot be protected and promoted when the government itself is intimidating workers from exercising their rights.\textsuperscript{154}

The final garment manufacturer in the CAFTA-DR dispute, Alianza, committed similar ILO violations relating to the freedom of association and the right to collective bargaining.\textsuperscript{155} The United States provided evidence that a Guatemalan labor court found that Alianza dismissed workers for initiating a collective agreement with their employer.\textsuperscript{156} Alianza’s actions violated the ILO because an employer cannot dismiss workers for merely participating in union activities.\textsuperscript{157} Furthermore, the ILO holds that firing an employee for presenting issues to its employer that the employee wishes to resolve cannot be

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\textsuperscript{149} See \textsc{In the Matter of Guatemala}, \textit{supra} note 4, at 135.
\textsuperscript{150} Effect Given to the Recommendations of the Committee and the Governing Body – Report No. 338, November 2005, Case No. 1890, \textit{supra} note 147, ¶ 179.
\textsuperscript{151} See \textsc{In the Matter of Guatemala}, \textit{supra} note 4, at 136.
\textsuperscript{152} \textit{Id.} at 124.
\textsuperscript{155} \textsc{See \textit{In the Matter of Guatemala}, \textit{supra} note 4, at 131-35.}
\textsuperscript{156} \textit{See id.} at 131.
\textsuperscript{157} \textit{See id.}

Similar to the shipping companies, although the garment manufacturers committed “obvious”\footnote{Id. at 159 (“It is obvious that the workers at Avandia, Fribo and Alianza who were unlawfully dismissed for seeking to organize a union and then denied any legal remedy were directly deprived of the ability to join and participate in a union.”).} freedom of association violations, the Panel reasoned that the garment manufacturers did not violate their obligations under Article 16.2.1(a) because the failures did not occur “in a manner affecting trade between the Parties.”\footnote{Id. at 164-65.} The Panel imposed an evidentiary requirement on the United States that is not required by the ILO: proof that the garment manufacturers engaged in trade between the CAFTA-DR Parties.\footnote{See id. at 150-51.} The ILO does not restrict complaints from being submitted only from parties engaged in trade with particular countries.\footnote{Committee on Freedom of Association, ILO, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087814.pdf.} Under the ILO, a state party cannot argue that an agreement signed with other countries justifies violating the ILO.\footnote{Definitive Report – Report No. 330, March 2003, Case No. 2194, supra note 90, ¶ 791.} Therefore, even if the garment manufacturers did not engage in trade between the CAFTA-DR Parties, the businesses still violated the ILO because they did not protect the freedom of association and the right to collective bargaining.\footnote{In the Matter of Guatemala, supra note 4, at 156, 161.}

Next, the Panel’s application of “in a manner affecting trade between the Parties” to the garment manufacturers violated the ILO because it disregarded the ILO’s requirements for reinstating workers.\footnote{Report in which the Committee Requests to be Kept Informed of Development – Report No. 330, March 2003, Case No. 2158, ILO, ¶ 838, http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMP-LAINT_TEXT_ID:2906864.} The ILO requires that unlawfully dismissed workers be
reinstated without loss of pay; had however, the Panel introduced a requirement that the failure to give dismissed workers back pay must have conferred a competitive advantage on the employer in relation to other businesses. The Panel acknowledged the garment manufacturers’ ILO violations, but reasoned that, because the United States had not proved the violations were “in a manner affecting trade between the Parties,” it did not violate Article 16.2.1(a).

3. The Rubber Manufacturer

The final employer, Soleasa, a major rubber manufacturer, violated the ILO because it did not comply with court reinstatement orders and it did not protect the right to collective bargaining. In the Panel’s final analysis, it examined Soleasa’s labor violations and the effects, if any, on trade. Similar to the garment manufacturers, Soleasa violated the ILO when it dismissed employees for initiating a collective bargaining negotiation with Soleasa. Additionally, Soleasa did not abide by court reinstatement orders nor did the courts adequately enforce these orders. This violated the ILO because respect and compliance of the rule of law must be maintained to ensure respect for the freedom of association. Furthermore, because the court reinstatement orders were not enforced, it signaled to other employers that labor laws would not be enforced.

