UNIVERSITY OF EDINBURGH
LAW SCHOOL

CONTEMPORARY CHALLENGES JOURNAL

The Global Crime, Justice & Security Journal

VOLUME 6 (2025)

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Foreword From Academic Sponsor

As one of the staff engaged in teaching on the MSc in Global Crime, Justice and Security at the University of Edinburgh, I have the pleasure of welcoming the 6th annual volume of Contemporary Challenges into the world. Since its launch in 2020, the journal has gone through an annual cycle of birth, maturation and then regeneration. An editorial board is formed, contributions are invited, reviewed and prepared for publication before the board transfers responsibility, and the knowledge they have gained along the way, to their successors.

It is testament to the students involved in these processes that this is done alongside the work of 'mastering' their topics on programmes in law and the social sciences, with a focus on the kinds of global and international issues reflected in the pages here. Convinced that graduating as a master of any subject involves taking seriously the work of knowledge production, I am proud that students on our programmes embrace a leading role in supporting others, through the vehicle of Contemporary Challenges and its editorial support and publication process, to refine and circulate knowledge.

Editor in Chief Hevenly Padron, Deputy Editors Sanjana Srivastava and Sofia Negri Nunes de Abreu, and their international and cross-disciplinary Board of Editors bring professionalism and a breadth of knowledge, experience and perspectives to the task of compiling a journal that reflects the key global and international challenges animating seminar discussion across our postgraduate programmes. They animate us because they are the challenges that stand between us and a more just world.

While it is easy to lose hope while looking out upon a world scarred by war and environmental degradation, people and communities suffering from violence and marginalisation, and state responses that oftentimes add to harms while trying to resolve them, the work of authors and editors in Contemporary Challenges, and on the different programmes of study in the background of the journal, should reassure the reader. As this journal reaches you, the editors and their colleagues from an intensive year or two of study will be moving on to a new stage in life. Having worked on producing and disseminating knowledge, many will now move on to positions in which the ideas, perspectives and sensibilities they have developed in the academy will be translated into action.

With this foreword, I commend them and the journal to you.

Andy Aydın-Aitchison (he/him)

Academic Sponsor

Senior Lecturer in Criminology

School of Law
University of Edinburgh
Old College
South Bridge
EDINBURGH EH8 9YL
Tel: +44 (0) 131 651 4563
WWW: http://www.law.ed.ac.uk/people/andyaitchison
View my research on my SSRN Author page: https://ssrn.com/author=2654642

Foreword by Editorial Board

It is with great pleasure that we present the sixth volume of *Contemporary Challenges*. Established in 2020 within the University of Edinburgh School of Law, the journal remains rooted in the ethos of student-led scholarship, critical inquiry, and collaborative knowledge production. Each year, a new editorial board steps forward, learning from their predecessors, issuing calls for submissions, overseeing rigorous peer review, and crafting a publication that reflects both scholarly integrity and intellectual curiosity.

From its inception, the journal has aimed to foster an interdisciplinary dialogue on issues at the intersection of global crime, justice, and security. Our contributors represent a range of backgrounds, academic disciplines, and lived experiences, enriching the journal's scope and ensuring that its focus extends beyond disciplinary boundaries. This commitment to a transnational and comparative lens reflects not only the global nature of the subject matter, but also the international identity of the postgraduate community at the University of Edinburgh.

As part of the Edinburgh Law School community, one known for its longstanding commitment to critical, globally engaged legal education, the journal continues to grow in both reach and depth. This year marks a notable milestone, with a significant rise in both submissions and accepted manuscripts. *Contemporary Challenges* has also gained increased visibility through indexing on key academic platforms, demonstrating the journal's maturation and sustained engagement among students, reviewers, faculty supporters, and readers.

Across the submissions received for this volume, several themes emerged that mirror the complex realities shaping our contemporary world. The articles explore urgent questions relating to state power and accountability, border and migration governance, cybercrime and emerging technologies, environmental insecurity, armed conflict, and the enduring struggle for justice in systems marked by inequality. Together, these contributions reflect a shared concern: how to respond to evolving forms of harm in a world defined by interdependence, uncertainty, and rapid change.

Looking forward, each new edition presents an opportunity not only to continue the journal's work, but to reaffirm our purpose. As global legal and security landscapes shift at pace, we remain committed to amplifying postgraduate scholarship that interrogates, critiques, and reframes the systems and assumptions that shape responses to crime, justice, and security.

Contemporary Challenges endures as more than a publication, it is a collective effort, a learning journey, and a reminder that scholarship carries both responsibility and hope. Behind each contribution lies the conviction that research can illuminate injustice, inspire dialogue, and contribute to change, however incremental. We hope that as readers, you feel challenged, encouraged, and perhaps even moved to imagine what a more just and secure world might require of all of us.
Thank you.

On behalf of the Editorial Board,
Hevenly Padron, Editor-in-Chief
Sanjana Srivastava, Deputy Editor-in-Chief
Sofia Negri Nunes de Abreu, Deputy Editor-in-Chief
Contemporary Challenges Journal, Volume VI
University of Edinburgh School of Law, 2025

Acknowledgment from the Editor-in-Chief and the Deputy Editors-in-Chief

From the stones of Old College to the evolving global classroom, Edinburgh Law School stands as a testament to how tradition and progress can illuminate one another.

As we introduce **Volume 6 of the Contemporary Challenges Journal**, this dual spirit of heritage and forward-thinking inquiry forms the foundation of our work. In a world where legal systems must continually adapt to shifting social, technological, and geopolitical realities, the scholarship gathered here reflects an evolving commitment to understanding what justice requires today.

This year's submissions reflect an exceptionally broad and dynamic body of scholarship. Together, the works in this volume engage with questions that span doctrinal legal analysis, socio-legal critique, theoretical inquiry, and policy-focused research. Across these contributions, we see recurring reflections on how systems of justice respond to harm: whether through punishment, prevention, negotiation, or transformation. Authors interrogate the expansion and contestation of criminalisation practices, from digital and environmental regulation to state corruption and governance. Others critically examine penal alternatives, gendered assumptions embedded in legal frameworks, and the evolving relationship between domestic legal systems and international oversight. While the cases, regions, and methods differ, the shared thread is clear: each piece asks, in its own way, what justice looks like in a world undergoing rapid and profound change.

We extend our sincere gratitude to all contributors. The authors of this volume represent a wide spectrum of disciplines and professional backgrounds, and their commitment to rigorous scholarship and careful revision has enriched this publication immensely. Their work embodies the critical thinking, curiosity, and global engagement that define Edinburgh Law School's scholarly community.

Our heartfelt thanks go to our article editors, all postgraduate students at the University of Edinburgh Law School. Balancing academic commitments with the demands of peer review is no small feat, yet they approached every submission with diligence, precision, and professionalism. Their efforts are central to sustaining CCJ's mission of

providing a platform for emerging scholars.

We also express our appreciation to those who continually support the journal behind the scenes. **Dr. Milena Tripkovic** and **Dr. Andy Aydin-Aitchison** offer invaluable mentorship and guidance throughout the editorial process. **Rebecca Wojturska** ensures the smooth functioning of our website and publication workflow, and the **Postgraduate Office team** provides essential logistical support that makes our work possible.

It is with great pride that we present this volume. We hope the scholarship within these pages inspires reflection, challenges assumptions, and encourages continued engagement with the evolving global landscape of crime, justice, and security.

Hevenly Padron

Editor-in-Chief

Sanjana Srivastava

Deputy Editor-in-Chief

Sofia Negri Nunes de Abreu

Deputy Editor-in-Chief

About the Journal

Contemporary Challenges was established with the aspiration to advance a multidisciplinary approach to issues of global crime, justice, and security that have traditionally been addressed in compartmentalised academic fields. We believe that this has contributed to the formation of functional academic silos that are counterproductive when discerning responses to contemporary challenges. Our vision is for CCJ to serve as a platform for interdisciplinary debate that is of relevance to academics, policymakers and law enforcement officials alike. We hope that the journal will be a starting point for further discussion, research and collaboration across disciplines and professions.

Disclaimer:

The Editorial Board is responsible for the overall direction and editorial content of the journal. The publications featured in Volume 6 have been rigorously peer-reviewed, carefully quality-improved, and professionally selected by the editorial staff.

Whilst every effort has been made to ensure that the information contained in this journal is correct, the author(s) of each article appearing in this Journal is/are solely responsible for the content thereof. The views expressed in the Journal are those of the authors and do not necessarily reflect the views of the Editorial Board or Edinburgh Law School.

The Contemporary Challenges Journal Team

Research Article

Africa, paving the way: Lessons from African actors pushing forward the international community's role and responsibility in addressing genocide

Iseult Daly

Received: 12 February 2025 / Accepted: 10 June 2025

Abstract

In the last few years, a shadow has been cast over the legitimacy of international institutions – not least because of the international community's systematic failure to protect the Palestinian people from genocide. This research paper explores whether normative innovations pioneered outside of the West could help better construct the international community's role and responsibility in responding to genocide. It focuses in on African contributions because the continent has historically struggled with high risk levels of mass atrocity, but also because it has often been defined by the interconnectedness of its people in the face of oppressive violence. The paper explores three dimensions of international activity to demonstrate that African actors have regularly led the charge in strengthening the international community's normative capacity - and duty - to intervene in cases of genocide. These are: (i) the African Union's unique regional governance framework for responding to genocide, (ii) African actors' role in the development of international law on genocide and (iii) the African bloc's consistent diplomatic advocacy for an extension of the international community's duty to respond to genocide.

I. Introduction

2024 marks the thirtieth anniversary of the Rwandan genocide, a tragedy that took the lives of 800,000 people in just under 100 days in 1994.[1] This event is widely considered to constitute a significant failure of the international community, especially in light of the 1997 inquiry of the International Panel of Eminent Personalities (IPEP) appointed by the Organisation of African Unity (OAU), which determined it was largely preventable had the international response been better coordinated.[2] Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 'genocide' is defined as 'any [act] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[3] The continent of Africa has been particularly challenged by such acts, due in part to its vast ethnic and religious diversity - encompassing over 3000 ethnic groups practising a range of different faiths[4] - and the fragility that its colonially inherited borders have left it in.[5] Yet, state-level efforts remain critically impotent in curbing these dangers. Consequently, since the events of the Rwandan genocide in particular, African actors have attempted to heighten the capacity and responsibility of the international community to intervene and prevent genocide. These efforts deserve attention in today's context, not only in light of the present heightened risk of genocide within Africa (most notably impending in South Sudan, Burundi, the Central African Republic and the DRC),[6] but also the currently critical state of the international order's normative authority since its continued enabling of the Palestinian genocide.

This essay evaluates the significance of African actors in promoting a stronger international standard in responding to instances of genocide, primarily through innovations in areas such as regional governance, international law and continental

[1] Chris McGreal, "Thirty Years Ago the World Failed to Stop the Rwandan Genocide. Now We Fail Gaza," *The Guardian*, April 10, 2024.
[2] International Panel of Eminent Personalities, "The Preventable Genocide: Report on the 1994 Genocide in Rwanda and Surrounding Events," *Peaceau.org*, July 7, 2000.
[3] United Nations General Assembly, *1948 Convention on the Prevention and Punishment of the Crime of Genocide*, Article 2.
[4] Thomas Brittner, "Ethnic Groups in Africa" *Study.com*, 2019.
[5] Minority Rights Group, "African Countries Dominate Global Ranking of Communities Facing Greatest Risk of Mass Killings," *minorityrights.org*, January 12, 2024.
[6] Godfrey Musila, "Preventing Genocide: Africa's Evolving Normative and Institutional Framework," *Africa Center for Strategic Studies*, April 7, 2017.

diplomacy. These efforts hold promise for global norm-setting, although they are still riddled with practical and political challenges. The first section of this essay will outline Africa's move from a principle of non-intervention to one of non-indifference and its pioneering regionalisation of genocide response. It will also show that these advancements in governance are still limited by challenges in capacity and national political will. A second section will discuss African actors' role in expanding the remit of the international legal order in addressing genocide, looking particularly at the implications of the Malabo Protocol for regionalised criminal justice, African actors' role in establishing the International Criminal Court (ICC), and the significance of The Gambia and South Africa's expansion of the *erga omnes* doctrine before the International Court of Justice (ICJ). The final section of this essay will demonstrate that the African bloc continuously makes proactive diplomatic efforts in the global arena to advocate for an improved international response to genocides. It will use the bloc's attitude towards the Palestinian genocide as an example of 'practising what you preach', while also recognising that the African bloc's ability to instigate change to the mostly Western-set normative canons of international interactions is still restricted. Despite this, the essay will emphatically conclude that African actors' efforts in the fields of regional governance, international law and diplomacy have continued to set a higher standard for international responsibility in suppressing genocide.

II. Shifting from continental 'non-intervention' to 'non-indifference'

1. Historical context

International interactions, especially in agreeing to standards of cooperative governance, have historically been underpinned by the fundamental principle of state sovereignty, which tends to root much of States' political legitimacy. In a newly decolonised Africa, the international rule of 'non-intervention' had particular moral potency, upholding previously oppressed peoples' fundamental right to self-determination. Indeed, before the burgeoning regional organisations of the continent shifted away from this, African relations were characterised by an

'absolutist' adherence to the principle of non-intervention.[7] Simultaneously, events like the Fifth Pan-African Congress, its outcome Declaration to Imperialist Powers of the World, and the publishing of the Lusaka Manifesto[8] have continued to underline the perceived interconnection of African peoples' struggle and their shared fight for freedom. Some prominent African figures have extended this ideological solidarity to include all peoples systematically oppressed. For example, in referring to South Africans, Mandela famously stated that their 'freedom is incomplete without the freedom of the Palestinians'.[9] Still, a number of ethnicity-based mass atrocities have traumatised the continent since its emancipation from colonialism, most infamously in Burundi, Nigeria, Sudan, and Rwanda. It was in its report on the latter that IPEP urged the adoption of a new norm of 'non-indifference' to mass atrocity amongst African actors.[10] While on some readings, 'non-indifference' emerged as a pragmatic response to the destabilising political and economic effects of mass regional violence[11], the impact of such traumatism on the African psyche cannot be understated in explaining regional policy development.

2. Non-indifference's induction into regional and continental law

In fact, Africa has 'been ahead of the curve' compared to other regions in terms of codifying regional intervention rights in situations presenting a high risk of genocide.[12] As early as 1998, the Economic Community of West African States (ECOWAS) became the first regional organisation in the world to enshrine a right of humanitarian intervention through its Framework Establishing ECOWAS's Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security[13]. This provided amongst other things that ECOWAS can militarily intervene in situations which

[7]Jeremy Levitt and Patasse Ange-Fdlix, "Pro-Democratic Intervention in Africa," *Wisconsin International Law Journal* 24, no. 3 (September 14, 2014), 831.
[8]Commonwealth Heads of Government. *The Lusaka Declaration of the Commonwealth on Racism and Racial Prejudice.* August 7, 1979.
[9]Huthifa Fayyad, "Nelson Mandela and Palestine: In His Own Words," *Middle East Eye*, February 11, 2020.
[10]Obinna Ifediora, "Regional Multilateralism: The Right to Protect, Not the Responsibility to Protect, in Africa," Working Paper Version 1, researchgate.net, November 10, 2021, 6.
[11]Jeremy Levitt, "The Law on Intervention: Africa's Pathbreaking Model," *Global Dialogue* 7, no. 1/2 (January 1, 2005), 51–55.
[12]Jenna Slotin, Castro Wesamba, and Teemt Kebede. "The Responsibility to Protect (RtoP) and Genocide Prevention in Africa" *International Peace Institute*, July 22, 2009, 1.
[13]Jeremy Levitt, "Africa's Pathbreaking Model", 53.

'threaten to trigger a humanitarian disaster'.[14] Its attached 1999 Protocol complements this right by providing the organisation may intervene where 'there has been a serious and massive violation of human rights and the rule of law', including genocide.[15] These revolutionary codifications have reportedly arisen in a context of West African States 'consistently demonstrating their willingness to forfeit sovereignty for peace' in the region.[16]

In response to the profound shock that rippled through the African community after the Rwandan genocide, the African Union (AU) sought in 2001 to expand on and 'continentalise' these codifications in its Constitutive Act.[17] Most notably, in Article 4(h) of the Act, the AU reserves the right 'to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity'.[18] With this move, the AU constitutionally enshrined a norm of 'non-indifference' to victims of mass atrocities all over Africa. It became the first continental institution to empower such intervention in instances of genocide. Rather than unduly encroaching on the principle of state sovereignty, these innovations seemed to signal a growing African understanding of sovereignty as responsibility and were mostly designed to 'operate alongside' domestic efforts.[19]

Still, Article 4(h) remains the only instance of a continent laying down a normative framework for unilateral military intervention.[20] Indeed, years before the inception of the Responsibility to Protect (RtoP) doctrine, the AU's Constitutive Act already attempted to draw a balance between state sovereignty and what it understood to be an international responsibility towards victims of mass atrocities. Yet, these regional innovations have had a degree of influence beyond Africa. As Levitt claims, 'the codification of African regional customary law allowing for pro-humanitarian

[14] ECOWAS, *Framework Establishing ECOWAS's Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security,* 1998, para. 46.
[15] ECOWAS, *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace– Keeping and Security,* 1999, Article 25.
[16]Jeremy Levitt and Patasse Ange-Fdlix, "Pro-Democratic Intervention in Africa,", 814.
[17]Jeremy Levitt, "Africa's Pathbreaking Model", 56.
[18]Heads of State and Government of the Members States of the Organisation of the African Unity, *Constitutive Act of the African Union,* 11 July 2000, Article 4(h).
[19]Alex de Waal, "From Darfur to Darfur: The Fall and Rise of Indifference to Mass Atrocities in Africa," *Just Security*, November 2, 2023.
[20]Jeremy Levitt, "Africa's Pathbreaking Model", 53.

intervention [...] has influenced the wider corpus of the law'.[21]

[21]Jeremy Levitt and Patasse Ange-Felix, "Pro-Democratic Intervention in Africa,", 814.

3. Implementation and challenges

In furtherance of these newly constitutionalised principles, both the regional organisations of Africa and the AU have developed international governance tools to bolster their capacity to intervene in situations involving a high risk of human tragedy. The AU has four institutional components to its peace and security architecture, overseen by the Peace and Security Council: the Continental Warning System, the Peace Fund, the Panel of the Wise, and the peacekeeping African Standby Force.

This architecture upholds the earliest comprehensive regional collective security and intervention regime in the world,[22] allowing the AU to 'take the lead' on cooperative efforts to prevent genocide in the continent.[23] It has pre-empted the UN Security Council's (UNSC) role several times in quickly responding to crises and has on several occasions restated its willingness to act in situations where UNSC approval might only be granted 'after the fact'.[24] This indicates a distinctly more proactive African understanding of international responsibility to swiftly and effectively protect populations from mass atrocities. Its effectiveness has also generated a trend toward more hybridised AU/UN peacekeeping missions.[25] Furthermore, just this year, the AU has debuted a Special Envoy for the Prevention of the Crime of Genocide and Other Mass Atrocities position to bolster its role in diplomatic, capacity-building and peacekeeping efforts to curb genocide in the region.[26] These examples support Levitt's claim that 'from a normative standpoint, Africa's collective security regime is more advanced than any other'.[27]

ECOWAS also stands among the regional systems that have intervened to prevent atrocities and obtained 'after-the-fact' UNSC sanctioning of their decision, notably in Liberia, Sierra Leone, and Guinea- Bissau.[28] According to a report by the Global Centre for the Responsibility to Protect (GCR2P), ECOWAS has been widely

[22] Jeremy Levitt, "Africa's Pathbreaking Model", 51.
[23] Godfrey Musila, "Preventing Genocide".
[24] Executive Council of the African Union, *The Common African Position on the Proposed United Nations Reform - "The Ezulwini Consensus",* March 8, 2005, 6.
[25] Godfrey Musila, "Preventing Genocide".
[26] Tchioffo Kodjo, "Statement by Adama DIENG: On the Mandate and Vision of the African Union Special Envoy for the Prevention of the Crime of Genocide and Other Mass Atrocities-African Union - Peace and Security Department," *African Union Peace and Security Department*, July 11, 2024.
[27] Jeremy Levitt, "Africa's Pathbreaking Model", 51.
[28] Ibid, 52-53.

'commended for its military and diplomatic engagements regarding emerging conflict' and 'has often been at the forefront of responding to violence, mobilising an international response to forestall escalation and prevent mass atrocities'.[29] Its highly sophisticated Early Warning and Response Network (ECOWARN) has been the subject of praise, and has inspired recommendations by the UN Secretary General in his 2023 *Report on the Development and the Responsibility to Protect*, alongside the AU, the Organisation for Security and Co-operation (OSCE) and the East African Intergovernmental Authority on Development (IGAD)'s mechanisms.[30]

Despite this, Africa is still one of the most prone regions to mass killings in the world,[31] indicating that its capacity to prevent such atrocities remains limited. The GCP2R claims that most states 'often have the will and desire to implement much needed reform [...] but lack the capacity to institute ambitious reforms without sustained external support'.[32] Yet, 15 years after the adoption of ECOWAS's Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security many initiatives "are still only at a developmental stage".[33] Beyond this, the Budapest Centre for Mass Atrocities Prevention has in its recent comprehensive study on African Regional Communities and the Prevention of Mass Atrocities identified political will as one of the principal challenges to regionalised prevention efforts.[34] The study cites corruption and the weakness of the rule of law in certain States as particularly impeding factors.[35] Moreover, regional state powers are still understood to unduly direct the agenda of regional bodies,[36] which can undermine their capacity to impartially and rapidly respond to genocidal risks. As illustrated by the GCPR, ECOWAS has at times struggled to respond to mass atrocities when such actions are in contrast with the political aims of its largest power, Nigeria. For example, there

[29]Jaclyn Streitfeld-Hall, "Preventing Mass Atrocities in West Africa" *Global Centre for the Responsibility to Protect, Occasional Paper Series* No. 6 (September 6, 2015), 9.
[30]United Nations Secretary General, "Development and the Responsibility to Protect: Recognizing and Addressing Embedded Risks and Drivers of Atrocity Crimes, 2023," *Documents.un.org*, June 6, 2024, 10.
[31]Early Warning Project, "Countries at Risk for Mass Killing 2023-2024: Statistical Risk Assessment Results," *Earlywarningproject.ushmm.org*, January 2024, 3.
[32]Jaclyn Streitfeld-Hall, "Preventing Mass Atrocities in West Africa", 22.
[33]Ibid, 9.
[34]African Task Force on the Prevention of Mass Atrocities, "African Regional Communities and the Prevention of Mass Atrocities ," *The Budapest Centre for Mass Atrocities Prevention*, October 2016,IV.
[35] Ibid, V.
[36] African Task Force on the Prevention of Mass Atrocities, "African Regional Communities and the Prevention of Mass Atrocities, " IX.

existed delays in responding to atrocities in Mali and Côte d'Ivoire as symptoms of this influence.[37] This leads some to argue that the regime's main lacunae in preventing atrocity is not in fact its material capacities, but members' lacking of 'courage to expend political and diplomatic capital to do so'.[38] Thus, African actors still have to overcome several practical and political challenges to effectively pioneer a continental principle of 'non-indifference' to mass atrocities.

III. Expanding genocide's international justiciability

1. An Africa-wide genocide court?

African actors have also been surprisingly proactive in strengthening the international justice system's capacity to punish genocide. For example, the Malabo protocol, conceived by the AU, constitutes an interesting regional judicial experiment and could inspire broader uptake. The adoption of the Protocol represents the first time a continental organisation is seeking to set up a court with regional criminal jurisdiction to tackle international crimes such as war crimes, crimes against humanity and genocide. This is particularly promising considering Africa's high susceptibility to cross-territorial crime, its historical inability to bring justice in such cases, and its persistently high rates of impunity for mass violations of human rights under international law.[39] The Protocol could make it easier to achieve justice for victims in situations of cross-border atrocities, complement domestic efforts in persecuting genocidaires, and better curb perpetrators' attempted evasions of domestic justice systems by consolidating a regional approach to the persecution of mass atrocity crimes. However, some aspects of the Protocol remain highly controversial. Most notably, it includes an immunity clause for serving heads of state and governments.[40] These are agents who, in many instances across Africa, have been the primary perpetrators or enablers of genocidal violence. Such a clause directly undermines the efficacy of the new African Court of Justice and Human Rights in bringing justice for victims of genocide. The court's institutional design also faces several operational and funding issues, leading Amnesty International to question its overall potential for

[37] Jaclyn Streitfeld-Hall, "Preventing Mass Atrocities in West Africa", 9.
[38] Godfrey Musila, "Preventing Genocide".
[39] Amnesty International, "Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court," *Amnesty.org*, 2017, 3.
[40] Ibid, 4.

efficiency.[41] Moreover, Malabo's uptake by Member States of the AU is slow and critically limited. Although the Protocol was initially adopted in 2014, it currently only has 15 signatories (out of 55 AU member states) and merely one ratification (Angola).[42] Despite its practical challenges, the AU's conceptualisation of a regionalised criminal justice system, one with the goal of bringing better justice to victims of international crimes such as genocide, is innovative in its vision.

2. African actors and the International Criminal Court

Africa has also played a significant role in enhancing the remit of a global criminal justice system under the auspices of the UN. Alongside the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the contribution African advocates made to the latter's design and operation set an important precedent for the international undertaking of genocidal justice. Indeed, the ICTR was the first ever international tribunal to interpret the Genocide Convention and convict a perpetrator of genocide, as well as being the first to convict and imprison a head of state for the crime of genocide.[43] The permanent International Criminal Court (ICC), created by the Rome Statute in 1998, is also a 'direct legacy' of the ICTR.[44] Furthermore, the ICC itself has stated that, at its inception, 'the most meaningful declarations about the Court were made by Africans' and that without African contribution, the Rome Statute might never have been adopted.[45] It also noted Africa is the most heavily represented region in the Court's membership and that it 'has benefited from the professional experience of Africans and several Africans occupy high-level positions in all organs of the Court'.[46] Indeed, for the same reasons the AU established the Malabo protocol, African actors have persistently pushed the need for an internationalised criminal justice system to punish genocidal crimes. The ICC is unprecedentedly empowered in this domain. As of 2024, the Court has issued arrest warrants on three heads of state under investigation for genocide-related crimes: former Sudanese president Al-Bashir, Russian president

[41] Amnesty International, "Malabo Protocol".
[42] Allan Ngari and Zenaida Machado, "Angola Becomes First Country to Join African Criminal Court," *Human Rights Watch*, June 14, 2024.
[43] United Nations International Residual Mechanism for Criminal Tribunals, "The ICTR in Brief," *UNIRMCT*, 2013.
[44] Human Rights Watch, "Rwanda: Justice after Genocide—20 Years On," *hrw.org*, March 28, 2014.
[45] International Criminal Court, "Understanding the International Criminal Court" *icc-ipr.com*, 2020, 15.
[46] Ibid.

Putin and Israel's prime minister, Netanyahu. However, it has failed to compel the arrest of any of them so far. Moreover, a trend is identified amongst African actors pulling back from the jurisdiction of the Court amidst accusations that it has 'disproportionately targeted African countries' and is being used 'as a tool of Western powers against developing nations'.[47] These criticisms are not completely unfounded: out of 54 individuals indicted by the Court in its lifetime, 47 are Africans.[48] Furthermore, recently, the ICC's capacity to deliver justice has been heavily put to the test amidst categorical dismissals of the warrants by the governments of Russia and Israel, which has described the Court as 'a biased and discriminatory political body'[49], as well as The United States, which has described the ICC's warrant on Netanyahu as 'outrageous', fundamentally rejecting it.[50]

3. *Erga Omnes* and third-party jurisdiction before the ICJ

Perhaps more promisingly, two African states have played a pioneering role in the development of the crucial *erga omnes* doctrine in interstate genocide cases brought before the ICJ. The notion of *erga omnes* operates as a conceptual framework for certain rights and duties in international law. *Erga omnes*, meaning 'towards all' in Latin, classifies legal obligations which are owed to the international community as whole (or in the case of *erga omnes partes*, towards all parties of a treaty). Specifically, *erga omnes* includes norms whose violation is considered such a high offence to humanity that they endanger the sanctity of the international community as a whole, such as genocide (as confirmed in *Bosnia v Serbia, Preliminary Objections*).[51] Importantly, the Genocide Convention also imposes a positive *erga omnes* duty on all Contracting Parties, 'which in any situation [have] it in [their] power to contribute to restraining in any degree the commission of genocide' to do so.[52] Some legal scholars

[47]Human Rights Watch, "Rwanda: Justice after Genocide—20 Years On". See also Kenneth Roth, "Africa Attacks the International Criminal Court," *hrw.org*, January 14, 2014.

[48]Melissa Hendrickse, "A Chance for Africa to Counter the Pitfalls of International Criminal Justice?," *Amnesty International*, April 22, 2024.

[49] Julian Borger and Andrew Roth, "ICC Issues Arrest Warrant for Benjamin Netanyahu for Alleged Gaza War Crimes,", *The Guardian*, November 22, 2024.

[50] Al Jazeera, "How US Politicians Responded to Netanyahu's ICC Arrest Warrant," *aljazeera.com*, November 21, 2024.

[51]In this paragrah the Courts actually states that *all* the rights and obligations under the Genocide Convention are rights and obligations *erga omnes*. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia v Serbia), Judgement on Preliminary Objections (ICJ July 11, 1996) [33].

[52]See article 1 of the Convention and its interpretation by the Court in para. 461 in *Application of the*

have gone as far as to suggest that this 'should be considered the legal basis for asserting the binding character of the responsibility to protect doctrine',[53] underlining the importance of the ICJ's application of the doctrine.

As of late 2024, no State has ever been held responsible for not acting on its capacity to prevent a genocide outside its territory. However, both The Gambia and South Africa have been uniquely proactive in attempting to discharge this duty. Bringing a case against Myanmar in 2019 for genocidal violence against its Rohingya population, The Gambia became the first state to invoke its jurisdiction to bring redress to a people that were not its nationals.[54] This case allowed the ICJ to confirm the *locus standi* of Contracting Parties to the Genocide Convention who are completely external to a genocide, by virtue of their *erga omnes* obligations (*The Gambia v Myanmar, Preliminary Objections*).[55] This has been extolled as a 'revolution',[56] expanding the legal capacity for Third States to bring justice for victims of genocide, and a 'promising solution to the systemic underenforcement of human rights'.[57] Indeed, in The Gambia's case, the ICJ promptly ordered Myanmar to bring an end to its genocidal acts.

Furthermore, in line with its long-standing support of the Palestinian people, South Africa became the second state to inter-continentally invoke such a jurisdiction to bring charges against Israel for its apartheid regime and genocidal acts in 2023. In its preliminary treatment of the case, the ICJ disposed of the question of jurisdiction in a single paragraph.[58] Israel did not object to South Africa's standing, indicating a move

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Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia), Judgement on Preliminary Objections (ICJ July 11, 1996), [461].

[53]Marco Longobardo, "Genocide, Obligations Erga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence," *The International Journal of Human Rights* 19, no. 8 (September 30, 2015): 1199–1212, 6.

[54] Rizwanul Islam, "The Gambia v. Myanmar: An Analysis of the ICJ's Decision on Jurisdiction under the Genocide Convention,"*American Society of International Law* 26, no. 8 (September 21, 2022).

[55]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Judgment on Preliminary Objections (2022),[108].

[56] Oona A. Hathaway, Alaa Hachem, and Justin Cole, "A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing," *Columbia Journal of Transnational Law* 61, no. 2 (October 3, 2023): 259–332.

[57]Oona A. Hathaway, Alaa Achem, and Justin Cole, "In the Case against Syria, a New Tool for Enforcing Human Rights," *Just Security*, October 9, 2023.

[58] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel), Provisional Measures Order (ICJ January 26, 2024), [33].

towards 'universal acceptance' of third-party *erga omnes*-founded standing.[59] The Court subsequently ordered an immediate cessation of the killing of Palestinians in Gaza, amongst other provisional measures aimed at preventing genocidal risk.[60]

The Gambia and South Africa's legal activism in these cases echoes the normative understanding of an interconnection of oppressed people that underpins the African approach to genocide. Like the Rohingyas, 95% of The Gambia's population is Muslim, and it acted under the strong support of the Organisation of Islamic Cooperation.[61] Similarly, South Africa has cited its painful history of apartheid as a motive in bringing forward its case.[62] However, in light of Israel's persistent and flagrant disrespect for these orders - fatally sanctioned by the United States - the efficacy of this new legal tool in protecting populations from genocide appears limited. Still, The Gambia and South Africa have set a high normative standard for inter-State litigation, pushing for stronger judicial condemnation of States enabling genocide, in situations where these States previously had little prospects of being held accountable.

IV. Diplomatic efforts towards taking international responsibility

1. African actors and the Responsibility to Protect doctrine

Alongside legal contributions, several political efforts emanating from Africa have increased pressure on the international community to protect populations from genocide. In the years since Africa's constitutional regionalisation of the norm of 'non-indifference', African actors have strongly advocated for its adoption at the global stage. Kofi Annan, the Ghanaian UN Secretary General in the early 2000s, was highly instrumental in orienting the UN's agenda towards the establishment of the

[59] Pearce Clancy, "Erga Omnes Partes Standing after South Africa v Israel," *Blog of the European Journal of International Law*, February 1, 2024.
[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel), Provisional Measures Order (ICJ January 26, 2024), [75]-[82].
[61] Owen Bowcott, "Gambia Files Rohingya Genocide Case against Myanmar at UN Court," *The Guardian*, November 11, 2019.
[62] McGreal, Chris. "How Apartheid History Shaped South Africa's Genocide Case against Israel." *The Guardian,* January 8, 2024.

RtoP doctrine.[63] Moreover, the International Peace Institute reports that it was due 'to the tireless efforts of several African leaders that RtoP paragraphs were ultimately included in the Outcome Document of the 2005 World Summit.[64]

On the occasion of the UN General Assembly's recent debate on the RtoP in 2023, African actors also made valuable contributions. Referring to mass atrocities, the Kenyan UN Special Adviser of the Secretary-General on the Responsibility to Protect, George Okoth-Obbo, emphasised in his introductory remarks that the international community should 'leverage development policies, strategies and programmes across the spectrum of atrocity risk assessment, early warning, preparedness and response to avoid, reduce or mitigate these risks and occurrences'.[65] The Gambian delegation further stressed the need for 'increased cooperation in addressing the risk of atrocity crimes'[66] while Djibouti urged the international community to 'leverage development programming across the spectrum'[67] to address genocidal risks. Moreover, Namibia stated it is its 'fervent hope' that community efforts 'will be geared towards strengthening the global peace and security architecture' and leveraging lessons learned to more swiftly and effectively address emerging issues.[68] These are a few of many examples of African actors' persistent advocacy for stronger international response mechanisms in situations of genocide at the UN.

2. Diplomatic solidarity with Palestine

The recent widespread attention on the Palestinian genocide has also allowed the African bloc to repeatedly demonstrate it 'practices what it preaches' in terms of upholding a globalised norm of 'non-indifference' towards mass atrocity. Historically, the OAU and the AU have both 'played a progressive role in supporting the Palestinian cause'.[69] The bloc has recently taken an even stronger stance against Israel's

[63] Karin Wester, "1 - the Origin of the Responsibility to Protect," in *Intervention in Libya the Responsibility to Protect in North Africa* (New York: Cambridge University Press, 2020), 11–23, 11-14.
[64] Jenna Slotin, Castro Wesamba, and Teemt Kebede. "The Responsibility to Protect (RtoP) and Genocide Prevention in Africa", 4.
[65] "Summary of the 2023 UN General Assembly Plenary Meeting on the Responsibility to Protect" *Global Centre for the Responsibility to Protect*, 2023,1.
[66] Ibid, 6.
[67] Ibid, 3.
[68] Ibid, 4.
[69] Kribsoo Diallo, "African Attitudes To, and Solidarity With, Palestine," *Transnational Institute*, October 3, 2024.

apartheid regime. As early as February 2023, the AU withdrew Israel's observer status in the Union - a privileged position for non-members of the Union to participate in its activities on a consultative basis - while the AU investigated the State's compliance with the organisation's values in light of its actions in Palestine (also, it boldly removed an 'uninvited' Israeli diplomat from its weekend Summit).[70] The 54-state bloc has also consistently voted in favour of General Assembly resolutions calling for a humanitarian truce or a ceasefire in Gaza.[71] Indeed, to the exception of Liberia, no African State has thus far objected to any UN resolution related to a ceasefire, the declaration of a humanitarian truce and the unimpeded delivery of humanitarian aid to Gaza.[72] Simultaneously, the AU has persistently advocated for an upgrade in Palestine's rights in the UN as an Observer State.[73] Despite these efforts, more than a year on from the genocide, the United Nations has failed to reach a ceasefire in Gaza. This is mainly due to the reticence or directly obstructive efforts of some of the UN's most powerful actors. In particular, the United States' relentless use of the veto in Security Council resolutions aimed at establishing a ceasefire and, critically, at protecting the Palestinian people from further genocide, casts doubt as to the African bloc's overall power to enshrine an effectively operating norm of 'non-indifference' globally. Despite this, Africa's continued and relatively unified diplomatic engagement remains vital in advancing the global discourse on the international community's responsibility to prevent genocide.

In conclusion, it can be said that African actors have worked tirelessly to consolidate a more effective international response to genocide. The AU and its regional organisations have pioneered a collective security model that empowers the continent in several ways to respond to and mitigate genocidal risks. Because of this, it has been praised by some academics as the most advanced collective security regime on the planet from a normative standpoint[74]. Additionally, African legal agents have paved an important path in terms of 'internationalising' criminal justice for genocidal acts, in such a way that such acts may be more effectively addressed. They have done this through their active role in the ICC's inception and in designing a new African Court of Justice

[70]Al Jazeera, "African Union Says Israel's Observer Status Suspended," *aljazeera.com*, February 23, 2023.
[71]Kribsoo Diallo, "African Attitudes To, and Solidarity With, Palestine".
[72]Ibid.
[73] Ibid.
[74]Jeremy Levitt, "Africa's Pathbreaking Model", 51.

and Human Rights, which would theoretically and in unprecedented fashion have jurisdiction to try some 14 newly outlined 'international crimes' (including genocide). Moreover, The Gambia and South Africa's legal activism has played an indispensable role in opening the *erga omnes* doctrine before the ICJ, and in permeating its bolstered interpretation of third states' duties to prevent genocide. Finally, the African bloc's diplomatic efforts have also displayed a united continental front in calling on the international community to proactively respond to ongoing genocides around the world. Although operating within global institutional structures that are still heavily directed by historical and material powers, African actors have, through many avenues, driven a push to elevate the international community's capacity - and duty - to intervene in situations of genocide.

Bibliography

Primary Sources

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia), Judgement on Preliminary Objections (ICJ July 11, 1996).

https://www.icj-cij.org/sites/default/files/case-related/91/091-19960711-JUD-01-00-EN.pdf

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Provisional Measures Order (ICJ January 26, 2024). https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Judgment on Preliminary Objections (ICJ July 22, 2022). https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-jud-01-00-en.pdf

Commonwealth Heads of Government. *The Lusaka Declaration of the Commonwealth on Racism and Racial Prejudice*, August 7, 1979. https://www.ohchr.org/en/resources/educators/human-rights-education-training/1-lus aka-declaration-commonwealth-racism-and-racial-prejudice-1979

ECOWAS. *Framework Establishing ECOWAS's Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security,* 1998.

ECOWAS. *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace– Keeping and Security,* December 10, 1999. https://amaniafrica-et.org/wp-content/uploads/2021/04/Protocol-Relating-to-the-Mech

anism-for-Conflict-Prevention-Management-Resolution-Peace-Keeping-and-Security

-1999.pdf.

Executive Council of the African Union. *The Common African Position on the Proposed United Nations Reform - "The Ezulwini Consensus",* May 8, 2005. https://old.centerforunreform.org/sites/default/files/Ezulwini%20Consensus.pdf

Heads of State and Government of the Members States of the Organisation of the African Unity. *Constitutive Act of the African Union*, July 11, 2000. https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf

United Nations General Assembly. *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948. https://www.refworld.org/legal/agreements/unga/1948/en/13495

United Nations Secretary General. "Development and the Responsibility to Protect: Recognizing and Addressing Embedded Risks and Drivers of Atrocity Crimes, 2023." *Documents.un.org*, June 6, 2024. https://documents.un.org/doc/undoc/gen/n23/162/84/pdf/n2316284.pdf.

Secondary Sources

African Task Force on the Prevention of Mass Atrocities. "African Regional Communities and the Prevention of Mass Atrocities ." The Budapest Centre for Mass Atrocities Prevention. *Genocideprevention.eu*, October 2016. https://www.genocideprevention.eu/files/African-Regional-Communities-and-the-Prev ention-of-Mass-Atrocities-Final-Report-African-Task-Force.pdf.

Al Jazeera. "African Union Says Israel's Observer Status Suspended." *Aljazeera.com*, February 23, 2023. https://www.aljazeera.com/news/2023/2/20/african-union-says-israels-observer-statu s-suspended.

Al Jazeera. "How US Politicians Responded to Netanyahu's ICC Arrest Warrant." *Aljazeera.com*, November 21, 2024. https://www.aljazeera.com/news/2024/11/21/how-us-politicians-responded-to-netany ahus-icc-arrest-warrant.

Amnesty International. "Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court." *Amnesty.org*, 2017. https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0161372017ENGLISH. pdf.

Borger, Julian, and Andrew Roth. "ICC Issues Arrest Warrant for Benjamin Netanyahu for Alleged Gaza War Crimes." The Guardian, *theguardian.com*, November 22, 2024.

https://www.theguardian.com/world/2024/nov/21/icc-issues-arrest-warrant-for-benja min-netanyahu-israel.

Bowcott, Owen. "Gambia Files Rohingya Genocide Case against Myanmar at UN Court." The Guardian, *theguardian.com*, November 11, 2019. https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanma r-un-court.

Brittner, Thomas. "Ethnic Groups in Africa." *Study.com,* 2019. https://study.com/academy/lesson/ethnic-groups-in-africa.html.

Clancy, Pearce. "Erga Omnes Partes Standing after South Africa v Israel." Blog of the European Journal of International Law, *ejiltalk.org*, February 1, 2024. https://www.ejiltalk.org/erga-omnes-partes-standing-after-south-africa-v-israel/.

Diallo, Kribsoo. "African Attitudes To, and Solidarity With, Palestine." Transnational Institute, October 3, 2024.https://www.tni.org/en/article/african-attitudes-to-and-solidarity-with-palestine.

Early Warning Project. "Countries at Risk for Mass Killing 2023-2024: Statistical Risk Assessment Results." *Earlywarningproject.ushmm.org*, January 2024.

https://earlywarningproject.ushmm.org/storage/resources/2872/Early%20Warning%20Project%20Statistical%20Risk%20Assessment%202023-24.pdf.

Fayyad, Huthifa. "Nelson Mandela and Palestine: In His Own Words." Middle East Eye, *middleeasteye.net*, February 11, 2020. https://www.middleeasteye.net/news/nelson-mandela-30-years-palestine.

Hathaway, Oona A., Alaa Achem, and Justin Cole. "In the Case against Syria, a New Tool for Enforcing Human Rights." Just Security, j*ustsecurity.net*, October 9, 2023. https://www.justsecurity.org/89362/in-the-case-against-syria-a-new-tool-for-enforcing-human-rights/.