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168. In the Matter of Guatemala, supra note 4, at 158.
169. Id. at 156-57, 167-70.
170. Id. at 141-42.
171. Id. at 165-67.
172. Id. at 137.
173. Id.
Similar to the shipping companies and the garment manufacturers, Solesa committed apparent ILO violations but did not violate Article 16.2.1(a) because its violations were not “in a manner affecting trade between the Parties.”\textsuperscript{176} The Panel’s application of the provision violates the ILO because it ignores the labor violations and instead bases its conclusion on one fact: that the United States did not provide proof that Solesa engaged in trade with the CAFTA-DR parties.\textsuperscript{177} The ILO does not require that a violation occurs only between certain state parties.\textsuperscript{178} Rather, the ILO holds that it is the responsibility of the government to implement and give effect to the ILO declaration and the declarations it signed onto.\textsuperscript{179} The Panel’s analysis and conclusion regarding Solesa’s freedom of association violations rests on the determination that Solesa did not export to a CAFTA-DR country.\textsuperscript{180}

IV. RECOMMENDATION: THE UNITED STATES SHOULD DEFINE AND CLARIFY THE MEANING OF “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES”

The United States should propose a detailed definition of the provision “in a manner affecting trade between the Parties” so that its application in future trade agreements will not violate the ILO. Although not binding, international arbitration panels often look to other international fora for guidance.\textsuperscript{181} The CAFTA-DR labor dispute effectively undermines the ILO because it absolved Guatemala of its responsibilities to protect labor rights.

\textsuperscript{176} In The Matter of Guatemala, \textit{supra} note 4, at 166-67 (reinforcing the notion that ILO requires violations to confer a competitive advantage to be prosecuted).

\textsuperscript{177} \textit{See id.} at 150-51.

\textsuperscript{178} Committee on Freedom of Association, \textit{supra} note 18 (“Complaints may be brought against a member state by employers’ and workers’ organizations.”).

\textsuperscript{179} ILO Declaration on Fundamental Principles and Rights, \textit{supra} note 12.

\textsuperscript{180} \textit{See In The Matter of Guatemala, supra} note 4, at 166-67; \textit{see also Definitive Report – Report No. 330, March 2003, Case No. 2194, supra} note 90.

\textsuperscript{181} \textit{See, e.g., In The Matter of Guatemala, supra} note 4, at 18 (“[W]e will take into account, where appropriate, WTO Appellate Body and dispute settlement panel reports.”); SD Myers v. Can., Partial Award, 40 I.L.M 1408, ¶ 244 (Nov. 12, 2000) (relying on a WTO appellate body decision for guidance on the meaning of the concept of “like products”).
apparent labor violations and it signals to other United States FTA partners that labor violations will be difficult to enforce.\textsuperscript{182} The ILO has unequivocally stated that additional agreements signed onto by ILO parties cannot justify labor violations.\textsuperscript{183} However, the CAFTA-DR labor dispute holds otherwise. Therefore, the United States should clarify and define the meaning of “in a manner affecting trade between the Parties” using a greater certainty clause. This clause will allow the United States to have greater control over what constitutes a labor violation in its FTAs.

Despite the Panel’s interpretation of the provision “in a manner affecting trade between the Parties,” the United States can, in the course of negotiating future FTAs, define how it interprets the provision. The parties to an FTA can mutually agree that their understanding of “in a manner affecting trade between the Parties” is not how the Panel interpreted it. A mutually agreed-upon interpretation of an FTA provision occurred in 2001.\textsuperscript{184}

The United States and Canada agreed on the interpretation of certain provisions in Chapter 11 of NAFTA.\textsuperscript{185} The agreement served to “clarify and reaffirm the meaning” of its provisions.\textsuperscript{186} Previous Chapter 11 disputes created many interpretation issues regarding the meaning and scope of the phrases “international law” and “fair and equitable treatment.”\textsuperscript{187} The Free Trade Commission (FTC) issued a note of interpretation to clarify the meaning of these terms. Subsequently, the notes of interpretation were used in future arbitral panels.\textsuperscript{188} Although some argued that it was controversial to issue the