Hathaway, Oona A., Alaa Hachem, and Justin Cole. "A New Tool for Enforcing Human Rights: Erga Omnes Partes Standing." *Columbia Journal of Transnational Law 61,* no. 2 (October 3, 2023): 259–332. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4569497.

Hendrickse, Melissa. "A Chance for Africa to Counter the Pitfalls of International Criminal Justice?" Amnesty International, *amnesty.org,* April 22, 2024. https://www.amnesty.org/en/latest/news/2024/04/a-chance-for-africa-to-counter-the-p itfalls-of-international-criminal-justice/.

Human Rights Watch. "Rwanda: Justice after Genocide—20 Years On." *Hrw.org*, March 28, 2014. https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years.

Ifediora, Obinna. Working Paper Version 1, "Regional Multilateralism: The Right to Protect, Not the Responsibility to Protect, in Africa," *Researchgate.net*, November 10, 2021. 10.33774/apsa-2021-x75m3

International Criminal Court. "Understanding the International Criminal Court." *Icc-cpi.int*, 2020. https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

International Panel of Eminent Personalities. “The Preventable Genocide: Report on the 1994 Genocide in Rwanda and Surrounding Events.” *Peaceau.org*, July 7, 2000. https://www.peaceau.org/uploads/report-rowanda-genocide.pdf.

Islam, Rizwanul. “The Gambia v. Myanmar: An Analysis of the ICJ’s Decision on Jurisdiction under the Genocide Convention.” *American Society of International Law 26,* no. 8 (September 21, 2022). https://www.asil.org/insights/volume/26/issue/9.

Levitt, Jeremy. “The Law on Intervention: Africa’s Pathbreaking Model.” *Global Dialogue* 7, no. 1/2 (January 1, 2005): 50–58. https://www.proquest.com/docview/211518811?accountid=10673&parentSessionId= BEghNaAHmiYO6gw1pJQQOO%2F3tWGHbZXPN8JEXNqqYuA%3D&pq-origsite=p rimo&sourcetype=Scholarly%20Journals.

Levitt, Jeremy, and Patasse Ange-Fdlix. “Pro-Democratic Intervention in Africa.” *Wisconsin International Law Journal* 24, no. 3 (September 14, 2014). https://www.bloomsburycollections.com/monograph-detail?docid=b-9781472564306 &tocid=b-9781472564306-chapter4.

Longobardo, Marco. “Genocide, Obligations Erga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence.” *The International Journal of Human Rights* 19, no. 8 (September 30, 2015): 1199–1212. https://doi.org/10.1080/13642987.2015.1082834.

McGreal, Chris. “How Apartheid History Shaped South Africa’s Genocide Case against Israel.” The Guardian, *theguardian.com,* January 8, 2024. https://www.theguardian.com/world/2024/jan/08/south-africa-genocide-case-israel-ap artheid-history.

McGreal, Chris. “Thirty Years Ago the World Failed to Stop the Rwandan Genocide. Now We Fail Gaza.” The Guardian, t*heguardian.com*, April 10, 2024. https://www.theguardian.com/commentisfree/2024/apr/10/rwanada-genocide-lessons-gaza-israel.

Minority Rights Group. “African Countries Dominate Global Ranking of Communities Facing Greatest Risk of Mass Killings.” *Minorityrights.org*, January 12, 2024. https://minorityrights.org/african-countries-dominate-global-ranking-of-communities-f acing-greatest-risk-of-mass-killings/.

Musila, Godfrey. “Preventing Genocide: Africa’s Evolving Normative and Institutional Framework.” Africa Center for Strategic Studies, *africacenter.org*, April 7, 2017. https://africacenter.org/spotlight/preventing-genocide-africas-evolving-normative-insti tutional-framework/.

Ngari, Allan, and Zenaida Machado. “Angola Becomes First Country to Join African Criminal Court.” Human Rights Watch, *hrw.org*, June 14, 2024. https://www.hrw.org/news/2024/06/14/angola-becomes-first-country-join-african-crimi nal-court.

Roth, Kenneth. “Africa Attacks the International Criminal Court.” Human Rights Watch, *hrw.org*, January 14, 2014.https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court.

Slotin, Jenna Castro Wesamba, and Teemt Bekele. "The Responsibility to Protect (RtoP) and Genocide Prevention in Africa" International Peace Institute, *ipinst.org*, July 22, 2009. https://www.ipinst.org/wp-content/uploads/publications/rtopinafrica_epub.pdf.

Streitfeld-Hall, Jaclyn. “Preventing Mass Atrocities in West Africa.” *Global Centre for the Responsibility to Protect Occasional Paper Series* No. 6, (September 6, 2015). http://www.globalr2p.org/wpcontent/uploads/2020/07/OccasionalPaper_WestAfrica_ Final.pdf.

“Summary of the 2023 UN General Assembly Plenary Meeting on the Responsibility to Protect.” Global Centre for the Responsibility to Protect, *globalr2p.org*, 2023. https://www.globalr2p.org/wp-content/uploads/2023/07/2023-Summary-of-UNGA-Ple nary-on-R2P.pdf.

Tchioffo Kodjo. "Statement by Adama DIENG: On the Mandate and Vision of the African Union Special Envoy for the Prevention of the Crime of Genocide and Other Mass Atrocities-African Union - Peace and Security Department." African Union Peace and Security Department, *peaceau.org*, July 11, 2024. https://www.peaceau.org/en/article/statement-by-adama-dieng-on-the-mandate-and- vision-of-the-african-union-special-envoy-for-the-prevention-of-the-crime-of-genocide-and-other-mass-atrocities.

United Nations International Residual Mechanism for Criminal Tribunals. "The ICTR in Brief." UNIRMCT, *irmct.org*. 2013. https://unictr.irmct.org/en/tribunal.

Waal, Alex de. "From Darfur to Darfur: The Fall and Rise of Indifference to Mass Atrocities in Africa." Just Security, *justsecurity.net*, November 2, 2023. https://www.justsecurity.org/89885/from-darfur-to-darfur-the-fall-and-rise-of-indifferen ce-to-mass-atrocities-in-africa/.

Wester, Karin. "1 - the Origin of the Responsibility to Protect." In *Intervention in Libya the Responsibility to Protect in North Africa*, 11–23. New York: Cambridge University Press, 2020. https://www.cambridge.org/core/books/intervention-in-libya/origin-of-the-responsibilit y-to-protect/1E8B5BA1B6D64DD19803413E8F075AA7.

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

Female Incarceration: Exploring Alternatives to Imprisonment in the Middle East and North Africa (MENA)

Reem Alhasan & Noora Alshaibani

Received: 17 February 2025 / Accepted: 10 June 2025

Abstract

Imprisonment aims to deter criminal behaviour and promote the rehabilitation of offenders. Prisons, however, frequently struggle with difficulties such as overcrowding and limited healthcare services. The difficulties faced by female prisoners are exacerbated by the fact that many facilities do not provide sufficient support for their particular needs. Gender-specific social and health services are crucial for the rehabilitation of female prisoners and for reducing social and cultural stigma. There is limited research on the challenges faced by female prisoners in the MENA, as well as on potential alternative solutions within the criminal justice system. This study applies a doctrinal methodology, analysing secondary data from newspapers, official reports, and existing literature. It explores the unique circumstances of female prisoners, particularly in the MENA region, and alternatives to imprisonment that could have a positive impact on rehabilitation back into the family and community.

Keywords: female in prison, alternatives to imprisonment, MENA region.

Introduction

The criminal justice system has long grappled with the dual goals of delivering justice for victims and society while preventing reoffending among individuals who have committed crimes. Within this framework, the experiences of incarcerated individuals can vary based on factors such as gender, socioeconomic status, and personal circumstances. The difficulties that come with incarceration are particularly severe for female prisoners, exacerbated by their unique health needs, including reproductive

issues that often go unmet within prison systems.[75] Moreover, prison has collateral consequences on mental health, including an increased sense of discomfort or psychological pain, feelings of anxiety, fear, and depression.[76]

Gender roles and cultural expectations in the Middle East and North Africa (MENA) region mean that women in prison face far greater stigma than men. This is due to cultural and societal norms that equate any conviction with a loss of honour for themselves and their families. It is common in many countries of this region for wives to visit their incarcerated husbands, yet husbands rarely extend the same support to their imprisoned wives. When females are released, they are often rejected by their communities and even by their families, as their conviction is viewed as bringing shame and dishonour.[77] As a result, many female prisoners face reintegration challenges as they struggle to rebuild their lives socially, economically, and emotionally in the face of enduring stigma and exclusion.

Worldwide, societal understanding of the criminal justice system is shifting towards prioritising rehabilitation over punishment. Thus, there is an increasing recognition of the necessity for alternatives to imprisonment, especially for non-violent offenders. In the MENA region, the exploration of these alternatives is crucial, as many females face barriers that hinder their successful reintegration into the community. Since there is limited research on such issue in the MENA region, this study sets out to delve into the complexities surrounding the imprisonment of females.[78] It emphasises the urgent need for compassionate and effective reforms that prioritise women's rehabilitation and consider the broader impact on their families and communities. Successful models and legislative advancements from countries in the MENA region such as Bahrain and

[75] Annie Bartlett & Sheila Hollins, "Challenges and Mental Health Needs of Women in Prison," *Br J Psychiatry* 212, no. 3 (2018): 134, https://doi.org/10.1192/bjp.2017.42.

[76] Penal Reform International, *Access to Justice: Discrimination of women in criminal justice systems.* (London: Penal Reform International, 2013), 8–9, https://cdn.penalreform.org/wp-content/uploads/2013/08/BRIEFING-Discrimination-women-criminal-justice.pdf.

[77] Awmaima A. Khattab Amrayaf, "International Health Care Standards in Women's Prisons in the Arab World" (PhD diss., University of Leeds, 2018).

[78] For the purposes of this study, the term *female* refers to individuals who are biologically assigned as women and who are incarcerated within the criminal justice system.

Jordan are used to illustrate potential for alternative recourse to imprisonment. Ultimately, this study advocates for a paradigm shift in how female offenders should be treated within the judicial system of the MENA region.

Methodology

A doctrinal methodology was adopted for this study to review and analyse secondary data from existing literature, official reports, and newspapers, following a four-stage process comprised of data collection, reduction, verification, and display. The next section relates the findings from the review of the secondary data. It first introduces the trajectory of the complex impact of incarceration on female prisoners in the MENA region, emphasising the unique challenges they encounter within the penal system. The study then moves to contextualise the alternatives to imprisonment for females, focusing on rehabilitation instead of incarceration. Additionally, this study explores how alternatives to imprisonment in the MENA region are being introduced, evaluating their progress and noting limitations. This study intends to demonstrate alternatives to imprisonment as the most feasible remedy for female rehabilitation and reform in the MENA region.

Literature Review

The Impact of Incarceration on Female Prisoners

The control and prevention of crime has always been one of the fundamental aims of laws that intend to maintain order in communities.[79] Prisons are facilities where people are legally confined following their conviction for a criminal offence.[80] This punishment aims to prevent them from reoffending and guides the offenders to realise their mistakes and improve themselves.[81] According to Jones, the theory of incarceration posits that keeping more criminals in jails will reduce the crime rate, ultimately leading to a safer community. Nevertheless, imprisonment places significant challenges on

[79] Cooper Jones, "The Failure of Incarceration: Does Alternative Sentencing Reduce Recidivism? A Preliminary Analysis," *Xavier Journal of Politics* V, (2014–15): 19

[80] Mechthild Nagel and Anthony Nocella, *The End of Prisons: Reflections from the Decarceration Movement* (Rodopi, 2013), 125.

[81] Jay Gormley et al., *The Effectiveness of Sentencing Options on Reoffending* (Sentencing Council, 2022), 9.

offenders.[82] For example, the deprivations and frustrations associated with prison life are not just related to being deprived of liberty, but also stem from being cut off from the community, being deprived of sexual relationships, and being deprived of autonomy.

Furthermore, imprisonment is regularly and disproportionately imposed on those who are already marginalised or excluded from society.[83] People who are already facing social, economic, or other forms of exclusion are more likely to end up in prison. This phenomenon of imprisoning marginalised individuals is not limited to one specific region, but instead occurs in various parts of the world.[84]

Exclusion and Female Prisoners

Gender plays an important role in shaping the experiences of exclusion, particularly for females. Research indicates that female prisoners often report enduring more painful experiences than their male counterparts, frequently carrying complex emotional histories and past trauma, including abuse within their communities before imprisonment.[85] Such 'pains of imprisonment' for females can make adjusting to prison life difficult, with studies suggesting that these experiences lead to prison misconduct and emotional problems, which in turn lead to future offending.[86] The phrase 'pains of imprisonment' is used here to broadly capture the gendered and contextual challenges faced by incarcerated women in MENA settings. The research in this study relates to Sykes' theory of the 'pains of imprisonment', by exploring how these are experienced differently and often more intensely by incarcerated women in MENA contexts,

[82] Jones, "Failure of Incarceration," 19.

[83] Nicola Douglas et al., "The Impact of Imprisonment on Health: What Do Women Prisoners Say?" *Journal of Epidemiology & Community Health* 63, no. 9 (2009): 749, https://jech.bmj.com/content/63/9/749.

[84] Elena Azaola, "Women Prisoners: Theory and Reality in Mexico," in Punishment and Incarceration: A Global Perspective, Sociology of Crime, Law and Deviance (Emerald Group Publishing, 2014), 9: 121, https://doi.org/10.1108/S1521-613620140000019005

[85] Yvonne Jewkes et al., "Designing 'Healthy' Prisons for Women: Incorporating Trauma-Informed Care and Practice (TICP) into Prison Planning and Design," *International Journal of Environmental Research and Public Health* 16, no. 20 (2019): 3818, 1 https://doi.org/10.3390/ijerph16203818.

[86] Gormley et al., *Effectiveness of Sentencing Options*, 18.

particularly in relation to autonomy, emotional suffering, and stigma.[87] This situation raises concerns about female health issues and reintegration into society.

Prison Population and Turnover Rate

At present, an estimated 741,000 females worldwide find themselves incarcerated either as pre-trial detainees or sentenced prisoners.[88] There is no international or regional body that regularly and systematically collects official and up-to-date data on the number of women in prisons across the MENA region. It can be said that the female prison population in this region is variable and dependent on the political, social, and legal contexts of each country. The female prison population in the MENA region varies by country, as can be seen in the following 14 jurisdictions: Algeria (1.5%), Bahrain (4.7%), Egypt (3.7%), Iraq (2.6%), Jordan (2.2%), Kuwait (5.8%), Lebanon (2.8%), Libya (3.3%), Morocco (2.3%), Oman (4.5%), Qatar (14.7%), Saudi Arabia (1.9%), Tunisia (3.3%), and the United Arab Emirates (11.7%).[89]

Despite comprising a relatively small percentage of the overall incarcerated population, females represent the most rapidly expanding segment worldwide, surpassing the male demographic.[90] From 2000 to 2022, the number of females deprived of their liberty globally increased by 59%, while the male prison population is

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[87] Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison*, (Princeton University Press, 1958).

[88] Marie Claire Van Hout et al., "# Me Too: Global Progress in Tackling Continued Custodial Violence Against Women: The 10-Year Anniversary of the Bangkok Rules," *Trauma, Violence, & Abuse* 24, no. 2 (2021): 515, https://doi.org/10.1177/15248380211036067.

[89] Helen Fair and Roy Walmsley, *World Female Imprisonment List: Women and Girls in Penal Institutions, Including Pre-Trial Detainees/Remand Prisoners*, 5th ed. (World Prison Brief: Institute for Crime & Justice Policy Research, 2022), 14, https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf.

[90] Marie Claire Van Hout et al., "'Women's Right to Health in Detention': United Nations Committee Observations Since the Adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)," *Journal of Human Rights Practice* 15, no. 1, (November 25, 2025): 139, https://doi.org/10.1093/jhuman/huac058. See also, WHO/Europe et al., "30.H. Workshop: Women and Prison: Vulnerability and Overlapping Health Needs of Women in Prison Worldwide," *European Journal of Public Health* 30, no. Supplement_5 (September 1, 2020), https://doi.org/10.1093/eurpub/ckaa165.1365.

estimated to have risen by 26.9% between 2000 and 2024.[91] These figures reflect a tendency towards a high turnover rate in female prisons. This is because females often serve relatively short sentences for a wider range of offences than males. These are primarily non-violent, less serious crimes, such as property or drug-related offences, with fewer females committing violent crimes.[92]

Unique Healthcare Needs

Females have specific health requirements because of their gender.[93] The increasing imprisonment of females augments the need for sexual and reproductive health care from prison health services.[94] Incarcerated females face distinct reproductive health challenges that often go unmet within prison systems. Historically, the architecture and environment of prisons were designed for male inmates, and this oversight not only intensifies female inmates' health deterioration but also hinders their rehabilitation and integration into society. As a result, the experience of incarceration can differentially impact female health.[95] In the MENA region, facilities often lack essential gender-sensitive infrastructure, such as spaces for maternal care, privacy in hygiene facilities, or access to appropriate healthcare services for women. Consequently, the carceral experience lacks targeted support to address the underlying issues, such as alcohol,

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[91] Helen Fair and Roy Walmsley, *World Prison Population List*, 14th ed (Institute for Crime & Justice Policy Research, 2024),17 https://eprints.bbk.ac.uk/id/eprint/53464/. See also, Fair and Walmsley, *World Female Imprisonment List*,14, https://doi.org/10.1177/15248380211036067 .

[92] Anastasia Jablonska, "The Health and Wellbeing of Women in Prison" (PhD diss., Royal Holloway, University of London, 2018), 46. See also, Brenda J. Van den Bergh et al., "Imprisonment and Women's Health: Concerns about Gender Sensitivity, Human Rights and Public Health," *Bulletin of the World Health Organization* 89, no. 9 (September 1, 2011), 690, https://doi.org/10.2471/BLT.10.082842.

[93] Royal College of Obstetricians and Gynaecologists, *Better for Women: Improving the Health and Well-Being of Women and Girls*, (December 2019), https://www.rcog.org.uk/media/h3smwohw/better-for-women-full-report.pdf.

[94] Martha Paynter et al., "Sexual and Reproductive Health Outcomes among Incarcerated Women in Canada: A Scoping Review," *Canadian Journal of Nursing Research* 54, no.1 (2022): 81, https://doi.org/10.1177/0844562120985988.

[95] All Party Parliamentary Group on Women in the Penal System, *Inquiry into Women's Health and Well-being in Prisons: Briefing One* (The Howard League for Penal Reform, 2022), 5, https://howardleague.org/wp-content/uploads/2022/04/APPG-womens-health-and-well-being-FINAL.pdf.

See also, International Committee of the Red Cross, *Health Care in Detention: A Practical Guide* (2nd ed., 2021), 73, https://www.icrc.org/en/publication/4213-health-care-detention-practical-guide; Michael Massoglia and William Alex Pridemore, "Incarceration and Health," *Annual Review of Sociology* 41, no. 1 (August 14, 2015), 299, https://doi.org/10.1146/annurev-soc-073014-112326.

drugs, mental health or domestic abuse trauma.

Mental health

Although incarceration is intended to deter future criminal behaviour, it often leads to collateral consequences on mental health, including an increased sense of discomfort or psychological pain, negative impacts on relations with family and friends, feelings of anxiety and fear, post-traumatic stress disorder, isolation and depression.[96] Moreover, the literature highlights variability in addressing mental health concerns among female prisoners. For example, in the MENA region, an assessment of mental health services in the Kuwaiti prison system revealed substantial deficiencies, with services being notably limited for the incarcerated female population.[97] An insufficient number of trained mental health professionals within the system has led to high caseloads, causing female prisoners to usually face long wait times for appointments and inadequate follow-up care.[98] Additionally, in Lebanon, Libya, and Egypt, the budget allocated to mental health services is disproportionately low compared to the significant demand among prisoners.[99]

This scarcity of resources, coupled with an insufficient staff-to-prisoner ratio, creates a situation where females in need of mental health services may remain untreated

[96] Rachel Hutchings et al., *Literature Review: Injustice? Towards a Better Understanding of Healthcare Access Challenges for Prisoners* (Nuffield Trust, 2021), 4, https://www.nuffieldtrust.org.uk/files/2021-10/prisoner-health-literature-review.pdf. See also, Danielle Wallace and Xia Wang, "Does In-Prison Physical and Mental Health Impact Recidivism?," *SSM - Population Health* 11 (March 20, 2020), 100569, https://doi.org/10.1016/j.ssmph.2020.100569; Andrew Forrester et al., "Mental Illness and the Provision of Mental Health Services in Prisons," *British Medical Bulletin* 127, no. 1 (2018): 105, https://doi.org/10.1093/bmb/ldy027.

[97] Van den Bergh et al., 690. See also, Maurizio Esposito, "Women in Prison: Unhealthy Lives and Denied Well-Being Between Loneliness and Seclusion," *Crime, Law and Social Change* 63, no. 3–4 (May 1, 2015): 139, https://doi.org/10.1007/s10611-015-9561-y.

[98] Kyle Msall and Rasha Mohammed, "An Evaluation of Mental Health Services Within the Kuwait Prison," in *Psychological Applications and Trends 2018*, eds. Clara Pracana and Michael Wang (InScience Press, 2018), 96, https://files.eric.ed.gov/fulltext/ED604953.pdf.

[99] Fiona Mangan and Rebecca Murray, *Prisons and Detention in Libya,* Peaceworks 119 (United States Institute of Peace, 2016), 30, https://en.minbarlibya.org/wp-content/uploads/2016/09/PW119-Prisons-and-Detention-in-Libya.pdf. See also, Sindoss Kassem and Lina Kurdahi Badr, "Health Care of Prisoners in Lebanon," *Lebanese Medical Journal* 68, no. 3 (2020): 167, http://www.lebanesemedicaljournal.org/articles/68-3/review1.pdf; Eman Ibrahim et al., *"Psychiatric Morbidity Among Prisoners in Egypt," World Journal of Medical Sciences* 11, no. 2 (2014): 232.

throughout their entire sentence. Consequently, many female prisoners resort to self-medicating through the use of alcohol, drugs, and other substances,[100] which is a significant factor contributing to reoffending.[101]

Maternal Health

The incarceration of females also brings significant concerns related to maternal health and the complexities of pregnancy. Approximately 5% to 10% of the global prison population consists of pregnant females.[102] There are no available data on the number of pregnant prisoners in the MENA region. However, the rising rates of incarcerated females suggest a corresponding increase in the number of pregnant females in prison in the region.[103]

Pregnant inmates should have access to the same level of healthcare available to females in the community, which includes consultations with obstetricians, gynaecologists, midwives, and birthing practitioners appropriate to their culture. If desired, these prisoners should be able to request female practitioners.[104] Complications related to pregnancy and preparation for childbirth are important issues during imprisonment, with research by Rajagopal et al. indicating that incarceration is associated with increased odds of preterm birth, placental abruption, and antepartum haemorrhage.[105]

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[100] Y. Jewkes et al., Designing 'Healthy' Prisons for Women, 6.

[101] Vivian C. Smith, "Substance-Abusing Female Offenders as Victims: Chronological Sequencing of Pathways Into the Criminal Justice System," *Victims & Offenders* 12, no. 1 (2017): 3, https://doi.org/10.1080/15564886.2015.1017131.

[102] Somayeh Alirezaei and Robab Latifnejad Roudsari, "The Needs of Incarcerated Pregnant Women: A Systematic Review of Literature," *International Journal of Community Based Nursing and Midwifery* 10, no. 1 (2022): 3, https://doi.org/10.30476/IJCBNM.2021.89508.1613.

[103] Paynter et al., "Sexual and Reproductive Health Outcomes," 81.

[104] Abirami Kirubarajan et al., "Pregnancy and Childbirth During Incarceration: A Qualitative Systematic Review of Lived Experiences," *BJOG: An International Journal of Obstetrics and Gynaecology* 129 (2022): 1461, https://doi.org/10.1111/1471-0528.17137. See also, WHO and UNODC, *Women's Health in Prison: Correcting Gender Inequity in Prison Health* (Copenhagen, WHO Regional Office for Europe, 2009), 16, https://iris.who.int/handle/10665/107931.

[105] Karissa Rajagopal et al., "Reproductive Health Care for Incarcerated People: Advancing Health Equity in Unequitable Settings," *Clinical Obstetrics and Gynecology* 66, no 1 (2023), 73, https://doi.org/10.1097/GRF.0000000000000746.

As previously mentioned, traditional practices within correctional facilities were primarily designed to manage the male prison population, as female incarceration had historically been infrequent. However, despite the rising number of incarcerated females, there have not been adjustments in the management strategies for this demographic,[106] with a notable lack of woman-centred approaches to care. This is particularly evident in the experiences of pregnant imprisoned females, with the absence of regular medical checkups and ultrasounds intensifying risk factors for adverse outcomes, leading to complications such as miscarriage, stillbirth, and the birth of disabled children.[107] This neglect not only contributes to heightened stress and inadequate nutrition but also increases the likelihood of violence and other negative health outcomes.[108]

In addition, mothers are often separated from their infants upon hospital discharge or during the immediate postpartum period; unfortunately, this separation inhibits bonding with the newborn and the initiation of breastfeeding.[109] A qualitative systematic review of pregnancy and childbirth during incarceration found that the most significant and devastating mental health concern for incarcerated females is the traumatic separation from their newborns after birth. Many of these females reported a reluctance to initiate breastfeeding due to fear of emotional attachment to the infant or discomfort in the presence of officers.[110]

Given the current status of female mental health care in prisons, imprisonment should be considered as a last resort, especially for those females who have committed non-violent offences and who do not pose a risk to society.

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[106] Afreen Alam, "Women's Right to Maternal and Reproductive Health: An Overview," *International Journal of Law Management and Humanities* 4, no 2 (2021): 310, http://doi.one/10.1732/IJLMH.26055.
[107] Yasmine Fakhry, "*Beyond Cells and Walls: Exploring Human Rights and Social Justice through Health and Nutrition in Lebanese Prisons"* (PhD diss., University of East London, School of Social Sciences, 2024), 194, https://doi.org/10.15123/uel.8yxvy.
[108] Rajagopal et al., "Reproductive Health Care," 73. See also, Adele Baldwin et al., "Pregnant in Prison: An Integrative Literature Review," *Women and Birth* 33, no. 1 (2020): 48, https://doi.org/10.1016/j.wombi.2018.12.004.
[109] Carolyn Sufrin, *Pregnancy and Postpartum Care in Correctional Settings* (National Commission on Correctional Health Care, 2018), 5, https://www.ncchc.org/wp-content/uploads/Pregnancy-and-Postpartum-Care-2018.pdf.
[110] Rajagopal et al., "Reproductive Health Care", 73.

Alternatives to Imprisonment for Female Prisoners

Criminal sentencing norms worldwide are moving towards rehabilitation and reform, aiming to re-integrate the offender into the community.[111] Alternative sentencing refers to non-custodial measures allowing offenders to remain in the community while serving their sentence to prevent reoffending.[112] It comprises alternatives to imprisonment measures authorised by the judge, where the accused participates in community work or engages in educational programmes to help rehabilitate the individual and foster their involvement within the community.[113] The theory behind using these alternative sentences serves the purpose of the correctional system. Instead of relying on imprisonment as a punishment, the approach focuses on rehabilitation, correction, education, and integration. It is characterised by a more humane and normative prison treatment system.[114] Alternative sentences can be applied if the offender does not pose a significant threat to their family or the community,[115] with several options available such as community service, house arrest, conditional release (which involves releasing an offender under certain conditions), restorative measures, electronic monitoring, fines, and open prisons.

The Bangkok Rules provide guidelines specifically for the imprisonment of female offenders.[116] The third section of the Rules focuses on utilising non-custodial measures, drawing on the Tokyo Rules to inform the development and implementation of these measures in cases involving female offenders.[117] For example, decisions

[111] Marcus Araromi, "Prisoners' Rights Under the Nigerian Law: Legal Pathways to Progressive Realization and Protection," *Journal of Sustainable Development Law and Policy* 6, no. 1 (2015): 171.
[112] Maiza Putri, "The Effort to Reduce Over Capacity in Correctional Facilities through Social Work Alternative Punishment," *Ius Poenale* 2, no. 2 (2021): 117.
[113] Andrew Coyle, *Prisons of the World, A Better Way*, 1st ed. (Policy Press, 2021), 272.
[114] Henny Nuraeny and Tanti Kirana Utami, "The Impact of Over Capacity on Fulfilling the Basic Rights of the Assisted Citizen in Prison in the Perspective of Human Right," in *Proceedings of the First International Conference on Progressive Civil Society (ICONPROCS 2019)*, (Atlantis Press, 2019), 150.
[115] Kristen E. DeVall et al., "Intensive Supervision Programs and Recidivism: How Michigan Successfully Targets High-Risk Offenders," *The Prison Journal* 97, no. 6 (2017): 587, https://doi.org/10.1177/0032885517728876.
[116] United Nations, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, (2010).
[117] United Nations General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), GA Res 45/110, (1990).*

regarding the sentencing of female offenders are expected to consider their past experiences, potential history of victimisation, family connections, and other relevant characteristics. These factors are essential in selecting appropriate diversionary measures and sentencing alternatives.[118]

Beichner and Hagemann suggest that most females in prison are incarcerated for non-violent and relatively minor offences.[119] Alternatives to incarceration are specifically designed for these types of crimes and can help reduce or avoid the harmful effects of imprisonment on female offenders. For example, alternatives to imprisonment for female drug offenders could focus on rehabilitation that would address the underlying drug problem.[120]

Education as an Alternative

It is noteworthy that female prisoners rarely continue their education while imprisoned or after release.[121] Low educational levels and limited work experience contribute to reduced opportunities for securing stable employment and achieving financial independence upon reintegration into society. Breaking the cycle of poverty and social exclusion also requires fostering self-awareness and a sense of personal value among female prisoners.[122] Educational training and rehabilitative interventions are particularly effective when delivered as an alternative to imprisonment, which include basic knowledge, skills, and attitudes aimed at improving literacy among offenders.

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[118] Angelina Stanojoska and Julija Jurtoska, "Women in Prison: Bangkok Rules, Prisoners' Rights in Prison and Macedonian Reality," in *Thematic Conference Proceedings of International Significance, Volume I, International Scientific Conference "Archibald Reiss Days"* (Belgrade, 2–3 October, Academy of Criminalistic and Police Studies, 2018): 118, https://core.ac.uk/download/pdf/300348141.pdf#page=118.

[119] Dawn Beichner and Otmar Hagemann, "A Global View of Women, Prison, and Aftercare: A Call for Reform," (*Violence Against Women* 28, no. 8 (2022): 1791, https://doi.org/10.1177/10778012221085997.

[120] WHO and UNODC, *Women's Health in Prison*, 11. See also, WHO/Europe, "30.H. Workshop, v501."

[121] Caroline Agboola, "'Why Do They Need to Punish You More?': Women's Lives after Imprisonment," *South African Review of Sociology* 48, no. 2 (2017): 39, https://doi.org/10.1080/21528586.2016.1233510.

[122] Shetika Bailey, "Alternatives to Incarceration: Reducing Recidivism Among Nonviolent Offenders Through Post-Incarceration Resources" (master's thesis, Tennessee State University, 2022), 10, https://search.proquest.com/openview/628674e2ded6ad8d5a48e091936e15e9/1?pq-origsite=gscholar&cbl=18750&diss=y.

Educational training can prepare non-violent offenders for meaningful and fulfilling roles as productive members of society. This training also equips non-violent offenders with essential skills to apply for and maintain employment and enhance productivity once they secure a job.[123]

The Family Unit

Mothers are fundamental to any family unit, and intervention promoting positive behavioural change can create more positive social environments.[124] For some incarcerated females, pregnancy and motherhood can serve as positive turning points, motivating them to become the best mothers they can be and to pursue desistance from crime.[125] Alternatives to imprisonment focus more on assessing and managing females in their place of residence rather than in a custodial setting. In every case, the circumstances of the female and her place in the family and community should be carefully considered before sentencing.

Alternative sentencing provides a rehabilitative and socially constructive approach to criminal justice, especially for non-violent offenders and female prisoners. By focusing on education, rehabilitation, reintegration, and family stability, these measures help reduce the adverse effects of incarceration while promoting long-term behavioural change.

Alternative Sentencing in the MENA Region

The concept of alternative sentencing was gradually developed in both Europe and the United States from the 1960s. In the United States, ‘electronic monitoring’ was introduced in 1964,[126] and in Europe, during the 1970s, community service emerged as the first alternative sentencing measure, initially aimed at alleviating prison

[123] Bailey, “Alternatives to Incarceration”,10–11. See also, Stanojoska and Jurtoska, “Women in Prison,” 123.
[124] Baldwin et al., “Pregnant in Prison,” 49.
[125] Diksha Sapkota et al., “Navigating Pregnancy and Early Motherhood in Prison: A Thematic Analysis of Mothers’ Experiences,” *Health and Justice* 10 (2022): art 32, 2, https://doi.org/10.1186/s40352-022-00196-4.
[126] Wejdan Suleiman Irtaimeh, “Electronic Monitoring as a Measure to Reduce the Use of Pre-trial Detention,” *Journal of Politics and Law* 15, no. 4 (2022): 214, https://doi.org/10.5539/jpl.v15n4p210.

overcrowding.[127] Despite the increasing use of alternatives to imprisonment, there remains a limited basis for alternatives in most MENA legal systems.[128] Some countries, however, have made significant developments in introducing alternative sentencing in their legislation.

For instance, the Royal Committee for Reform of the Judiciary and Enhancing the Rule of Law in Jordan developed a comprehensive roadmap to improve judicial efficiency, aiming to promote rehabilitation, protect the community, and uphold human rights. As part of this reform, in 2017, the Jordanian legislature amended the Penal Code to include alternative sentencing in Article 25 bis through Law No. 27.[129]

Similarly, in 2017, Bahrain implemented seven alternatives to imprisonment applicable to all types of offenders.[130] Bahrain's courts can now utilise alternative sentencing more effectively, emphasising the rehabilitation of offenders and their reintegration into society. Previously, adult prisoners had to serve half their custodial sentence before becoming eligible for alternative sentencing. However, this requirement has since been revised, potentially allowing all prisoners to qualify for alternative sentencing.[131] Furthermore, the United Arab Emirates introduced alternatives to imprisonment in

[127] Robert Morgan and Mark Olver, "Envisioning the Future of Correctional Psychology: Administration, Training, Practice, and Research," in *The History and Future of Correctional Psychology*, eds. Philip R. Magaletta et. al (Springer, 2023): 289.

[128] Nick Curley and Saule Mektepbayeva, *Promoting Human Rights Based Approach Towards Vulnerable Groups in Detention in the Middle East and North Africa Region*, (SIDA, 2014): 16, https://cdn.penalreform.org/wp-content/uploads/2015/08/MENA-SIDA-Evaluation-Final-for-website.pdf.

[129] Ahmad Olaim, "The Alternative Sanctions in Jordan," *Applied Science University Journal* 5, no. 1 (2021): 41–42.

[130] "Bahrain Human Rights Achievements Recognized Globally," *Bahrain News Agency*, January 11, 2025,, https://www.bna.bh/en/news?cms=q8FmFJgiscL2fwIzON1%2BDkZStSSoKV6nWzPHWM%2FqLuo%3D.

[131] Ombudsman Bahrain, "Ombudsman's Office Participates in International Conference on Human Rights and Prisons" (24 October 2024) https://www.ombudsman.bh/en/news/24-10-2024. See also *Bahrain News Agency*, "Bahrain Extends Progressive Criminal Justice Reforms on Alternative Sentencing" (September 9, 2021) https://www.bna.bh/en/Bahrainextendsprogressivecriminaljusticereformsonalternativesentencing.aspx?cms=q8FmFJgiscL2fwIzON1%2BDsTWKRShpUM22YYPESpI3L8%3D#:~:text=Alternative%20sentences%20may%20include%20community,tagging%2C%20rehabilitation%20programmes%20or%20compensation.

2018, with electronic monitoring being the most widely used option.[132]

Despite these advances, some countries in the MENA region are still in the process of developing alternative sentencing. Morocco's parliament proposed a review of these laws in 2023, aiming to alleviate overcrowding in the country's prisons, while in Kuwait, the Minister of Justice and the Minister of Endowments and Islamic Affairs announced in 2024 that the Alternative Procedures and Penalties Law is currently being developed for approval. In contrast, some countries, such as Algeria, Saudi Arabia,[133] and Qatar, only implement alternative sentences in specific cases and lack legal provisions to replace prison time with alternative punishments.[134]

Discussion

Sentencing

The findings suggest that there is an urgent need to apply alternatives to imprisonment for females at all stages of the criminal justice procedures. In many cases, these alternatives can be more easily applied to female offenders, as a significant percentage are incarcerated for non-violent offences. However, it is essential to thoroughly evaluate all alternatives to imprisonment and choose the appropriate type carefully to avoid unexpected consequences. For instance, house arrest as an alternative to imprisonment could expose female offenders to domestic violence or put children and other dependent relatives in the house at risk. Moreover, judges play a significant role in assessing the individual's circumstances, including their criminal history, health and family situation before sentencing an alternative measure. Ensuring sentencing is tailored to the unique needs of each female offender will contribute to fostering safer communities.

Cultural norms

[132] Raed Faqir and Ehab Alrousan, "Community Service as an Alternative Penalty to Short-Term Imprisonment in the UAE and Malaysia: A Comparative Legal Analysis," *Russian Law Journal* 11 (2023): 1179, https://doi.org/10.52783/rlj.v11i3.1513.
[133] Irtaimeh, "Electronic Monitoring," 215.
[134] Muath Al-Zuobi and Mikhlid Ibrahim, "Alternative Penalties in Qatari and Jordanian Legislation," *Revue Jurisprudence* 11 (2019): 44, https://www.univ-biskra.dz/revues/index.php/ijdl/article/view/4357.

Cultural and societal norms in the MENA region create significant reintegration challenges for female ex-prisoners: strong cultural traditions impose strict expectations on females, where any conviction – violent or non-violent – can be perceived as a loss of honour for both the individual and her family. These norms deeply affect MENA region females who greatly value religion and modesty. Therefore, the stigma of imprisonment often isolates them from social connections, leading to feelings of worthlessness.[135] This societal perception deters their ability to rebuild relationships and regain acceptance, underscoring the need for culturally sensitive rehabilitation approaches.[136]

Conclusion

Prison aims to prevent reoffending and provide justice for victims and society. However, imprisonment presents significant challenges for individuals, especially for those who are already marginalised or excluded from society. Gender plays a critical role in shaping experiences of punishment. The challenges of imprisonment can make it more difficult for females to adjust to prison life. Such challenges include a lack of health facilities that support reproductive health and specific mental health issues. These difficulties can lead to prison misconduct, emotional issues, and future criminal behaviour. This raise concerns related to the security and health of incarcerated females, and particularly to their reintegration into society, since the impact of imprisonment on females affects not only them but also their children and other family members.

In the MENA region, lack of essential gender-sensitive infrastructure and cultural and societal norms exacerbate the experience of female prisoners and can lead to significant reintegration challenges. The idea of punishment in the criminal justice system is shifting towards rehabilitation and reform, aiming to facilitate offender reintegration into the community. This shift emphasises family connection, education, mental health support, and community engagement rather than depending on

[135] Salma, "Problems Faced by Emprisoned Women," 35.
[136] Patrice Villettaz et al., “The Effects on Re-offending of Custodial vs. Non-Custodial Sanctions: An Updated Systematic Review of the State of Knowledge,” *Campbell Systematic Reviews* 11, no. 1 (2015): 55, https://doi.org/10.4073/csr.2015.1.

imprisonment as the only resolution.

Alternative sentencing is still in the early stages in the MENA region, but there are some countries with progressive developments that can act as role models for the region. For example, Bahrain has introduced a flexible system that shows promising results; all adults sentenced to imprisonment are eligible for alternative sentencing, even prior to the commencement of their sentence. Similarly, in Jordan, the amendment of the Penal Code allows alternative sentencing, aiming to reduce overcrowding and support the reintegration of offenders into society.

This study suggests more compassionate and constructive solutions for female offenders in the MENA region, prioritising rehabilitation over punishment. Alternatives to incarceration programmes can result in lower reoffending rates, allowing offenders to maintain family ties and employment, facilitating smoother reintegration into the community. Consistent monitoring and further research throughout the region are recommended to evaluate how different types of alternative sentencing affect rehabilitation of female offenders and the impact on their families and communities.

Bibliography

Agboola, Caroline. "'Why Do They Need to Punish You More?': Women's Lives after Imprisonment." *South African Review of Sociology* 48, no. 2 (2017): 32–48 https://doi.org/10.1080/21528586.2016.1233510.

Alam, Afreen. "Women's Right to Maternal and Reproductive Health: An Overview." *International Journal of Law Management and Humanities* 4, no. 2 (2021): 303–16. http://doi.one/10.1732/IJLMH.26055.

Alirezaei, Somayeh, and Robab Latifnejad Roudsari. "The Needs of Incarcerated Pregnant Women: A Systematic Review of Literature." *International Journal of Community Based Nursing and Midwifery* 10, no. 1 (2022): 2–17. https://doi.org/10.30476/IJCBNM.2021.89508.1613.

All Party Parliamentary Group on Women in the Penal System. *Inquiry into Women's Health and Well-being in Prisons: Briefing One*. The Howard League for Penal Reform, 2022. https://howardleague.org/wp-content/uploads/2022/04/APPG-womens-health-and-well-being-FINAL.pdf.

Al-Zuobi, Muath, and Mikhlid Ibrahim. "Alternative Penalties in Qatari and Jordanian Legislation." *Revue Jurisprudence* 11 (2019): 44–59.

Amrayaf, Awmaima A. Khattab. "International Health Care Standards in Women's Prisons in the Arab World." PhD diss., University of Leeds, 2018. oai:etheses.whiterose.ac.uk:21617.

Araromi, Marcus. "Prisoners' Rights Under the Nigerian Law: Legal Pathways to Progressive Realization and Protection." *Journal of Sustainable Development Law and Policy* 6, no. 1 (2015): 169–98. 10.4314/jsdlp.v6i1.8.

Azaola, Elena, "Women Prisoners: Theory and Reality in Mexico." In *Punishment and Incarceration: A Global Perspective, Sociology of Crime, Law and Deviance series,* Vol. 19,121–38. Emerald Publishing, 2014. https://doi.org/10.1108/S1521-613620140000019005.

Bahrain News Agency, "Bahrain Extends Progressive Criminal Justice Reforms on Alternative Sentencing." September 9, 2021. https://www.bna.bh/en/Bahrainextendsprogressivecriminaljusticereformsonalternativesentencing.aspx?cms=q8FmFJgiscL2fwIzON1%2BDsTWKRShpUM22YYPESpI3L8%3D#:~:text=Alternative%20sentences%20may%20include%2

0community,tagging%2C%20rehabilitation%20programmes%20or%20compensation

Bahrain News Agency. "Bahrain Human Rights Achievements Recognized Globally." January 11, 2025. https://www.bna.bh/en/news?cms=q8FmFJgiscL2fwIzON1%2BDkZStSSoKV6nWzPHWM%2FqLuo%3D.

Bailey, Shetika. "Alternatives to Incarceration: Reducing Recidivism Among Nonviolent Offenders Through Post-Incarceration Resources." Master's thesis, Tennessee State University, 2022. ProQuest. https://search.proquest.com/openview/628674e2ded6ad8d5a48e091936e15e9/1?pq-origsite=gscholar&cbl=18750&diss=y.

Baldwin, Adele, Agnieszka Sobolewska, and Tanya Capper. "Pregnant in Prison: An Integrative Literature Review." *Women and Birth* 33, no. 1 (2020): 41–50. https://doi.org/10.1016/j.wombi.2018.12.004.

Bartlett, Annie, and Sheila Hollins. "Challenges and mental health needs of women in prison." *Br J Psychiatry* 212, no. 3 (2018): 134–136. https://doi.org/10.1192/bjp.2017.42.

Beichner, Dawn, and Otmar Hagemann. "A Global View of Women, Prison, and Aftercare: A Call for Reform." *Violence Against Women* 28, no. 8 (2022): 1788–1808. https://doi.org/10.1177/10778012221085997.

Coyle, Andrew. *Prisons of the World: A Better Way.* 1st ed. Bristol: Policy Press, 2021. https://www.perlego.com/book/3533331/prisons-of-the-world-a-better-way-pdf.

Curley, Nick, and Saule Mektepbayeva. *Promoting Human Rights Based Approach Towards Vulnerable Groups in Detention in the Middle East and North Africa Region*. SIDA, 2014. https://cdn.penalreform.org/wp-content/uploads/2015/08/MENA-SIDA-Evaluation-Final-for-website.pdf.

DeVall, Kristen E., David J. Hartmann, Sarah Hupp Williamson, and Laquana N. Askew. "Intensive Supervision Programs and Recidivism: How Michigan Successfully Targets High-Risk Offenders." *The Prison Journal* 97, no. 6 (2017): 585–608. https://doi.org/10.1177/0032885517728876.

Douglas, Nicola, Emma Plugge, and Ray Fitzpatrick. "The Impact of Imprisonment on Health: What Do Women Prisoners Say?" *Journal of Epidemiology &*

Community Health 63, no. 9 (2009): 749–754. https://jech.bmj.com/content/63/9/749.

Esposito, Maurizio. "Women in Prison: Unhealthy Lives and Denied Well-Being Between Loneliness and Seclusion." *Crime, Law and Social Change* 63, no. 3–4 (2015): 137–58. https://doi.org/10.1007/s10611-015-9561-y.

Fair, Helen, and Roy Walmsley. *World Female Imprisonment List: Women and Girls in Penal Institutions, Including Pre-Trial Detainees/Remand Prisoners.* 5th ed. World Prison Brief. Institute for Crime & Justice Policy Research, 2022. https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf.

Fair, Helen, and Roy Walmsley. *World Prison Population List*. 14th ed. Institute for Crime & Justice Policy Research, 2024. https://eprints.bbk.ac.uk/id/eprint/53464/.

Fakhry, Yasmine. "Beyond Cells and Walls: Exploring Human Rights and Social Justice through Health and Nutrition in Lebanese Prisons." PhD diss., University of East London, School of Social Sciences, 2024. https://doi.org/10.15123/uel.8yxvy.

Faqir, Raed, and Ehab M. Alrousan. "Community Service as an Alternative Penalty to Short-Term Imprisonment in the UAE and Malaysia: A Comparative Legal Analysis." *Russian Law Journal* 11 (2023): 1179–1189. https://doi.org/10.52783/rlj.v11i3.1513.

Forrester, Andrew, Alex Till, Alexander Simpson, and Pamela J Shaw. "Mental Illness and the Provision of Mental Health Services in Prisons." *British Medical Bulletin* 127, no. 1 (2018): 101–09. https://doi.org/10.1093/bmb/ldy027.

Gormley, Jay, Melissa Hamilton, and Ian Belton. *The Effectiveness of Sentencing Options on Reoffending*. Sentencing Council, 2022.

Hutchings, Rachel, Miranda Davies, and Eilís Keeble. *Literature Review: Injustice? Towards a Better Understanding of Healthcare Access Challenges for Prisoners*. Nuffield Trust, 2021. https://www.nuffieldtrust.org.uk/files/2021-10/prisoner-health-literature-review.pdf.

Ibrahim, Eman, Zeinab A. Halim, Enayatee A. Wahab, and Noha A. Sabry, "Psychiatric Morbidity Among Prisoners in Egypt.") *World Journal of Medical Sciences* 11, no. 2 (2014): 228–32. https://www.idosi.org/wjms/11(2)14/15.pdf.

International Committee of the Red Cross. *Health Care in Detention: A Practical Guide*. 2nd ed. 2021. https://www.icrc.org/en/publication/4213-health-care-detention-practical-guide.

Irtaimeh, Wejdan Suleiman. "Electronic Monitoring as a Measure to Reduce the Use of Pre-trial Detention." *Journal of Politics and Law* 15, no. 4 (2022): 210–29. https://doi.org/10.5539/jpl.v15n4p210.

Jablonska, Anastasia. "The Health and Wellbeing of Women in Prison." PhD diss., Royal Holloway, University of London, 2018.

Jewkes, Yvonne, Melanie Jordan, Serena Wright, and Gillian Bendelow. "Designing 'Healthy' Prisons for Women: Incorporating Trauma-Informed Care and Practice (TICP) into Prison Planning and Design." *International Journal of Environmental Research and Public Health* 16, no. 20 (2019): 3818. https://doi.org/10.3390/ijerph16203818.

Jones, Cooper. "The Failure of Incarceration: Does Alternative Sentencing Reduce Recidivism? A Preliminary Analysis." 2014. *Xavier Journal of Politics* V (2014–15): 18–31.

Kassem, Sindoss, and Lina Kurdahi Badr. "Health Care of Prisoners in Lebanon." *Lebanese Medical Journal* 68, no. 3 (2020): 166–169. http://,www.lebanesemedicaljournal.org/articles/68-3/review1.pdf.

Kirubarajan, Abirami, Jackie Tsang, Susan Dong, Jeanette Hui, Padmaja Sreeram, Zuhal Mohmand, Shannon Leung, Alessandra Ceccacci, and Mara Sobel. "Pregnancy and Childbirth during Incarceration: A Qualitative Systematic Review of Lived Experiences." *BJOG: An International Journal of Obstetrics and Gynaecology* 129 (2022): 1460–1472. https://doi.org/10.1111/1471-0528.17137.

Mangan, Fiona, and Rebecca Murray. *Prisons and Detention in Libya*. Peaceworks 119, United States Institute of Peace, 2016. https://en.minbarlibya.org/wp-content/uploads/2016/09/PW119-Prisons-and-Detention-in-Libya.pdf.

Massoglia, Michael, and William Alex Pridemore. "Incarceration and Health." *Annual Review of Sociology* 41, no. 1 (2015): 291–310. https://doi.org/10.1146/annurev-soc-073014-112326.

Mechthild, Nagel, and Anthony J. Nocella. *The End of Prisons: Reflections from the Decarceration Movement*. Rodopi, 2013.

Morgan, Robert, and Mark E. Olver. "Envisioning the Future of Correctional Psychology: Administration, Training, Practice, and Research." In The History and Future of Correctional Psychology, edited by Philip R. Magaletta, Marguerite Ternes, and Marc Patry, 289–301. Springer, 2023. https://doi.org/10.1007/978-3-031-37480-7_14.

Msall, Kyle, and Rasha Mohammed. "An Evaluation of Mental Health Services Within the Kuwait Prison," In *Psychological Applications and Trends 2018*, edited by Clara Pracana and Michael Wang, 93–96. InScience Press, 2018. https://files.eric.ed.gov/fulltext/ED604953.pdf.

Nuraeny, Henny, and Tanti Kirana Utami. "The Impact of Over Capacity on Fulfilling the Basic Rights of the Assisted Citizen in Prison in the Perspective of Human Right." In *Proceedings of the First International Conference on Progressive Civil Society (ICONPROCS 2019)*. Atlantis Press, 2019.

Olaim, Ahmad. "The Alternative Sanctions in Jordan." *Applied Science University Journal* 5, no. 1 (2021): 41–42.

Ombudsman Bahrain. "Ombudsman's Office Participates in International Conference on Human Rights and Prisons." October 24, 2024. https://www.ombudsman.bh/en/news/24-10-2024.

Paynter, Martha, Clare Heggie, Shelley McKibbon, Ruth Martin-Misener, Adelina Iftene, and Gail Tomblin Murphy. "Sexual and Reproductive Health Outcomes Among Incarcerated Women in Canada: A Scoping Review." *Canadian Journal of Nursing Research* 54, no.1 (2022): 72–86. https://doi.org/10.1177/0844562120985988.

Penal Reform International. *Access to Justice: Discrimination of women in criminal justice systems*. London: Penal Reform International, 2013. https://cdn.penalreform.org/wp-content/uploads/2013/08/BRIEFING-Discrimination-women-criminal-justice.pdf .

Putri, Maiza. "The Effort to Reduce Over Capacity in Correctional Facilities through Social Work Alternative Punishment." *Ius Poenale* 2, no. 2 (2021): 113–22.

Rajagopal, Karissa, Deborah Landis-Lewis, Kimberly Haven, and Carolyn Sufrin. "Reproductive Health Care for Incarcerated People: Advancing Health Equity in Unequitable Settings." *Clinical Obstetrics and Gynecology* 66, no. 1 (2023): 73–85. https://doi.org/10.1097/GRF.0000000000000746.

Royal College of Obstetricians and Gynaecologists. *Better for Women: Improving the Health and Well-Being of Women and Girls*. 2019. https://www.rcog.org.uk/media/h3smwohw/better-for-women-full-report.pdf.

Salma, Umme. "Problems Faced by Emprisoned Women in Context with Islam and Review of the Steps taken to Resolve the Same." Epistemology 4, no. 1 (2017): 30–50. https://journal.epistemology.pk/index.php/epistemology/article/view/85/32.

Sapkota, Diksha, Susan Dennison, Jyai Allen, Jenny Gamble, Corrie Williams, Nomxolisi Malope-Rwodzi, Laura Baar, Janet Ransley, and Tara Renae McGee. "Navigating Pregnancy and Early Motherhood in Prison: A Thematic Analysis of Mothers' Experiences." *Health and Justice* 10 (2022): art. 32. https://doi.org/10.1186/s40352-022-00196-4.

Smith, Vivian C. "Substance-Abusing Female Offenders as Victims: Chronological Sequencing of Pathways into the Criminal Justice System." *Victims & Offenders* 12, no. 1 (2017): 1–22. https://doi.org/10.1080/15564886.2015.1017131.

Stanojoska, Angelina, and Julija Jurtoska. "Women in Prison: Bangkok Rules, Prisoners' Rights in Prison and Macedonian Reality." In *Thematic Conference Proceedings of International Significance*, vol. 1, International Scientific Conference *Archibald Reiss Days*, Belgrade, 2–3 October 2018, 116–123. Belgrade: Academy of Criminalistic and Police Studies, 2018. https://core.ac.uk/download/pdf/300348141.pdf.

Sufrin, Carolyn. *Pregnancy and Postpartum Care in Correctional Settings.* National Commission on Correctional Health Care, 2018. https://www.ncchc.org/wp-content/uploads/Pregnancy-and-Postpartum-Care-2018.pdf.

Sykes, Gresham, M. *The Society of Captives: A Study of a Maximum Security Prison*. Princeton University Press, 1958.

Taylor, Caitlin J. "Gendered Pathways to Recidivism: Differential Effects of Family Support by Gender." *Women & Criminal Justice* 25, no. 3 (2015): 169–83. https://doi.org/10.1080/08974454.2014.989305.

United Nations General Assembly*. United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules). GA Res 45/110, 1990.*

United Nations. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*." 2010.

Van den Bergh, Brenda J., Alex Gatherer, Andrew Fraser, and Lars Møller. "Imprisonment and Women's Health: Concerns about Gender Sensitivity, Human Rights and Public Health." *Bulletin of the World Health Organization* 89, no. 9 (2011): 689–94. https://doi.org/10.2471/BLT.10.082842.

Van Hout, Marie Claire, Simon Fleißner, and Heino Stöver. "# Me Too: Global Progress in Tackling Continued Custodial Violence Against Women: The 10-Year Anniversary of the Bangkok Rules." *Trauma, Violence, & Abuse* 24, no. 2 (2021): 515–29. https://doi.org/10.1177/15248380211036067.

Van Hout, Marie Claire, Simon Fleißner, and Heino Stöver. "'Women's Right to Health in Detention': United Nations Committee Observations Since the Adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)." *Journal of Human Rights Practice* 15, no. 1 (2025): 138–55. https://doi.org/10.1093/jhuman/huac058.

Villettaz, Patrice, Gwladys Gillieron, and Martin Killias. "The Effects on Re-offending of Custodial vs. Non-custodial Sanctions: An Updated Systematic Review of the State of Knowledge." *Campbell Systematic Reviews* 11, no. 1 (2015): 1–92. https://doi.org/10.4073/csr.2015.1.

Wallace, Danielle, and Xia Wang. "Does In-Prison Physical and Mental Health Impact Recidivism?" *SSM - Population Health* 11 (2020): 100569. https://doi.org/10.1016/j.ssmph.2020.100569.

WHO and UNODC, *Women's Health in Prison: Correcting Gender Inequity in Prison Health*. Copenhagen: WHO Regional Office for Europe, 2009. https://iris.who.int/handle/10665/107931.

WHO/Europe, University of Pisa (Italy), EMCDDA, UNODC, EUPHA Public Health Policy and Politics Section, and EUPHA Infectious Diseases Control Section. "30.H. Workshop: Women and Prison: Vulnerability and Overlapping Health Needs of Women in Prison Worldwide." *European Journal of Public Health* 30, No. Supplement_5 (September 2020): v500–01. https://doi.org/10.1093/eurpub/ckaa165.1365.

Research Article

Changing the Carceral Course: How the Carceral Shift in Human Rights Met the Good Friday Agreement and Northern Ireland's Abolitionist Imperative

Nate Johnson

Received: 02 February 2025 / Accepted: 10 June 2025

Abstract

Northern Ireland faces a growing police use of force, increased imprisonment of individuals suffering from mental ill-health, the lowest minimum age of criminal responsibility in Europe, and high reports of abuse against marginalised communities. Despite a decades-long movement for carceral abolition in the United Kingdom and a robust Northern Irish civil society human rights apparatus, reliance on police and prison as means of social control remains strong in Northern Ireland. In fact, both the immediate custody and remand populations in prison have climbed to the highest they have been in almost 9 years. Why have carceral systems, such as police and prisons, persisted in Northern Ireland? This article argues that the carceral 'turn' in international human rights and historic marginalisation of economic, social, and cultural rights were incorporated into the Good Friday Agreement with the effect of anchoring reliance on carceral responses to social harms. This has continued well into the twenty-first century, despite growing criticism of such responses at the local and international levels. In response, this article suggests strengthening the alternatives to criminal legal systems that carceral abolitionist and anti-carceral human rights advocacy organisations in Northern Ireland are already pursuing.

I. Introduction

The Good Friday Agreement ('Agreement') pulled off the remarkable feats of stopping violence in Northern Ireland, maintaining peace for the past two and a half decades, and establishing a new constitutional order. It did so by imbuing that new order with international human rights ('IHR') standards. At the same time, the Agreement replicated the increasingly carceral tenor of IHR[137] and the historic marginalisation of economic, social, and cultural rights ('ESCRs') through its language and emphasis on security apparatus and carceral system reform.[138] Since the Agreement entered into force, Northern Irish agencies and individuals have gone to great lengths to turn historically problematic criminal legal enforcement mechanisms into human rights-compliant ones.[139] Rather than causing radical change, such efforts have perpetuated the taken-for-granted status prisons and police enjoy in Northern Ireland, as seen in the growing custody and remand populations.[140]

Importantly, these systems may be neither inevitable nor preferred.[141] This is

[137] Karen Engle, "Anti-impunity and the Turn to Criminal Law in Human Rights," *Cornell Law Review* 100, no. 5 (2015): 1082, https://ssrn.com/abstract=2595677.

[138] See generally, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes), Ireland-U.K., December 2, 1999, 2113 U.N.T.S. 473 [Agreement]. Throughout this paper, the term 'carceral system' is used interchangeably with the term 'criminal legal system.' Understanding that the term 'carceral system' may be used to define the broad continuum of mechanisms of surveillance and punishment, including migrant detention facilities, schools, or public assistance institutions, it is used in this paper to refer primarily to police and prisons. Michael Foucault, *Discipline and Punish: The birth of the prison* (Penguin, 1977), 299.

[139] See Part I.

[140] Department of Justice, "The Northern Ireland Prison Population 2023/24," October 2024, https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Northern-Ireland-Prison-Population-2023-24.pdf. Between April 1, 2021 and April 1, 2024 alone, the prison population rose by 37%. Rebecca Black, "Prison population increases by almost 40% in three years." *Irish News*, April 22, 2024https://www.irishnews.com/news/northern-ireland/prison-population-increases-by-almost-40-in-three-years-3HSDQCGPCFAAFO23I4YWZOTAAE/. Indeed, in one conversation between the author and a long-time Belfast resident, said resident praised the PSNI for their ability to speak to protestors' right of peaceful assembly. This was so long as such right did not threaten the PSNI officer reciting such right himself, of course.

[141] Mattia Pinto, "Coercive Human Rights and the Forgotten History of the Council of Europe's *Report on Decriminalisation*" *Modern Law Review* 86, no. 5 (2023): 1108, 1133, http://dx.doi.org/10.2139/ssrn.4352583. Pinto argues that the 'direction taken by the ECtHR, and more broadly by human rights law and activism, is not inevitable and can be reversed.'

particularly so given the historically problematic role of prisons and police in Northern Ireland, their ongoing failure to prevent or redress the social issues at the root of allegedly criminal conduct, and their distraction from the protection of ESCRs.[142] Such concerns may be better addressed through non-punitive, community-led alternatives that seek the progressive realisation of ESCRs.

Part I of this essay will explore the coupling of criminal law and IHR. This Part situates the Agreement within the lineage of the carceral IHR regime, including in Europe. By expressly incorporating the European Convention on Human Rights ('ECHR'), the Agreement also incorporated the European Court of Human Rights' ('ECtHR') carceral jurisprudence. The Agreement so successfully enmeshes human rights and carceral systems that it is now argued that one cannot exist without the other. Paradoxically, this argument is both supported and undermined by relentless efforts to render Northern Ireland's carceral systems human rights-compliant through reviews, reports, and reforms. While these efforts have had potential for truly transformative change, Northern Ireland's carceral systems have instead only been strengthened by them, leading to their wider societal acceptance.

Part II explores how the Agreement also replicates the historic marginalisation of ESCRs. The continuing focus of reform has been on rendering carceral systems human rights-compliant, rather than identifying and addressing allegedly offending

[142] Nate Johnson, "The Advocacy Gap: Anti-Carceral, but not Abolitionist, Advocacy in Northern Ireland," *Oxford Human Rights Hub* (January 22, 2025), https://ohrh.law.ox.ac.uk/the-advocacy-gap-anti-carceral-but-not-abolitionist-human-rights-advocacy-in-northern-ireland/. See also, Police Service of Northern Ireland, "Use of Force by the Police in Northern Ireland 1 April 2023 to 31 March 2024," June 2024, https://www.psni.police.uk/sites/default/files/2022-09/PSNI%20Use%20of%20Force%20Statistical%20Report%201%20Apr%202021%20-%2031%20Mar%202022v2.pdf; Black, "Prison population increases;" Department of Justice, "Increasing the Minimum Age of Criminal Responsibility in Northern Ireland from 10 Years to 14 Years, Summary of Consultation Responses," June 2023, https://www.justice-ni.gov.uk/sites/default/files/publications/justice/summary-consultation-macr.pdf; Niamh Campbell, "£1.6m spent on suspended PSNI officers accused of domestic abuse and sexual assault," *Belfast Telegraph*, October 4, 2024, https://www.belfasttelegraph.co.uk/news/northern-ireland/16m-spent-on-suspended-psni-officers-accused-of-domestic-abuse-and-sexual-assault/a957588661.html; Luke Butterly, "PSNI apologises for claiming migrants might make fake domestic abuse claims," *The Detail,* March 22, 2023, https://www.thedetail.tv/articles/psni-apologises-for-claiming-migrants-might-make-fake-domestic-abuse-claims-to-avoid-deportation; John T. Topping and Ben Bradford, "Now you see it, now you don't: On the (in)visibility of police stop and search in Northern Ireland" *Criminology & Criminal Justice* 20, no. 1 (2018): 98, https://doi.org/10.1177/1748895818800742.

pathways grounded in the state's failure to protect ESCRs. The ongoing fixation on carceral reform has tangibly distracted from the protection of ESCRs, with especially harsh consequences for marginalised groups. According to Northern Irish carceral abolitionists, instead of addressing social harms that lead to these offending pathways, such as a lack of employment, housing, or mental healthcare, the UK and Northern Ireland governments have preferred individualised criminalisation of them. Thus, the marginalisation of ESCRs has further bolstered the position of carceral systems within Northern Irish society by creating the very pathways that lead to interaction with the criminal legal system.

Part III places critiques of carceral systems by Northern Irish government entities and IHR scholars, practitioners, and bodies in conversation with those of the carceral abolitionists discussed in Part II. The arguments raised by this broad swathe of IHR professionals raise the question of whether a human rights-compliant carceral system is anything more than a contradiction in terms. Part III suggests that it is time to reconsider the Agreement's approach to human rights-based carceral systems and ESCRs to dismantle the former by promoting the latter. Such an argument is not radical. Indeed, IHR bodies and specific 'anti-carceral human rights advocacy'[143] organisations in Northern Ireland have successfully pursued alternatives that de-emphasise carceral solutions and promote ESCRs.[144] Thus, these organisations and others like them should be emboldened to continue and improve upon their work.

Based on these developments, the Conclusion envisions a broader effort to align IHR advocacy with the abolitionist goals of reducing reliance on harmful carceral systems and increasing emphasis on ESCRs.

II. Entangling International Human Rights and Criminal Law: A Northern Ireland Perspective

Given the explicit incorporation of carceral ECtHR jurisprudence, the Agreement set

[143] Chi Adanna Mgbako et al., "Anti-Carceral Human Rights Advocacy," *University of Pennsylvania Journal of Law and Social Change* 26, no. 2 (2023): 175, https://doi.org/10.58112/jlasc.26-2.2. This is defined as the 'de-emphasis on carceral solutions as the primary response to human rights violations in favor of social and economic interventions that prevent human rights abuses, heal survivors, and transform perpetrators.'

[144] Johnson, "The Advocacy Gap."

the stage for the entanglement of human rights and carceral systems in Northern Ireland. The Agreement accepted carceral systems as necessary and inevitable within society, particularly one emerging from conflict. It did so by establishing distinctions between communities that are deserving and undeserving of punishment and situating human rights-compliant carceral regimes as the standard for doling out that punishment. The Agreement and subsequent reform efforts have strengthened acceptance of these systems to the extent of making IHR and carceral systems mutually dependent.

A. Northern Ireland Enters the Carceral Landscape

While the IHR regime initially developed as a means of protecting individuals from state structures, including police and prisons,[145] it has increasingly called for the end of impunity through the expansion of international criminal law.[146] Early instances of the institutionalisation of criminal law in response to IHR violations appeared at the end of World War II,[147] when the Nuremberg Trials positioned individual criminal responsibility as one of the only viable responses to mass violence.[148] At the end of the Cold War, international criminal law and institutions proliferated. This is seen in the 'justice cascade' of Latin American human rights prosecutions led by grassroots activists;[149] the Inter-American Court of Human Rights ('IACtHR') jurisprudence on the obligation to investigate, prosecute, and punish human rights violations;[150] and the

[145] Engle, "Anti-Impunity and the Turn to Criminal Law," 1073.

[146] Engle, "Anti-Impunity and the Turn to Criminal Law," 1073. See also, Rocío Lorca, "Should Feminists be Worried about Impunity?" *Harvard Human Rights Journal* 37, no. 1 (2024): 53, https://journals.law.harvard.edu/hrj/wp-content/uploads/sites/83/2024/06/02_HLH_37_1_Roc%C2%A1o-Lorca47-80.pdf.

[147] See Vasuki Nesiah, "Doing History with Impunity," in *Anti-Impunity and the Human Rights Agenda*, ed. Karen Engle, Zinaida Miller and DM Davis (Cambridge University Press, 2016), 102.

[148] Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa," in Engle, Miller and Davis, *Anti-Impunity and the Human Rights Agenda*, 351.

[149] See generally, Kathryn Sikkink, *The Justice Cascade: how human rights prosecutions are changing world politics* (WW Norton, 2011).

[150] Engle, "Anti-Impunity and the Turn to Criminal Law," 1080. The seminal case establishing this requirement was *Velásquez-Rodríguez v. Honduras*. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988). A long line of precedent has developed in the IACtHR striking down amnesty laws as violating states' duties to investigate, prosecute, and punish. Engle, "Anti-Impunity and the Turn to Criminal Law," 1082. This obligation was subsequently reiterated and amplified throughout the IHR regime in the 1993 Vienna Declaration and Program of Action and the 1997 Joinet Report released by the U.N. Sub-Commission on the Prevention of Discrimination and

creation of permanent and ad hoc international criminal tribunals in the 1990s.[151] Additionally, the IHR regime has generally accepted that criminal legal structures, including their enforcement arms, are a necessary and legitimate fixture of contemporary society.[152] In fact, a search through the Office of the United Nations High Commissioner for Human Rights ('OHCHR') publications on 'detention and imprisonment' and 'law enforcement' reveals an abundance of training manuals, handbooks, and guidance on maintaining human rights-compliant prisons and police forces.[153] The Council of Europe has also issued its own 'Prison Rules.'[154]

Like the IACtHR, the ECtHR has developed its own anti-impunity jurisprudence, 'driving penality at the domestic, regional and international levels.'[155] Despite an early willingness of the Council of Europe to consider decriminalisation,[156] the ECtHR has established that states may only meet their obligations under Articles 2 (right to life) and 3 (freedom from torture) of the ECHR so long as they maintain investigatory mechanisms capable of leading to prosecution for violations of these rights.[157] Where

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Protection of Minorities. Engle, "Anti-Impunity and the Turn to Criminal Law," 1083–84. As a point of comparison, this is the exact opposite conclusion as that of the South African Constitutional Court in *Azanian Peoples Org. (AZAPO) v. President of the Republic of S. Africa* of 1996, which upheld the South African amnesty as allowing for a truth and forgiveness more important to victim, perpetrator, and nation, than could be provided by a purely punitive model of justice. Engle, "Anti-Impunity and the Turn to Criminal Law," 1088; Azanian Peoples Org (AZAPO) v. President of the Republic of S. Afr., 1996 (4) SA 671 (CC) (S. Afr.).

[151] Engle, "Anti-Impunity and the Turn to Criminal Law," 1074–77.

[152] See generally, Isobel Renzulli, "Prison Abolition: International Human Rights Law Perspectives" *International Journal of Human Rights* 26, no. 1 (2021), https://doi.org/10.1080/13642987.2021.1895766. See also, Mgbako, "Anti-Carceral Human Rights Advocacy," 186-90; Karen Engle, "Abolitionist Human Rights: Queering LGBT Human Rights Advocacy and Law" in *Queer Encounters with International Law: Lives, Communities, Subjectivities*, ed. Claerwen O'Hara and Tamsin Paige (Routledge, 2024).

[153] See "Publications," OHCHR, accessed January 16, 2025, https://www.ohchr.org/en/publications?field_subject_target_id[751]=751&field_subject_target_id[736]=736&created[min]=&created[max]=&sort_bef_combine=field_published_date_value_DESC.

[154] *European Prison Rules*, COUNCIL OF EUR. (2006), https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae.

[155] Pinto, "Coercive Human Rights," 1109.

[156] Council of Europe, European Committee on Crime Problems (ECCP*), Report on Decriminalisation* (1980): cited in Pinto, "Coercive Human Rights," 1121-22

[157] McCann and Others v. UK, 324 Eur. Ct. H.R. (ser. A) 161 (1995), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57943%22]}; McKerr v. UK 2001-III Eur. Ct. H.R. 112-113, 115, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-59451%22]}; Finucane v. UK 2003-VIII Eur. Ct. H.R. 67-69, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61185%22]}; Jordan v. UK, App. No. 24746/94, ¶ 107 (May 4, 2001),

police are responsible for violating the right to life, the state must put 'in place effective criminal-law provisions' to be backed up by the very 'law-enforcement machinery' that gave rise to the violation in the first place, *i.e.* the police.[158] While this obligation falls short of requiring prosecution, it still establishes criminal processes as the benchmark of success in fulfilling rights, even when violated by the police themselves.[159] In fact, the ECtHR has repeatedly found the UK in violation of ECHR Article 2 where investigations did not rise to these procedural standards.[160]

Negotiated and drafted within this milieu, the Agreement situates human rights-compliant carceral systems as central pillars of ongoing peace in Northern Ireland. The Agreement established the ECHR as a pivotal safeguard against the threat of a return to violence.[161] The ECHR was subsequently implemented in the UK and Northern Ireland through the Human Rights Act 1998, which brought with it a reliance on criminal processes as the primary means of promoting human rights.[162] This can be seen in the decision of *Dillon and Others v. Secretary of State of Northern Ireland*.[163] In *Dillon*, the High Court held that the sweeping amnesty of the Northern Ireland Troubles

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https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59450%22]}; Brecknell v. UK, App. No. 32547/04 ¶¶ 65-72 (Feb. 27, 2008), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-83470%22]}. See also Gordon Anthony et al., *Investigations, Prosecutions, and Amnesties Under Articles 2 & 3 of the European Convention on Human Rights* (Arts and Humanities Research Council 2015) 3, 10, http://dx.doi.org/10.2139/ssrn.2668106; Karen Engle, "A Genealogy of the Criminal Turn in Human Rights," in Engle, Miller and Davis, *Anti-Impunity and the Human Rights Agenda*, 36. For an in-depth outline on the development of Article 2 jurisprudence, see Alyson Kilpatrick, *Independent Review of Article 2 ECHR Compliance: Kenova and Related Matters* (Operation Kenova, Aug. 2, 2021).

[158] *Guide on Article 2 of the European Convention on Human Rights: Right to Life*, EUR. CT. HUM. RTS. 144 (Aug. 31, 2023), https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_eng#:~:text=Article%202%20of%20the%20Convention,-%E2%80%9C1.&text=Everyone's%20right%20to%20life%20shall,penalty%20is%20provided%20by%20law. Carceral responses to human rights violations were also encouraged by the Human Rights Committee in its 2015 Concluding Observations on the U.K. and Northern Ireland, where it repeatedly emphasised that investigations be capable of leading to prosecution and punishment in the contexts of conflict-related violations in Northern Ireland, hate crime legislation, and violence against women. Hum. Rts. Comm., Concluding observations on the seventh period report of the United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CCPR/C/GBR/CO/7 (Aug. 17, 2015), https://digitallibrary.un.org/record/804708?v=pdf.

[159] Johnson, "The Advocacy Gap."

[160] *McCann*, at 214; *McKerr*, at 161; *Finucane*, at 84; *Jordan*, at 145; *Brecknell*, at 82. See also Kilpatrick, *Independent Review*.

[161] Agreement, Strand One, "Safeguards" s.5b. The ECHR is mentioned 6 times throughout all strands of the Agreement. Agreement, *passim*.

[162] Human Rights Act 1998 (U.K.).

[163] Dillon and Others v. Secretary of State of Northern Ireland (2024) NIKB 11.

(Legacy and Reconciliation) Act 2023 breached the prosecutorial duties of Articles 2 and 3 as established by the ECtHR.[164] As exemplified by the *Dillon* case, the Agreement incorporated the ECtHR's emphasis on criminal accountability mechanisms for certain rights violations. This entanglement has allowed for the ongoing acceptance of prisons and police in Northern Ireland.[165]

[164] *Dillon*, at 144-215, 710(i)-(ii).
[165] See Part II.A.

B. Good Friday and the Myth of Good Prisons

While the Agreement significantly reduced an increasingly politicised and growing prison population,[166] it also bolstered the role of the prison in post-conflict society. The Agreement provided for the early release of individuals imprisoned for qualifying offences,[167] so long as they did not pose a risk to the public upon release.[168] As a result, between 1999 and 2007, 449 political prisoners were released under the Northern Ireland (Sentences) Act 1998.[169]

Rather than question the role of penal institutions altogether, however, the Agreement strengthened the position of the prison in Northern Ireland in two ways. First, the Agreement established distinctions between groups deemed to be deserving or undeserving of punishment.[170] Based on determinations made by the Sentence Review Committee, 'ordinary decent criminals' remained imprisoned, while political prisoners did not.[171] Even within the undeserving population of political prisoners, individual assessments of dangerousness were made based on the likelihood of continued affiliation and activity within paramilitary organisations.[172] Second, the frequent use of human rights language alongside this continuation of prison for the 'ordinary decent criminal' supported the belief that a prison could be human rights-compliant.[173] This, in turn, fixed the myth of prison as the best way to respond to harm

[166] At one point, Northern Ireland had one of the highest prison populations per capita in Western Europe, likely due to the political situation. Clare D. Dwyer, "Risk, Politics and the 'Scientification' of Political Judgment: Prisoner Release and Conflict Transformation in Northern Ireland," *British Journal of Criminology* 47, no. 5 (2007): 783, https://doi.org/10.1093/bjc/azm025.

[167] Qualifying offenses fell under 'scheduled offenses' defined in various acts outlined in Schedule 1 of the Northern Ireland Arms Decommissioning Act 1997, including the Northern Ireland (Emergency Provisions) Act 1996 and Northern Ireland (Sentences) Act 1998 s.3.

[168] Agreement, Annex A, "Prisoners" (1)-(2).

[169] Dwyer, "Risk, Politics, and 'Scientification,'" 787. See also, Kieran McEvoy, "Prisoner Release and Conflict Resolution: international Lessons for Northern Ireland" *International Criminal Justice Review* 8, no. 1 (1998): 45-46, https://doi.org/10.1177/105756779800800103: discussing risk factors as a determinant of release.

[170] Phil Scraton, "Penal abolition in the north of Ireland," in *The Routledge International Handbook of Penal Abolition*, ed. Michael J. Coyle and David Scott (Routledge, 2021) 369; Dwyer, "Risk, Politics and 'Scientification,'" 783.

[171] Dwyer, "Risk, Politics and 'Scientification,'" 787-89.

[172] Deborah H. Drake and David Scott, "Overcoming obstacles to abolition and challenging myths of imprisonment" in Coyle and Scott, *Routledge Handbook of Penal Abolition*, 412-13.

[173] Agreement, "Declaration of Support" s.2; Agreement, Strand 3, "Prisoners". See also, Drake and Scott, "Overcoming obstacles," 412-13.

or risk of harm posed by the punishment-deserving 'ordinary decent criminal.'[174]

The emphasis on human rights-compliant imprisonment of deserving individuals has perpetuated acceptance of prison in Northern Ireland in the face of numerous opportunities for change. In 2007, after increases in both women's imprisonment and women's deaths while imprisoned,[175] Baroness Jean Corston was commissioned by the UK Government to investigate the treatment of vulnerable women in the criminal justice system.[176] Recognising the failure of prisons to meet the needs of vulnerable women, Corston argued for women's community centres as alternatives to jail[177] and rejected the use of remand for women unlikely to receive a custodial sentence.[178] At the same time, however, Corston explicitly rejected prison abolition and held firm on imprisoning women who posed serious risks to the public, *i.e.,* those deserving of punishment.[179] Thus, as in the Agreement, Corston placed women on a 'carceral continuum' in which certain women deserved punishment while others did not.[180] Corston justified imprisonment of deserving women on the grounds of a 'human rights approach to prison management.'[181] According to Corston, such an approach would provide meaningful activity, structure, mutual aid, feelings of safety and control, normalisation, social inclusion, health or recovery services, and empowerment to both

[174] Drake and Scott, "Overcoming obstacles," 412-13.

[175] Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System, *The Corston Report: The Need for a Distinct, Radically Different, Visibly-Led, Strategic, Proportionate, Holistic, Woman-Centred, Integrated Approach*, (March 2007) [Corston Report] 1. This was a global trend: between 2000 and 2019, women's imprisonment increased by 53% as compared to a 19.6% increase of men's imprisonment. Gillian McNaul, "The Space In-Between: The Gendered Marginalisation of Women's Custodial Remand," policy briefing paper for Queens University Belfast, February, 2019, 1, https://www.qub.ac.uk/home/queens-on-gender/research-activity/TheSpaceIn-between.html#:~:text=Research%20Activity-,Paper%3A%20The%20Space%20In%2Dbetween%3A%20The%20Gendered%20Marginalisation%20of,global%20arena%20of%20remand%20imprisonment.

[176] See Corston Report. See also, Linda Moore, Phil Scraton and Azrini Wahidin, "Introduction" in *Women's Imprisonment and the Case for Abolition*, ed. Linda Moore, Phil Scraton and Azrini Wahidin (Routledge, 2017) 1.

[177] Corston Report 59-68.

[178] Corston Report 58. 10 years after issuing her report, only two out of 43 recommendations were realised, and one only partially. Phil Scraton and Bree Carlton, "Beyond Corston: The politics of decarceration and abolition in a punitive climate" in Moore, Scraton and Wahidin, *Women's Imprisonment*, 173.

[179] Corston Report i, 58.

[180] Gillian McNaul, "Post-Corston Reflections on Remanded Women's Experiences in Northern Ireland" in Moore, Scraton and Wahidin, *Women's Imprisonment*, 104.

[181] Corston Report 18.

the women and, significantly, the prison workforce.[182]

Another opportunity for radical change that instead further conflated human rights and prison occurred upon devolution of policing and justice powers to the Northern Ireland Assembly. As part of the 2011 Hillsborough Agreement,[183] a Prison Review Team led by Dame Anne Owers was charged with reviewing the conditions and oversight of prisons.[184] The Owers Report explicitly placed human rights at the centre of its goal of 'fundamental change and transformation.'[185] That change did not include rethinking the role of prisons in society. Instead, it relied on IHR and European standards on prison conditions and prisoner treatment as an 'ethical basis for running prisons.'[186] Using these standards, Owers argued for rehabilitative service provision to address the frequent ill-health, substance misuse, and self-harm that occur within prison walls[187] as well as a reduction in the prison population.[188] In other words, Owers recognised the harms of containment and the social marginalisation that leads to it.[189] Yet, she failed to question the value of individual punishment or emphasise preventative community-based alternatives to such punishment.[190] Instead, Owers accepted the deserving-undeserving dichotomy and applied a human rights panacea, again legitimising the prison in Northern Ireland with the language of human rights.[191]

On the surface, early release mechanisms and reports calling for alternatives to remand or custodial sentences gestured towards limiting reliance on prison. Upon closer inspection, however, the acceptance of deserving and undeserving populations and the entanglement of human rights with punishment strengthened the role of prisons within Northern Ireland. These same dynamics are at play in the Agreement's response to and subsequent reforms of policing.

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[182] Corston Report 18.
[183] Agreement at Hillsborough Castle (Feb. 5, 2010).
[184] Dame Anne Owers et al., *Review of the Northern Ireland Prison Service: Conditions, management and oversight of all prisons* (Prison Review Team, October 2011) [Owers Report] 2.
[185] Owers Report 9.
[186] Owers Report 11-12.
[187] Owers Report, 12-13.
[188] Owers Report, 28.
[189] Owers Report, 12.
[190] Scraton, "Penal abolition in the north of Ireland," 371-73.
[191] Owers Report 12.

C. Good Friday and the Promise of Policing

The Agreement provided for a remarkable overhaul of the policing structure in Northern Ireland. It expressly recognised the particularly incendiary past of Northern Ireland's police force, given historic abuses by the Royal Ulster Constabulary ('RUC').[192] Therefore, the Agreement sought to establish a 'new beginning to policing in Northern Ireland' expressly based upon 'principles of protection of human rights.'[193] Unfortunately, 1998 represented just that – a new beginning, rather than an end, to policing.

Charting the path forward was the 1999 Patten Report.[194] Similar to the prison reform efforts, the Patten Report started from the assumption that police are both legitimate and necessary to uphold the rule of law in a liberal democracy.[195] Recognizing the distinctly tenuous position of police in Northern Ireland,[196] the Patten Report endeavoured to reimagine the RUC as a new entity reflective of the community it policed[197] and with its fundamental purpose being 'the protection and vindication of the human rights of all.'[198] The Patten Report went so far as to state that protection of human rights is the very purpose of policing.[199] To achieve that purpose, the Patten Report recommended that the ECHR be integrated into the Police Service Northern Ireland ('PSNI') code of ethics and training modules.[200] Thus, the Patten Report situated the continuation of both police and human rights protection as reliant upon each other, bolstering the former's perception, acceptance, and legitimacy within

[192] Agreement, Annex A, "Policing and Justice" s.1.
[193] Agreement, Annex A, "Policing and Justice" ss.1-2.
[194] Lord Christopher Patten, *A New Beginning: Policing in Northern Ireland* (Report of the Independent Commission on Policing for Northern Ireland, 1999) [Patten Report].
[195] Patten Report, para. 1.12.
[196] Patten Report, para. 1.3.
[197] Patten Report, para. 15.4-15.7.
[198] Patten Report, para. 4.1. The effort to distinguish the Police Service Northern Ireland ('PSNI') from its predecessor organisation has proven more difficult than potentially thought. For example, one need only attend a student protest at Queens University Belfast to hear protestors refer to the PSNI crowd control officers as 'RUC.'
[199] Patten Report, para. 4.6.
[200] Patten Report, para 4.8. The Patten Report also recommended the creation of a new Policing Board and Police Ombudsman, incorporation of a human rights lawyer within the PSNI, neighbourhood policing teams, and more. Patten Report, paras. 4.11, 6.2, 6.41, 7.10.

society.[201]

The notion of human rights protection as policing's *raison d'etre* has underpinned calls for reform across the island of Ireland. In 2018, for instance, the Commission on the Future of Policing in Ireland (the 'Commission') issued a report stating that '[p]olicing is one of the ways in which the state meets its obligations to protect fundamental human rights,' despite the concurrent ability of police to curtail such rights.[202] As seen in the Patten Report, the Commission recommended establishing a human rights unit and conducting human rights training, particularly regarding treatment of minoritised populations.[203]

Additionally, in March 2022, one of the leading human rights organisations in Northern Ireland, the Committee on the Administration of Justice ('CAJ'), held a conference on the PSNI's 200-plus human rights reforms since the Patten Report.[204] During the conference, three IHR and policing experts lauded the human rights-based approach to policing.[205] Perhaps most clearly embodying the continuing mutually assured existence of police and human rights in Northern Ireland, one human rights practitioner stated that '[h]uman rights are not protected without the police,' despite their monopoly on violence, intrusive powers, and deprivation of liberty.[206]

The positive perception of Northern Ireland's allegedly human rights-compliant police and prison system has been adopted by Northern Irish civil society organisations, human rights scholars, the public, and beyond. For example, CAJ considers itself a critical friend to the criminal legal system and generally calls for reforms aimed at rendering policing human rights-compliant.[207] Transitional justice scholars from

[201] Patten Report, paras. 4.11, 6.2, 6.41, 7.10.
[202] *The Future of Policing in Ireland* (Commission on the Future of Policing in Ireland, September 2018) 10, https://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf.
[203] *Future of Policing*, 11-12.
[204] *PSNI@20: Human rights Reflections on Policing Reform Northern and South, Conference Report* (Committee on the Administration of Justice (CAJ), March 2022) 15, https://caj.org.uk/wp-content/uploads/2022/03/PSNI@20-HIGH-RES.pdf.
[205] CAJ, *PSNI@20*, 9-25.
[206] CAJ, *PSNI@20*, 20.
[207] "Our Work: Policing and Justice," CAJ, accessed January 16, 2025, https://caj.org.uk/our-work/policing-and-justice/.