\textsuperscript{182} In the Matter of Guatemala, supra note 4, at 166-67.
\textsuperscript{183} Definitive Report – Report No. 330, March 2003, Case No. 2194, supra note 90, ¶ 792.
\textsuperscript{184} NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Gov’t of Can. (July 31, 2001), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng (examining the interpretation of “access to documents” and “minimum standard of treatment in accordance with international law” in U.S. FTAs).
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{188} Id. at 349.
interpretation,\textsuperscript{189} it is better to clarify the meaning of a provision than to allow disputes to go on without certainty of what a provision means. Although the note of interpretation is unique, clarifying provisions is not uncommon.

For greater certainty clauses are used in many United States FTAs to clarify what a given provision means. The United States should clarify the meaning of “in a manner affecting trade between the Parties” using a for greater certainty clause. Therefore, if the United States included a for greater certainty clause, it would clarify the meaning and intended application of the provision for future labor dispute panels.

\section*{V. CONCLUSION}

The United States-Guatemala labor dispute under Article 16.2.1(a) of the CAFTA-DR is the first labor dispute initiated under an FTA. It is also the first time an arbitral panel interpreted the labor chapter in United States’ FTAs. Although the CAFTA-DR references several times that one of its objectives and purposes is to enhance, protect, and promote internationally recognized labor rights, the CAFTA-DR dispute effectively undermines the agreement’s objective because of the Article 16.2.1(a) provision “in a manner affecting trade between the Parties.” The dispute’s outcome makes enforcing international labor standards more difficult.

The three groups of businesses committed several serious ILO violations including the unlawful dismissal of workers and the failure to reinstate employees despite court orders. The Panel recognized and acknowledged these failures, but it did not conclude that Guatemala violated its obligations under Article 16.2.1(a). Rather, it reasoned that the failures were not “in a manner affecting trade between the Parties,” defined as conferring a competitive advantage as a result of the failures. The Panel’s interpretation violated the VCLT and the ILO.

The interpretation given to “in a manner affecting trade between the Parties” violated the VCLT because it did not take into account the object and purpose of the whole agreement in its analysis. The interpretation violated the ILO because it established an evidentiary

\textsuperscript{189} Id.
requirement for proving a labor violation not required by the ILO. The CAFTA-DR Panel made clear that Guatemala violated the ILO, but it required the United States to show that the employers gained a competitive advantage from their actions.

The Panel’s holding has grave implications. First, the holding undermines the ILO. ILO members are obligated to adhere to the obligations set out in the ILO declaration and in the ILO conventions it ratified. However, the Panel’s reasoning effectively excuses Guatemala’s ILO violations. In addition, because the meaning given to “in a manner affecting trade between the Parties” violates the ILO, several other United States FTAs, including a renegotiated NAFTA, will violate the ILO. The provision and the CAFTA-DR labor chapter act as a template for FTA negotiations. Because arbitral panels look to other international tribunals for guidance on the meaning of a term, a future labor dispute panel will look to the CAFTA-DR labor dispute for guidance on the application of “in a manner affecting trade between the Parties.” Therefore, because the Panel violated the ILO when it interpreted the provision, future labor dispute panels will also violate the ILO. Subsequently, the United States should explicitly define the provision so that it will no longer violate the ILO.

The United States and Canada clarified the definition of Chapter 11 of NAFTA in 2001. In its agreement, the United States and Canada explained its understanding and interpretation of the phrases “international law” and “fair and equitable treatment.” The United States could use a for greater certainty clause in the renegotiated NAFTA to clarify the standard for proving a labor violation. Although the United States contends that its FTAs contain strong labor provisions, the CAFTA-DR labor dispute suggests otherwise. If the United States is to keep its commitment to enforcing labor rights, it should clarify the meaning of “in a manner affecting trade between the Parties” because the provision violates the ILO and future FTAs that include the provision will also violate the ILO.
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