Northern Ireland with histories of working in restorative justice programs outside the criminal legal system have also accepted that the '*need* for better policing... is indisputable.'[208] The Northern Irish general public has expressed broad support for police and prisons, particularly as responses to human rights violations stemming from the conflict there.[209] Finally, this acceptance has even extended beyond the borders of Northern Ireland, as PSNI human rights expertise is now sought by police forces around the world, including in France, Canada, Oman, and elsewhere.[210]

Despite this widespread acceptance, the reliance on carceral systems is not without issue. In fact, it has had a tangible effect on the protection of ESCRs in Northern Ireland throughout the twenty-first century. The next Part will outline the extent to which an emphasis on carceral systems has perpetuated the marginalisation of ESCRs in Northern Ireland.

III. The ESCRs Effect

While the Agreement's reliance on IHR standards fixed carceral systems in Northern Ireland, it also pushed ESCRs to the margins. Much effort was and continues to be expended to render prisons and police human rights-compliant, whereas less attention has been paid to socioeconomic concerns. Those suffering from rights deprivations in the contexts of employment, housing, and healthcare subsequently risk the most friction with carceral systems.[211] Thus, investment in police and prison reform at the expense of proper ESCRs protection feeds the cycle of carceral reliance, making both mutually reinforcing.

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[208] Kieran McEvoy, "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice," in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Hart Publishing 2008) 41 (emphasis in original).

[209] "Northern Ireland: Majority of the UK public are against the Troubles Bill – new poll," *Amnesty International*, June 23, 2023, accessed January 4, 2025, https://www.amnesty.org.uk/press-releases/northern-ireland-majority-uk-public-are-against-troubles-bill-new-poll. See also Anthony et al., *Investigations, Prosecutions, and Amnesties*, 10.

[210] Butterly, "PSNI apologises."

[211] McElhone, Kemp and Lamble, "Defund – not defend – the police" 279; McNaul, "The Space In-Between" 265-66; McNaul, "Post-Corston Reflections," 93. See also, Moore, Scraton and Wahidin, "Introduction," 4.

A. Starting at the Margins

In recent years, IHR scholars have worked diligently to re-establish the importance of ESCRs and their indivisibility from civil and political rights ('CPRs') within the human rights field.[212] Unfortunately, the historic marginalisation of the former in favour of the latter continues today.[213] This history has infiltrated both the UK government's

[212] Aoife Nolan, "The Justiciability of Social and Economic Rights: An Updated Appraisal," Working Paper No. 15 (Centre for Human Rights and Global Justice, New York University, August, 2007) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944: countering arguments distinguishing between CPRs and ESCRs based on their character, court capacity to adjudicate ESCRs, and democratic legitimacy. See also, Allison Corkery and Ignacio Saiz, "Progressive Realization using Maximum Available Resources: the Accountability Challenge," in *Research Handbook on Economic, Social, and Cultural Rights as Human Rights*, ed. Jackie Dugard, Bruce Porter and Daniela Ikawa, (Edward Elgar Publishing 2020): arguing for budget work to ensure that the notions of 'progressive realization' and 'maximum available resources' are given full, enforceable effect within the human rights system; Ben Warwick, "Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights?" *Human Rights Law Review* 19, no. 3 (2019): 467, https://doi.org/10.1093/hrlr/ngz023: arguing for greater understanding of the principle of non-retrogression to ensure fulfilment of ESCRs obligations; Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol," *Human Rights Quarterly* 42, no. 1 (2020): 48 https://muse.jhu.edu/article/747391#info_wrap: assessing emerging jurisprudence of CESCR to establish reasonableness criteria allowing for greater efficacy and legitimacy of CESCR processes; Ellie Palmer, "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights," *Erasmus Law Rev* 2, no. 4 (2009): 397, https://ssrn.com/abstract=1542674: arguing for strategic litigation of Articles 3 and 8 of the European Convention of Human Rights to protect ESCRs. There also exists a movement within transitional justice to be more cognizant of the socioeconomic causes of conflict. See Zinaida Miller, "Effects of Invisibility: In Search of the Economic in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 276-76, https://doi.org/10.1093/ijtj/ijn022; Lisa Laplante, "Transitional Justice and Peace Building: Diagnosing and Addressing Socioeconomic Roots of Violence through a Human Rights Framework," International Journal of Transitional Justice 2, no. 3 (2008): 334, https://doi.org/10.1093/ijtj/ijn031.

[213] For a debate regarding the foundational marginalisation of ESCRs in western countries, see Daniel J, Whelan and Jack Donnelly, "The West, Economic and Social Rights, and the Human Rights Regime: Setting the Record Straight," *Human Rights Quarterly* 29, No. 4 (2007), https://doi.org/10.1353/hrq.2007.0050, and Susan Kang, "The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly," (2009) 31 *Human Rights Quarterly* 31, no. 4 (2009): 1023, https://doi.org/10.1353/hrq.0.0106. For a debate as to the effectiveness of human rights advocacy of CPRs as opposed to ESCRs, see Kenneth Roth, "Defending Economic Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26, no. 1, (2004): 63, https://doi.org/10.1353/hrq.2004.0010, and Leonard Rubenstein, "How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth," *Human Rights Quarterly* 26, no. 4 (2004): 845, https://doi.org/10.1353/hrq.2004.0056.

approach to ESCRs[214] and the text of the Agreement in two ways.

First, as with many peace agreements,[215] the Agreement established a hierarchy of rights.[216] While ESCRs are referenced in the Agreement,[217] their significance is undermined by the Agreement's particular emphasis on CPRs and security reform. The Agreement incorporated the ECHR, which is almost exclusively concerned with CPRs.[218] Additionally, 6 out of 8 human rights given particular attention in the Agreement are CPRs.[219] And, while only five paragraphs of the Agreement are committed to ESCRs, 22 are devoted to security apparatus reform, showing greater willingness to address past CPR violations by the police than future socioeconomic deprivations.[220] The emphasis on addressing past CPR violations is also reflected in the Agreement's establishment of a power-sharing arrangement designed to meet the governance goals of the communities involved in prior conflict.[221]

Second, where ESCRs are referenced in the Agreement, no specific rights are enumerated.[222] Rather, ESCRs are abstracted through vague language of equality of opportunity and are not written explicitly into the Agreement as ends in themselves.[223]

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[214] See Joint Committee on Human Rights, The International Covenant on Economic, Social and Cultural Rights: Twenty-First Report of Session 2003-04, 2003-2004, HL 183/HC 1188, 9-14.

[215] Rory O'Connell, Lina Malagón and Fionnuala Ni Aoláin, "Are Economic, Social and Cultural Rights Sidelined in Peace Agreements? Insights from Peace Agreement Databases," *Gonzaga Journal of International Law* 26, no. 1 (2022): 28, https://ssrn.com/abstract=4468905.

[216] Rory O'Connell, Lina Malagón and Fionnuala Ni Aoláin, "The Belfast/Good Friday Agreement and Transformative Change: Promise, Power, and Solidarity," *Israel Law Review* 57, no. 1 (2023): 18, https://doi.org/10.1017/S0021223723000031.

[217] Agreement, Strand 3, "Rights, Safeguards and Equality of Opportunity," "Human Rights and Economic, Social and Cultural Issues."

[218] European Convention on Human Rights, November 4, 1950 [ECHR].

[219] Agreement Strand 3, Rights, Safeguards and Equality of Opportunity, "Human Rights."

[220] Agreement Strand 3, Rights, Safeguards and Equality of Opportunity, "Economic, Social and Cultural Issues," "Decommissioning," and "Policing and Justice."

[221] Agreement, Strand 1, Democratic Institutions in Northern Ireland, "Safeguards," s.5. See also O'Connell, Malagón and Ni Aoláin, "The Belfast/Good Friday Agreement," 25.

[222] Agreement Strand 3, Rights, Safeguards and Equality of Opportunity, "Economic, Social and Cultural Issues."

[223] O'Connell, Malagón and Ni Aoláin, "The Belfast/Good Friday Agreement," 18. See also, Agreement Strand 3, Rights, Safeguards and Equality of Opportunity, "Human Rights": emphasizing equal opportunity in all social and economic activity); Agreement Strand 3, Rights, Safeguards and Equality of Opportunity, "Economic, Social and Cultural Issues": only requiring the British Government to pursue 'broad policies for sustained economic growth' and for 'promoting social inclusion, including in particular community development and the advancement of women in public life.' The most specifically addressed ESCR is right to promotion of the Irish language. Ibid.

There is also no dispute resolution forum within the Agreement, and the subsequently enacted statutory equality duty continues to be significantly diluted.[224] Finally, for years, the Northern Ireland Executive failed to adopt an anti-poverty strategy, despite its mandate to do so in 1998.[225] These failings have made it all the more difficult to protect ESCRs in the face of Northern Ireland government collapses,[226] UK austerity policies,[227] and Brexit.[228]

B. ESCRs and Offending Pathways

The lack of ESCRs protection for particular populations and the growing criminal legal apparatus in Northern Ireland are mutually reinforcing. This is because, rather than promote ESCRs either in the Agreement or afterwards, governments have preferred to criminalise conduct that may be seen as the result of a lack of ESCRs protections.[229] For example, rough sleeping is still criminalized by the Vagrancy Act 1824 and Vagrancy (Ireland Act) 1847;[230] police officers increasingly respond to mental health crises[231] and overwhelmingly target individuals from socioeconomically deprived

[224] O'Connell, Malagón and Ni Aoláin, "The Belfast/Good Friday Agreement," 20. This is only further hindered by the dualist approach to international law of both the UK and Ireland, which requires that the domestic governments of each state explicitly incorporate international treaties into domestic law for them to have effect.

[225] Northern Ireland Act 1998 s. 28E. See also, Committee on the Administration of Justice (CAJ) and Brian Gormally's Application [2015] NIQB 59; New Decade, New Approach, January 2020, p. 9.

[226] O'Connell, Malagón and Ni Aoláin, "The Belfast/Good Friday Agreement," 29; Special Rapporteur on Extreme Poverty Philip Alston, *Statement on Visit to the United Kingdom* (November 16, 2018), https://www.ohchr.org/en/statements/2018/11/statement-visit-united-kingdom-professor-philip-alston-united-nations-special?LangID=E&NewsID=23881.

[227] Mark Simpson, "Assessing the Compliance of the United Kingdom's Social Security System with its Obligations under the European Social Charter," *Human Rights Law Review* 18, no. 4 (2018): 745, https://doi.org/10.1093/hrlr/ngy030: arguing that the UK's austerity measures violated various argues of the European Social Charter; Paul O'Connell, "Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity," in *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, ed. Aoife Nolan, Colin Harvey and Rory O'Connell (Hart, 2013) 60-61.

[228] Sarah Craig, Claire Lougarre and Rory O'Connell, *EU Developments in Equality and Human Rights: Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland: Update Paper on Developments post January 2022* (Equality Commission Northern Ireland, November 2024) 21-22, https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/DMU/EU-EqualityHumanRights-BrexitImpactUpdate-Nov2024.pdf: discussing renewed speculation about the UK's withdrawal from the ECHR.

[229] McNaul, "Post-Corston Reflections" 93. See also, Moore, Scraton and Wahidin, "Introduction" 4.

[230] Vagrancy Act (1824) s. 4; Vagrancy (Ireland) Act 1847 s. 3.

[231] Judith Bailie, *From custody to community: mental health and criminal justice in Northern Ireland* (Northern Ireland Assembly Research and Information Service) updated October 10, 2023, accessed

neighbourhoods for stop and search;[232] Belfast-based immigrants, including minors, are more frequently threatened with criminal detention amidst crackdowns on illegal employment and immigration;[233] and, imprisonment can lead to unemployment.[234] At best, then, these realities increase interaction between individuals suffering ESCRs deprivations and the criminal legal system; at worst, they actively contribute to the criminalisation of those suffering from such deprivations.

This has resulted in particularly harsh consequences regarding the rights to employment, adequate standards of living, and the highest attainable physical and mental health for Northern Ireland's most vulnerable populations. Instead of appropriate investment in the protection of these ESCRs, governments have relied on carceral responses to the social ills of poverty, homelessness, mental ill-health, or substance abuse.[235] Those suffering from these rights deprivations subsequently risk the most friction with carceral systems.[236]

Northern Irish carceral abolitionists, such as McNaul, Moore, Scraton, and Wahidin, argue that the state has conflated 'social need' with 'lifestyle risk.'[237] In other words, social concerns of poverty, homelessness, mental ill-health, and substance abuse are not recognised as failures of the state to promote social well-being or protect certain

June 3, 2025, https://www.assemblyresearchmatters.org/2024/10/10/from-custody-to-community-mental-health-and-criminal-justice-in-northern-ireland/.

[232] Topping and Bradford, "Now you see it, now you don't," 98.

[233] Claire Williamson, "More than 30 men – including 16-year-old – arrested as officers swoop on illegal workers in Belfast," *Belfast Telegraph*, Mar 23, 2025, https://www.belfasttelegraph.co.uk/news/northern-ireland/more-than-30-men-including-16-year-old-arrested-as-officers-swoop-on-illegal-workers-in-belfast/a1941850669.html.

[234] Northern Ireland Audit Office, *Reducing Adult Reoffending in Northern Ireland* (June 13, 2023) accessed June 3, 2025, https://www.niauditoffice.gov.uk/files/niauditoffice/documents/2023-06/NI%20Audit%20Office%20Report%20-%20Reducing%20Adult%20Reoffending%20in%20NI_0.pdf.

[235] Megan McElhone, Tom Kemp and Sarah Lamble, "Defund – not defend – the police: A response to Fleetwood and Lea," *Howard Journal of Crime and Justice* 62 (2023): 279, http://doi.org/10.1111/hojo.12508; Gillian McNaul, "The Space In-Between: An examination of the marginalization experienced by women remand prisoners in Northern Ireland" (PhD diss., Queens University Belfast, 2018), 265-66, https://pure.qub.ac.uk/en/studentTheses/the-space-in-between-2; McNaul, "Post-Corston Reflections," 93. See also, Moore, Scraton and Wahidin, "Introduction," 4.

[236] McElhone, Kemp and Lamble, "Defund – not defend – the police" 279; McNaul, "The Space In-Between" 265-66; McNaul, "Post-Corston Reflections," 93. See also, Moore, Scraton and Wahidin, "Introduction," 4.

[237] McNaul, "Post-Corston Reflections" 93. See also, Moore, Scraton and Wahidin, "Introduction" 4.

rights, but rather as pathways to individual criminal conduct.[238] McNaul argues that this is particularly problematic in Northern Ireland, given its history of conflict, which contributed to systematic disinvestment, heightened unemployment, physical and mental ill-health, and substance abuse, all of which are further compounded on gender grounds due to patriarchal religious systems.[239] As a result, the communities most affected by the failure to promote ESCRs are also the communities that tend to be disproportionately targeted by police and represented in prisons.[240] This is true both for the 'illegal workers' detained in Belfast, who already suffer 'extremely poor living conditions, inhumane working hours and below minimum wage,' and for the vulnerable women addressed in the Corston Report.[241]

The increase in carceral responses to these concerns fails to recognise that policing, imprisonment, and efforts to render them human rights-compliant actually detract resources from investment in community programs that might mitigate these so-called offending pathways.[242] Indeed, activists and academics argue police and prisons, with their own histories of promoting the interests of specific populations over others,[243] cannot adequately protect the communities that tend to bear the 'brunt of suspicion, intervention and violence' based on their minority, gender, or socioeconomic status.[244] Rather than resolve the state-created pathways to incarceration, such as a lack of employment, social housing, or adequate physical and mental healthcare, the UK and Northern Ireland governments have responded by individualising these social harms and displacing them to allegedly human rights-compliant carceral settings.[245]

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[238] McNaul, "Post-Corston Reflections" 93. See also, Moore, Scraton and Wahidin, "Introduction" 4.
[239] McNaul, "Post-Corston Reflections," 91-92.
[240] McElhone, Kemp and Lamble, "Defund – not defend," 279; McNaul, "The Space In-Between," 265-66; McNaul, "Post-Corston Reflections," 93. See also, Moore, Scraton and Wahidin, "Introduction," 4.
[241] Williamson, "More than 30 men." See also, McNaul, "Post-Corston Reflections" 93; Moore, Scraton and Wahidin, "Introduction" 4.
[242] McNaul, "Post-Corston Reflections," 91-92. See also Maureen Mansfield, "Irish Penal Abolition Network: A New Voice With An Old Ideal," *Abolitionist Futures,* https://abolitionistfutures.com/latest-news/irish-penal-abolition-network-a-new-voice-with-an-old-ideal.
[243] See Butterly, "PSNI apologises"; Adam Elliott-Cooper, *Black Resistance to British Policing* (Manchester University Press, 2021) 40-41; Drake and Scott, "Overcoming obstacles," 413.
[244] McElhone, Kemp and Lamble, "Defund – not defend – the police," 279; McNaul, "The Space In-Between," 53-58.
[245] McNaul, "Post-Corston Reflections," 89; McElhonone, Kemp and Lamble, "Defund – not defend," 279; McNaul, "The Space In-Between," 265-66.

Thus, the acceptance of human rights-compliant carceral systems and the failure to adequately protect ESCRs are mutually reinforcing. The fixation on human rights-based police and prison reform from the Agreement through today has failed to adequately account for and safeguard ESCRs, including the employment rights, an adequate standard of living, and the highest attainable standards of physical and mental health. Given that poverty, homelessness, mental ill-health, and substance abuse are viewed as offending pathways leading to criminalisation and are replicated within carceral settings, the failure to adequately protect the ESCRs that might mitigate such social harms further feeds the carceral systems already receiving greater attention. The next Part will explore criticisms of the mutually reinforcing role of carceral acceptance and ESCRs denial from a Northern Ireland and international perspective.

IV. The False Promise of Human Rights-Compliant Prisons and Police

This Part will place the arguments of the carceral abolitionists discussed above in conversation with those of Northern Irish agencies, government representatives, and IHR scholars, practitioners, and bodies to highlight these mutually reinforcing roles. This Part will then explore the positive progress made on criminal law policy in Northern Ireland and further anti-carceral human rights alternatives that de-emphasise reliance on carceral systems in favour of protection of ESCRs.

A. Anti-Carceral Critics at Home

It is not just Northern Irish carceral abolitionists who have criticised Northern Ireland's police and prisons. Indeed, the reformers themselves, Corston, Owers, and Patten, all criticised police and prisons and were commissioned by either the UK or Northern Ireland governments. Still other government entities have conducted extensive reviews of prisons and found much to criticise, particularly pertaining to self-harm, substance misuse, mental ill-health, bullying, intimidation, and the failure to provide therapeutic counselling, occupational therapy, or constructive employment and educational opportunities.[246] There is also a steady stream of reputable exposés on

[246] HM Chief Inspector of Prisons and the Chief Inspector of Criminal Justice in Northern Ireland (HMCIP/CIJINI), Report on an unannounced inspection of Hydebank Wood Prison and Young Offender Centre (14-17 Mar 2005), 2005, https://cjini.org/getattachment/223afdb3-2d54-4157-9bb1-

rampant police abuse and discrimination from Northern Irish publications,[247] including at the 2022 CAJ conference on human rights policing reform.[248] At that same conference, Dr. John Topping highlighted that, despite having undergone 200 human rights reforms, the PSNI is 'arguably the poorest performing police service in the UK for stop and search.'[249] Additionally, Lilliana Senoi-Barr, then the Director of Programmes for the North West Migrants Forum and now the Mayor of Derry, stated that the 'history of differential treatment in policing minority ethnic communities and how they have been targeted for particular forms of policing is well documented.'[250]

The arguments that marginalised populations are over-policed and under-protected, police have contributed to abuse of vulnerable populations, and prisons fail to meet standards that promote human dignity, mirror criticisms of police and prisons made by IHR bodies more generally.[251] For one, local and international bodies argue that the

1991ff0c2453/Hydebank-Wood-Prison-March-2005.aspx; HMCIP/CIJINI, Report on an unannounced inspection of Hydebank Wood Young Offender Centre 5-9 Nov 2007, 2008, https://cjini.org/getattachment/743c0eb6-5bc1-4a27-b08f-e0d17ad490e3/Hydebank-Wood-Young-Offender-Centre-November-2007.aspx; HMCIP/CIJINI, Report on an unannounced full follow-up inspection of Maghaberry Prison 19-23 Jan 2009, 2009, https://cjini.org/getattachment/a258078a-5376-4c89-88c8-13d4e0e4f3ee/Report-on-an-unannounced-full-follow-up-inspection-of-Maghaberry-Prison-19-23-January-2009.aspx; HMCIP/CIJINI, Report on an unannounced short follow-up inspection of Hydebank Wood Young Offenders Centre 21-25 Mar 2011, 2011, https://cjini.org/getattachment/bed0d54a-b267-4925-9555-4394af77c3b3/Hydebank-Wood-Young-Offenders-Centre.aspx; HMCIP/CIJINI, Report on an unannounced inspection of Maghaberry Prison 11-22 May 2015, 2015, https://cjini.org/getattachment/a98fca95-ae81-4443-88cc-1870be44250f/report.aspx; HMCIP/CIJINI, Overview of initial findings of a report on an unannounced inspection of Maghaberry Prison 4-15 January 2016, 2016, https://cjini.org/getattachment/4a4b596d-24bb-418f-a50c-9da353df0d88/report.aspx; HMCIP/CIJINI, Report on an announced visit to Maghaberry Prison 5-7 September 2016, 2016, https://cjini.org/getattachment/1d77c1e6-8311-413e-ad9d-b9f9aa384506/report.aspx.

[247] Campbell, "£1.6m spent on suspended PSNI"; Butterly, "PSNI apologises"; Topping and Bradford, "Now you see it, now you don't," 98.

[248] CAJ, *PSNI@20*, 38.

[249] CAJ, *PSNI@20*, 38.

[250] CAJ, *PSNI@20*, 41.

[251] Johnson, "The Advocacy Gap." See also, Mgbako et al., "Anti-Carceral Human Rights Advocacy," 187-89, and accompanying footnotes. IHR bodies have not only explicitly criticised police forces and prison conditions, but also recognised concerns over the relationship between criminal law and ESCRs. These include the Inter-American Commission on Human Rights, the U.N. Human Rights Council, and treaty monitoring bodies. For an extensive list of publications by international human rights institutions that provide these criticisms, see Mgbako et al., "Anti-Carceral Human Rights Advocacy," 188-89, nn. 114-115. Yet, in the same breath that these bodies criticise the conduct of police or the conditions of prisons, more often than not, they also call for reformist reforms that strengthen these institutions. Mgbako et al., "Anti-Carceral Human Rights Advocacy," 187-88.

continued recognition of populations deserving and undeserving of punishment and government co-optation of restorative justice accepts the validity of criminal punishment, creates dynamics of offender-victim, and detracts resources from alternative mechanisms of justice.[252] Second, local and international bodies argue that reliance on individual criminal responses to harm distracts from the structural causes of a given offence, which are often rooted in ESCRs deprivations, social exclusion, or economic violence.[253] Finally, international and local bodies argue that individual criminal accountability ignores the role of the state or its agents in creating the structural dynamics leading to harm in the first place, such as governmental collapses resulting from the power-sharing arrangement, policies of austerity, and, of course, Brexit.[254]

Related arguments have even entered the jurisprudence of the ECtHR, which applies to Northern Ireland through the Human Rights Act 1998.[255] Despite historically being at least permissive and at most supportive of domestic criminal legal sanctions, the ECtHR explicitly recognised the role of poverty, illiteracy, and unemployment in exposure to criminal penalties in the 2021 case of *Lăcătuş v. Switzerland*.[256] The ECtHR considered whether issuing a custodial sentence against a 19-year-old Roma woman living in extreme poverty without employment or formal education after she failed to pay a fine for begging violated her right to private life under Article 8 of the ECHR.[257] The ECtHR conducted an extensive comparative law analysis of European states that banned begging through criminal legal sanctions, including Ireland and the UK,[258] and assessed United Nations, European, Inter-American, and African

[252] Mamdani, "Beyond Nuremberg," 352–53. See also, Department of Justice, "Restorative Justice Protocol and Annual Report published," July 21, 2023, https://www.justice-ni.gov.uk/news/restorative-justice-protocol-and-annual-report-published.
[253] Karen Engle, "Introduction" in Engle, Miller and Davis, *Anti-Impunity and the Human Rights Agenda*, 9. See also, McNaul, "Post-Corston Reflections," 91-92.
[254] Engle, "Anti-Impunity and the Turn to Criminal Law," 1120–21. See also, O'Connell, Malagón and Ni Aoláin, "The Belfast/Good Friday Agreement," 29; Simpson, "Assessing the Compliance of the United Kingdom's Social Security System," 745; Craig, Lougarre and O'Connell, *EU Developments in Equality and Human Rights*, 21-22.
[255] Human Rights Act 1998 (U.K.); *Dillon*, at 144-215, 710(i)-(ii).
[256] Lăcătuş v. Switzerland, App. No. 14065/15, 58 (Jan. 19, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207695%22]}.
[257] *Lăcătuş*, at 50.
[258] *Lăcătuş*, at 19-31.

international legal instruments that highlighted the particularly acute harms to vulnerable people resulting from criminalisation of begging and homelessness.[259] Upon this assessment, the ECtHR held that punishing an extremely vulnerable person for pursuing one of her only means of subsistence and survival diminished her human dignity, impaired the essence of her rights under Article 8, and was not necessary in a democratic society.[260]

This case is particularly relevant to Northern Ireland. The underlying structural causes of the claimant's alleged criminal conduct included that she lived in poverty, had no employment, was not educated, and had to beg as a means of subsistence.[261] In other words, a lack of access to ESCRs, including rights to adequate conditions of work and remuneration, education, and housing, contributed to the claimant's vulnerability. Instead of taking steps necessary to protect, respect, and fulfil those ESCRs, Swiss law criminalised the very actions necessary for her subsistence.[262] In *Lăcătuş*, the effect of this criminalisation was to avoid state responsibility for the failure to protect a particularly vulnerable person's ESCRs and to respond with further rights deprivations through incarceration, contributing to the over-criminalisation of the Swiss Roma population.[263]

The facts of *Lăcătuş* exemplify the mutually reinforcing roles played by a belief in carceral legitimacy, a scepticism of ESCRs protection, and the adverse effects of both on marginalised groups. Northern Ireland similarly still criminalises rough sleeping[264] and suffers from many of the same ESCRs deprivations with particularly harsh

[259] *Lăcătuş*, at 32-49.
[260] *Lăcătuş*, at 115.
[261] *Lăcătuş*, at 50.
[262] *Lăcătuş*, at 19-49.
[263] Daniel Rietiker and Mary Levine, "Begging the Question: Lăcătuş v. Switzerland and the European Court of Human Rights' Recognition of Begging as a Human Rights Issue" *Harvard International Law Journal Online* April 6, 2022, https://journals.law.harvard.edu/ilj/2022/04/begging-the-question-la%cc%86ca%cc%86tus%cc%a7-v-switzerland-and-the-european-court-of-human-rights-recognition-of-begging-as-a-human-rights-issue/.
[264] Vagrancy Act (1824) s. 4; Vagrancy (Ireland) Act 1847 s. 3.

consequences for vulnerable populations, including Travellers,[265] asylum seekers,[266] women,[267] people with disabilities,[268] and LGBTQIA+ individuals.[269] This raises the spectre of similar rights violations to those in *Lăcătuş*. Luckily, however, the ECtHR recognised these violations. Perhaps it is this recognition that has contributed to contemporary changes to the carceral landscape in Northern Ireland.

B. A Changing Landscape?

These criticisms and the continued failure to protect ESCRs suggest that it is time to reconsider the Agreement's promise of human rights-compliant criminal legal systems. Instead, Northern Ireland civil society should be encouraged and emboldened to render carceral systems obsolete through a 'constellation of alternative strategies and institutions' to revitalise 'education at all levels, a health system that provides free

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[265] *Response to the Consultation by the Department of Health on the draft Mental Health Strategy 2021-2031*, Equality and Human Rights Commission (EHRC), (2021), para. 2.17, https://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2021/DoH-draftMentalHealthStrategy.pdf.

[266] [266] "Asylum Support: What You'll Get," UK Visas and Immigration (UKVI), accessed December 30, 2024, https://www.gov.uk/asylum-support/what-youll-get. UN Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, ¶¶ 24, 34, U.N. Doc. E/C.12/GBR/CO/6 (July 14, 2016).

[267] *Joint Northern Ireland Civil Society Submission to the United Nations Committee on Economic, Social and Cultural Rights*, (Human Rights Consortium, January 2023), paras. 76-77, https://www.humanrightsconsortium.org/wp-content/uploads/2023/02/Joint-NI-Civil-Society-submission-to-UN-Committee-on-Economic-Social-and-Cultural-Rights-CESCR-Jan-2023.pdf. See also, NISRA, "Employee Earnings." Promises of regulations requiring gender pay gap reporting have not come to fruition since 2016. Robert Sheen, "Pay Gap Reporting on Deck in Northern Ireland," *Trusaic*, December 19, 2024, https://trusaic.com/blog/pay-gap-reporting-on-deck-in-northern-ireland/.

[268] "Little progress tackling issues affecting people with disabilities," Equality Commission Northern Ireland (ECNI), Aug. 17, 2023, https://www.equalityni.org/Footer-Links/News/Delivering-Equality/Tackling-issues-affecting-persons-with-disabilities. See also "Disability pay and employment gaps," TUC, accessed December 30, 2024, https://www.tuc.org.uk/sites/default/files/2020-11/Disabled%20workers%20note.pdf; Jonathan Portes and Howard Reed, "The cumulative impact of tax and welfare reforms," Equality and Human Rights Commission, (March 2018), https://www.equalityhumanrights.com/sites/default/files/cumulative-impact-assessment-report.pdf: cited in Human Rights Consortium, *Joint Northern Ireland Civil Society Submission*, para. 79;

[269] See Detention and Escorting Services, "FOI 72097," October 19, 2022, https://www.humanrightsconsortium.org/wp-content/uploads/2022/12/EDB-FOI-72097-Response.pdf; Detention and Escorting Services, "FOI 72494," December 8, 2022, https://www.humanrightsconsortium.org/wp-content/uploads/2022/12/EDB-FOI-72494-Response.pdf; Rainbow Migration, *Ending the immigration detention of LGBTQI+ people* (September 2023), https://www.rainbowmigration.org.uk/wp-content/uploads/2023/10/LGBTQI-Detention-Parliamentary-Briefing-September-2023-v4-Web.pdf. See also, Human Rights Consortium, *Joint Submission*, para. 61.

physical and mental health care for all, and a justice system based on reparation and reconciliation rather than retribution and vengeance.'[270] A complete assessment of how to operationalise this abolitionist vision is beyond the scope of this paper.

Heeding such abolitionist calls, however, human rights advocates could both criticise carceral systems and promote substantive fulfilment of ESCRs for those most at risk of contact with those systems.[271] Suppose one is to follow the example of abolitionist organisations in Northern Ireland. This may take the form of arguing against reformist reforms, such as hate crime legislation or stop and search best practices, in favour of abolitionist ones, such as repealing prison-building projects or decriminalising sex work, drug use, or immigration.[272] Human rights organisations in Northern Ireland, including NIACRO, Sex Workers Alliance, and Participation and Practice of Rights, are already doing some of this work by exploring restorative justice alternatives to prosecution, criticising the minimum age of criminal responsibility, arguing for decriminalisation of sex work, and pursuing advancement of socioeconomic rights.[273]

While not self-identifying as abolitionists, the organisations above are leaders in the field of 'anti-carceral human rights advocacy'[274] and are models for its effective practice. In fact, their efforts are working. Northern Irish leaders are listening to the human rights concerns raised by these organisations and IHR bodies, as Justice Minister Long recently launched a consultation on the decriminalisation of 'rough

[270] Angela Y. Davis, *Are Prisons Obsolete* (Seven Stories Press, 2003) 107.
[271] Mgbako et al, "Anti-Carceral Human Rights Advocacy," 205-07.
[272] "Defund the police: Reformist Reforms vs Abolitionist Steps for UK policing," Abolitionist Futures, (2020), accessed November 10, 2024, https://abolitionistfutures.com/defund-the-police#:~:text=The%20purpose%20of%20this%20chart,communities%20for%20health%20and%20flourishing; Mansfield, "Irish Penal Abolition Network;" "About EDB," End Deportations Belfast, accessed 10 November 2024, https://enddeportationsbelfast.wordpress.com/about-edb/.
[273] Johnson, "The Advocacy Gap." See also, *Policy Priorities 2017-2018*, NIACRO, https://www.niacro.co.uk/sites/default/files/NIACRO%20Policy%20Priorities%202017-2018.pdf; "Garda and Court Stats Are Proof that Sex Work Laws Are a Complete Failure," Sex Workers Alliance Ireland, updated October 18, 2024, accessed 10 November, 2024, https://sexworkersallianceireland.org/2024/10/garda-and-court-stats-are-proof-that-sex-work-laws-are-a-complete-failure/; Seán Mac Bradaigh, "Racism in Belfast: What do we know? And how are we using it to combat racist violence?" *PPR*, (August 5, 2024), https://www.nlb.ie/blog/2024-08-racism-in-belfast-what-do-we-know-and-how-are-we-using-it-to-combat-racist-violence.
[274] Mgbako et al., "Anti-Carceral Human Rights Advocacy," 175.

sleeping' and begging.[275] Such 'anti-carceral human rights advocacy' thus provides the starting point for a new experiment that aligns more closely and explicitly with the goals of abolition and extends beyond the borders of Northern Ireland.

This is not a radical notion. As early as 1980, the Council of Europe analysed the costs of criminal justice and considered arguments for decriminalisation within a broader abolitionist perspective.[276] The European Council's Subcommittee on Decriminalisation proposed reducing the criminal legal apparatus by expanding access to housing, education, healthcare, social services, and community interventions that attacked root causes of undesirable conduct.[277] Other UN bodies have also recognised the social harms of incarceration and the root causes of interpersonal harm while actively promoting non-custodial measures.[278]

Despite these criticisms and their successes, for the most part, Northern Ireland,[279] Europe,[280] and the world[281] remain beholden to the repeatedly proven failure of carceral logic, especially in response to human rights abuses. Northern Ireland alone has seen recent increases in remand and custody populations,[282] police use of force,[283] and imprisonment of individuals with mental health concerns.[284] As outlined in this section, however, there is growing evidence that a human rights-compliant carceral system is a contradiction in terms.[285] As a result, it may be time to seriously

[275] "Justice Minister launches consultation on decriminalization of rough sleeping and begging," Department of Justice, updated November 20, 2024, accessed February 1, 2025, https://www.justice-ni.gov.uk/news/justice-minister-launches-consultation-decriminalisation-rough-sleeping-and-begging.
[276] European Committee on Crime Problems (ECCP), *Report on Decriminalisation*, (1980): cited in Pinto, "Coercive Human Rights" *passim*.
[277] Pinto, "Coercive Human Rights," 1121-23.
[278] See generally, GA Res 45/110, (Dec. 14, 1990); UNDOC, UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary (Bangkok Rules), U.N. Doc. A/RES/65/229 (Mar. 16, 2011); ECOSOC, Commission on Crime Prevention and Criminal Justice, Report on the twenty-seventh session (8 December 2017 and 14-18 May 2018) U.N. Doc. E/2018/30 (2018).
[279] *Amnesty International*, "Majority of the UK public"; Anthony et al., *Investigations, Prosecutions, and Amnesties*.
[280] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press, 2009), 111.
[281] See generally Engle, "Anti-Impunity and the Turn to Criminal Law"; Sikkink, *Justice Cascade*.
[282] Department of Justice, "Northern Ireland Prison Population 2023/24"
[283] Police Service of Northern Ireland, "Use of Force by the Police."
[284] Black, "Prison population increases."
[285] Drake and Scott, "Overcoming obstacles," 412-16; Scraton and Carlton, "Beyond Corston," 186.

consider abolitionist alternatives to the human rights-based, reformist reforms that strengthen these systems.[286]

V. Conclusion

Ever since the Agreement, decisionmakers have been shackled to the false promises of reformist reform.[287] The Agreement accepted IHR's entanglement with criminal law and the corresponding failure to promote ESCRs, with tangible consequences for the most vulnerable in Northern Ireland. The ongoing lapse of ESCRs protection has produced greater reliance on criminal legal systems rather than driving protection of these rights through the criminalisation of social harms such as homelessness, mental ill-health, or substance misuse. This has created a cycle of deprivation and criminalisation.

This should ring the alarm bells for any human rights advocate who recognises the historic harms caused by carceral systems, as it has for carceral abolitionists in Northern Ireland, Northern Irish government entities and representatives, and IHR scholars, practitioners, and bodies. Humanity's efforts to prove the law-and-order hypothesis with liberal reforms to its method has been ineffectual at eliminating harm or human rights abuses.[288]

Rather, increased reliance on policing and imprisonment has proven to cause greater harm to and disinvestment from marginalised communities, exposing those very communities to greater criminalisation. Thus, perhaps it is time to heed the calls of abolitionist activists and follow the examples of those organisations which seek alternatives to criminalisation grounded in human dignity, non-discrimination, and the promotion of rights to housing, healthcare, employment, education, and more. Perhaps it is high time to assume an abolitionist human rights agenda in Northern Ireland and

[286] "Reformist reforms vs. abolitionist steps to end imprisonment," Critical Resistance, updated May 14, 2020, accessed November 10, 2024, https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing/.

[287] For an in-depth exploration of the modern prison as the result of reforms to pervasive coercive control and power dynamics, see Foucault, *Discipline and Punish* 82: defining the primary objectives of reform as 'not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body.'

[288] Wade Mansell, *A Critical Introduction to Law* (Taylor & Francis Group, 2015) 10.

beyond.

Bibliography

Primary Sources

UK and Northern Ireland Cases

Committee on the Administration of Justice (CAJ) and Brian Gormally's Application [2015] NIQB 59

Dillon and Others v. Secretary of State of Northern Ireland [2024] NIKB 11

UK and Northern Ireland Statutes

Human Rights Act 1998

Northern Ireland Arms Decommissioning Act 1997

Northern Ireland (Emergency Provisions) Act 1996

Northern Ireland (Executive Formation etc) Act 2019

Northern Ireland (Sentences) Act 1998

Vagrancy Act (1824)

Vagrancy (Ireland) Act 1847

International Cases

Azanian Peoples Org (AZAPO) v. President of the Republic of S. Afr., 1996 (4) SA 671 (CC) (S. Afr.).

Brecknell v. UK, App. No. 32547/04 (Feb. 27, 2008), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-83470%22]}

Finucane v. UK 2003-VIII Eur. Ct. H.R. (Oct 1, 2003), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61185%22]}

Jordan v. UK, App. No. 24746/94 (May 4, 2001), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59450%22]}

Lăcătuş v. Switzerland, App. No. 14065/15 (Jan. 19, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-207695%22]}.

McCann and Others v. UK, 324 Eur. Ct. H.R. (ser. A) (1995), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57943%22]}

McKerr v. UK 2001-III Eur. Ct. H.R. (Aug. 4, 2001), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-59451%22]}

Velásquez-Rodríguez v Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988)

International Agreements

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes), Ireland-U.K., December 2, 1999, 2113 U.N.T.S. 473

European Convention on Human Rights, November 4, 1950

European Social Charter, Feb. 26, 1965, C.E.T.S. 35, 529 U.N.T.S. 89

International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3

New Decade, New Approach, January 2020

Secondary sources

Abolitionist Futures. "Defund the police: Reformist Reforms vs Abolitionist Steps for UK policing." Accessed November 10, 2024. https://abolitionistfutures.com/defund-the-police#:~:text=The%20purpose%20of%20this%20chart,communities%20for%20health%20and%20flourishing.

Amnesty International. "Northern Ireland: Majority of the UK public are against the Troubles Bill – new poll." June 23, 2023, accessed January 4, 2025. https://www.amnesty.org.uk/press-releases/northern-ireland-majority-uk-public-are-against-troubles-bill-new-poll.

Anthony, Gordan et al. *Investigations, Prosecutions, and Amnesties Under Articles 2 & 3 of the European Convention on Human Rights.* Arts and Humanities Research Council 2015. http://dx.doi.org/10.2139/ssrn.2668106.

Arbour, Louise. "Economic and Social Justice for Societies in Transition." *NYU Journal for International Law and Politics* 40, no. 1 (2007). https://nyujilp.org/wp-content/uploads/2013/02/40.1-Arbour.pdf.

Bailie, Judith. *From custody to community: mental health and criminal justice in Northern Ireland*. Northern Ireland Assembly Research and Information Service. October 10, 2023. https://www.assemblyresearchmatters.org/2024/10/10/from-custody-to-community-mental-health-and-criminal-justice-in-northern-ireland/.

Black, Rebecca. "Prison population increases by almost 40% in three years." *Irish News*, April 22, 2024 https://www.irishnews.com/news/northern-ireland/prison-population-increases-by-almost-40-in-three-years-3HSDQCGPCFAAFO23I4YWZOTAAE/#:~:text=Justice%20Minister%20Naomi%20Long%20said,1%2C886%20on%20April%201%2C%202024.

Butterly, Luke. "PSNI apologises for claiming migrants might make fake domestic abuse claims." *The Detail*, March 22, 2023. https://www.thedetail.tv/articles/psni-apologises-for-claiming-migrants-might-make-fake-domestic-abuse-claims-to-avoid-deportation.

Campbell, Niamh. "£1.6m spent on suspended PSNI officers accused of domestic abuse and sexual assault." *Belfast Telegraph*, October 4, 2024. https://www.belfasttelegraph.co.uk/news/northern-ireland/16m-spent-on-suspended-psni-officers-accused-of-domestic-abuse-and-sexual-assault/a957588661.html.

Collison, Alex. "Disability pay and employment gaps." *TUC*, November 27, 2024. https://www.tuc.org.uk/research-analysis/reports/disability-pay-and-employment-gaps.

Commission on the Future of Policing in Ireland. *The Future of Policing in Ireland*. September 2018. https://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf.

Committee on Accountability and Justice (CAJ). "Our Work: Policing and Justice." Accessed January 16, 2025. https://caj.org.uk/our-work/policing-and-justice/.

Committee on the Administration of Justice (CAJ). *PSNI@20: Human rights Reflections on Policing Reform Northern and South, Conference Report*. March 2022. https://caj.org.uk/wp-content/uploads/2022/03/PSNI@20-HIGH-RES.pdf.

Corkery, Allison and Ignacio Saiz. "Progressive Realization using Maximum Available Resources: The Accountability Challenge." In *Research Handbook on Economic, Social, and Cultural Rights as Human Rights*, edited by Jackie

Dugard, Bruce Porter and Daniela Ikawa. Edward Elgar Publishing, 2020.

Council of Europe, European Committee on Crime Problems (ECCP*). Report on Decriminalisation* (1980).

COUNCIL OF EUR. *European Prison Rules*. 2006. https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae.

Coyle, Michael J. and David Scott, eds. *The Routledge International Handbook of Penal Abolition*. Routledge, 2021.

Craig, Sara, Claire Lougarre and Rory O'Connell. Equality Commission Northern Ireland. *EU Developments in Equality and Human Rights: Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland: Update Paper on Developments post January 2022.* November 2024. https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/DMU/EU-EqualityHumanRights-BrexitImpactUpdate-Nov2024.pdf.

Critical Resistance. "Reformist reforms vs. abolitionist steps to end imprisonment." Updated May 14, 2020. Accessed November 10, 2024. https://criticalresistance.org/resources/reformist-reforms-vs-abolitionist-steps-in-policing/.

Dame Anne Owers et al., Prison Review Team. *Review of the Northern Ireland Prison Service: Conditions, management and oversight of all prisons*. October 2011.

Davis, Angela Y. *Are Prisons Obsolete*. Seven Stories Press, 2003.

Department of Justice. "Increasing the Minimum Age of Criminal Responsibility in Northern Ireland from 10 Years to 14 Years, Summary of Consultation Responses." June 2023. https://www.justice-ni.gov.uk/sites/default/files/publications/justice/summary-consultation-macr.pdf.

Department of Justice. "Restorative Justice Protocol and Annual Report published." July 21, 2023. https://www.justice-ni.gov.uk/news/restorative-justice-protocol-and-annual-report-published.

Department of Justice. "Justice Minister launches consultation on decriminalization of rough sleeping and begging." Updated November 20, 2024. Accessed February 1, 2025. https://www.justice-ni.gov.uk/news/justice-minister-launches-consultation-decriminalisation-rough-sleeping-and-begging.

Department of Justice. "The Northern Ireland Prison Population 2023/24." October 2024. https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Northern-Ireland-Prison-Population-2023-24.pdf.

Detention and Escorting Services. "FOI 72097." October 19, 2022. https://www.humanrightsconsortium.org/wp-content/uploads/2022/12/EDB-FOI-72097-Response.pdf.

Detention and Escorting Services. "FOI 72494." December 8, 2022. https://www.humanrightsconsortium.org/wp-content/uploads/2022/12/EDB-FOI-72494-Response.pdf.

Dwyer, Claire D. "Risk, Politics and the 'Scientification' of Political Judgment: Prisoner Release and Conflict Transformation in Northern Ireland." *British Journal of Criminology* 47, no. 5 (2007). https://doi.org/10.1093/bjc/azm025.

ECOSOC, Commission on Crime Prevention and Criminal Justice, Report on the twenty-seventh session (8 December 2017 and 14-18 May 2018) U.N. Doc. E/2018/30 (2018).

Elliott-Cooper, Adam. *Black Resistance to British Policing*. Manchester University Press, 2021.

End Deportations Belfast. "About EDB." Accessed 10 November 2024. https://enddeportationsbelfast.wordpress.com/about-edb/.

Engle, Karen. "Abolitionist Human Rights: Queering LGBT Human Rights Advocacy and Law." In *Queer Encounters with International Law: Lives, Communities, Subjectivities*, edited by Claerwen O'Hara and Tamsin Paige. Routledge, 2024.

Engle, Karen. "Anti-impunity and the Turn to Criminal Law in Human Rights." *Cornell Law Review* 100, no. 5 (2015). https://ssrn.com/abstract=2595677.

Engle, Karen, Zinaida Miller and DM Davis, eds. *Anti-Impunity and the Human Rights Agenda*. Cambridge University Press, 2016.

Equality Commission Northern Ireland (ECNI). "Little progress tackling issues affecting people with disabilities." Aug. 17, 2023. https://www.equalityni.org/Footer-Links/News/Delivering-Equality/Tackling-issues-affecting-persons-with-disabilities.

Equality and Human Rights Commission. *Response to the Consultation by the Department of Health on the draft Mental Health Strategy 2021-2031*. 2021. https://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2021/DoH-draftMentalHealthStrategy.pdf.

EUR. CT. HUM. RTS. *Guide on Article 2 of the European Convention on Human Rights: Right to Life*. Aug. 31, 2023. https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_eng#:~:text=Article%202%20of%20the%20Convention,-%E2%80%9C1.&text=Everyone's%20right%20to%20life%20shall,penalty%20is%20provided%20by%20law.

Foucault, Michel. *Discipline and Punish: The birth of the prison.* Penguin, 1977.

GA Res 45/110, (Dec. 14, 1990).

HM Chief Inspector of Prisons and the Chief Inspector of Criminal Justice in Northern Ireland (HMCIP/CIJINI). Report on an unannounced inspection of Hydebank Wood Prison and Young Offender Centre (14-17 Mar 2005). 2005. https://cjini.org/getattachment/223afdb3-2d54-4157-9bb1-1991ff0c2453/Hydebank-Wood-Prison-March-2005.aspx.

HMCIP/CIJINI. Report on an unannounced inspection of Hydebank Wood Young Offender Centre 5-9 Nov 2007. 2008. https://cjini.org/getattachment/743c0eb6-5bc1-4a27-b08f-e0d17ad490e3/Hydebank-Wood-Young-Offender-Centre-November-2007.aspx.

HMCIP/CIJINI. Report on an unannounced full follow-up inspection of Maghaberry Prison 19-23 Jan 2009. 2009. https://cjini.org/getattachment/a258078a-5376-4c89-88c8-13d4e0e4f3ee/Report-on-an-unannounced-full-follow-up-inspection-of-Maghaberry-Prison-19-23-January-2009.aspx.

HMCIP/CIJINI. Report on an unannounced short follow-up inspection of Hydebank Wood Young Offenders Centre 21-25 Mar 2011. 2011. https://cjini.org/getattachment/bed0d54a-b267-4925-9555-4394af77c3b3/Hydebank-Wood-Young-Offenders-Centre.aspx.

HMCIP/CIJINI. Report on an unannounced inspection of Maghaberry Prison 11-22 May 2015. 2015. https://cjini.org/getattachment/a98fca95-ae81-4443-88cc-1870be44250f/report.aspx.

HMCIP/CIJINI. Overview of initial findings of a report on an unannounced inspection of Maghaberry Prison 4-15 January 2016. 2016. https://cjini.org/getattachment/4a4b596d-24bb-418f-a50c-9da353df0d88/report.aspx.

HMCIP/CIJINI. Report on an announced visit to Maghaberry Prison 5-7 September 2016. 2016. https://cjini.org/getattachment/1d77c1e6-8311-413e-ad9d-

b9f9aa384506/report.aspx.

Hum. Rts. Comm. Concluding observations on the seventh period report of the United Kingdom of Great Britain and Northern Ireland. U.N. Doc. CCPR/C/GBR/CO/7. Aug. 17, 2015. https://digitallibrary.un.org/record/804708?v=pdf.

Human Rights Consortium. *Joint Northern Ireland Civil Society Submission to the United Nations Committee on Economic, Social and Cultural Rights*. January 2023. https://www.humanrightsconsortium.org/wp-content/uploads/2023/02/Joint-NI-Civil-Society-submission-to-UN-Committee-on-Economic-Social-and-Cultural-Rights-CESCR-Jan-2023.pdf.

Johnson, Nate. "The Advocacy Gap: Anti-Carceral, but not Abolitionist, Advocacy in Northern Ireland." *Oxford Human Rights Hub*, January 22, 2025. https://ohrh.law.ox.ac.uk/the-advocacy-gap-anti-carceral-but-not-abolitionist-human-rights-advocacy-in-northern-ireland/.

Joint Committee on Human Rights. The International Covenant on Economic, Social and Cultural Rights: Twenty-First Report of Session 2003-04. HL 183/HC 1188. 2003-2004.

Kang, Susan. "The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly." *Human Rights Quarterly* 31, no. 4 (2009). https://doi.org/10.1353/hrq.0.0106.

Kilpatrick, Alyson. *Independent Review of Article 2 ECHR Compliance: Kenova and Related Matters*. *Operation Kenova*, Aug. 2, 2021.

Laplante, Lisa. "Transitional Justice and Peace Building: Diagnosing and Addressing Socioeconomic Roots of Violence through a Human Rights Framework." International Journal of Transitional Justice 2, no. 3 (2008). https://doi.org/10.1093/ijtj/ijn031.

Liebenberg, Sandra. "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol." *Human Rights Quarterly* 42, no. 1 (2020). https://muse.jhu.edu/article/747391#info_wrap.

Lorca, Rocío. "Should Feminists be Worried about Impunity?" *Harvard Human Rights Journal* 38, (2024). https://journals.law.harvard.edu/hrj/wp-content/uploads/sites/83/2024/06/02_HLH_37_1_Roc%C2%A1o-Lorca47-80.pdf.

Lord Christopher Patten. *A New Beginning: Policing in Northern Ireland* (Report of the Independent Commission on Policing for Northern Ireland. 1999.

Mac Bradaigh, Seán. "Racism in Belfast: What do we know? And how are we using it to combat racist violence?" *PPR*, August 5, 2024. https://www.nlb.ie/blog/2024-08-racism-in-belfast-what-do-we-know-and-how-are-we-using-it-to-combat-racist-violence

Mansell, Wade. *A Critical Introduction to Law*. Taylor & Francis Group, 2015.

Mansfield, Maureen. "Irish Penal Abolition Network: A New Voice With An Old Ideal." *Abolitionist Futures.* Accessed February 1, 2025. https://abolitionistfutures.com/latest-news/irish-penal-abolition-network-a-new-voice-with-an-old-ideal.

McElhone, Megan, Tom Kemp and Sarah Lamble, "Defund – not defend – the police: A response to Fleetwood and Lea." *Howard Journal of Crime and Justice* 62 (2023). http://doi.org/10.1111/hojo.12508.

McEvoy, Kieran. "Letting Go of Legalism: Developing a 'Thicker' Version of Transitional Justice." In *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, edited by Kieran McEvoy and Lorna McGregor. Hart Publishing 2008)

McEvoy, Kieran. “Prisoner Release and Conflict Resolution: international Lessons for Northern Ireland.” *International Criminal Justice Review* 8, no. 1 (1998). https://doi.org/10.1177/105756779800800103.

McNaul, Gillian. “The Space In-Between: An examination of the marginalization experienced by women remand prisoners in Northern Ireland.” PhD diss., Queens University Belfast, 2018. https://pure.qub.ac.uk/en/studentTheses/the-space-in-between-2.

McNaul, Gillian. "The Space In-Between: The Gendered Marginalisation of Women’s Custodial Remand.” Policy briefing paper for Queens University Belfast, February, 2019. https://www.qub.ac.uk/home/queens-on-gender/research-activity/TheSpaceIn-between.html#:~:text=Research%20Activity-,Paper%3A%20The%20Space%20In%2Dbetween%3A%20The%20Gendered%20Marginalisation%20of,global%20arena%20of%20remand%20imprisonment.

Mgbako, Chi Adanna et al. “Anti-Carceral Human Rights Advocacy.” *University of Pennsylvania Journal of Law and Social Change* 26, no. 2 (2023). https://doi.org/10.58112/jlasc.26-2.2.

Miller, Zinaida. “Effects of Invisibility: In Search of the Economic in Transitional Justice.” *International Journal of Transitional Justice* 2, no. 3 (2008). https://doi.org/10.1093/ijtj/ijn022.

Moore, Linda, Phil Scraton and Azrini Wahidin, eds. *Women’s Imprisonment and the Case for Abolition*. Routledge, 2017.

National Institute of Economic and Social Research (NIESR). *Powering Down, Not Levelling Up*. 2022. https://www.niesr.ac.uk/wp-content/uploads/2022/02/UK-Economic-Outlook-Winter-2022.pdf.

NIACRO. *Policy Priorities 2017-2018*. Accessed February 1, 2025. https://www.niacro.co.uk/sites/default/files/NIACRO%20Policy%20Priorities%202017-2018.pdf.

Nolan, Aoife. "The Justiciability of Social and Economic Rights: An Updated Appraisal." Working Paper No. 15. Centre for Human Rights and Global Justice, New York University, August, 2007. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944.

Northern Ireland Abortion and Contraception Taskgroup. *Report on Sexual and Reproductive Health in Northern Ireland 2024 Review*. 2024. https://fsrh.org/Common/Uploaded%20files/documents/niact-review-2024-final.pdf.

Northern Ireland Audit Office. *Reducing Adult Reoffending in Northern Ireland.* June 13, 2023. https://www.niauditoffice.gov.uk/files/niauditoffice/documents/2023-06/NI%20Audit%20Office%20Report%20-%20Reducing%20Adult%20Reoffending%20in%20NI_0.pdf.

Northern Ireland Human Rights Commission (NIHRC). *Out of Sight, Out of Mind: Travellers' Accommodation in Northern Ireland*. March 2018. https://www.community-relations.org.uk/files/communityrelations/media-files/Out_of_Sight%2C_Out_of_Mind%E2%80%99__Travellers%E2%80%99_Accommodation_in_NI_-_Full_Report.pdf.

Northern Ireland Statistics and Research Agency (NISRA). Employee Earnings in Northern Ireland." Updated October 29, 2024. Accessed December 30, 2024. https://datavis.nisra.gov.uk/economy-and-labour-market/Employee-earnings-NI-2024.html#Key_Points.

Northern Ireland Statistics and Research Agency (NISRA). "Northern Ireland Housing Statistics 2023-24." Updated September 25, 2024. Accessed December 30, 2024. https://datavis.nisra.gov.uk/communities/northern-ireland-housing-

statistics-2023-24.html#Introduction.

Northern Ireland Statistics and Research Agency (NISRA). "Northern Ireland Labour Market Report." Updated December 17, 2024. Accessed December 30, 2024. https://datavis.nisra.gov.uk/economy-and-labour-market/labour-market-report-december-2024.html#.

Northern Ireland Statistics and Research Agency (NISRA). "Women in Northern Ireland 2023." Updated November 26, 2024. Accessed December 30, 2024. https://datavis.nisra.gov.uk/economy-and-labour-market/women-in-northern-ireland-2023.html#4_Women_with_Dependent_Children.

O'Connell, Paul. "Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity." In *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, edited by Aoife Nolan, Colin Harvey and Rory O'Connell. Hart, 2013.

O'Connell, Rory, Lina Malagón and Fionnuala Ni Aoláin, "Are Economic, Social and Cultural Rights Sidelined in Peace Agreements? Insights from Peace Agreement Databases." *Gonzaga Journal of International Law* 26 (2022). https://ssrn.com/abstract=4468905.

O'Connell, Rory, Lina Malagón and Fionnuala Ni Aoláin, "The Belfast/Good Friday Agreement and Transformative Change: Promise, Power, and Solidarity." *Israel Law Review* 57, no. 1 (2023). https://doi.org/10.1017/S0021223723000031.

OHCHR. "Publications." Accessed January 16, 2025, https://www.ohchr.org/en/publications?field_subject_target_id[751]=751&field_subject_target_id[736]=736&created[min]=&created[max]=&sort_bef_combine=field_published_date_value_DESC.

OHCHR. "View the ratification status by country or by treaty." Accessed 30 December 2024.

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/treaty.aspx?treaty=cescr&lang=en.

Palmer, Ellie. "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights." *Erasmus Law Rev* 2, no. 4 (2009). https://ssrn.com/abstract=1542674.

Pinto, Mattia. "Coercive Human Rights and the Forgotten History of the Council of Europe's *Report on Decriminalisation*." *Modern Law Review* 86, no. 5 (2023). http://dx.doi.org/10.2139/ssrn.4352583.

Police Service of Northern Ireland. "Use of Force by the Police in Northern Ireland 1 April 2023 to 31 March 2024." June 2024. https://www.psni.police.uk/sites/default/files/2022-09/PSNI%20Use%20of%20Force%20Statistical%20Report%201%20Apr%202021%20-%2031%20Mar%202022v2.pdf.

Rainbow Migration. *Ending the immigration detention of LGBTQI+ people*. September 2023. https://www.rainbowmigration.org.uk/wp-content/uploads/2023/10/LGBTQI-Detention-Parliamentary-Briefing-September-2023-v4-Web.pdf.

Renzulli, Isobel. "Prison Abolition: International Human Rights Law Perspectives." *International Journal of Human Rights* 26, no. 1 (2021). https://doi.org/10/1080/13642987.2021.1895766.

Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System. *The Corston Report: The Need for a Distinct, Radically Different, Visibly-Led, Strategic, Proportionate, Holistic, Woman-Centred, Integrated Approach*. March 2007.

Rietiker, Daniel and Levine, Mary. "Begging the Question: Lăcătuş v. Switzerland and the European Court of Human Rights' Recognition of Begging as a Human

Rights Issue." *Harvard International Law Journal Online*. April 6, 2022. https://journals.law.harvard.edu/ilj/2022/04/begging-the-question-la%cc%86ca%cc%86tus%cc%a7-v-switzerland-and-the-european-court-of-human-rights-recognition-of-begging-as-a-human-rights-issue/.

Roth, Kenneth. "Defending Economic Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization." *Human Rights Quarterly* 26, no. 1, (2004). https://doi.org/10.1353/hrq.2004.0010.

Rubenstein, Leonard. "How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth." *Human Rights Quarterly* 26, no. 4 (2004). https://doi.org/10.1353/hrq.2004.0056.

Seibert-Fohr, Anja. *Prosecuting Serious Human Rights Violations.* Oxford University Press, 2009.

Sex Workers Alliance Ireland. "Garda and Court Stats Are Proof that Sex Work Laws Are a Complete Failure." Updated October 18, 2024. Accessed 10 November, 2024. https://sexworkersallianceireland.org/2024/10/garda-and-court-stats-are-proof-that-sex-work-laws-are-a-complete-failure/.

Sheen, Robert. "Pay Gap Reporting on Deck in Northern Ireland." *Trusaic*, December 19, 2024. https://trusaic.com/blog/pay-gap-reporting-on-deck-in-northern-ireland.

Sikkink, Kathryn. *The Justice Cascade: how human rights prosecutions are changing world politics.* WW Norton, 2011.

Simpson, Mark. "Assessing the Compliance of the United Kingdom's Social Security System with its Obligations under the European Social Charter." *Human Rights Law Review* 18, no. 4 (2018). https://doi.org/10.1093/hrlr/ngy030.

Special Rapporteur on Extreme Poverty Philip Alston. *Statement on Visit to the United*

Kingdom. November 16, 2018. https://www.ohchr.org/en/statements/2018/11/statement-visit-united-kingdom-professor-philip-alston-united-nations-special?LangID=E&NewsID=23881.

Topping, John T. and Ben Bradford. "Now you see it, now you don't: On the (in)visibility of police stop and search in Northern Ireland." *Criminology & Criminal Justice* 20, no. 1 (2018). https://doi.org/10.1177/1748895818800742.

TUC. "Disability pay and employment gaps." Accessed December 30, 2024. https://www.tuc.org.uk/sites/default/files/2020-11/Disabled%20workers%20note.pdf.

UK Visas and Immigration (UKVI). "Asylum Support: What You'll Get." Accessed December 30, 2024. https://www.gov.uk/asylum-support/what-youll-get.

UNDOC. UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary (Bangkok Rules). U.N. Doc. A/RES/65/229. March 16, 2011.

Ulster University Economic Policy Center. *UUEPC Outlook Summer 2024*. 2024. https://www.ulster.ac.uk/__data/assets/pdf_file/0009/1678122/Summer-Outlook-2024-Update.pdf.

UN Committee on Economic, Social and Cultural Rights (CESCR). Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland. U.N. Doc. E/C.12/GBR/CO/6. July 14, 2016.

Warwick, Ben. "Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights?" *Human Rights Law Review* 19, no. 3 (2019). https://doi.org/10.1093/hrlr/ngz023.

Whelan, Daniel J. and Jack Donnelly. "The West, Economic and Social Rights, and the Human Rights Regime: Setting the Record Straight." *Human Rights*

Quarterly 29, No. 4 (2007). https://doi.org/10.1353/hrq.2007.0050.

Williamson, Clair. "More than 30 men – including 16-year-old – arrested as officers swoop on illegal workers in Belfast." Belfast Telegraph, Mar 23, 2025. https://www.belfasttelegraph.co.uk/news/northern-ireland/more-than-30-men-including-16-year-old-arrested-as-officers-swoop-on-illegal-workers-in-belfast/a1941850669.html.

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

Collective Risk Allocation and Restorative Justice in the Age of Artificial Intelligence

Dr. Maria Carla Canato

Received: 28 January 2025 / Accepted: 10 June 2025

Abstract

This paper aims to reflect on the issue of the 'responsibility gap' introduced by artificial intelligence (AI) within the criminal law context. Starting from this critical point, it outlines potential pathways to move beyond traditional punitive models, placing particular emphasis on the relevance of restorative approaches. The first part highlights the challenges that AI poses to the applicability of conventional criminal law institutions. The analysis then shifts to the mechanisms through which risk associated with the use of AI is distributed among the various actors involved in its design and deployment, underlining not only the importance of accountability, but above all the systemic and collective nature of 'AI-related risk'.

Within this framework, the concluding section explores restorative justice as a possible tool to address the consequences of algorithmic harm, emphasising mechanisms grounded in dialogue, trust-building, and social responsibility. The core thesis advanced is the need to rethink the notions of culpability and responsibility in the AI era, moving beyond the primacy of the individual toward a more systemic and shared perspective. In this sense, the paper aims to make a critical contribution to the development of a justice model that addresses new digital challenges through the lens of distributed and collective responsibility, while ensuring that the protection of fundamental rights, particularly in the criminal domain, continues to affirm its inherently human dimension.

Introduction

The use of artificial intelligence (AI) has impacted various sectors, including healthcare, transportation, and criminal justice, raising significant ethical, legal, and philosophical discussions. The primary issue associated with the use of AI relates to what has been termed in the literature as the 'responsibility gap', understood as the situation in which it is challenging to identify the party accountable for the consequences arising from the deployment of AI systems.[289] Given the influence of such tools in sensitive decision-making contexts — such as those connected to healthcare[290], the judiciary[291], or autonomous vehicle operation[292] — the limitations of applying traditional liability models become clear[293]. The opacity of AI algorithms, their capacity for self-learning, and their reliance on vast datasets[294] further complicate the attribution of responsibility.[295]

The rapid pace of technological innovation, especially in artificial intelligence, has outstripped the evolution of legal and ethical frameworks, resulting in a significant 'responsibility gap'[296] that challenges the core principles of criminal law. This article aims to examine the impact of the so-called responsibility gap on traditional liability frameworks, while exploring alternative models of justice — specifically restorative justice — as a potential response to the complexities of the digital age. The proposed model shifts the focus away from individual liability to investigate the role of collective responsibility[297], which redistributes the risk associated with artificial intelligence across all stages of AI system development. It conceptualises responsibility within a

[289] Matthias, A., *The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata*, in *Ethics and Information Technology,* vol. 6, (2004): 1 et seq.

[290] Bartlett, A., *The possibility of AI-induced medical manslaughter: Unexplainable decisions, epistemic vices, and a new dimension of moral luck*, in *Medical Law International* (2023).

[291] Darshan, V. *Demystifying the Role of Artificial Intelligence in Legal Practice*, in *Nirma University Law Journal*, vol. 8, no.2 (2019).

[292] Hilgendord, E., *Automated Driving and the Law*, in *Robotics, Autonomics and the Law*, (E. Hilgendorf-U. Seidel, 2017): 181-182.

[293] On the limits of criminal liability, see recently Fragasso, B., *Intelligenza artificiale e responsabilità penale: principi e categorie alla prova di una tecnologia "imprevedibile"*. (Turin: Giappichelli, 2025).

[294] Doncieux, S., Mouret, J.B., *Beyond black-box optimization: a review of selective pressures for evolutionary robotics*, in *Evolutionary Intelligence* (2014): 71 et seq.

[295] Salvadori, I., *Agenti artificiali, opacità tecnologica e distribuzione della responsabilità penale, RIDPP* (2021): 90 et seq.

[296] Matthias, A., *The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata, op. cit.*

[297] Taylor, I. *Collective Responsibility and Artificial Intelligence*, in *Philos. Technol.* Vol. 37, n. 27 (2024).

multi-layered framework that encompasses all actors involved in the design, implementation, and use of such technologies.[298]

Given the well-documented complexity and opacity of the aforementioned systems, as well as the large number of actors involved in their use[299], it often becomes unfeasible to allocate liability for harms to individual persons. This implies the need to establish a new model of shared responsibility. In this respect — and in light of the inherent irreducibility of AI-related risks, as acknowledged by the risk-based approach adopted in the AI Act[300] — it appears promising to respond through the institutionalisation of non-criminal strict liability regimes for violations of technical, ethical, and safety standards, within a broader framework of accountability.[301]

Such mechanisms enable the alignment of AI systems with relevant standards, promoting effective risk management without resorting to criminal proceedings. Criminal law, in fact, proves inadequate not only in terms of timeliness but also, and often more critically, in ensuring the effective protection of fundamental rights. This is due to the inherent difficulty — if not impossibility — of proving guilt beyond a reasonable doubt in many cases.

Therefore, in the wake of enhanced accountability frameworks, the valorisation of non-criminal restorative approaches — such as restorative justice — offers a human-centred method for addressing the negative outcomes stemming from the use of artificial intelligence. This model emphasises dialogue, repair, and social reintegration over punitive responses, thereby seeking to fulfil the rehabilitative function of criminal law.

Ultimately, this integrated governance framework places the effective protection of

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[298] Lima, D., *Could AI Agents Be Held Criminally Liable: Artificial Intelligence and the Challenges for Criminal Law*, in *South Carolina Law Review*, vol. 69 (2018): 687. In addressing the possible analogies between AI and legal entities, it is noted that legal entities do not exist autonomously, as they are closely tied to individuals and represent an artificial construct created by them. In contrast, AI systems seem to surpass this artificial nature, as they are increasingly capable of operating without the need for direct human intervention.

[299] Consulich, F., *Il concorso di persone nel reato colposo* (Torino: 2023), 1 ss.

[300] European Union. *Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828*. Official Journal of the European Union, L 259 (July 12, 2024): 1–294.

[301] Panattoni, B., *AI and Criminal Law: The Myth of 'Control' in a Data-Driven Society*, in *Revue Internationale de Droit Pénal*, (2021): 138.

fundamental rights at the core of the balance between technological risk, ethical imperatives, and the foundational principles of criminal law.

Within this context, the concept of 'permitted risk'[302] emerges as a key legal instrument to address and resolve issues of liability in AI use. Traditionally, this concept has been employed in criminal law to delineate the boundaries of culpability in situations where certain residual risks persist despite the adoption of all mandated precautions.

The idea of permitted risk acknowledges that some level of danger is inherent to complex or innovative processes, and the legal system has typically drawn a distinction between acceptable risks and those that cross the threshold of criminal responsibility. However, with the rapid advancements in AI, these boundaries become increasingly challenging to define, as the systems driving AI technologies often operate in ways that are not fully predictable, even by experts.[303]

AI systems introduce new forms of risk, especially risks that arise from their ability to learn, adapt, and make decisions independently of direct human control.[304] These characteristics challenge traditional legal frameworks, where responsibility is typically assigned based on human intention or negligence.[305]

The nature of AI, however, complicates this by blurring the lines between human agency and machine autonomy. When an AI system causes harm or damage, it is often unclear who, if anyone, should be held accountable: the developers who programmed the AI, the users who deployed it, or the AI itself, as an independent actor? In this sense, the concept of permitted risk requires adaptation.[306] While the

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[302] Consulich, F., *Rischio consentito*, in *Reato colposo*, *Enciclopedia del Diritto*, ed. M. Donini (Milano: Giuffrè, 2021).

[303] Gless, S., Silverman, E., Weigend, T., *If robots cause harm, who is to blame? Self-driving cars and criminal liability*, *New Criminal Law Review*, (2016): 425 et seq.

[304] On this point, see Doncieux, S., Mouret, J.B., *Beyond black-box optimization: a review of selective pressures for evolutionary robotics, op. cit*. (2014): 71 et seq.

[305] Pagallo, U., *The Laws of Robots. Crimes, Contracts and Torts* (Springer, 2013), 47; Beck, S., *Google Cars, Software Agents, Autonomous Weapons Systems – New Challenges for Criminal Law?*, *Law, Computer Science* (2017): 243. Regarding autonomous cars, see Surden, H., Williams, M.A., *Technological Opacity, Predictability, and Self-Driving Cars*, in *Cardozo Law Review* (2016): 157 et seq.

[306] Although unrelated to artificial intelligence, recent European jurisprudence underscores the structural limitations of assigning legal responsibility solely to individual agents in cases of diffuse, cumulative, or probabilistic harm. The shift evident in these rulings points toward a normative logic of *precautionary accountability*—a forward-looking responsibility model that prioritizes institutional vigilance, shared risk management, and systemic safeguards over retrospective fault attribution. This orientation, grounded in environmental and human rights law, offers a valuable precedent for AI governance, where causal opacity and collective agency are likewise central. See:

legal system may acknowledge that certain AI-driven risks are foreseeable, it must also consider whether the systems in question were developed or used in a manner that reasonably minimised those risks. Furthermore, it raises questions about the ethical responsibility of those who deploy AI technologies without fully understanding or mitigating their potential consequences.

This perspective naturally leads to the exploration of 'collective responsibility' as a way to address the systemic nature of AI risks. AI development and deployment are not solely individual efforts; they involve a wide array of stakeholders, including developers, corporations, regulators, and users.[307] As such, the ethical and legal implications of AI technologies cannot be contained within the scope of individual actions. Instead, responsibility must be distributed across the entire ecosystem that enables and sustains AI[308].

I. Precautionary Accountability, the AI Act, and Restorative Justice

The concept of collective responsibility emphasises the need for coordinated and multi-stakeholder efforts to ensure that AI systems are developed, deployed, and operated with due diligence, transparency, and adherence to robust ethical standards. While the AI Act does not explicitly invoke the terminology of 'collective responsibility', its regulatory framework implicitly fosters this approach by imposing comprehensive obligations on a wide range of actors, particularly enterprises, to uphold stringent requirements throughout the AI lifecycle[309].

– *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, Judgment of 20 December 2019, ECLI:NL:HR:2019:2007 (affirming the state's tort liability for climate inaction based on positive duties of prevention).

– *KlimaSeniorinnen v. Switzerland*, ECtHR, Grand Chamber, Judgment of 9 April 2024, App. No. 53600/20 (establishing a state obligation under Article 8 ECHR to prevent foreseeable harm caused by systemic environmental risk).

– *Lliuya v. RWE AG*, Oberlandesgericht Hamm (Germany), Case No. 5 U 15/17, appeal pending as of 2024 (exploring corporate tort liability for global emissions despite partial and indirect contribution).

– *Cannavacciuolo and Others v. Italy*, ECtHR, Chamber Judgment of January 2025, App. No. 43247/19 (expanding Article 2 ECHR to include deaths linked to long-term state inaction on environmental hazards).

[307] Fragasso, B., *La responsabilità penale del produttore di sistemi di intelligenza artificiale*, in *Sistema Penale*, (2023): 1 et seq.

[308] Van de Poel, I., Sand, M., *Varieties of responsibility: two problems of responsible innovation*, in *Synthese* 198 (Suppl 19), 4769–4787 (2021).

[309] As already noticed, recent evolutions in European jurisprudence suggest a growing recognition of the structural inadequacy of individual fault-based liability when dealing with distributed and emergent

By setting harmonised standards for risk management data governance, transparency, and human oversight, the AI Act creates a legal environment where accountability is distributed across various organisational levels and functions. This diffusion of responsibility encourages companies to embed ethical and safety considerations into their processes and governance structures, thereby contributing to a systemic model of accountability.[310] In this sense, the Act aligns with the broader notion that ensuring trustworthy AI is not solely the burden of individual developers or users but a shared enterprise involving designers, manufacturers, deployers, and regulators.

Furthermore, the AI Act's framework reflects an awareness of the 'permitted risk'[311], inherent to technological innovation. It implicitly acknowledges that while some degree of risk cannot be entirely eliminated, it must be proactively managed through preventive measures and compliance with established standards. This approach aligns with the paradigm of collective responsibility, emphasising that the duty to prevent harm does not rest with isolated individual agents, but rather extends to all actors within the digital ecosystem—including the political, corporate, and social domains.[312]

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harms—particularly in contexts characterized by cumulative risk, epistemic uncertainty, and organizational complexity. This has prompted a normative turn toward precautionary accountability, a forward-looking model that emphasizes shared responsibility, institutional oversight, and ex ante harm mitigation over traditional ex post blame assignment. Such a shift aligns with several core provisions of the AI Act, which introduces a risk-based regulatory framework that imposes preventive duties—e.g., risk assessments, traceability, human oversight—not on individuals per se, but on systemic actors such as providers, deployers, and notified bodies. These duties are expressly designed to operate irrespective of individual foreseeability or intent, reflecting the epistemic and causal fragmentation typical of AI systems.mechanisms, and forward-oriented accountability processes, complementing the AI Act's preventive ethos and bridging the residual responsibility gaps.

[310] Giannini, A., '*Criminal Behavior and Accountability of Artificial Intelligence Systems'* (Maastricht Law Series, 2023), 180–185.

[311] In fact, the notion of permitted risk has two possible interpretations: one that associates it with all dangerous but socially accepted activities, and the other that uses it to define the residual risk that remains after all possible precautions have been taken and is therefore accepted simply because it is unavoidable, provided that the legal norm does not prohibit it following a cost-benefit balance (here, the purpose of the violated norm may have potential utility). On the dual meanings, see Forti, G., *Colpa ed evento nel diritto penale*, (Giuffré, 1990), 456. On the concept of permitted risk as the general risk of daily life or tolerated residual risk, see Frisch, W., *Zum gegenwärtigen Stand der Diskussion und zur Problematik der objektiven Zurechnungslehre*, *G.A. StR.* (2003): 723; on this matter, see also, Roxin, C., Greco, L., *Strafrecht, Allgemeiner Teil,* (C.H. Beck, 2020), 488.

[312] This anticipatory structure resonates with the jurisprudential reasoning in *Urgenda* and *KlimaSeniorinnen*, where courts imposed legal duties on states to act preventively in the face of probabilistic, yet foreseeable, collective harm. Similarly, the precautionary logic embedded in the AI Act

The relationship between the protection of fundamental rights and the prevention of systemic risk arising from AI, which underpins recent European legislation, aims to establish a governance model that is both adaptive and precautionary. It is essential to highlight that this system delineates a threshold between 'acceptable' and 'irreducible' risks, on the one hand, and 'unacceptable' risks, on the other.

Ultimately, the AI Act represents a crucial step toward the implementation, at the European level, of a form of collective accountability for artificial intelligence. This model is grounded in compliance with development and deployment standards and sustained by ongoing regulatory oversight. It complements — without displacing — traditional notions of individual liability.

As AI increasingly permeates sensitive contexts, the legal framework must evolve to balance technological innovation with ethical imperatives, ensuring that responsibility is appropriately allocated, based on clearly defined and anticipatory obligations, and oriented toward the protection of fundamental rights and social welfare.

This integrated, multilevel governance approach—including at the supranational level—highlights the need to reconceptualise regulation through the lens of equity.[313] It calls for a cost-benefit balance that, while recognising the shared nature of risks[314], restores a personalised perspective in the face of harm[315].

Within this complex framework,[316] restorative justice should be fully incorporated into AI governance, contributing to the realisation of 'collective' accountability through a dialogic approach centred on the individual, non-retributive, but rehabilitative and remedial in nature.

Ultimately, this discussion highlights the importance of a holistic and adaptive approach to justice, one that extends beyond traditional notions of individual

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can be seen as prefiguring a framework of distributed, institutional responsibility: a form of collective duty of care suited to socio-technical environments.

[313] On this topic, see Novelli, C., *L'Artificial Intelligence Act Europeo: alcune questioni di implementazione*, *federalismi.it*, no.2 (2024): 95.

[314] Ortalda, A., De Hert, P., *Artificial Human Rights Impact Assessment*, in *Artificial Intelligence and Human Rights*, (A. Quintavalla and J. Temperman, 2023), 532. The authors argue that 'Not only technology changes. Human rights are equally undergoing a period of change'.

[315] Novelli, C., Casolari, F., Rotolo, A., Taddeo, M., Floridi, L., *AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act*, in *Digital Society* (2024): 18 et seq.

[316] In fact, 'permitted risk' is not determined by looking at the type of danger itself but depends on the qualification of the activity from which it arises, in relation to the precautions that the legal system has imposed on it in light of considerations of general utility.

accountability to encompass collective responsibility and restorative justice. As AI continues to reshape our world, justice systems must evolve to ensure that the benefits of this transformative technology are balanced with the imperatives of accountability, fairness, and equity. The law must be equipped to address not only the risks associated with AI but also the profound ethical questions that arise when we relinquish some degree of control to intelligent systems.[317] In doing so, we can build a future where technological advancements do not outpace our moral and legal obligations, but rather operate within a framework of responsibility and care that reflects our shared values.

A. The Philosophy of Punishment in the Context of AI

Traditional theories of punishment, including retribution, deterrence, and rehabilitation, presuppose a moral agent capable of intentional action and understanding the consequences of their behaviour.[318] However, AI systems, particularly those based on machine learning, lack intentionality, moral awareness, and the capacity for guilt or remorse.[319] This absence of moral agency[320] undermines the applicability of these

[317] Freitas, P., Andrade, F., Novais, P., *Criminal Liability of Autonomous Agents: From the Unthinkable to the Plausible*, in Casanovas-Pagallo-Palmirani-Sartor, *AI Approaches to the Complexity of Legal Systems*, *AICOL-IV and AICOL-V International Workshops 2013*, (Springer, 2014), 145 et seq.

[318] Hallevy, G., *The Criminal Liability of Artificial Intelligence Entities – from Science Fiction to Legal Social Control*, in *Akron Intellectual Property Journal (*2010):171 et seq.

[319] Hallevy, G., *Liability for Crimes Involving Artificial Intelligence Systems*, (Springer, 2015), 47 et seq. According to the author, there are no valid reasons to deny the criminal liability of Artificial Intelligence (AI) systems.
Hallevy theorizes that advanced AI systems may fulfill both the *actus reus* and *mens rea* requirements of criminal law, given their capacity for autonomous conduct, data acquisition, and probabilistic reasoning. He contends that certain mental states—such as negligence, recklessness, or general intent—may be ascribed to such systems, despite their lack of consciousness or emotions. Rejecting the traditional axiom that machines cannot commit or be punished for crimes, Hallevy proposes granting AI legal personhood and articulates three models of liability: (1) perpetration via another, where the AI acts as an innocent agent under human control; (2) natural probable consequence, involving derivative or shared liability; and (3) direct liability, whereby the AI may be held independently accountable for its actions.

[320] Electronic personhood, as envisioned by its proponents, aims to balance the injured party's right to compensation—with access to indemnification that does not depend on proving a product defect or user fault—with the need to foster innovation among businesses and to ensure predictability in judicial decisions. In particular, assigning direct civil liability to an AI system would mainly benefit claimants by easing the burden of proof. The establishment of an e-personality could be accompanied by the assignment of a unique identification number to each AI system, along with the creation of a "register of artificial agents," modeled after traditional corporate registries. This would allow individuals interacting with intelligent agents to obtain information about their financial resources, ownership, and any harmful

theories, posing fundamental challenges to the legal frameworks designed to govern human conduct.[321]

Retribution, for example, is grounded in a commutative logic between the wrongful act and the corresponding punishment. However, artificial intelligence systems cannot be said to 'deserve' punishment, as they lack consciousness, intentionality, and *mens rea*.[322] Similarly, assigning responsibility to developers or users may fail to uphold the principles of culpability and causation.[323] In this sense, punishment — whether directed at the system itself or its 'creators' — risks offering a merely symbolic response to harm, falling short of addressing the systemic risks or design flaws embedded in the technology.[324] These shortcomings are often independent of any single operator and rather reflect, at a higher level, a *mala gestio* in the failure to adopt preventive measures concretely capable of avoiding harm.[325]

Within this framework, it appears more appropriate to conduct an analysis of the victim's needs and interests, shifting the focus away from blame and punishment toward reparation.

The general-preventive function of criminal sanctions — another cornerstone of criminal law — also proves problematic in the context of artificial intelligence.[326] It

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incidents attributed to them—thus enabling better assessments of their reliability. On this topic see also Beck, S., *The Problem of Ascribing Legal Responsibility in the Case of Robotics*, AI & Society 31 (2016): 473 ss.

[321] Basile, F., *Intelligenza artificiale e diritto penale: quattro possibili percorsi di indagine*, in *Diritto Penale e Uomo*, (2019): 31; Borsari, R., *Intelligenza artificiale e responsabilità penale: prime considerazioni*, *Medialaws* (2019): 262 et seq.

[322] Asaro, P.M., *A body to Kick, but Still No Soul to Damn: Legal Perspectives on Robotics*, in Lin, P., Abney, K., Bekey, G.A., *Robot Ethics*, (The MIT Press Cambridge, 2012), 169 et seq.; also ID., Determinism, Machine Agency, and Responsibility, *Politica & Società* (2014): 265 et seq., and ID., Robots and Responsibility from a Legal Perspective, *Proceedings of the 2007 IEEE International Conference on Robotics and Automation* (2011): 20 et seq.

[323] Asaro, P.M., *A body to Kick, but Still No Soul to Damn: Legal Perspectives on Robotics*, in Lin, P., Abney, K., Bekey, G.A., *Robot Ethics*, (The MIT Press Cambridge, 2012), 169 et seq.; also ID., Determinism, Machine Agency, and Responsibility, *Politica & Società* (2014): 265 et seq., and ID., Robots and Responsibility from a Legal Perspective, *Proceedings of the 2007 IEEE International Conference on Robotics and Automation* (2011): 20 et seq.

[324] Cappellini, A., *Machina delinquere non potest? Brevi appunti su intelligenza artificiale e responsabilità penale*, in *Criminalia*, 2019,

[325] Bartlett, B., *The possibility, op. cit.,* 269 et seq.

[326] Regarding so-called 'hard crimes', see the contribution of Nerantzi, E., Sartor, G. '*Hard AI Crimes': The Deterrence Turn*', in *Oxford Journal of legal studies* (2024); 44. According to the authors, the "AI deterrence paradigm" would serve to operationalize the "duty of care" that commissioners are expected to uphold when deploying AI agents with the technical features of economic machines. Specifically, distributors of AI agents would be required to maintain a compliance mechanism (when appropriate

presupposes the existence of conscious agents capable of understanding and adjusting their behaviours in response to legal sanctions, a condition that is not easily met in the case of autonomous systems.

However, the effectiveness of this principle is contingent on the capacity of the punished party to understand and adapt their behaviour. AI systems, being non-sentient entities, cannot learn from punishment in the way humans do. Moreover, punishing the organisations or individuals responsible for deploying AI systems may not effectively deter future misconduct if the root causes of harm lie in the inherent complexity and opacity of these technologies.

Rehabilitation, often considered the most forward-looking of the traditional theories of punishment, is equally inapplicable to AI.[327] The concept of rehabilitation presupposes the possibility of moral or psychological reform, a notion that is meaningless when applied to AI systems. While technical improvements can be made to AI systems, these do not constitute rehabilitation in the conventional sense. This raises questions about the utility and fairness of applying conventional punitive mechanisms to a fundamentally different type of agent.

The inadequacy of traditional punishment theories in addressing AI-related harm necessitates a re-examination of justice frameworks.[328] Philosophers[329] and legal

technologies are available in the relevant application domains), establishing: *machinae economicissimae*, which incorporate anticipated sanctions into their profit calculations; *machinae legales*, equipped with mandatory compliance systems; and *machinae legales et economicae*, which combine both approaches.

[327] Abbott R.B., Sarch, A.F., *Punishing Artificial Intelligence: Legal Fiction or Science Fiction*, in *UC Davis Law Review* (2019): 323.

[328] King, T.C., Aggarwal, N., Taddeo, M., Floridi, L., *Artificial Intelligence Crime: An Interdisciplinary Analysis of Foreseeable Threats and Solutions*, in *Science and Engineering Ethics* (2019): 1 et seq.

[329] For a recent debate concerning the possible recognition of legal personhood for artificial intelligence systems, see Novelli, C., Floridi, L., and Sartor, G., *AI as Legal Persons: Past, Patterns, and Prospects*, in *Social Science Research Network* (2024): 1 et seq. The authors consider the attribution of legal personhood to AI to be unlikely, given that it would require substantial legislative reforms, which are not supported by any existing legal provisions. Past legal decisions have shown that legal personhood is typically conferred upon entities capable of fulfilling concrete social roles and holding rights and responsibilities, such as corporations. However, AI lacks characteristics such as the ability to own property or enter into contracts. Additionally, research indicates that the current legal trend does not support the recognition of AI as a legal entity. Future decisions will largely depend on legislative and political developments. Although the issue does not appear urgent in the short term, the ongoing evolution of AI technologies could make the discussion more relevant in the future, especially in contexts such as the integration of AI with human intelligence (e.g., through brain-machine interfaces). Nevertheless, for AI to be granted legal personhood, a major shift in the concept of legal personhood would be required, transforming AI from a separate entity into a potential extension of human identity.

scholars have argued for alternative approaches that shift the focus from punishing individual actors to addressing systemic issues and repairing harm.[330] This shift aligns with the principles of restorative justice, which prioritise accountability, dialogue, and the repair of relationships.

In this context, it is more appropriate to adopt an approach centered on the analysis of the victim's needs and interests, shifting the focus away from blame and punishment toward reparation.

The collective and systemic redefinition of accountability in the field of AI thus enables a more effective response to the challenges posed by artificial intelligence, taking into account the inherent unpredictability and opacity of such technological systems, and aiming both at the achievement of ethical standards and the reinforcement of public trust.[331]

Likewise, punishment must reflect the disconnection between the individual and culpability in the digital environment[332], thereby not only exposing the limitations of traditional punitive theories[333] but also encouraging the exploration of alternative responses to harm. These may include non-criminal and even strict liability mechanisms, which offer more effective and proportionate remedies beyond the boundaries of criminal law.[334]

1. Collective Risk Allocation in the AI Era

The deployment of AI systems requires a fundamental shift from individual liability models to collective risk allocation frameworks.[335] The development and

[330] Bartlett, B., *The possibility, op. cit.,* 269 et seq.

[331] Eichenhofer, J., *Trustworthy AI and Fundamental Rights*, in *European Review of Public Law* 36, no. 1 (2024): 131.

[332] Santoni de Sio, F., and G. Mecacci, G., *Four Responsibility Gaps with Artificial Intelligence: Why They Matter and How to Address Them*, *Philosophy & Technology* (2021): 34, identify four responsibility gaps, including the 'culpability gap'.

[333] Giannini, A., *Artificial intelligence, human oversight, and criminal liability: a european 'strenght tes*t', in *Criminalia*, (2021): 1 et seq.

[334] For a critical approach to strict liability, see Simons, K.W., *When Is Strict Criminal Liability Just?*, in *Journal of Criminal Law & Criminology*, vol. 87 (1997): 1075-76, discussing retributive views that denounce strict liability. Simons argues that 'strict liability appears to be a straightforward case of punishing the blameless, an approach that might have consequential benefits but is unfair on any retrospective theory of just deserts'. This highlights the concern that strict liability punishes individuals who are not at fault, which may be seen as unjust under a retributive justice framework.

[335] Mongillo, V., *Corporate criminal liability for AI-related crimes: possible techniques and obstacles*, in Picotti L. & Panattoni, B. (Eds.), *Traditional Criminal Law Categories and AI: Crisis or Palingenesis?*

implementation of AI involve multiple actors, including corporations, developers, policymakers, and regulators, whose decisions collectively shape the system's outcomes. Individual criminal liability, particularly in light of the complexity of algorithmic systems, often becomes problematic—especially with regard to establishing causal links. Likewise, it frequently proves ineffective in ensuring the effective protection of rights. This is particularly evident in high-risk contexts, where algorithmic outputs have significant consequences for society at large.

In this regard, accountability[336] represents the most appropriate solution for addressing harm caused by artificial intelligence, within a framework where collective risk allocation suggests that responsibility should be shared and distributed across the entire lifecycle of the technology, from its design to its deployment. What thus becomes essential is a thorough assessment of the actual risks posed by the tool, closely tied to the implementation of ongoing control and monitoring mechanisms, starting from the development phase and extending throughout the post-deployment stage.

Moreover, regulatory instruments should allow for the continuous adaptation of measures, in proportion to newly emerging risks.

This approach moves beyond the punitive logic of the traditional legal framework, reaffirming the criminal law principles of harm and ultima ratio. It seeks to embed ethical considerations into the fabric of AI governance, ensuring that risks are managed collectively rather than attributed to individual fault[337]. By framing responsibility as a 'shared endeavour', collective risk allocation aligns with broader societal interests in preventing harm and safeguarding fundamental rights. When

(Maklu, 2024), 82 et seq.; Consulich, F., *Criminal Law and Artificial Intelligence: Perspective From Italian And European Experience*, *European Criminal Law Review*, no. 3 (2023): 270-307.

[336] Accountability, in fact, is one of the seven principles mentioned by the Artificial Intelligence High-Level Expert Group (AI HLEG), established by the European Commission in the document *'Ethics Guidelines for Trustworthy AI'* and represents a recurring element in European regulatory initiatives, as well as in the broader global landscape of so-called AI ethics. For instance, reference can be made to the OECD principles (*OECD, Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449, 2019*); the UNESCO recommendations on AI ethics (*UNESCO, Recommendation on the ethics of artificial intelligence, SHS/BIO/REC-AIETHICS/2021,* 2021). For a global overview, see the studies conducted by Fjeld, J. et al., *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-based Approaches to Principles for AI* (Berkman Klein Center for Internet & Security, 2020); Jobin, A. et al., *The global landscape of AI ethics guidelines*, in *Nature Machine Intelligence*, vol. 1 (2019).

[337] Rességuier, A., Rodrigues, R., *AI ethics should not remain toothless! A call to bring back the teeth of ethics*, in *Big Data & Society* (2020): 2.

regulatory or technical standards are not adhered to, an organisation can be held liable even in the absence of a direct causal link between its 'organisational fault' and the specific harmful event. This form of liability is ultimately linked to structural and systemic inadequacies, rather than to individual fault or a clear causal connection between action and outcome. From this perspective, organisational liability—particularly in cases of non-compliance with the standards established for a given category of risk—would take the form of strict liability.[338]

In the context of artificial intelligence, this calls for the prioritisation of proactive risk management, grounded in a logic of prevention[339]. Within this framework, accountability emerges as a key mechanism for fostering collective trust and safeguarding shared rights and values.

Moreover, the interdependence inherent in AI systems—whose performance relies heavily on the data used for training—highlights the importance of adopting an integrated approach not only to risk assessment but also to the distribution of responsibility. All stakeholders involved must contribute to effective risk mitigation.

Collaboration, particularly within governance structures, can thus play a crucial role in promoting a fair balance between inclusive development and transparency. This includes the establishment of mechanisms for stakeholder dialogue, data-sharing agreements, and ethical review boards, all aimed at ensuring that AI systems align with societal priorities and ethical standards.

2. Restorative Justice and the Sense of Sanction

Restorative justice offers a powerful lens through which to address the responsibility gap created by AI systems.[340] Unlike traditional punitive approaches, restorative justice focuses on understanding and repairing harm, addressing the needs of victims,

[338] Canato, M.C., *La responsabilità da reato degli enti di fronte al 'rischio da intelligenza artificiale': responsibility gap e 'rinnovata' corporate liability*, in *Quaderni del Dottorato in Giurisprudenza dell'Università di Padova 2024*, edited by Paola Lambrini (Ledizioni, 2025), 61-90.

[339] European Commission, *Communication on the Precautionary Principle*, COM(2000) 1 final, 2 February 2000.

[340] Ligi, T.K., *Introduction of restorative justice practices in criminal justice system: An overview'* in *International Journal of Criminal, Common and Statutory Law*, no. 4 (2024): 132-138; Nurul P. A. Nasution, Jubair and Abdul Wahid, *The Concept of Restorative Justice in Handling Crimes, European Journal of Law and Political Science* (2022).

and fostering accountability through collaborative processes.[341] In the context of AI, restorative justice could provide a framework for engaging all stakeholders—victims, developers, organisations, and regulators—in meaningful dialogue to address harm and prevent recurrence. Such a system not only enables a more tailored application of sanctions, but also serves as an effective instrument for identifying, through a proportional and dialogical approach, the most effective sanctions and the most appropriate remedial measures to address the needs of the harmed party, based on a case-by-case assessment.[342] In fact, victims of AI-induced errors often experience frustration and alienation due to the opaque and impersonal nature of these systems.[343] Restorative justice prioritises their involvement, ensuring that their voices are heard and their needs are addressed. For instance, victims might receive explanations of how errors occurred, assurances of corrective action, and commitments to systemic reform. This approach not only repairs trust but also reinforces the legitimacy of the justice system. By centring the experiences of those affected, restorative justice fosters a sense of empowerment and inclusion that is often

[341] The term 'accountability' derives from the Latin *computāre* (to calculate, consider), via Old French *acconter*, combined with the suffix *-ability*, denoting capacity. 'Responsibility,' by contrast, originates from *respondere* (to answer, to pledge). While 'liability' refers to specific legal obligations, accountability and responsibility operate within broader moral and social frameworks. Accountability may also be understood procedurally—as a public process of evaluating conduct to determine its justification and assign liability. This becomes especially significant in AI governance, where accountability mechanisms are essential to allocate risks and responsibilities among multiple stakeholders.

[342] The Principles of Restorative Practice outlined by the Restorative Justice Council (RJC) focus on core values that practitioners should uphold. These six principles are:

1. Restoration – The primary goal is to address and repair the harm caused.
2. Voluntarism – Participation in restorative processes is voluntary, with participants making an informed choice.
3. Neutrality – Restorative processes are fair and unbiased toward all participants.
4. Safety – The process ensures the safety of participants and provides a secure space for expressing feelings and views about the harm caused.
5. Accessibility – Restorative processes are non-discriminatory and accessible to everyone affected by conflict or harm.
6. Respect – Restorative practices uphold the dignity of all participants and those affected by the harm.

These principles guide restorative practices to ensure fairness, safety, and inclusivity.

[343] Users affected by AI-induced errors frequently report feelings of frustration and alienation, particularly due to the opaque and impersonal nature of algorithmic decision-making. See Reuben Binns et al., *It's Reducing a Human Being to a Percentage,* in *Perceptions of Justice in Algorithmic Decisions Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems* (Association for Computing Machinery, 2018), https://doi.org/10.1145/3173574.3173951. The study highlights how lack of transparency and explainability in AI systems contributes to diminished user trust and a sense of powerlessness.

absent in traditional punitive processes.[344]

Restorative justice also invites reflection on the broader societal role of sanctions.[345] The primary aim of sanctions in this context should not be retribution but the effective protection of fundamental rights and the promotion of accountability.[346] Measures such as public apologies, commitments to improve AI transparency, and reparative actions, like funding initiatives to address biases in AI training data, can achieve these goals without resorting to criminal penalties. By shifting the focus away from punishment, restorative justice aligns with the principle of criminal law as an *extrema ratio*[347]reserved for the most severe breaches of societal norms. This shift also highlights the potential for restorative justice to serve as a bridge between legal and ethical accountability, ensuring that justice systems remain relevant and responsive in the age of AI.

Restorative processes can also address the psychological and societal impacts of AI-related harm. Victims, developers, and organisations can engage in structured dialogues to share perspectives, identify root causes, and co-develop solutions. These processes not only facilitate healing but also foster a culture of shared accountability and continuous improvement. By emphasising dialogue and collaboration, restorative justice can transform the responsibility gap into an opportunity for systemic learning

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[344] Bertasini, I., '*Tra esigenze del giusto processo e prospettive rigenerative: il paradigma della Restorative Justice dentro e oltre il d.lgs. 150/2022'*, in *La scrittura nella giustizia. Una ricerca applicata di topica giudiziale*, (Padova University press, 2024), 243 et seq.

[345] Mannozzi, G., *Nuovi scenari per la giustizia riparativa. Riflessioni a partire dalla legge delega 134/2021*, in *Archivio Penale* (2022): 1. For a deeper understanding of the concept, see also Reggio, F., *Giustizia Dialogica. Luci e ombre della restorative justice* (Franco Angeli, 2010).

In her article, Mannozzi argues that restorative justice should enhance, not replace, traditional criminal law, making it more people-centered and community-focused. She highlights its potential to transform the justice system by prioritizing repair and community involvement. Federico Reggio, in his work on dialogic justice, explores both the benefits and challenges of restorative justice, emphasizing its role in modern legal systems. Both authors advocate for a justice approach that integrates accountability, community participation, and repair.

[346] Nonetheless, it is now evident that the traditional approach, focused on individual omissions or negligent behavior, must evolve to encompass the broader management of risks associated with the use of autonomous technologies. In this context, the AI Act serves as a critical benchmark, as it establishes clear requirements and provides essential guidelines to ensure organizations adopt continuous and proactive monitoring of their technologies. This reduces the potential 'responsibility gap' created by the decision-making autonomy inherent in AI systems.

[347] Florio*,* M.E., *Struggle in favour of a criminal law as an 'ultima ratio'. Critical observations on the criminalisation obligations arising from the jurisprudence of the European Court of Human Rights in the light of the principle of subsidiarity*, in *European Criminal Law Review,* no.13 (2023): 135-164.

and innovation.

3. Filling the Responsibility Gaps

The 'responsibility gap' in AI governance poses significant challenges to traditional legal systems. Restorative justice offers a practical and ethical response to these challenges by addressing harm in a holistic and inclusive manner.[348] For example, the dialogical tools typical of restorative justice could enable a deeper analysis of the root causes of erroneous AI outputs, allowing for a precise allocation of responsibility among the involved actors and the definition of targeted preventive measures. Moreover, within a socially shared framework, these mechanisms could function as spaces for information and awareness-raising, equipping stakeholders with the means to adapt risk categories and understand their practical implications—particularly in relation to distributed responsibility. The culture of accountability, therefore, intersects with restorative justice in fostering a collaborative governance model that upholds the principle of trust in the context of artificial intelligence.

Restorative justice also highlights the relevance of a forward-looking form of responsibility—one that prioritises prevention over repression—encouraging organisations to adopt ex ante risk management strategies. Additionally, dialogue with affected communities ensures the effectiveness of fundamental rights protection, within a long-term and adaptive framework.

Furthermore, restorative justice aligns with a collective vision of risk allocation by offering tailored solutions for residual harms that cannot be addressed through preventive measures alone and that thus fall within the scope of 'permitted risk.' If an AI system causes harm despite adherence to best practices during development and deployment, restorative mechanisms can be used to adapt responsibility to the specific needs of the harmed parties, ensuring both effective and proportionate redress.

This shared and integrated framework, in turn, enables a concrete modelling of 'legal risk'[349] arising from artificial intelligence, effectively re-aligning abstract technological risks with the principle of criminal *offensiveness*, thereby bridging the gap between

[348] Vidmar, N., and Miller, D.T., *Socialpsychological Processes Underlying Attitudes Toward Legal Punishment*, in *Law and Society Review* (1980): 565–602.

[349] Canato, M.C., *Verso il superamento del 'legal risk' europeo: intelligenza artificiale e approccio proporzionale al rischio*, *La Legislazione Penale* (2024).

potential harm and the thresholds required for penal intervention.

4. Conclusions

The 'responsibility gap'[350] in the context of artificial intelligence calls for a profound re-evaluation of traditional criminal law categories through the lens of accountability. Individual criminal liability—still anchored to the principles of culpability and the causal nexus between conduct and typical harm—proves increasingly inadequate in addressing the specific challenges posed by AI systems, particularly due to the multiplicity of actors involved in risk management. [351]

As a result, it becomes necessary to promote a shift towards collective risk allocation, grounded in a 'renewed' model of corporate liability and in the use of context-sensitive remedial tools, particularly through restorative justice frameworks.

Within this new paradigm, corporate liability is clearly decoupled from the prior model of individual criminal responsibility, which remains applicable only where personal culpability is clearly established. The analytical focus must therefore move away from the individual act and towards the systemic dimension of organisational accountability. This regulatory model also signals a gradual detachment from traditional criminal law, recognising that the specific risks posed by autonomous systems such as AI require a broader and more proactive approach. Failure to comply with the standards set by the AI Act and sector-specific legislation may thus give rise to strict liability, at least on a presumptive basis, with respect to AI-induced harm—even in the absence of a proven causal link or individual fault.

In this framework, prevention, transparency, and proactive risk management assume a central role, shifting the focus away from culpability as the main foundation of liability. Individual responsibility, where it arises, must be reinterpreted within a systemic and distributed logic. At the same time, corporate liability becomes autonomous from that of its members, aligning organisational duties with the need to manage systemic risks

[350] Matthias, A., *The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata*, *op. cit.*

[351] Consulich, F., *Il nastro di Möbius. Intelligenza artificiale e imputazione penale nelle nuove forme di abuso del mercato*, in *Banca Borsa Titoli di Credito* (Giuffrè, 2018), 195 et seq.

inherent to AI. [352]

In this context, restorative justice provides an opportunity to explore sanctioning mechanisms and adaptive remedies that are effectively concrete in managing AI-related harm. It promotes a model that shifts attention from punitive logic to prevention, deterrence, and repair, in accordance with the general and special preventive functions of penalties.[353]

In the AI era, the legal framework evolves ethically, acknowledging that when faced with 'accepted' and 'collectively' borne risks, the protection of fundamental human rights must serve as the primary benchmark for any form of justice. The move away from criminal law—consistent with its nature as an *extrema ratio*—and the promotion of dialogical and individualised instruments, such as restorative justice, ultimately allows for the reconstruction of a truly 'trustworthy European AI'.[354]

Adopting these innovative frameworks, including a renewed corporate liability and restorative justice, will be crucial in ensuring that justice remains both effective and equitable, especially in the face of rapid technological advancements. Addressing the unavoidable risks of artificial intelligence lies in conducting thorough and proportionate risk assessments[355], ensuring a careful human balance between costs and benefits, maintaining effective human oversight, and fostering a collective approach to risk management through robust accountability mechanisms.[356]

In conclusion, when considering the risk-based approach integral to the AI Act, the criteria for determining liability must undergo significant transformation to address the inherently unavoidable risks posed by AI systems. The current paradigms of criminal law, particularly those grounded in the strict application of principles like legality and

[352] The AI Act treats artificial intelligence as a 'product'. In this context, the regulation aligns with frameworks that impose strict liability for harmful events, assigning responsibility to the owner or operator of the system, even when it is intended for public or collective use.
This approach underscores the principle that liability can arise independently of direct fault, emphasizing accountability for managing the risks inherent in the development, deployment, and oversight of such technologies.

[353] Salvi, F., La funzione della pena tra castigo e risocializzazione, *SalvisJuribus* (2022).

[354] European Commission, *Ethics Guidelines for Trustworthy AI*, High-Level Expert Group on Artificial Intelligence, April 2019.

[355] Novelli, C., Casolari, F., Rotolo, A., Taddeo, M., Floridi, L., *AI Risk Assessment, op. cit.*

[356] Canato, M.C., *Verso il superamento del 'legal risk' europeo: intelligenza artificiale e approccio proporzionale al rischio, op. cit*.

culpability, must be reassessed and, in some cases, replaced with alternative protective frameworks. These frameworks should ensure that sanctions for violations of fundamental rights remain 'proportionate and effective', in line with the evolving principles articulated by supranational jurisprudence[357]. Only through this recalibration, incorporating strict 'non-criminal' corporate liability and restorative justice, can justice systems effectively address the challenges posed by AI. This approach ensures the preservation of human oversight. It maintains a human-centred framework for criminal law, applying the principle of criminal liability as an *extrema ratio*, and only when negligence is clearly evident.

[357] The Strasbourg case law, with regard to medical liability, has ruled out the requirement for criminal sanctions by States in cases of medical negligence, as long as the effective protection of the right to life under Article 8 of the European Convention on Human Rights (ECHR) is guaranteed. For a detailed examination of this issue, see Pranka, D., *The Price of Medical Negligence – Should it be Judged by the Criminal Court in the Context of the Jurisprudence of the European Court of Human Rights?,* in *Baltic Journal of Law & Politics,* no. 14, 1 (2021); 124-152.

Bibliography

Abbott, R. B., Sarch A. F., 'Punishing Artificial Intelligence: Legal Fiction or Science Fiction', *UC Davis Law Review* (2019).

Asaro, P. M., 'Robots and responsibility from a legal perspective', *Proceedings of the 2007 IEEE International Conference on Robotics and Automation* (2011).

Asaro, P. M., 'A Body to Kick, but still no soul to damn: Legal perspectives on robotics', in *Robot Ethics* edited by Lin P., Abney K., Bekey G. A. (The MIT Press Cambridge, 2012),

Asaro, P. M., 'Determinism, machine Agency, and responsibility', *Politica & Società* (2014).

Bartlett, B., 'The Possibility of AI-Induced Medical Manslaughter: Unexplainable Decisions, Epistemic Vices, and a New Dimension of Moral Luck', *Medical Law International* (2023).

Basile, F., 'Intelligenza Artificiale e Diritto Penale: Quattro Possibili Percorsi di Indagine', *Diritto Penale e Uomo* (2019).

Beck, S. 'The Problem of Ascribing Legal Responsibility in the Case of Robotics', *AI & Society* 31 (2016): 473 ss.

Bertasini, I., 'Tra esigenze del giusto processo e prospettive rigenerative: il paradigma della restorative justice dentro e oltre il D.Lgs. 150/2022', *La scrittura nella giustizia. Una ricerca applicata di topica giudiziale (*2024).

Canato, M. C., 'Verso il Superamento del 'Legal Risk' Europeo: Intelligenza Artificiale e Approccio Proporzionale al Rischio', *La Legislazione Penale* (2024).

Canato, M. C., 'La Responsabilità da Reato degli Enti di Fronte al 'Rischio da Intelligenza Artificiale': Responsibility Gap e 'Rinnovata' Corporate Liability', in *Quaderni del Dottorato in Giurisprudenza dell'Università di Padova 2024*, edited by P. Lambrini (Ledizioni, 2025).

Cappellini, A., 'Machina delinquere non potest? Brevi Appunti su Intelligenza Artificiale e Responsabilità Penale', *Criminalia* (2019).

Consulich, F., 'Rischio consentito', in *Reato colposo*, *Enciclopedia del Diritto*, ed. M. Donini (Milano: Giuffrè, 2021).

Consulich, F., 'Il concorso di persone nel reato colposo' (Torino: 2023).

Consulich, F., 'Criminal Law and Artificial Intelligence: Perspective From Italian and European Experience', *European Criminal Law Review*, no.3 (2023).

Consulich, F., 'Il Nastro di Möbius. Intelligenza Artificiale e Imputazione Penale nelle Nuove Forme di Abuso del Mercato', *Banca Borsa Titoli di Credito*, (Giuffrè, 2018).

Consulich, F., 'Rischio Consentito' in *Enciclopedia del diritto. Reato colposo*, edited by M. Donini (Giuffrè, 2021).

Darshan, V., 'Demystifying the Role of Artificial Intelligence in Legal Practice', *Nirma University Law Journal*, no. 2 (2019).

Doncieux, S., J. B. Mouret, 'Beyond Black-Box Optimization: A Review of Selective Pressures for Evolutionary Robotics' , *Evolutionary Intelligence* (2014).

Floridi, M. E., 'Struggle in Favour of a Criminal Law as an 'Ultima Ratio.' Critical Observations on the Criminalisation Obligations Arising from the Jurisprudence of the European Court of Human Rights in the Light of the Principle of Subsidiarity', *European Criminal Law Review*, no. 2 (2023).

Eichenhofer, J., 'Trustworthy AI and Fundamental Rights', *European Review of Public Law* 36, no. 1 (2024): 131.

Fragasso, B., 'La Responsabilità Penale del Produttore di Sistemi di Intelligenza Artificiale.' *Sistema Penale* (2023).

Fragasso, B., 'Intelligenza artificiale e responsabilità penale: principi e categorie alla prova di una tecnologia "imprevedibile*"*'. (Turin: Giappichelli, 2025).

Fjeld, J., et al., 'Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-based Approaches to Principles for AI' (Berkman Klein Center for Internet & Security, 2020).

Forti, G., 'Colpa ed Evento nel Diritto Penale' (Giuffrè, 1990).

Giannini, A., 'Artificial Intelligence, Human Oversight, and Criminal Liability: A European 'Strength Test'', *Criminalia* (2021).

Giannini, A. 'Criminal Behavior and Accountability of Artificial Intelligence Systems' (Maastricht Law Series, 2023).

Gless, S., E. Silverman, T. Weigend, 'If Robots Cause Harm, Who Is to Blame?

Self-Driving Cars and Criminal Liability', *New Criminal Law Review* (2016).

Hallevy, G., 'The Criminal Liability of Artificial Intelligence Entities – from Science Fiction to Legal Social Control', *Akron Intellectual Property Journal* (2010).

Hallevy, G., 'Liability for Crimes Involving Artificial Intelligence Systems' (Springer, 2015).

Hilgendorf, E., 'Automated Driving and the Law.' In *Robotics, Autonomics and the Law*, edited by E. Hilgendorf and U. Seidel (Nomos, 2017).

Jobin, A., et al., 'The Global Landscape of AI Ethics Guidelines', *Nature Machine Intelligence*, no. 1, (2019).

King, T. C., Aggarwal N., Taddeo M., and Floridi L., 'Artificial Intelligence Crime: An Interdisciplinary Analysis of Foreseeable Threats and Solutions', *Science and Engineering Ethics*, no. 2 (2019).

Lima, D., 'Could AI Agents Be Held Criminally Liable: Artificial Intelligence and the Challenges for Criminal Law' *South Carolina Law Review* (2018).

Mannozzi, G., 'Nuovi Scenari per la Giustizia Riparativa. Riflessioni a Partire dalla Legge Delega 134/2021', *Archivio Penale* (2022).

Mongillo, V., 'Corporate Criminal Liability for AI-Related Crimes: Possible Techniques and Obstacles', in *Traditional Criminal Law Categories and AI: Crisis or Palingenesis?*, edited by Picotti L. and Panattoni B., (Maklu, 2023).

Nerantzi, E., Sartor G., ''Hard AI Crimes': The Deterrence Turn' (Oxford, 2024).

Novelli, C., 'L'Artificial Intelligence Act Europeo: Alcune Questioni di Implementazione', *federalismi.it*, no.2 (2024).

Novelli, C., Casolari F., Rotolo A., Taddeo M., Floridi L. 'AI Risk Assessment: A Scenario-Based, Proportional Methodology for the AI Act', *Digital Society* (2024).

Novelli, C., Floridi L., Sartor G., 'AI as Legal Persons: Past, Patterns, and Prospects.' *Social Science Research Network* (2024).

Ortalda, A., De Hert P., 'Artificial Human Rights Impact Assessment.' In *Artificial Intelligence and Human Rights*, edited by A. Quintavalla and J. Temperman (Hart Publishing, 2023).

Pagallo, U., 'The Laws of Robots: Crimes, Contracts and Torts' (Springer, 2013).

Panattoni, B., 'AI and Criminal Law: the Myth of 'Control' in a Data-Driven Society', *Revue Internationale de Droit Pénal* (2021).

Pranka, D., 'The Price of Medical Negligence – Should It Be Judged by the Criminal Court in the Context of the Jurisprudence of the European Court of Human Rights*?'* (Kaunas, 2021).

Reggio, F., 'Giustizia Dialogica: Luci e Ombre della Restorative Justice' (Franco Angeli, 2010).

Rességuier, A., Rodrigues R., 'AI Ethics Should Not Remain Toothless! A Call to Bring Back the Teeth of Ethics', *Big Data & Society* (2020).

Roxin, C., Greco L., 'Strafrecht, Allgemeiner Teil', (C.H. Beck, 2020).

Salvadori I., 'Agenti Artificiali, Opacità Tecnologica e Distribuzione della Responsabilità Penale', *RIDPP* (2021).

Salvi, F., 'La funzione della pena tra castigo e risocializzazione', *Salvis Juribus* (2022).

Santoni de Sio, F., Mecacci G., 'Four Responsibility Gaps with Artificial Intelligence: Why They Matter and How to Address Them.' *Philosophy & Technology* (2021).

Simons, K. W., 'When Is Strict Criminal Liability Just?' *Journal of Criminal Law & Criminology* (1997).

Surden, H., M. A. Williams, 'Technological Opacity, Predictability, and Self-Driving Cars', *Cardozo Law Review* (2016).

Taylor, I., 'Collective Responsibility and Artificial Intelligence', *Philos. Technol.* Vol. 37, n. 27 (2024).

Van de Poel, I., Sand, M., 'Varieties of responsibility: two problems of responsible innovation', *Synthese* 198 (Suppl 19), 4769–4787 (2021).

Vidmar, N., Miller D. T., 'Socialpsychological Processes Underlying Attitudes Toward Legal Punishment.', *Law and Society Review* (1980).

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

Defending Women's Rights: The Inter-American Court's Role in Ensuring Justice for Gender-Based Violence Victims

"Access to justice is the first line of defense for the human rights of women victims of sexual violence"[358]

Niesje Vanduffel

Received: 31 January 2025 / Accepted: 10 June 2025

Abstract

This paper argues that the Inter-American Court of Human Rights (IACtHR) has significantly enhanced the justiciability and remedies dimensions of women's right to access justice in cases of gender-based violence. Through a holistic approach, the Court has demonstrated a commitment to addressing not only individual acts of violence but also the structural and systemic factors that perpetuate such violations. By analysing key jurisprudence, the paper illustrates how the IACtHR has expanded the legal standards for state accountability, strengthened due diligence obligations, and advanced reparative frameworks that go beyond individual redress to include transformative measures. Furthermore, the paper examines how national jurisdictions and international legal bodies have engaged with and integrated the Court's jurisprudence, reinforcing its broader impact on the protection of women's rights. The findings suggest that the IACtHR has played a crucial role in shaping a more robust and enforceable legal framework for gender justice in the Inter-American system and beyond.

[358] IACHR, "Access to justice for women victims of sexual violence In Mesoamerica", December 9, 2011, https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf.

I. Introduction

According to the World Health Organisation (WHO), 34% of women aged 15-49 in the Americas have suffered from gender-based violence (GBV) at least once in their lifetime.[359] Such GBV is an extreme manifestation of discrimination against women, rooted in structural inequality and societal patterns of discrimination, that needs to be addressed in a gender-sensitive way.[360] To effectively address this violence, courts adjudicating GBV cases must therefore apply a comprehensive approach that not only considers the individual harm but also the broader societal norms and dynamics that perpetuate it. A prerequisite to effectively applying this comprehensive approach is ensuring access to justice for women who have been victims of GBV. The Committee of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), however, has observed several obstacles that keep women from realising their right to access to justice and asserts that these obstacles, in turn, occur in a context of structural inequality.[361] To ensure fair outcomes for women, courts must therefore apply a holistic approach that considers the impact of such structural inequality on both the occurrence of GBV and the challenges in its adjudication.

The Inter-American Court of Human Rights (IACtHR) is known for its progressive case law and holistic methodologies, offering innovative solutions to complex human rights issues.[362] Adjudicating the right to access to justice after gender-based violence is a particularly complex issue due to the interplay of structural inequality and individual cases of violence. In its case law on GBV, the Court has demonstrated the required nuanced understanding of this interplay, showcasing innovative legal reasoning to

[359] WHO, "Violence against women prevalence estimates, 2018 - Region of the Americas", March 9, 2021, https://iris.who.int/bitstream/handle/10665/341337/9789240022256-eng.pdf?sequence=1.

[360] Committee on the Elimination of Discrimination against Women (CEDAW Committee), "General recommendation No. 19: violence against women", 1992, UN Doc. A/47/38, §7, https://www.refworld.org/legal/resolution/cedaw/1992/en/96542; Rashida Manjoo, "Report of the Special Rapporteur on violence against women, its causes and consequences", April 23, 2010, UN Doc. A/HRC/14/22, §24, https://docs.un.org/en/A/HRC/14/22; Inter-American Commission on Human Rights (IACHR), "Eradicating violence against women requires normative and institutional frameworks focused on prevention, punishment, and redress", November 25, 2024, https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2024/292.asp.

[361] CEDAW Committee, "General recommendation No. 33 on women's access to justice", August 3, 2015, UN Doc. CEDAW/C/GC/33, §3, https://digitallibrary.un.org/record/807253?v=pdf.

[362] See, for example, their case law regarding indigenous rights; Enzamaria Tramontana, "The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources" *Int'l J on Minority & Group Rts* no. 17 (2010): 241.

establish state responsibility and define reparations, as will be demonstrated below.

After addressing the relevant framework and definitions, the essay will argue that the IACtHR has effectively enhanced the "justiciability" and "remedies" dimensions of women's right to access justice in cases relating to gender-based violence. Specifically, it will demonstrate that the Court has enhanced these dimensions by (1) accepting its jurisdiction under the *Belém do Pará* Convention, (2) developing a due diligence obligation for states, and (3) ordering transformative reparations in GBV cases, highlighting the Court's commitment to addressing the root causes of GBV while ensuring comprehensive and effective remedies for victims.

II. Framework and definitions

Before assessing the IACtHR's contributions to access to justice after GBV, it is essential to identify the relevant legal instruments in the Inter-American System and to define the key concepts, as they underpin the evaluation of the Court's impact in this area of international law.

A. Legal framework - *Belém do Pará* Convention

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the *Belém do Pará* Convention) is the key instrument in the Inter-American System for addressing gender-based violence. [363] It was also the first women's rights convention specifically designed to address violence against women (VAW).[364] The convention provides a comprehensive framework for addressing VAW, as it is not limited to an enumeration of rights[365], but also contains provisions relating to specific state obligations[366], and to the protection mechanisms available to women, including an individual complaint mechanism.[367] These characteristics distinguish the

[363] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 9 June 1994. (*Belém do Pará* Convention; hereinafter: the Convention).
[364] 32 states have ratified the Convention, which makes it the most ratified instrument in the Inter-American System; Ciara O'Connell, "Women's Rights and the Inter-American System." in *International Human Rights of Women,* ed. Niamh Reilly (Springer Singapore, 2019), 141; James L. Cavallaro and others "Women's rights, gender, and sexuality" in *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System,* ed. James L. Cavallaro and others (Oxford Academic, 2019), 550.
[365] Art. 3-6 *Belém do Pará* Convention.
[366] Art. 7-9 *Belém do Pará* Convention.
[367] Art. 12 *Belém do Pará* Convention.

Belém do Pará Convention from other international instruments on women's rights, such as the CEDAW Convention[368] and the Maputo protocol[369], which more generally aim to eradicate discrimination against women. The only other convention that is specifically concerned with violence against women is the Istanbul Convention[370], which does not, however, provide a complaint mechanism that allows women to enforce their rights. The provisions of the CEDAW do include such an individual complaint mechanism.[371] Nevertheless, this mechanism cannot lead to a binding court decision.[372] The *Belém do Pará* Convention, therefore, remains the only international convention aimed at eradicating VAW with a complaint mechanism that can lead to a binding court decision. Of course, it does not operate in a vacuum: other instruments adopted within the Organization of American States must be considered when assessing access to justice after gender-based violence in the Inter-American System. The most important provisions in this regard are art. 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention on Human Rights.[373]

B. Relevant legal definitions

1. Gender-based violence

Art. 1 of the *Belém do Pará* Convention defines "Violence against Women" as:

> "[…] any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."

The CEDAW Committee has also elaborated on the concept in its general

[368] Convention on the Elimination of All Forms of Discrimination against Women, 3 September 1981,1249 UNTS 1.
[369] Protocol to the African Charter on human and people's rights on the rights of women in Africa, 11 July 2007, 3268 UNTS 1.
[370] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 11 May 2011, 3010 UNTS 107.
[371] Art. 2 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999, 2131 UNTS 83 (hereafter: Optional Protocol).
[372] Art. 7(3) Optional Protocol.
[373] American Convention of Human Rights, 22 November 1969, 1144 UNTS 123; Violations are often found in relation to violations of article 7 of the *Belém do Pará* Convention*:* Maria da Penha v. Brazil, Case no. 12.051 (IACHR, April 16, 2001); Gonzalez, et al. ("Cotton Field") v. Mexico (IACtHR November 16, 2009); Angulo Losada v. Bolivia (IACtHR November 18, 2022).

recommendations, providing the following definition:

> "[…] violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty*."*[374]

While these definitions vary slightly, their main elements largely correspond: GBV concerns (1) acts of violence, (2) directed against women based on their gender, that (3) cause (or threaten to cause) harm. It is worth mentioning that the terms "gender-based violence", "violence against women", and "gender-based violence against women" are used interchangeably to refer to the same concept.[375]

2. Access to justice

The normative content of "access to justice" has been explored by the CEDAW Committee in its general recommendation No. 33 on women's access to justice[376]. The Committee has identified six interrelated elements that are essential to ensuring access to justice: justiciability, availability, accessibility, good quality, provision of remedies, and accountability of justice systems. For this paper, the "justiciability" and "provision of remedies" aspects are particularly important, as the contributions of the IACtHR are related to these dimensions. "*Justiciability"* refers to women's ability and empowerment to claim their rights as legal entitlements.[377] This dimension requires states, *inter alia,* to ensure that justice system professionals handle cases in a gender-sensitive manner[378] and to ensure that rights and correlative legal protections are recognised and incorporated into the law.[379] The "*Provision of remedies"* dimension*,* on the other hand, requires that remedies provide viable protection and meaningful

[374] CEDAW Committee, "General recommendation No. 19", §6 and CEDAW Committee, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19", July 26, 2017, UN Doc. CEDAW/C/GC/35, §9, https://docs.un.org/en/CEDAW/C/GC/35.
[375] See for example CEDAW Committee, "General Recommendation No. 19".
[376] CEDAW Committee, "General recommendation No. 33".
[377] Ibid., §14(a).
[378] Ibid., §15(c).
[379] Ibid., §15(a).

redress to women.[380]

With the legal framework and relevant definitions in mind, the next sections will address the jurisprudence of the Inter-American Court, highlighting three areas in which the Court has demonstrated innovative legal reasoning to enhance women's access to justice after GBV.

III. Contributions from the Inter-American Court

A. Acceptance of jurisdiction

Article 12 of the *Belém do Pará* Convention states that:

> "Any person […], may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, *[…].*"

Given that this provision does not explicitly mention the Court, Mexico challenged its jurisdiction in the *Cotton Field* case in 2009.[381] The Court had at that point already established a violation of the Convention in the *Miguel Castro-Castro Prison v. Peru* case (2006)[382], but because the parties had not disputed the jurisdiction of the Court, an extensive analysis of the issue was never conducted. Following Mexico's challenge, the Court therefore decided to resolve the issue, taking away any doubt about its jurisdiction.

In a systematic interpretation, the Court found that the explicit mention of the Commission could only lead to the conclusion that the Court implicitly has jurisdiction, for the American Convention on Human Rights allows the Commission to refer cases to the Court.[383] The teleological interpretation of the provision confirmed this interpretation, as "*the purpose of the existence of a system of individual petitions […]*

[380] Ibid., §14(e); for further elaboration, see: UNGA, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", December 15, 2015, Resolution 60/147, https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf.
[381] Gonzalez, et al. ("Cotton Field") v. Mexico (IACtHR November 16, 2009); Cavallaro, "Women's rights, gender, and sexuality", 555.
[382] Miguel Castro-Castro Prison v. Peru, (IACtHR November 25, 2006).
[383] Ibid., §43-58.

is to achieve the greatest right to judicial protection possible".[384] This, in combination with the "principle of effectiveness", provided for a further argument to accept the Court's jurisdiction under the *Belém do Pará* Convention.[385] Another topic of discussion was the Court's jurisdiction over articles 8 (specific measures) and 9 (intersectionality), as article 12 only mentions article 7 (due diligence) explicitly. Here, the Court found that it could not use systematic or teleological interpretation to establish such jurisdiction, given that the literal meaning of article 12 is very clear on the matter.[386] However, this does not prevent the Court from using these articles for the interpretation of article 7.[387]

The acceptance of its jurisdiction on the Convention through systematic and teleological interpretation is a first sign of the Court's willingness to comprehensively adjudicate women's rights following instances of GBV. Its interpretation of the purpose of article 12 also showcases an understanding of the importance of justiciability in the development of comprehensive strategies to prevent, punish and eliminate violence against women.[388] This jurisprudence relates to the "justiciability" aspect of women's access to justice, as this broad interpretation of art. 12 increases the opportunities for women to enforce their rights, allowing them to obtain a binding Court judgment after having suffered violations of the Convention, even when they are unable to do so in their national jurisdictions. In this sense, the Court functions as a court of last resort, providing a crucial avenue for justice when domestic legal systems fail to uphold women's rights.

[384] Ibid., §61.
[385] Ibid., §59-65.
[386] Caroline Bettinger-López, "The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case" *CUNY L. Rev*. 15, no. 2 (2012): 321, https://ssrn.com/abstract=2295060; *Ibid,* §79.
[387] Ibid.
[388] Ibid., §61.

B. Due diligence obligation of states

A second contribution of the IACtHR relates to the development of due diligence obligations for states, which has significantly impacted the way private acts of gender-based violence are adjudicated.[389]

1. Velásquez-Rodríguez v. Honduras

The concept of "due diligence" was first developed by the Court in 1988, in its judgment in the *Velásquez-Rodríguez v. Honduras* case on forced disappearances.[390] In this case, the Court acknowledged that states are not only responsible for "state-sponsored acts of violence", but also for "private acts of violence".[391] More specifically, the Court reasoned that:

> "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 Convention."[392]

States thus have a responsibility to prevent and respond to private acts of violence. This responsibility is triggered when a violation occurs with the "*support or acquiescence of the government*," for instance, when the State fails to take reasonable preventive measures or respond adequately.[393] The development of this principle has been crucial in bridging the gap between the public and private spheres, significantly expanding the scope of state responsibility. It ensures that states are held accountable and cannot escape liability for failing to exercise due diligence in addressing private

[389] Elizabeth A.H. Abi-Mershed, "Due diligence and the fight against gender-based violence in the Inter American system." in *Due diligence and its application to protect women from violence* ed. Carin Benninger-Budel (Brill, 2009), 129-131.
[390] O'Connell, "Women's Rights and the Inter-American System", 145; Abi-Mershed, "Due diligence and the fight against gender-based violence in the Inter American system".
[391] Velásquez-Rodríguez v. Honduras (IACtHR July 29, 1988), §172; Cavallaro, "Women's rights, gender, and sexuality", 562 & 572.
[392] Velásquez-Rodríguez v. Honduras (IACtHR July 29, 1988), §172.
[393] Ibid., §173; Abi-Mershed, "Due diligence and the fight against gender-based violence in the Inter American system", 130.

violence.

2. Influence of the jurisprudence

Even though the *Velásquez-Rodríguez* case related to enforced disappearances, it has been a key case for the development of jurisprudence and normative frameworks relating to GBV in the Inter-American System and in the international sphere as a whole.[394]

An example of such an influence on normative frameworks can be found within the Inter-American System, more specifically in art. 7(b) of the *Belém do Pará* Convention:

> "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to […] *apply due diligence to prevent, investigate and impose penalties for violence against women*; *[…]"* (emphasis added)

The impact of the jurisprudence, however, extends beyond the Inter-American System.[395] In the European context, Article 5 of the Istanbul Convention imposes a similar due diligence obligation on states. The European Court of Human Rights has also embraced this obligation, explicitly referencing the *Velásquez-Rodríguez* case in its judgments.[396]

At the international level, the due diligence obligation is reflected in the work of various United Nations bodies (UN bodies), including the CEDAW Committee's general recommendations and country reports, as well as the reports of the UN Special

[394] For a more elaborate analysis, see: Paulina García-Del Moral and Megan Alexandra Dersnah "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship" *Citizenship Stud* 18, no. 6-7 (2014)*:* 665-671, https://doi.org/10.1080/13621025.2014.944772.

[395] CAHVIO, "The Duty of Due Diligence", May 21, 2010, CAHVIO (2010), 7, https://rm.coe.int/1680593fc8.

[396] Opuz v. Turkey, Case No. 33401/02 (ECtHR June 9, 2009), §83-88.

Rapporteurs on violence against women.[397] Notably, the report of the Special Rapporteur on the due diligence standard explicitly mentions the *Velásquez-Rodríguez* case as a foundational precedent.[398] In the same report, the Special Rapporteur also concluded that "there is a rule of *customary international law* that obliges States to prevent and respond to acts of violence against women with due diligence".[399] The existence of such a due diligence obligation in customary international law indicates that the Court's jurisprudence has enhanced women's access to justice after GBV worldwide, as the obligation now arguably applies to all states, regardless of their participation in relevant human rights conventions. The Court's jurisprudence has thus been fundamental in shaping the normative frameworks regarding due diligence obligations of states concerning private acts of violence against women.[400] However, the relationship between the Court's jurisprudence and these normative frameworks is not one-sided, as the frameworks, and more specifically the *Belém do Pará* Convention, have, in turn, allowed the Court to determine the specific due diligence obligations of states in GBV cases.

3. Further development of the due diligence obligation

In 2000, the *Maria da Penha v. Brazil* case marked the first application of *the Belém do Pará* Convention in the Inter-American System.[401] In this decision, the Commission articulated the due diligence obligation in relation to domestic violence, focusing on impunity and existing patterns of violence.[402] Given that it took more than seventeen years for a final sentence to be delivered in the case, the Commission found that Brazil

[397] CEDAW Committee, "General recommendation 19", §9; CEDAW Committee, "Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico", January 27, 2005, UN Doc. CEDAW/C/2005/OP.8/MEXICO, https://www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8-MEXICO-E.pdf; Radhika Coomaraswamy, "Report of the Special Rapporteur on violence against women, its causes and consequences, submitted in accordance with Commission on Human Rights Resolution 1995/85", February 5, 1996, UN Doc. E/CN.4/1996/53, §36, https://digitallibrary.un.org/record/228137?v=pdf; Yakin Ertürk, "The due diligence standard as a tool for the elimination of violence against women", January 20, 2006, UN Doc. E/CN.4/2006/61, https://docs.un.org/en/E/CN.4/2006/61 (Accessed June 1, 2025).

[398] Ertürk, "The due diligence standard as a tool for the elimination of violence against women", §20.

[399] Ibid., §29, (emphasis added).

[400] Ibid.

[401] Cavallaro, "Women's rights, gender, and sexuality", 574; Maria da Penha v. Brazil, Case no. 12.051 (IACHR, April 16, 2001).

[402] Maria da Penha v. Brazil, Case no. 12.051 (IACHR, April 16, 2001), §55-58.

had violated its due diligence obligations.[403]

In the aftermath of this case, Brazil adopted the "Maria da Penha law"[404], aiming, *inter alia,* to "restrain domestic and family violence against women and to determine several mechanisms and measures for prevention, protection and assistance to women in situations of violence."[405] Through the creation of (1) mechanisms to prevent and restrain domestic GBV, (2) special courts on domestic GBV, and (3) assistance and protection measures for women, this law has enhanced women's access to justice for cases related to domestic violence in Brazil. The IACHR has been a catalyst for bringing about these changes.[406] Both the Inter-American Court and Commission have applied the due diligence obligation in several women's rights cases since then.

In the 2006 *Miguel Castro-Castro Prison v. Peru* case, for example, the Court further specified the due diligence obligations concerning the investigation of GBV, stating that "State authorities must open, ex officio and without delay, a serious, impartial and effective investigation as soon as they become aware of facts that constitute violence against women, […]."[407]

The preventive aspects of the obligation were further developed in the *Cotton Field* case (2009), as the Court decided that states must ensure their due diligence obligations through "permanent education and training programs and courses for public officials on human rights and gender, […] and judicial proceedings concerning gender-based discrimination, abuse and murder of women and to overcome stereotyping about the role of women in society*".*[408] In the same case, the Court also found that there is an *ex officio* obligation for States to consider the potential relation between systematic practices and the individual case under investigation.[409] This reasoning reflects the Court's nuanced understanding of the intersection between

[403] Ibid.*,* § 58; Paula Spieler, "The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil", *IND. J. GLOBAL LEGAL STUD.* 18, no.1 (2011): 133, https://doi.org/10.2979/indjglolegstu.18.1.121.
[404] Law no. 1134/2006 (Brazil).
[405] Ibid.*,* 138.
[406] Ibid.*,* 139.
[407] Miguel Castro-Castro Prison v. Peru, (IACtHR November 25, 2006), §378.
[408] *Ibid;* Gonzalez, et al. ("Cotton Field") v. Mexico (IACtHR November 16, 2009), §602(22).
[409] Gonzalez, et al. ("Cotton Field") v. Mexico (IACtHR November 16, 2009), §368.

systemic discrimination and individual cases of gender-based violence.

An in-depth analysis of this intersection was provided in 2016 when the Court rendered its judgment in the *Velásquez Pais et al. v. Guatemala* case.[410] Referring to the *Miguel Castro-Castro prison* case*,* the Court went into further detail as to how the existence of gender stereotypes had resulted in the failure to investigate the case properly, stating that the *Belém do Pará* Convention requires states to apply a gender perspective during the investigation of GBV.[411] According to the Court, a failure to do so

> "Promotes an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women may be tolerated and accepted. This encourages its perpetuation and the social acceptance of the phenomenon and causes women to feel unsafe and develop a permanent mistrust in the system for the administration of justice*"*[412]

With this paragraph, the Court demonstrates its nuanced, holistic understanding of the interplay between the occurrence of individual cases of violence, the existence of societal patterns of structural discrimination, and issues related to access to justice. In this case, the Court also further substantiated the due diligence obligations in contexts of increased violence against women. It stated that, whenever a report is made regarding the disappearance of a woman, a duty of strict due diligence arises from the very first hours. This duty requires authorities to conduct thorough research activities immediately. The Court further stated that it must be presumed that the missing woman is still alive until there is evidence to the contrary.[413] Since the Court judgment, Guatemala has, *inter alia,* (1) adopted a national strategy to achieve an effective and immediate search for missing women and (2) implemented permanent educational programmes for public officials who are involved in the investigation of acts of homicide

[410] Velásquez Pais et al. v. Guatemala, (IACtHR November 19, 2015).
[411] Ibid.*,* §173-200.
[412] Ibid.*,* §176.
[413] Ibid.*,* §122.

against women.[414]

Lastly, in a more recent case regarding sexual violence in a familial context (*Angulo Losada v. Bolivia,* 2022), the Court had the opportunity to explore the intersectionality between gender and childhood.[415] In this case, the Court has created enhanced due diligence obligations for states when dealing with children who were victims of GBV, enumerating very concrete measures to be taken by states.[416] Once again, this highlights the Court's ability to apply a holistic perspective, considering victims' specific vulnerabilities and deepening our understanding of states' due diligence obligations in specific circumstances.

In conclusion, the Inter-American Court of Human Rights has shaped our comprehension of state responsibilities regarding private acts of violence against women through the introduction and further development of the due diligence obligation of states regarding GBV. The Court's gender-sensitive articulation of state obligations has opened new avenues for women to enforce their rights, allowing them to hold states accountable for failing to prevent, investigate, and punish gender-based violence. This impact extends beyond the Inter-American System, influencing global case law, treaty provisions, and the development of customary international law. Additionally, the national implementations of the Court's judgments have enhanced the justiciability of women's rights in national jurisdictions, as the newly created laws, protocols, and training programmes are tackling the underlying issues of structural discrimination and inequality that were keeping women from enforcing their rights. The Court has therefore clearly contributed to the "justiciability" aspect of access to justice for women who have been the victims of GBV through the development of the due diligence obligation of states.

[414] IACtHR, "Caso Velásquez Paiz y otros Vs. Guatemala: reparaciones declaradas cumplidas", June 19, 2024, https://www.corteidh.or.cr/docs/supervisiones/SCS/guatemala/velasquez/velasquezc.pdf.
[415] Angulo Losada v. Bolivia (IACtHR November 18, 2022), §95.
[416] Ibid., §106; These measures include that children cannot be interviewed more than strictly necessary and that the interview must be conducted by a specialised psychologist.

IV. Transformative reparations

Lastly, the Court has played a significant role in developing a "holistic gender approach to reparations".[417] Rubio-Marín and Sandoval identify two main components that are necessary to apply such a gender approach: (1) the preconditions for the application of gender-sensitive reparations and (2) the ability to craft gender-sensitive reparations.[418] The preconditions identified by Rubio-Marín and Sandoval include the proper identification of the relevant facts, violations, and victims in each case, as well as the correct assessment of the harm caused by these violations.[419] This last component requires courts to take into account the "gendered nature of the harms that women endure".[420] Courts should therefore mainstream a gender-sensitive approach in their decision-making processes, allowing them to successfully consider women's unique experiences and needs.[421] To subsequently order gender-sensitive reparations, courts must consider adequate and transformative remedies.[422] From the remedies included in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation[423], "guarantees of non-repetition" offer the greatest transformative potential, allowing courts to order states to adopt legislative reforms, public policies, or change of practices, thereby addressing the root causes of violence against women.[424]

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[417] Ruth Rubio-Marín and Clara Sandoval, "Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: the promise of the cotton field judgment" *Human rights quarterly* 33, no. 4 (2011): 1062. https://ssrn.com/abstract=3134058; Bettinger-López, "The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case", 325; For a more in-depth analysis of the Court's reparation judgments: Gina Donoso, "Inter-American Court of Human Rights' Reparation Judgments. Strengths and Challenges for a Comprehensive Approach" *Inter-American Institute of Human Rights Journal*, no. 49 (2010): 29, https://www.corteidh.or.cr/tablas/r24577.pdf.

[418] Ibid., 1064.

[419] Ibid.

[420] Ruth Rubio-Marín, "The Gender of Reparations in Transitional Societies." in *The Gender of Reparations* ed. Ruth Rubio-Marín (Cambridge University Press, 2009), 91.

[421] Manjoo, "Report of the Special Rapporteur on violence against women, its causes and consequences", §26.

[422] Rubio-Marín and Sandoval "Engendering the reparations jurisprudence of the Inter-American Court of Human Rights", 1070.

[423] UNGA, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", December 15, 2015, Resolution 60/147.

[424] Manjoo, "Report of the Special Rapporteur on violence against women, its causes and consequences", §62; Pablo Saavedra Alessandri, "A Broader Look at the Transformative Impact of the Inter-American Court of Human Rights' Decisions", in *The Impact of the Inter-American Human Rights*

The IACtHR has demonstrated its willingness to apply a gender-sensitive approach and its ability to craft transformative reparations on several occasions. Although the incorporation of a gendered analysis has not always been straightforward and, at times, the Court has failed to fully adopt a gendered perspective (for example, in the *Artavia Murillo* case, where it distanced the issue from the abortion rights movement by framing it as a reproductive disability matter and relied on gendered stereotypes about "motherhood" in its reasoning on the right to private life),[425] its contributions to this field of international law remain significant, as will be highlighted in the following paragraphs.

In its 2009 *Cotton Field* ruling, for example, the Court recognised that reparations should be informed by a transformative agenda to adequately address the issues at hand, stating that:

> *"*When the violations occur in a context of structural discrimination, reparations cannot simply return victims to the situation they were in before the violation took place […]; instead, reparations should aim to transform or change the pre-existing situation."[426]

In concreto, the Court ordered the state to provide several "guarantees of non-repetition", including (1) further standardisation of its investigative protocols in relation to cases of sexual violence,[427] (2) the creation of a national database with information on all missing women and girls[428], and (3) an obligation to provide training to personnel involved in the prevention, investigation, and prosecution of GBV, as well as education on the issue to the general public.[429] These guarantees of non-repetition are closely related to the 'due diligence' obligations discussed above, as they aim to address

System: Transformations on the Ground eds. Armin von Bogdandy and others (Oxford University Press 2024), 540.

[425] See, for example: Patricia Palacios Zuloaga, "The Path to Gender Justice in the Inter-American Court of Human Rights" *Tex J Women & L* 17, no. 2 (2008)*:* 227, http://hdl.handle.net/2152/27999; O'Connell "Women's Rights and the Inter-American System", 147-148; Artavia Murillo et al. ('In vitro fertilization') v. Costa Rica, (IACtHR November 28, 2012).

[426] Gonzalez, et al. ("Cotton Field") v. Mexico (IACtHR November 16, 2009), §450.

[427] Ibid.*,* §497-502.

[428] Ibid.*,* §503-512.

[429] Ibid.*,* §531-543.

systemic failures within states in relation to these obligations.[430]

The *Cotton Field* case is often referred to as a landmark ruling for the development of the framework regarding transformative reparations, as it "changed the way we understand reparations for acts of gender-based violence".[431] Additionally, it is argued that this case has (indirectly) led to the adoption of the "Latin American Model Protocol for the investigation of gender-related killings of women" and the adoption of an operational protocol for the investigation of the crime of femicide in San Salvador, further underlining its significance.[432]

Over the years, the Court has further refined its jurisprudence on transformative reparations through a case-by-case approach, ordering creative, context-sensitive reparations to address particular issues in the relevant countries.

In a 2016 case regarding forced sterilisation (*IV v. Bolivia)*, for example, the Court ordered Bolivia to publish a leaflet that sets out the rights of women in relation to their sexual and reproductive health.[433] Additionally, the Court found that Bolivia must adopt permanent education programmes for medical students and professionals on issues relating to informed consent and gender-based violence.[434] The Court deemed this

[430] Rubio-Marín and Sandoval, "Engendering the reparations jurisprudence of the Inter-American Court of Human Rights", 1089.

[431] LSE Blogs, "Gonzalez, Monreal and Monarrez ("Cotton Field") v. Mexico", June 3, 2016, https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/gonzalez-et-al-v-mexico/; See also: Manjoo, "Report of the Special Rapporteur on violence against women, its causes and consequences", §77; International Commission of Jurists, "Women's Access to Justice for Gender-Based Violence A Practitioners' Guide", February 2016, 76-77, https://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-accesss-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf; Ricardo Arrendondo, "Note on Convention of *Belém do Pará* (Inter American Convention on the Prevention, Punishment and Eradication of Violence Against Women)" (Oxford Public International law 2021), https://opil.ouplaw.com/display/10.1093/law-oxio/e463.013.1/law-oxio-e463.

[432] ELLA, "The cotton field case in Mexico: setting legal precedents for fighting gender-based violence – Policy Brief", https://assets.publishing.service.gov.uk/media/57a08a0be5274a31e00003c2/130810_GOV_GenVio_BRIEF2.pdf (Accessed June 1, 2025); UN Women, "Femicide in Latin America", 4 April 2013, https://www.unwomen.org/en/news/stories/2013/4/femicide-in-latin-america; UN Women and UNHCHR, "Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide)", 2015, https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/LatinAmericanProtocolForInvestigationOfFemicide.pdf.

[433] IV v. Bolivia, (IACtHR November 30, 2016), §341.

[434] Ibid., §342.

necessary, as it had previously established that the violations of the rights of the individual involved were the consequence of negative gender-based stereotypes. Bolivia has complied with most of the Court's orders, the development of the education programme being the only exception.[435]

More recently, in the *Angulo Losada v. Bolivia* case (2022), the Court ordered Bolivia to reform its legislation to make the absence of consent, rather than the use of physical force, the constitutive element of sexual violence crimes.[436] Through this reform, the Court seeks to remove obstacles and help secure justice for victims of sexual violence.[437] Additionally, the Court instructed Bolivia to integrate sexual education into the official curriculum, emphasising the importance of education on consent.[438] The Bolivian authorities have already taken steps to amend the relevant laws, and a commission to review femicide cases was established in 2022.[439] The Constitutional Court has also ordered the Criminal Chamber of the Supreme Court to give priority to judicial proceedings related to femicide and to evaluate the training curricula for judges and judicial personnel.[440]

The Court's focus on both the damages for victims and the underlying causes of GBV through reparations offers meaningful redress for women, aiming not only to right past wrongs but also to prevent future violations. This effectively enhances the "provision of remedies" dimension of women's access to justice. Moreover, the Court's jurisprudence extends beyond individual cases, offering principles that can be applied region-wide, potentially driving systemic change and improving access to justice for women throughout the Inter-American System. As a result of the *Angulo Losada v. Bolivia case,* for example, all states in the region are now required to ensure that "lack

[435] IACtHR, "Caso I.V. Vs. Bolivia: reparaciones declaradas cumplidas", November 17, 2021, https://www.corteidh.or.cr/docs/supervisiones/IV_17_11_21.pdf.
[436] Angulo Losada v. Bolivia (IACtHR November 18, 2022), §198; Yale Law School, "Court Issues Landmark Sexual Violence Ruling, Agreeing with Lowenstein Clinic Brief", January 21, 2023, https://law.yale.edu/yls-today/news/court-issues-landmark-sexual-violence-ruling-agreeing-lowenstein-clinic-brief#:~:text=In%202012%2C%20Brisa%20Liliana%20De,when%20she%20was%20a%20child.
[437] Ibid., §197.
[438] Ibid., §216.
[439] "Comisión de Revisión de Casos de Violación y Feminicidio"; Edyta Lis, "Gender Perspective in the Recent Case Law of the Inter-American Court of Human Rights" *International Community Law Review* 26, no. 6 (2024): 611, https://doi.org/10.1163/18719732-bja10126.
[440] Ibid; Tribunal Constitucional Plurinacional de Bolivia, Sentencia Nº 0001/2022, March 31, 2022.

of consent" is the constitutive element of sexual violence crimes in their domestic legislation, making it easier for women to enforce their rights.[441] Through these transformative remedies and their implementation in national jurisdictions, the Court has thus also enhanced the "justiciability" dimension of women's access to justice.

V. Conclusion

The Inter-American Court of Human Rights has played a crucial role in advancing access to justice for victims of gender-based violence, setting important legal precedents that address both individual violations and systemic inequalities. By applying a gender-sensitive perspective, the Court has shown its capability to understand the interplay between individual cases of violence, the subsequent issues regarding access to justice, and the societal patterns that underpin both these phenomena. This approach has allowed the Court to develop innovative legal concepts to effectively address these issues.

Two notable contributions are the development of due diligence obligations for states and the implementation of transformative reparations. The due diligence obligations have deepened our understanding of states' responsibilities regarding GBV and have made it possible for women to hold states accountable when they fail to act. These obligations enhance the "justiciability" dimension of women's right to access justice. Transformative reparations, on the other hand, aim to address systemic failures within states, requiring reforms such as organising training for state officials, implementing changes to judicial systems, and introducing new legislation. These measures provide comprehensive remedies for victims, targeting the underlying causes of GBV and promoting societal change. Consequently, the Court has enhanced the "remedies" dimension of access to justice.

While many states have made efforts to implement the principles advanced in these judgments, effective implementation on the national level has not always been achieved.[442] The cornerstone of the Court's efforts to enhance access to justice for

[441] Yale Law School, "Court Issues Landmark Sexual Violence Ruling, Agreeing with Lowenstein Clinic Brief".

[442] See, for example: Rashida Manjoo, "Reflections on the Concept and Implementation of Transformative Reparations" *Int'l J Hum Rts* 21, no. 9 (2017): 1198, doi:

women after GBV is therefore its acceptance of jurisdiction over the *Belém do Pará* Convention; through this jurisdiction, the Court can now operate as a "court of last resort" in GBV cases and rectify the failure of states to fulfil their obligations.

In conclusion, the Court has firmly established itself as a powerful guardian of women's right to access to justice after GBV, driving meaningful legal innovations that challenge systemic barriers and empower women.

https://doi.org/10.1080/13642987.2017.1366666; Caroline Bettinger-López, "The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case", 315.

Bibliography

Abi-Mershed, Elizabeth A.H. “Due diligence and the fight against gender-based violence in the Inter American system.” in *Due diligence and its application to protect women from violence* ed. Carin Benninger-Budel. Brill, 2009.

Angulo Losada v. Bolivia (IACtHR November 18, 2022).

Arrendondo, Ricardo. “Note on Convention of Belém do Pará (Inter American Convention on the Prevention, Punishment and Eradication of Violence Against Women)”. Oxford Public International law 2021. https://opil.ouplaw.com/display/10.1093/law-oxio/e463.013.1/law-oxio-e463 (Accessed June 1, 2025).

Artavia Murillo et al. (‘In vitro fertilization’) v. Costa Rica, (IACtHR November 28, 2012).

Bettinger-López, Caroline. “The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case”. *CUNY L. Rev*. 15, no. 2 (2012). https://ssrn.com/abstract=2295060.

CAHVIO, “The Duty of Due Diligence”, May 21, 2010, CAHVIO (2010), 7. https://rm.coe.int/1680593fc8 (Accessed June 1, 2025).

Cavallaro, James L., and others. “Women’s rights, gender, and sexuality”. in *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System.* ed. Cavallaro, James L., and others. Oxford Academic, 2019.

Committee on the Elimination of Discrimination against Women (CEDAW Committee). “General recommendation No. 19: violence against women”. 1992, UN Doc. A/47/38. https://www.refworld.org/legal/resolution/cedaw/1992/en/96542 (Accessed June 1, 2025).

CEDAW Committee. “Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the

Convention, and reply from the Government of Mexico". January 27, 2005, UN Doc. CEDAW/C/2005/OP.8/MEXICO. https://www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8-MEXICO-E.pdf (Accessed June 1, 2025).

CEDAW Committee. "General recommendation No. 33 on women's access to justice". August 3, 2015, UN Doc. CEDAW/C/GC/33. https://digitallibrary.un.org/record/807253?v=pdf (Accessed June 1, 2025).

CEDAW Committee. "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19". July 26, 2017, UN Doc. CEDAW/C/GC/35, https://docs.un.org/en/CEDAW/C/GC/35 (Accessed June 1, 2025).

Coomaraswamy, Radhika. "Report of the Special Rapporteur on violence against women, its causes and consequences, submitted in accordance with Commission on Human Rights Resolution 1995/85". February 5, 1996, UN Doc. E/CN.4/1996/53. https://digitallibrary.un.org/record/228137?v=pdf (Accessed June 1, 2025).

Donoso, Gina. "Inter-American Court of Human Rights' Reparation Judgments. Strengths and Challenges for a Comprehensive Approach". *Inter-American Institute of Human Rights Journal*, no. 49 (2010). https://www.corteidh.or.cr/tablas/r24577.pdf (Accessed June 1, 2025).

ELLA. "The cotton field case in Mexico: setting legal precedents for fighting gender-based violence – Policy Brief". https://assets.publishing.service.gov.uk/media/57a08a0be5274a31e00003c2/130810_GOV_GenVio_BRIEF2.pdf (Accessed June 1, 2025).

Ertürk, Yakin. "The due diligence standard as a tool for the elimination of violence against women". January 20, 2006, UN Doc. E/CN.4/2006/61. https://docs.un.org/en/E/CN.4/2006/61 (Accessed June 1, 2025).

García-Del Moral, Paulina and Alexandra Dersnah, Megan. "A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship". *Citizenship Stud* 18, no. 6-7 (2014). https://doi.org/10.1080/13621025.2014.944772.

Gonzalez, et al. ("Cotton Field") v. Mexico (IACtHR November 16, 2009).

Inter-American Commission on Human Rights (IACHR). "Eradicating violence against women requires normative and institutional frameworks focused on prevention, punishment, and redress". November 25, 2024. https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2024/292.asp (Accessed June 1, 2025).

IACHR. "Access to justice for women victims of sexual violence In Mesoamerica". December 9, 2011. https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf (Accessed October 9, 2025).

Inter-American Court of Human Rights (IACtHR). "Caso I.V. Vs. Bolivia: reparaciones declaradas cumplidas". November 17, 2021. https://www.corteidh.or.cr/docs/supervisiones/SCS/bolivia/iv/ivc.pdf (Accessed June 1, 2025).

IACtHR. "Caso Velásquez Paiz y otros Vs. Guatemala: reparaciones declaradas cumplidas". June 19, 2024. https://www.corteidh.or.cr/docs/supervisiones/SCS/guatemala/velasquez/velasquezc.pdf (Accessed June 1, 2025).

International Commission of Jurists. "Women's Access to Justice for Gender-Based Violence A Practitioners' Guide". February 2016, 76-77. https://www.icj.org/wp-content/uploads/2016/03/Universal-Womens-accesss-to-justice-Publications-Practitioners-Guide-Series-2016-ENG.pdf (Accessed June 1, 2025).

IV v. Bolivia. (IACtHR November 30, 2016).

Lis, Edyta. "Gender Perspective in the Recent Case Law of the Inter-American Court of Human Rights". *International Community Law Review* 26, no. 6 (2024). https://doi.org/10.1163/18719732-bja10126.

LSE Blogs. "Gonzalez, Monreal and Monarrez ("Cotton Field") v. Mexico". June 3, 2016. https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/gonzalez-et-al-v-mexico/ (Accessed June 1, 2025).

Manjoo, Rachida. "Report of the Special Rapporteur on violence against women, its causes and consequences". April 23, 2010, UN Doc. A/HRC/14/22. https://docs.un.org/en/A/HRC/14/22 (Accessed June 1, 2025).

Rashida Manjoo, "Reflections on the Concept and Implementation of Transformative Reparations" *Int'l J Hum Rts* 21, no. 9 (2017).

Maria da Penha v. Brazil. Case no. 12.051 (IACHR, April 16, 2001).

Miguel Castro-Castro Prison v. Peru. (IACtHR November 25, 2006).

O'Connell, Ciara. "Women's Rights and the Inter-American System." in *International Human Rights of Women,* ed. Reilly, Niamh. Springer Singapore, 2019.

Opuz v. Turkey, Case No. 33401/02 (ECtHR June 9, 2009).

Rubio-Marín, Ruth. "The Gender of Reparations in Transitional Societies." in *The Gender of Reparations* ed. Ruth Rubio-Marín. Cambridge University Press, 2009.

Rubio-Marín, Ruth and Sandoval, Clara. "Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: the promise of the cotton field

judgment". *Human rights quarterly* 33, no. 4 (2011). https://ssrn.com/abstract=3134058.

Saavedra Alessandri, Pablo. "A Broader Look at the Transformative Impact of the Inter-American Court of Human Rights' Decisions". In *The Impact of the Inter-American Human Rights System: Transformations on the Ground* eds. Armin von Bogdandy and others. Oxford University Press 2024.

Spieler, Paula. "The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil". *IND. J. GLOBAL LEGAL STUD.* 18, no.1 (2011). https://doi.org/10.2979/indjglolegstu.18.1.121.

Tramontana, Enzamaria. "The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources". *Int'l J on Minority & Group Rts* no. 17 (2010).

Tribunal Constitucional Plurinacional de Bolivia, Sentencia Nº 0001/2022, March 31, 2022.

UNGA. "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". December 15, 2015, Resolution 60/147. https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf (Accessed June 1, 2025).

UN Women. "Femicide in Latin America". 4 April 2013. https://www.unwomen.org/en/news/stories/2013/4/femicide-in-latin-america (Accessed June 1, 2025).

UN Women and UNHCHR. "Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide)". 2015.

https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/LatinAmericanProtocolForInvestigationOfFemicide.pdf (Accessed June 1, 2025).

Velásquez Pais et al. v. Guatemala. (IACtHR November 19, 2015).

Velásquez-Rodríguez v. Honduras. (IACtHR July 29, 1988).

WHO. "Violence against women prevalence estimates, 2018 - Region of the Americas". March 9, 2021. https://iris.who.int/bitstream/handle/10665/341337/9789240022256-eng.pdf?sequence=1 (Accessed June 1, 2025).

Yale Law School. "Court Issues Landmark Sexual Violence Ruling, Agreeing with Lowenstein Clinic Brief". January 21, 2023. https://law.yale.edu/yls-today/news/court-issues-landmark-sexual-violence-ruling-agreeing-lowenstein-clinic-brief#:~:text=In%202012%2C%20Brisa%20Liliana%20De,when%20she%20was%20a%20child (Accessed June 1, 2025).

Zuloaga, Patricia Palacios. "The Path to Gender Justice in the Inter-American Court of Human Rights". *Tex J Women & L* 17, no. 2 (2008). http://hdl.handle.net/2152/27999.

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

Defining and Legitimising Violence in the Modern World

Valeria Couttolenc Gonzalez

Received: 17 February 2025 / Accepted: 10 June 2025

Abstract

This article aims to explore understandings of violence beyond the use of force and aggression through an analysis of the persistent and evolving nature of violence within the context of late-stage capitalism, (neo)colonialism, and imperialism, arguing that violence is not just a physical or immediate phenomenon, but also a systemic, symbolic, and slow process embedded within the structures of modern global societies. The text draws on the work of decolonial and Global South scholars to propose how, despite decolonisation movements, colonial legacies persist in the structures of neoliberalism, albeit in a less visible manner, and in the continued exploitation of the Global South by Global North countries through new forms of colonialism and capitalism. This piece proposes defining and understanding violence through different lenses and frameworks - acknowledging socio-political, economic, environmental and structural factors and how they interplay into systems of oppression and harm to perpetuate violence. It also offers criticisms of violent legacies of the past as well as violent practices of the present through imperialism and different modern-day expressions of colonialism. Moreover, discussions on the weaponisation of language to inflict and legitimise violence are explored, in tandem with presenting other conceptualisations of violence such as slow violence (with an environmentalist emphasis), economic exploitation through trade, and the forcing into debt of Global South countries in the name of development/modernity. To conclude, the text invites a critical reflection of current economic and political systems and their impacts on everyday lives to address the constant metamorphoses of violence as it continues to permeate the world we exist in, through the different manifestations of violence beyond

the use of force and aggression.

Keywords: violence, legitimation of violence, colonialism

The era of globalisation has intrinsically tied together different types of violence into a political and economic system under neoliberalism and (what is now) late-stage capitalism. The existence of violence in everyday lives is not a recent phenomenon; it is simply the latest manifestation of the systems put in place since colonialism. As Frantz Fanon states in *The Wretched of the Earth,* "colonialism is not a thinking machine, nor a body endowed with reasoning faculties. It is violence in its natural state, and it will only yield when confronted with greater violence."[443] Despite global decolonisation movements in the 1960s and onwards, many argue that colonialism has not gone away, as will be discussed throughout this piece. Instead, the structures left behind by colonialism hold steady as the ideological aspect morphs into a new, more subtle and human rights-friendly manner of expanding colonialism and imperialism. In our present age, colonialism is not monolithic; nation-states no longer rely solely on violence or armed forces to subjugate other states as colonies. Consider settler colonialism, as discussed by Patrick Wolfe, who states that it is not the elimination of the native people, but access to and control of the land that they're in, that characterises settler societies. In these cases, the settler colony's invasion is not a one-off event, but rather a structure built on the destruction and disintegration of native societies and the creation of a new colonial society that attempts to replace them.[444] To this definition, Lorenzo Veracini adds the important features of domination and reproduction to understand how settler colonies are constituted and function, acknowledging the coexistence of settler colonialism with colonialism, but also emphasising the distinctions between the two structural models of oppression.[445]

[443] Frantz Fanon, *The Wretched of the Earth* (Cape Town: Kwela Books, 1961), 61.
[444] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (December 21, 2006): 387–409, https://doi.org/10.1080/14623520601056240.
[445] Lorenzo Veracini, *Settler Colonialism* (Cham: Springer Nature, 2010), 1–173. See also Lorenzo Veracini, "Understanding Colonialism and Settler Colonialism as Distinct Formations," *Interventions* 16, no. 5 (November 14, 2014): 615–33, https://doi.org/10.1080/1369801x.2013.858983.

Colonialism is also ongoing, as seen in rising inequality and other forms of systematic oppression. Therefore, if one understands colonialism as inherently violent, as Fanon states[446], then how can its offspring of neocolonialism and imperialism be anything different? Furthermore, Aimé Césaire states that "no one colonises innocently."[447] The rationalisation that Césaire presents in *Discourse on Colonialism* regarding the need to exercise colonial violence with impunity[448] is implicitly given by the neoliberal world order to countries in the Global North to oppress and exploit countries in the Global South for cheap labour and natural resources.

To understand how violence works in everyday lives, we must first ask what violence is beyond aggression and who has the power to legitimise or legalise it. In the field of International Relations, conceptions of violence centre on the use of force and aggression, with a specific focus on war.[449] This view is supported by environmentalist and scholar-activist Dr. Rob Nixon's definition of violence being "customarily conceived as an event or action that is immediate in time, explosive and spectacular in space, as erupting into instant sensational visibility."[450] However, only understanding violence as a physical and immediate phenomenon overlooks the most pervasive types of violence that impact citizens across the world, often without their knowledge, and cause harm extending far beyond war casualties. These types of violence — including systemic, symbolic, and slow violence - are also addressed in the works of Jason Hickel and Achille Mbembe. Violence, in their analysis, does not necessarily manifest in a perceptive manner yet it infiltrates the structures, systems and bodies of the world.

In conversation with the authors above, Walden Bello's analysis in *Counterrevolution: The global rise of the far right* offers the possibility to conceptualise violence beyond the use of force and aggression. Moreover, the emergence of analysis of different

[446] Frantz Fanon, *The Wretched of the Earth* (Cape Town: Kwela Books, 1961).
[447] Aimé Césaire, *Discourse on Colonialism*, trans. Joan Pinkham (1950; repr., New York, NY: Monthly Review Press, 2000), 39.
[448] Ibid.
[449] See Kant's Perpetual Peace: A Philosophical Sketch (1975); Galtung's Perpetual Peace: A Philosophical Sketch (1969); Buzan and Waever's Regions and Powers: The Structure of International Security (2003).
[450] Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge, MA: Harvard University Press, 2011), 2.

types of violence does not entail what is traditionally perceived as violence (i.e. use of force and aggression) is no longer a relevant understanding of violence. Meaning, physical violence can be used by those in power to further other types of violence and oppression, or can represent the culmination of other violent forces coming to the surface. It represents the face of violence that is invisible to the naked eye, but impacts everything anyway. Caitlin Cahill and Rachel Pain propose an understanding of violence as "...ongoing and always present, and informed by the past…",[451] which in turn points to the need to analyse the past and understand how the current world system came to be from the 1960s (at the height of the post-colonial movements) to the present. The past informs how violence found in the structural and systemic legacies of colonialism developed into new forms of control and oppression exercised by the Global North on the Global South, thus leading to ongoing and always present attributes since violence is intermeshed within institutions and systems.

Jason Hickel, in *The Divide: A Brief Guide to Global Inequality and Its Solutions*, addresses the systemic or structural (used interchangeably throughout this essay) violence exercised by the current neoliberal politics, maintaining a hegemony of the Global North over the Global South.[452] Understanding that "development for some meant underdevelopment for others,"[453] it is hard to see the current world state as anything but a violent system of oppression that enacts violence through the structures that determine the functioning of the neoliberal capitalist global order. An example of such structural violence and a consequence of underdevelopment is the creation of Structural Adjustment Programmes (SAPs) that push the development and neoliberal agenda in the Global South rather than the developmentalist practices implemented at the end of the colonial period.[454] Such programmes represented a form of neo-colonialist economic practices that have managed to ensure that countries in the Global South stay enslaved via debt[455] by neoliberal international organisations such

[451] Caitlin Cahill and Rachel Pain, "Representing Slow Violence and Resistance," *ACME: An International Journal for Critical Geographies* 18, no. 5 (October 3, 2019): 1054–65.
[452] Jason Hickel, *The Divide: A Brief Guide to Global Inequality and Its Solutions* (London: Windmill Books, 2018).
[453] Ibid,19.
[454] Ibid.
[455] In the words of John Adams, "there are two ways to conquer and enslave a nation. One is by the sword. The other is by debt."

as the International Monetary Fund and the World Bank.[456]

The SAPs and other more modern forms of debt perpetuate international systemic violence that supports the power imbalances capitalism needs to exploit and oppress countries in the Global South. In other words, countries from the Global South find themselves in a subordinate position in relation to the international organisations and countries from the Global North that are providing them with money for so-called development and modernisation. Hickel reframes this relationship, stating that "rich countries aren't developing poor countries; poor countries are effectively developing rich countries – and they have been since the late 15th century."[457] Such analysis supports the argument that colonialism was never really defeated in the late twentieth century or before; instead, it has just reincarnated into other types of colonialism and imperialism in a neoliberal global order.

Exploitation driven by capitalism remains exploitation, even if neoliberals comfort themselves by believing their humanitarian approach is genuine and distinct from past colonial practices. As set forward by Nicholas Vrousalis on *Exploitation as Domination: Why Capitalism is Unjust,* "...for all its pretensions to freedom and equality-of having superseded might-makes-right — capitalism remains a system of unfreedom and inequality."[458] Vrousalis then, along the lines of Marxist critical theory, paints capitalism as still an exploitative relationship that is based on a power-induced domination of one party unilaterally over the other with a servitude-based labour flow, as well as within the structures of the current political and economic systems at a global level.

Moreover, understanding the exploitative nature of the neoliberal system and tying Walden Bello's analysis of counterrevolutions in the post-colonial project, specifically Chile's case study during the Cold War, one can see how the use of force can be tied

[456] Jason Hickel, The Divide: A Brief Guide to Global Inequality and Its Solutions (London: Windmill Books, 2018).
[457] Ibid, 29. See also Walter Rodney, How Europe Underdeveloped Africa (London: Bogle-L'ouverture Publications, 1972).
[458] Nicholas Vrousalis, *Exploitation as Domination* (Oxford: Oxford University Press, 2022),3.

into the use of violent economic policies with the Chicago Boys.[459,460] Here, Naomi Klein's concept of *disaster capitalism* through the *shock doctrine* becomes relevant to consider state violence through the imposition of neoliberal/capitalist economic practices during moments of crisis, which would later be replicated in other countries around the Global South.[461] Beyond the economic violence outlined here, the violence caused by the push for development and so-called modernity can be seen in rising inequality (necessary to keep the system working)[462] and poverty, as well as with the passage of time in other manifestations of slow violence as discussed below.

Slow violence, as defined by Nixon, whose work focuses on the struggles for environmental justice in the Global South, constitutes an event or action that occurs "gradually and out of sight…delayed destruction that is dispersed across time and space…violence that is typically not viewed as violence at all."[463] While Nixon focuses primarily on the environmentalist dimension of slow violence, there are references to the impacts of violence in other spheres of everyday life, such as housing (the existence of development refugees as a consequence of so-called modernity projects), claims to land (surplus people)[464], and health (uranium poisoning from the deployment of weapons)[465]. Throughout his book, Nixon offers one of the most complete examples of how violence goes beyond the physical and immediate, as is portrayed in his case study on uranium poisoning during and after the Iraq War.[466] The international

[459]The Chicago Boys were a group of Chilean economists trained in the University of Chicago, learning from Milton Friedman, who gained power after the 1973 military coup against Allende. Their economic policies "applied a "shock treatment" to balance the budget and to reduce inflation, reformed labor legislation, contained the power of unions, attracted foreign investors, and strengthened the rule of law." (Sebastian Edwards, *The Chile Project: The Story of the Chicago Boys and the Downfall of Neoliberalism* (NJ: Princeton University Press, 2023), 2.)

[460] Walden F Bello, "Crucifying the Left in Chile," in *Counterrevolution : The Global Rise of the Far Right* (Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019), 62–78.

[461] Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism (London: Penguin Books Ltd, 2007).

[462] Jason Hickel, The Divide: A Brief Guide to Global Inequality and Its Solutions (London: Windmill Books, 2018).

[463] Rob Nixon, Slow Violence and the Environmentalism of the Poor (Cambridge, MA: Harvard University Press, 2011), 2.

[464] Nixon describes surplus people as mostly women and children that are "deemed superfluous to the labor market/ideal of national development and were forcibly removed/barred from cities" (Ibid, 150).

[465] Rob Nixon, Slow Violence and the Environmentalism of the Poor (Cambridge, MA: Harvard University Press, 2011).

[466] Ibid.

narrative tends to centre around war casualties by use of force as opposed to acknowledging other impacts that wars have on the environment in which they are waged. This can be seen in examples such as the contamination of natural resources leading to their weaponisation to be used against people who, instead of becoming casualties, become survivors of wars they did not start or partake in. Slow violence in this sense ties into Achille Mbembe's work in Necropolitics, addressing slow violence through slow death, as discussed below, emphasising the racial violence and attritional nature of the harms.[467]

The violent impact of the development or modernity agenda is seen in the living conditions across the Global South, and increasingly for certain populations in the Global North.[468] Tying into the environmental violence perpetrated through overconsumption, Hickel notes that "if poor countries increase their consumption, which they will have to do to some extent to eradicate poverty, they will only tip us further towards disaster."[469] If, as Hickel states, GDP growth is leading to more poverty than it is eliminating,[470] one can describe the current late-stage capitalist system as an unsustainable one because of the pressures that it causes on the finite resources of the Earth. The violence of this system lies in the negative impacts that it will have in the long term for those living in it. Harm to the environment is not something that is removed from humanity's future, no matter how many strongmen in positions of power deny the reality of climate change or how much the narrative is shifted away from this crisis affecting people in the long-term.[471] The most significant manifestations of violence that will impact humankind are not those in the news or on social media, but the legacy left by the structural violence of people considering the environment as infinite and looking the other way when a conflict or situation does not impact them directly. There is a need to understand violence this way to be able to address it, beyond the immediate and short-term media focus we are accustomed to, as Nixon

[467] Achille Mbembe, Necropolitics, trans. Steve Corcoran (Durham, NC: Duke University Press, 2019).
[468] Jason Hickel, The Divide: A Brief Guide to Global Inequality and Its Solutions (London: Windmill Books, 2018).
[469] Jason Hickel, The Divide: A Brief Guide to Global Inequality and Its Solutions (London: Windmill Books, 2018), 277.
[470] Ibid.
[471] Eve Darian-Smith, "Deadly Global Alliance: Antidemocracy and Anti-Environmentalism," Third World Quarterly 44, no. 2 (December 2, 2022): 1–16, https://doi.org/10.1080/01436597.2022.2144206.

argues.[472]

Looking beyond violence as occurring between nation-states, one can acknowledge how language is used as a form of violence that, in turn, impacts humans in a sometimes-imperceptible manner. In Amitav Ghosh's *The Nutmeg Curse: Parables for a Planet in Crisis,* colonial violence is discussed as the Dutch discover the Bandana islands and colonise them.[473] Here the emphasis lies in the (in)visibility of violence, as in the narrative account undertaken by Ghosh as he describes the invisibilisation of the colonial violence inflicted through the use of language to describe massacres and the imposition of new names for places as part of colonialism (similarly seen in the Spanish crown's naming of New Spain for the territory spanning across Latin America and parts of the US)[474] as a new and symbolic violence.[475]

The use of language to legitimise violence manifests in different dimensions, too. Anthropologist Neil Whitehead discusses how the anthropology of the war subfield has approached the use of cultural and political violence in recent times. The central questions of study centre around cultural appropriateness of violence – as in who gets to decide when, why and how violence manifests as either a cultural expression, a discursive practice or a performance. In Whitehead's words, "these pseudo-anthropological attempts at explanation only serve to recapitulate colonial ideas about the inherent savagery of the non-Western world…"[476]. Coupled with "...to appreciate the links between cultural affirmation and violence leads to intractable political quagmires…where the violent insertion of Western models of political association only

[472] Rob Nixon, Slow Violence and the Environmentalism of the Poor (Cambridge, MA: Harvard University Press, 2011).
[473] Amitav Ghosh, The Nutmeg's Curse: Parables for a Planet in Crisis (Chicago, IL: The University of Chicago Press, 2021).
[474] Raymond B. Craib, "Cartography and Decolonization," in Decolonizing the Map: Cartography from Colony to Nation, ed. James R Akerman (Chicago: The University of Chicago Press, 2017), 18.
[475] Amitav Ghosh, The Nutmeg's Curse: Parables for a Planet in Crisis (Chicago, IL: The University of Chicago Press, 2021). See also Mishuana R. Goeman, "Disrupting a Settler-Colonial Grammar of Place: The Visual Memoir of Hulleah Tsinhnahjinnie," in Theorizing Native Studies, ed. Audra Simpson and Andrea Smith (Durham: Duke University Press, 2014) and Brenda Nicolas, "Pertenencia Mutua : Indigenous Oaxacans Contesting Settler Colonial Grammars," American Quarterly76, no. 2 (June 2024): 241–71, https://doi.org/10.1353/aq.2024.a929165.
[476]Neil L. Whitehead, "Introduction: Cultures, Conflicts, and the Poetics of Violent Practice," in *Violence*, ed. Neil L. Whitehead (Santa Fe: School of American Research, 2004), 4.

serves to induce even fiercer opposition through violent means…"[477], Whitehead illustrates a wider panorama on how culture interplays into understandings of what is violence beyond the traditional analyses.[478] Additionally, this constant "othering" of the non-Western world has only led to justifications of uses of force through invasions in contemporary times, even after the decolonisation movements in the 20th century, in turn leading to hostility towards the Global North for their modern exploitative, colonial, and violent practices as well as the continuous imposition of Western cultural norms and values (cultural colonialism).[479]

Furthermore, beyond the constant Othering lies what Saidiya Hartman describes as the "afterlife of slavery" to address both the denial and erasure of violent legacies as well as ongoing practices.[480] Such an analysis offers insight into how language is also crucial to legitimise or legalise violence, answering the question of who gets to determine what violence is and how this is achieved. Considering the practice by the West to sweep under the rug the most negative aspects of their history, as seen in the lack of common knowledge around Germany's colonialism in Namibia[481], King Leopold's in the Congo[482] or residential schools in Canada and the United States[483], it should not be surprising to discover the weaponisation of language to construct alternative narratives and hide violence from the naked eye.

Another example, found in another of Bello's case studies, is the rise of the Hindu

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[477] Ibid.

[478] For further reading, see also Neil L. Whitehead, ed., *Violence*, *Violence* (Santa Fe: School of American Research, 2004).

[479] Sarah Amsler, "Cultural Colonialism," in *The Wiley Blackwell Encyclopedia of Sociology* (John Wiley & Sons, Ltd, August 1, 2016), https://doi.org/10.1002/9781405165518.wbeosc202.pub2.

[480] Saidiya Hartman, Lose Your Mother: A Journey along the Atlantic Slave Route (New York: Farrar, Straus and Giroux, 2008), 6.

[481] Henning Melber, "Colonialism, Genocide and Reparations: The German-Namibian Case," *Development and Change* 55, no. 4 (July 2, 2024), https://doi.org/10.1111/dech.12840.

[482]Adam Hochschild, *King Leopold's Ghost: The Plunder of the Congo and the Twentieth Century's First International Human Rights Movement* (Boston: Houghton Mifflin, 1998).

[483] Antonio Voce, Leyland Cecco, and Chris Michael, "'Cultural Genocide': The Shameful History of Canada's Residential Schools – Mapped," The Guardian, September 6, 2021, https://www.theguardian.com/world/ng-interactive/2021/sep/06/canada-residential-schools-indigenous-children-cultural-genocide-map; Rukmini Callimachi and Sharon Chischilly, "Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools," *The New York Times*, July 19, 2021, sec. U.S., https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html.

nationalism movement in India and its construction of an idealised past to justify and legitimise old and new mechanisms of domination through the dehumanisation of the Other - in this case, Muslims, Christians, Dalits and Adivasis in India.[484] Additionally, the Hindu right has used social media for what Bello calls organised trolling,[485] when online harassment transcends into offline violence as civil society actively participates in lynchings and mob violence that has been legitimised and justified by their government.[486] Building on this case, one finds the weaponisation of the internet to manufacture consent in the Philippines through the distribution of misinformation and attacking critics and dissenters of the Duterte regime[487]. The online space then offers the possibility for a type of violence that is not physical but is manufactured using language for the construction of narratives to further an ideology or political agenda. In some cases, this online-offline space dimension can also transcend and be used as fuel for physical violence. A more current example is the narrative manufacturing around the ongoing genocide in Palestine, committed by Israel with help from the United States and other countries in the West, which legitimises the use of violence and allows the media reporting on the genocide to alter the role played by Israeli forces.[488]

The invisibilisation of violence, in these cases, is connected to crafting narratives to legitimise violence, and can be easily dismissed and overlooked in future historical depictions of the current times. Ghosh looks at the invisibilisation surrounding the

[484] Walden Bello, "The Hindu Counterrevolution: The Violent Re-Creation of an Imagined Past," in Counterrevolution : The Global Rise of the Far Right (Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019), 99–138.
[485] Walden Bello, "The Hindu Counterrevolution: The Violent Re-Creation of an Imagined Past," in Counterrevolution : The Global Rise of the Far Right (Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019), 99–138.
[486] Walden Bello, "The Hindu Counterrevolution: The Violent Re-Creation of an Imagined Past," in Counterrevolution : The Global Rise of the Far Right (Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019), 99–138.
[487] Walden Bello, "The Philippines: Emergence of a Fascist Original," in Counterrevolution : The Global Rise of the Far Right (Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019), 99–138.
[488] Nur Masalha, "Settler-Colonialism, Memoricide and Indigenous Toponymic Memory: The Appropriation of Palestinian Place Names by the Israeli State," Journal of Holy Land and Palestine Studies 14, no. 1 (May 2015): 3–57, https://doi.org/10.3366/hlps.2015.0103.

ordinary citizen's awareness of violence through a historical perspective.[489] Additionally, to tie into Nixon's environmentalist focus, Ghosh discusses how the language around the torture of witches was later used to legitimise the exploitation of nature and current ways of life under capitalism.[490] Such is achieved through a view of the Earth as an infinite resource, ready for the taking and exploiting,[491] without thought of consequences beyond the idea of a short-term development lens that has been pushed by the development agenda, as Hickel also notes in his analysis.[492]

Nixon discusses the aftermath of incidents, events, actions and how the language used to describe them contributes to the invisibilisation of the violence perpetrated there. For this, he uses Mike Davis's *dialectic of ordinary disaster*[493] to explain how narratives are interwoven throughout history to minimise the impact of disasters and alter public memory, since the burden falls on those living outside of the Global North. Likewise, Nixon argues that the currently waged battles are not only for material dominance, but also about who gets to control the narrative and its impact on appearances.[494]

In Mbembe's *Brutalism*, different types of violent forces interact with each other – ranging from the description of the process of brutalisation as a *making savage*,[495] to how understanding of this process should go beyond the traditional perceptions of violence in war and atrocities and into its pervasiveness in everyday life of those brutalised by it. This critique of the current world order emphasises how the civilian sphere of life has come to be shaped by an increased militarisation of public life, leading to dehumanisation, and in turn connecting to the use of necropolitics by States.

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[489]Amitav Ghosh, The Nutmeg's Curse: Parables for a Planet in Crisis (Chicago, IL: The University of Chicago Press, 2021).
[490]Amitav Ghosh, The Nutmeg's Curse: Parables for a Planet in Crisis (Chicago, IL: The University of Chicago Press, 2021).
[491] Ibid.
[492] Jason Hickel, The Divide: A Brief Guide to Global Inequality and Its Solutions (London: Windmill Books, 2018).
[493] Mike Davis, "Los Angeles after the Storm: The Dialectic of Ordinary Disaster ," Antipode 27, no. 3 (July 1995): 221–41, https://doi.org/10.1111/j.1467-8330.1995.tb00276.x.
[494] Rob Nixon, Slow Violence and the Environmentalism of the Poor (Cambridge, MA: Harvard University Press, 2011).
[495] Achille Mbembe, Brutalism, trans. Steve Corcoran (Durham, NC: Duke University Press, 2024).

The legitimation of violence in this case relies on the re-shaping of the human bodies and their value[496] – similar to Nixon's arguments on surplus people.[497]

Additionally, Mbembe's previous work on *Necropolitics,* specifically the focus on the state's choice of awarding life and distributing death to whoever it perceives as a threat to its power, is also a clear manifestation of systemic violence.[498] This work also ties into racial violence through the racialisation of bodies when analysed through neo-Malthusianism[499] and the politics of belonging – which then ties back into a point raised by Mbembe on an interview for *Brutalism* mentioning "a long history of reshaping by force, of depleting, of exhausting both physical-psychic energies and of basically reinventing the human-or human forms in general."[500] Neo-Malthusianism, in Mbembe's account, allows nation-states to employ necropolitics to justify population control, leading to neo-eugenics and a language that alters the perception of what constitutes a body.[501] Foucault's biopower and biopolitics[502] also come into play with neo-Malthusianism as capitalism's demands need to be met to guarantee economic productivity that will uphold the system. Biopower regulates the lives of those in the system, while necropolitics decides who gets to be a part of it. What is this if not an example of violence that is deeply embedded into everyday life but not perceptible to

[496] Ibid.

[497] Jason Hickel, The Divide: A Brief Guide to Global Inequality and Its Solutions (London: Windmill Books, 2018).

[498] Achille Mbembe, Necropolitics, trans. Steve Corcoran (Durham, NC: Duke University Press, 2019).

[499] Neo-Malthusianism is an ideology prominent in the 1940s to 1960s, which stated that an overgrowth of the world's population would lead to an economic, ecologic and humanitarian crises as the Earth's resources, especially food production, would not be able to keep up with the demand. In turn, neo-Malthusians argued for different policies to control the growth of the population - see the Chinese one-child policy or India's forced sterilizations for examples. (Marc Frey, "Neo-Malthusianism and Development: Shifting Interpretations of a Contested Paradigm," *Journal of Global History* 6, no. 1 (February 23, 2011): 75–97, https://doi.org/10.1017/s1740022811000052; Chelsea Follett, "Neo-Malthusianism and Coercive Population Control in China and India: Overpopulation Concerns Often Result in Coercion" (Washington DC: Cato Institute, 2020), https://www.cato.org/sites/cato.org/files/2020-07/pa-897-updated.pdf)

[500] Achille Mbembe, Transcript: In conversation with Achille Mbembe, interview by Paul Gilroy, Sarah Parker Remond Centre for the Study of Racism and Racialisation at University College London, June 17, 2020, https://www.ucl.ac.uk/racism-racialisation/transcript-conversation-achille-mbembe.

[501] Achille Mbembe, Brutalism, trans. Steve Corcoran (Durham, NC: Duke University Press, 2024).

[502] Richard A. Lynch, "Foucault's Theory of Power," in Michael Foucault Key Concepts, ed. Dianna Taylor (Acumen Publishing, 2010), https://doi.org/10.1017/upo9781844654734; Chloë Taylor, "Biopower," in Michael Foucault Key Concepts, ed. Dianna Taylor (Acumen Publishing, 2010), https://doi.org/10.1017/upo9781844654734.

the naked eye?

The arguments presented by Mbembe in *Brutalism* on the militarisation of borders and limited mobility[503] then speak to the politics of belonging, and a non-immediately threatening manner of necropolitics - such as the enforcement of hard borders and refusing entry to asylum seekers and refugees, or the open air prisons that Palestinians have been forced into since 1947 and the first Nakba in 1948,[504] which leads the threatened population towards a *slow death*. Thus, through this set of policies, violence is exercised in the name of "national security", where imperialist states currently use language and power to justify their necropolitics and politics of belonging to decide who gets to be a citizen within their proclaimed territory.

[503] Achille Mbembe, Brutalism, trans. Steve Corcoran (Durham, NC: Duke University Press, 2024).
[504] Al Jazeera, "The Nakba Did Not Start or End in 1948," Al Jazeera (Al Jazeera, May 23, 2017), https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948.

Violence does not exist in a vacuum. While this work has presented the ways that violence is not a specifically defined phenomenon but can take many forms, it is also important to note that more than one type of violence is usually coexisting. That is to say, in an instance where environmental violence is happening, political violence is most likely also occurring. In addition, violence is in constant metamorphosis, exercised by those in power to continue oppression through new methods that create new types of harm for society. Mbembe summarises how, even after decolonisation, "in the North in particular, old imperialist pulses now combine with nostalgia and melancholy".[505] The power of language to push for the satisfaction of such needs created by the narratives and the imagined past, mentioned by Bello,[506] will continue to allow an avenue for the legitimisation of the use of violence on other nation-states and global citizens for as long as it is needed for oppression and exploitation in late-stage capitalism and the neoliberal world order.

To conclude, violence permeates every sphere of our existence, whether we are aware of it or not. That awareness of violence is dictated by the accessibility that we have to alternative forms of knowledge that go beyond the nation-states' discourse and offer criticisms on violent legacies of the past as well as violent practices of the present through imperialism and neocolonialism. Addressing violence will require tackling the different factors that impact the manifestations of violence beyond the use of force and aggression. Here, the use of zemiological frameworks that consider not only the structural factors (economic, social, cultural, and political) but also social harms (i.e. criminalisation of poverty, human rights violations, securitisation of migration) can be useful for further understanding the construction of violence in our societies. The question of where else one can find violence in our everyday life is one that will remain open as late-stage capitalism and neoliberalism speed us into what can only end in destruction. Whether this destruction will represent the dawn of a new world with the "sun coming up on a dream come 'round…years from the empire now"[507] before it's

[505] Achille Mbembe, Brutalism, trans. Steve Corcoran (Durham, NC: Duke University Press, 2024).
[506] Walden Bello, "The Hindu Counterrevolution: The Violent Re-Creation of an Imagined Past," in Counterrevolution : The Global Rise of the Far Right (Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019), 99–138.
[507] Hozier, Empire Now (Dublin, Ireland: Rubyworks Ltd., 2024).

too late or culminates in the destruction of our planet remains to be seen. Violence, meanwhile, will continue its metamorphosis and infiltration of every sphere of existence.

Bibliography

Al Jazeera. “The Nakba Did Not Start or End in 1948.” Al Jazeera. Al Jazeera, May 23,

2017. https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948

Amsler, Sarah. “Cultural Colonialism.” In *The Wiley Blackwell Encyclopedia of Sociology*, 1–3. John Wiley & Sons, Ltd, August 1, 2016. https://doi.org/10.1002/9781405165518.wbeosc202.pub2

Bello, Walden. *Counterrevolution : The Global Rise of the Far Right*. Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019.

———.“Crucifying the Left in Chile.” In *Counterrevolution : The Global Rise of the Far Right*,

62–78. Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019.

———. “The Hindu Counterrevolution: The Violent Re-Creation of an Imagined Past.” In *Counterrevolution : The Global Rise of the Far Right*, 99–138. Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019.

———. “The Philippines: Emergence of a Fascist Original.” In *Counterrevolution : The Global Rise of the Far Right*, 99–138. Winnipeg, Manitoba; Black Point: Fernwood Publishing, 2019.

Cahill, Caitlin, and Rachel Pain. “Representing Slow Violence and Resistance.” *ACME: An International Journal for Critical Geographies* 18, no. 5 (October 3, 2019): 1054–65.

Callimachi, Rukmini, and Sharon Chischilly. “Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools.” *The New York Times*, July 19, 2021, sec. U.S. https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html

Césaire, Aimé. *Discourse on Colonialism*. Translated by Joan Pinkham. 1950. Reprint, New York, NY: Monthly Review Press, 2000.

Darian-Smith, Eve. “Deadly Global Alliance: Antidemocracy and Anti-Environmentalism.” *Third World Quarterly* 44, no. 2 (December 2, 2022): 1–16. https://doi.org/10.1080/01436597.2022.2144206

Davis, Mike. “Los Angeles after the Storm: The Dialectic of Ordinary Disaster .” *Antipode* 27, no. 3 (July 1995): 221–41. https://doi.org/10.1111/j.1467-

8330.1995.tb00276.x

Edwards, Sebastian. *The Chile Project: The Story of the Chicago Boys and the Downfall of Neoliberalism*. NJ: Princeton University Press, 2023.

Fanon, Frantz. *The Wretched of the Earth*. Cape Town: Kwela Books, 1961.

Follett, Chelsea. "Neo-Malthusianism and Coercive Population Control in China and India: Overpopulation Concerns Often Result in Coercion." Washington DC: Cato Institute, 2020. https://www.cato.org/sites/cato.org/files/2020-07/pa-897-updated.pdf

Frey, Marc. "Neo-Malthusianism and Development: Shifting Interpretations of a Contested Paradigm." *Journal of Global History*6, no. 1 (February 23, 2011): 75–97. https://doi.org/10.1017/s1740022811000052

Ghosh, Amitav. *The Nutmeg's Curse: Parables for a Planet in Crisis*. Chicago, IL: The University of Chicago Press, 2021.

Hartman, Saidiya . *Lose Your Mother: A Journey along the Atlantic Slave Route*. New York: Farrar, Straus and Giroux, 2008.

Hickel, Jason. *The Divide: A Brief Guide to Global Inequality and Its Solutions*. London: Windmill Books, 2018.

Hochschild, Adam. *King Leopold's Ghost: The Plunder of the Congo and the Twentieth Century's First International Human Rights Movement*. Boston: Houghton Mifflin, 1998.

Hozier. *Empire Now*. Dublin, Ireland: Rubyworks Ltd., 2024.

Klein, Naomi. *The Shock Doctrine: The Rise of Disaster Capitalism*. London: Penguin Books Ltd, 2007.

Lynch, Richard A. "Foucault's Theory of Power." In *Michel Foucault Key Concepts*, edited by Dianna Taylor. Acumen Publishing, 2010. https://doi.org/10.1017/upo9781844654734

Masalha, Nur. "Settler-Colonialism, Memoricide and Indigenous Toponymic Memory: The Appropriation of Palestinian Place Names by the Israeli State." *Journal of Holy Land and Palestine Studies* 14, no. 1 (May 2015): 3–57. https://doi.org/10.3366/hlps.2015.0103

Mbembe, Achille. Transcript: In conversation with Achille Mbembe. Interview by Paul Gilroy. *Sarah Parker Remond Centre for the Study of Racism and Racialisation at University College London*, June 17, 2020. https://www.ucl.ac.uk/racism-

racialisation/transcript-conversation-achille-mbembe

———. *Brutalism*. Translated by Steve Corcoran. Durham, NC: Duke University Press, 2024.

———. *Necropolitics*. Translated by Steve Corcoran. Durham, NC: Duke University Press, 2019.

Melber, Henning. "Colonialism, Genocide and Reparations: The German-Namibian Case." *Development and Change* 55, no. 4 (July 2, 2024). https://doi.org/10.1111/dech.12840

Mishuana R. Goeman, "Disrupting a Settler-Colonial Grammar of Place: The Visual Memoir of Hulleah Tsinhnahjinnie," in Theorizing Native Studies, edited by Audra Simpson and Andrea Smith. Durham: Duke University Press, 2014.

Nicolas, Brenda. "Pertenencia Mutua : Indigenous Oaxacans Contesting Settler Colonial Grammars." *American Quarterly* 76, no. 2 (June 2024): 241–71. https://doi.org/10.1353/aq.2024.a929165

Nixon, Rob. *Slow Violence and the Environmentalism of the Poor*. Cambridge, MA: Harvard University Press, 2011.

Raymond B. Craib, "Cartography and Decolonization," in Decolonizing the Map: Cartography from Colony to Nation, edited by James R Akerman. Chicago: The University of Chicago Press, 2017.

Taylor, Chloë. "Biopower." In *Michel Foucault Key Concepts*, edited by Dianna Taylor. Acumen Publishing, 2010. https://doi.org/10.1017/upo9781844654734

Vrousalis, Nicholas. *Exploitation as Domination*. Oxford: Oxford University Press, 2022.

Veracini, Lorenzo. *Settler Colonialism*. Cham: Springer Nature, 1–173. 2010.

Voce, Antonio, Leyland Cecco, and Chris Michael. "'Cultural Genocide': The Shameful History of Canada's Residential Schools – Mapped." The Guardian, September 6, 2021. https://www.theguardian.com/world/ng-interactive/2021/sep/06/canada-residential-schools-indigenous-children-cultural-genocide-map

Walter Rodney, How Europe Underdeveloped Africa (London: Bogle-L'ouverture Publications, 1972).

Whitehead, Neil L. "Introduction: Cultures, Conflicts, and the Poetics of Violent Practice." In *Violence*, edited by Neil L. Whitehead, 3–24. Santa Fe: School of

American Research, 2004.

———, ed. *Violence*. *Violence*. Santa Fe: School of American Research, 2004.

Wolfe, Patrick. “Settler Colonialism and the Elimination of the Native.” *Journal of Genocide Research* 8, no. 4 (December 21, 2006): 387–409. https://doi.org/10.1080/14623520601056240

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

Conventionality control: an ineffective model for regional enforcement of human rights

Jack Dias-Harrison[508]

Received: 16 February 2025 / Accepted: 10 June 2025

Abstract

Observing the practice of the Inter-American Court, this article will criticise the doctrinal effectiveness of conventionality control as a mode of regional enforcement of human rights. The article firstly criticises the theoretical argument that conventionality control is a more effective way to regionally enforce state human rights compliance. Firstly, there is no actual legal basis both explicitly in the American Convention on Human Rights, and implicitly through precedent from the decision of Almonacid or by invocation of the principle of effectiveness. Without authority there is no normative reason for States to subject their own domestic law to the Inter-American Court to enforce human rights. Secondly, the article criticises the systematic illegitimacy in unjustifiably restraining the actions of democratically legitimate states. Finally, this article proves these normative issues in practice through an empirical analysis of the low compliance rates in conventionality control judgements. The article then engages with the highly complied alternative friendly settlement process which by comparison proves that conventionality control is ineffective due to its lack of dialogue with the states. If the states have no normative reasons to subject their domestic laws or comply with enforcement orders, and in practice conventionality control does not cause high compliance in contrast to non-maximalist dialogic mechanisms, then conventionality control is an ineffective mode of regional enforcement of human rights.

[508] Jack Dias-Harrison is an alumni who graduated the Law LLB degree in 2025. He became interested in the practices of the Inter-American System after taking the class 'Innovations from Global South Actors' taught Dr Kathryn Nash. He produced this essay with the guidance and encouragement of Dr Nash to which he is very grateful.

I. Introduction

This article will argue that the Inter-American Court of Human Rights' (IACtHR) model for regional enforcement of human rights, 'conventionality control', is ineffective both in theory and practice. This article will attempt to examine and find fault with the theoretical basis that the doctrine provides an effective means of enforcement. This is due to several factors, including a lack of a formal legal basis, which gives no normative reasons for states to consent to this model of enforcement. Additionally, the system of enforcement through conventionality control is illegitimate, giving no normative reasons for states to enforce human rights through conventionality control. The article will then examine, through these theoretical reasons, the practical considerations of low rates of compliance in comparison to the success of the non-legal dialogic friendly settlement mechanism, demonstrating a lack of dialogue between states as a root cause for ineffectiveness of the doctrine. As there is no theoretical reasoning or practical evidence to show the doctrine as effective, conventional control is an ineffective model, and a more dialogic, non-hierarchical method of regional enforcement ought to be preferred.

II. Context

The Inter-American Court of Human Rights is the regional court of Latin America that interprets the American Convention on Human Rights (ACHR).[509] The IACtHR exists within a wider framework of the Organisation of American States (OAS) and the Inter-American System (IAS). Twenty-three of the OAS member states accept the Court's jurisdiction at the time of writing.[510] The IACtHR has the authority to enforce human rights by initiating contentious proceedings against states and subsequently monitor the orders issued by the Court.[511] Conventionality control is a model of human rights enforcement from the IACtHR. The theoretical justification was to increase the

[509] American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969.

[510] "Frequently asked questions", Inter-American Commission on Human Rights. Accessed February 10, 2025. https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/usersupport/faq.asp#:~:text=The%20States%20that%20have%20recognized,Trinidad%20and%20Tobago%2C%20Uruguay%20and.

[511] 'What is the I/A Court H.R.?' Inter-American Court of Human Rights, Accessed 23/11/2024 https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en .

effectiveness of enforcing human rights regionally by obliging all states to interpret and apply their domestic law consistently with the jurisprudence of the IACtHR.[512] This model is maximalist, as it provides less room for domestic law discretion to offer varied protection of human rights; all interpretation of human rights and their scope is decided hierarchically by the IACtHR. The doctrine has been expanded over time to override the constitutional provisions of the state by the IACtHR's own body of law.[513] The current model evolved from what was originally intended to be a minimum threshold protection of human rights subsidiary to the domestic states' own system and safeguards.[514] This progression has been defended theoretically as necessary to ensure "harmonious application of international law at the state level".[515] The benefit is the consistency of protecting and meaningful enforcement where mass human rights violations occur without effective recourse or remedy from the State.[516] No other regional system offers such a degree of a direct enforcement comparable to this. However, there are reasons to doubt whether conventionality control can be perceived to improve the effectiveness of human rights enforcement.

What defines enforcement of human rights as effective stems from state consent and the recognition of the IACtHR's legitimacy to enforce human rights through conventionality control.[517] Even where a member state may disagree with the decision, they reluctantly enforce the international court's ruling as they consented to the body having final say and recognise their legitimacy to do this. Legitimacy gives normative reasons for states to cooperate, which consequently means reparation orders are fully

[512] Pablo Gonzalez-Dominguez, *The doctrine of conventionality control: between uniformity and legal pluralism in the inter-American human rights system* (Cambridge University Press, 2018) 1-2.

[513] Claudina Orunesu, 'Conventionality Control and International Judicial Supremacy: Some Reflections on the Inter-American System of Human Rights' *Revus J Const. Theory & Phil, Law* 40 (2020), 45, 48-49.

[514] See American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Article 29(b).

[515] Paolo G Carozza and Pablo Gonzalez, 'The Final Word? Constitutional dialogue and the Inter-American Court of Human Rights: A reply to Jorge Contesse I-CON: Debate!' *International journal of constitutional law* 15, no. 2 (2017), 436, 441 citing Garcia Ramirez, 'The relationship between Inter-American jurisdiction and states (national systems: some pertinent questions' (2014) 1(1) Notre Dame J. Int'l & Comp.L. 141.

[516] Ariel E. Dulitzky, 'An Inter-American Constitutional Court? The Intervention of the Conventionality Control by the Inter-American Court of Human Rights' *Texas International Law Journal* 50 (2015), 45, 54-55.

[517] Claudina Orunesu (n 5), 49-50.

executed and complied with.[518] Therefore, to assess the effectiveness of conventionality control, it depends on the compliance of states in response to the judgments of the IACtHR.[519] The former two sections refute the theoretical idea that states, through conventional control, would feel compelled to comply with IACtHR's orders; the latter proves that states generally do not comply with IACtHR orders, denying the idea that conventional control can be effective.

III. Lack of a normative basis for conventionality control

IIIA. Lack of ACHR basis

Conventionality control lacks a legal basis through the ACHR and precedent to enforce human rights. Without this, there is no normative justification for the states to consent and comply with the IACtHR, which makes conventionality control theoretically ineffective to enforce human rights. The doctrine was formally established in *Almonacid* in 2006.[520] The Court invoked Article 2 ACHR,[521] which requires the state to undertake "legislative or other measures" to ensure ACHR rights are given effect.[522] They combined this with the art.1.1[523] requirement to "ensure" the rights can be exercised.[524] The argument was that by ratifying the ACHR, the states' judiciary was bound to exercise control over their domestic law to be compliant with the convention; Article 27 of the Vienna Convention (VC)[525] was referenced to support this.[526] However, the ACHR does not support this kind of enforcement under conventional control; the preamble refers to the convention as complementary.[527] No explicit

[518] Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", in *International judicial lawmaking on public authority and democratic legitimation in global governance*, ed. Armin von Bogdandy and Ingo Venzke (Springer, 2012) 297.
[519] Henk Addink, *Good governance: concept and context* (Oxford University Press, 2019) 147-150.
[520] *Almonacid Arellano et al. v Chili,* Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.154 (26 September 2006).
[521] American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Article 2.
[522] *Almonacid* (n 12) 115-119.
[523] American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Article 1.1.
[524] *Almonacid* (n 12) 123.
[525] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331, Article 27 VC.
[526] *Almonacid* (n 12) 125.
[527] American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969, Preamble.

direction is given on the application that the states should take to "ensure" the protection of rights.[528] Art. 68.1 gives a duty of compliance only when states are parties to the dispute.[529] Gonzalez-Dominguez examined the preparatory materials and original context of the ACHR and concluded art.2 was intended to give deference to states in implementation as opposed to accepting direct effect of the IACtHR.[530] Furthermore, scholars have argued that, by its nature, art.27 VC does not support an interpretation consistent with direct effect and supremacy of international law.[531] It cannot be said that there is evidence to suggest there is legitimacy for such a maximalist form of enforcement under the ACHR and VC alone.

III.B. Lack of precedential basis

There is a lack of precedential basis to give justification for conventionality control. Precedent justifies an expansive interpretation of the ACHR by principles including effectiveness.[532] In *Dismissed Employees*, the Court held that conventional control should be carried out "*ex officio*".[533] This meant domestic judges were approved to give abstract rulings on the conventionality of domestic law within their respective competences,[534] yet states with centralised constitutional control would not give competence for domestic judges to do this and their constitutional structure was subsequently undermined. The Court justified an interpretation of the ACHR supporting this on the effectiveness of enforcing human rights domestically without needing to petition the IAS.[535] Similarly, it can be argued that the Almonacid reasoning was to give effectiveness to the ACHR in applying an amnesty law where domestic law could not. This is a different assessment of effectiveness on whether conventional control gives the best application to the ACHR over domestic mechanisms. The

[528] ibid Article 1.1, 2, 13, 17, 18, 25, 43.
[529] ibid Article 68.1.
[530] Pablo Gonzalez-Dominguez (n 4) 121.
[531] Claudina Orunesu (n 5) 48-9, Pablo Gonzalez-Dominguez (n 4) 139.
[532] Eduardo Ferrer Mac-Gregor, 'Symposium: The constitutionalisation of international law in Latin America conventionality control the new doctrine of the inter-American court of human rights.' *AJIL Unbound* 2019 (2015), 93, 96.
[533] *Dismissed Congressional Employees (Aguado-Alfaro et al.) v Peru,* Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.158 (24 November 2006), 128.
[534] ibid 128.
[535] ibid 131.

precedential basis can be rejected on two grounds. Firstly, the argument that the precedent can bind states to exercise conventional control is circular. Secondly, even if we accept a precedential basis, it cannot be justified by the principle of effectiveness in the current regional context.

There is no precedential basis to justify conventional control since the argument is circular. Gonzalez-Dominguez highlights the circularity of the justification from *Almonacid*. Conventionality control is justified because *Almonacid* confirmed that States ought to do so and consider IACtHR precedent binding. Yet why *Almonacid* said this is less clear. As aforementioned, it cannot be found by an explicit legal basis or formal mutual agreement. Rather, the basis for this is that the doctrine of conventional control itself exists, which is a non-justification.[536] One might argue that custom forms the basis, and the States acquiesced to its binding precedent, but there has been no source that identifies this. Although the IACtHR is seen as the ultimate interpreter of the ACHR, this does not save this reasoning either, as it does not necessarily imply an acceptance of conventionality control. Other international courts assume the role of ultimate interpreter but still play subsidiary roles in actual enforcement within the states.[537] Consequently, precedent does not provide a convincing justification for conventionality control either.

Even if we were to accept there was a precedential basis for conventionality control, the expansionist interpretation of the ACHR on the principle of effectiveness to justify it is inapplicable in the modern regional context. For the principle of effectiveness to justify a directly enforcing relationship to interpret the ACHR, state consent must be continuous, and the factual situation needs to explain why it is effective for the ACHR to be interpreted in such a way.[538] Latin America's previous era of authoritarian regimes and dictatorships meant that human rights could not be enforced domestically.[539] In the transition to democracies, many states bought into the IACtHR and ACHR to guarantee human rights whilst the states were fragile and still developing

[536] Pablo Gonzalez-Dominguez (n 4) 143-144.
[537] ibid 144.
[538] Henk Addink (n 11) 150-151.
[539] Jorge Contesse, 'Contestation and deference in the Inter-American Human Rights System' *Law and Contemporary Problems* 79, no. 2 (2016), 123, 133-134.

democratic practices.[540] After the 1990s, states established democratic mechanisms to enforce human rights tailored to their local contexts.[541] Petitions in the modern context are increasingly for more politically sensitive and non-lethal rights violations.[542] Crema argues that the IACtHR in Almonacid adapted a politically specific judgment into a blanket normative precedent for intervention in the state's enforcement of human rights. [543] The factual demand for conventionality control in *Almonacid* relied heavily on the political consent and cooperation of the new democratic government which wanted to remove the amnesty granted during Pinochet's regime.[544] The decision was only effective because Chile chose to cooperate due to their lack of domestic procedure in place, not because they felt a normative obligation to do so.[545] Gonzalez-Dominguez expands this reasoning to other cases regarding dealing with the aftermath of previous regimes like Fujimori's regime in Peru.[546] Since *Almonacid* and related circumstances are politically specific instances, and the current regional context shows that democratic states have their own politically decided mechanisms to enforce rights, it cannot be said that the factual demand proves conventionality control is the most effective way to give application to the ACHR. This allows the IACtHR to empower judges to disapply laws with which the IACtHR may politically disagree. For example, in *Esposito,* Argentina disagreed with the IACtHR but felt obliged to comply to avoid international responsibility.[547] There cannot be continuous normative support from states in the current context where conventionality control is perceived as politically undermining and subsequently not required for best application in the current regional context. In the absence of both an explicit or precedential legal basis for conventionality control, there is no normative reason for the states to consent and enforce human rights. The doctrine is a theoretically ineffective model to enforce human rights.

[540] Ariel E. Dulitzky (n 8) 55-56.
[541] Ximena Soley and Silvia Steininger, 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' *International Journal of the Law in Context* 14, no. 2 (2018), 237, 242.
[542] Jorge Contesse (n 32) 128.
[543] Luigi Crema, 'Are Amnesties Still an Option ? A Non-Policy Based Critique of the Inter-American Approach', *The Center for Civil & Human Rights Working Paper Series* 6 (2013), 1, 50-51.
[544] Pablo Gonzalez-Dominguez (n 4) 145-146.
[545] ibid 145.
[546] ibid.
[547] Claudina Orunesu (n 5), 53-54.

IV. Systematic legitimacy

IV.A. Defining Systematic legitimacy

Conventionality control is not an effective model of the enforcement of human rights, also because it lacks systematic legitimacy. The effectiveness of an international institution depends on the continued support of the states, while the international institutions determine the validity of domestic law.[548] As aforementioned, the effectiveness of enforcement is dependent on legitimacy as legitimacy provides a normative reason for the states to buy-in to conventionality control making it effective.[549] An international institution does not necessarily need to be democratically legitimate; systematic legitimacy is achieved by dividing the labour of the international institution and democratically legitimate states appropriately. The states only have their autonomy infringed by the institution when proportionate to the benefits of the Court intervening through conventionality control.[550] Iglesias-Vila endorses systematic legitimacy as a goal for the IACtHR.[551] It is beyond the scope of this essay to consider the democratic legitimacy of the IACtHR. It is enough to assume that democratic legitimacy can be contested on the basis of similar issues to other international courts and the fact there is no explicit basis for state consent to conventionality control.[552] Therefore, conventionality control needs to be systematically legitimate to be theoretically effective for enforcement.

Deference to the states in certain circumstances would be a systematically legitimate way of dividing labour. The eleventh IACtHR President argued against deference as judges would be subject to intimidation and pressure to not enforce human rights.[553] But as proven in the previous section, this is no longer the general case. Each state

[548] Henk Addink (n 11) 151.
[549] Allen Buchanan, *The Heart of Human Rights* (Oxford University Press, 2013), 180.
[550] ibid 193-194.
[551] Marisa Iglesias-Vila, 'The conventionality control and the Fontevecchia case: Is the margin of appreciation the pancea?' *Journal for Constitutional Theory and Philosophy of Law* 46 (2022), 1, 9-10.
[552] Cohen Harlan Grant, Follesdal Andreas, Grossman Nienke, Ulfstein Geir, "Legitimacy and International Courts – A Framework" in *Legitimacy and International Courts. Studies on International Courts and Tribunals*, eds. Grossman Nienke, Cohen Harlan Grant, Follesdal Andreas, Ulfstein Geir (Cambridge University Press; 2018), 7-8.
[553] Jorge Contesse (n 32)133-134.

has their political sensitivities and contexts which place the domestic court in a better position to adjudicate.[554] Without a fair division of labour, conventionality control undermines the legal and sovereign autonomy of each state and risks the judicial overreach of the IACtHR to decide issues which overlook the realities of the political context and priorities of each nation. The next sections will illustrate through the cases of *Gelman* and *Fontevecchia* that conventionality control through its infringement of state autonomy with no deference to democratic procedures is systematically illegitimate.

IV.B. Lack of deference in *Gelman*

The illegitimacy of conventionality control is exemplified through the case of *Gelman* which gave no sort of legitimate deference to Uruguay's domestic context and law in handling the situation. The case concerned an amnesty law regarding the Uruguayan dictatorship.[555] The IACtHR remained consistent with their amnesty law jurisprudence deciding against Uruguay.[556] The public generally supported nullity of amnesty laws, but the democratic credentials in *Gelman* differentiated this case.[557] It was passed by a democratic government and legislature, then upheld twice by popular vote.[558] The state demonstrated they preferred the amnesty law to prevent social unrest and allow the democratic government to progress their objectives.[559] The IACtHR held that the ACHR and protection of human rights are non-derogable and therefore take priority over the will of the public.[560] The decision has been criticised for its lack of deference.[561] The IACtHR or Commission could have ordered Uruguay to ensure a remedy is sought for the victims or facilitate a dialogue with the victims whilst monitoring compliance, as opposed to dismissing the democratic context and requiring the law to be applied. The Court by utilising conventionality control was systematically illegitimate in not dividing the labour to allow Uruguay to ensure remedy without

[554] Ariel E. Dulitzky (n 8) 53.
[555] *Gelman v Uruguay*, Merits and Reparations, Inter-American Court of Human Rights Series C No.221 (24 February 2011) 2.
[556] ibid 228-229.
[557] Christina Binder (n 10) 325-326.
[558] Jorge Contesse (n 32) 134-136.
[559] ibid 134-136.
[560] *Gelman* (n 48) 238-239.
[561] Jorge Contesse (n 32) 137.

disenfranchising their democratic will. The fallout of this systematic illegitimacy was shown when the Supreme Court struck down criminal code provisions compliant with *Gelman* under conventionality control because it was unconstitutional.[562] Uruguay felt the infringement to their democratic autonomy was not proportionately restricted, and consequently felt no normative reason to comply with the court. *Gelman* illustrates that the non-deferential model of conventionality control is systematically illegitimate and ineffective as a means of enforcement.

IV.C. Lack of deference in *Fontevecchia*

Fontevecchia provides further evidence that conventionality control is systematically illegitimate therefore giving no normative reason for compliance making the doctrine ineffective. Before 2017, Argentina was one of the most amenable states to conventionality control.[563] Though this may be due to convenience. Argentina operates a diffuse system of constitutional control and afforded the ACHR constitutional status in the 1994 reforms meaning the exercise of conventionality control was relatively uncontroversial as opposed to true state buy-in.[564] *Fontevecchia* concerned the violation of freedom of expression in Argentina.[565] The IACtHR explicitly ordered Argentina to "revoke the decision in its entirety".[566] Argentina refused on the basis it violates a constitutional principle of *res judicata*.[567] The Supreme Court of Justice of Argentina (SCJAN) argued the Court ought not to act as a fourth instance but merely be subsidiary to alert non-compliance.[568] Therefore, the IACtHR was acting outside of its competences and could not order a violation of Argentina's constitution.[569] Argentina did not oppose the binding nature of the IACtHR within its competences.[570]

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[562] Burt J.M, "Recent Sentence by Uruguayan Supreme Court Obstructs Search for Truth and Justice". Accessed December 1, 2024. https://www.wola.org/analysis/recent-sentence-by-uruguayan-supreme-court-obstructs-search-for-truth-and-justice/

[563] Laurence Burgorgue-Larsen, 'Conventionality Control: Inter-American Court of Human Rights (IACtHR)' *Oxford Public International Law* 1 (2018), 42.

[564] Jorge Contesse (n 32) 140, Lucia Bellochio, 'Conventionality control in Argentina case law' *Revista de Direito Economico e Socioambiental* 12 (2021), 60, 61.

[565] Anon, "Fontevecchia Case" *International Law Reports* 186 (2020) 430, 433.

[566] *Fontevecchia and D ' Amico v Argentina,* Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No. 238 (29 November 2011) 105.

[567] Anon (n 58) 436-438.

[568] ibid 434-435.

[569] ibid 435-437.

[570] ibid 438.

The reasoning of Argentina can be criticised as unsound, considering it implies the IACtHR's ability to enforce is subject to Argentina's interpretation of what is in its competencies.[571] Regardless, this was an instance of the court refusing to comply with conventionality control for its undue restriction on state autonomy. Argentina was criticising the overstep of the IACtHR into becoming a fourth instance court which gives specific remedial orders as opposed to ordering the result that needs to be achieved.[572] The IACtHR is the "ultimate interpreter" of the convention but this does not necessarily imply that they then get to determine the appropriate remedy for the state.[573] The issue in *Fontevecchia* was a matter of enforcement, not substantive right.

By ordering a specific order rather than requesting the disapplication, the Court's infringement on Argentina's autonomy outweighed the benefit of the IACtHR's interpretation of the ACHR on freedom of expression. The Court subsequently conceded that Argentina did not necessarily have to revoke the judgment but could find other outcomes to ensure the judgment had no effect.[574] The order was satisfied through a label attached to the publication of the original case notifying non-compliance with the ACHR.[575]

Multiple scholars suggest an inter-court dialogue between the IACtHR and states would be systematically legitimate.[576] The IACtHR criticised Argentina for not asking alternatives before refusing to enforce their ruling, however if there had been some dialogue for an alternative prior to the ruling there would not be illegitimate sentiments towards the IACtHR.[577] The missed opportunity for the Court to both give deference and engage in dialogue with the SCJAN represents another instance where the court was systematically illegitimate. Argentina's executive, which originally supported the

[571] Lucia Bellochio (n 53) 68-69.
[572] Jorge Contesse (n 32) 143.
[573] Pablo Gonzalez-Dominguez (n 4) 143-144.
[574] *Fontevecchia and D ' Amico v Argentina*, Monitoring Compliance with Judgement, Inter-American Court of Human Rights (18 October 2017) 16 (Translated Spanish to English by Microsoft Word Translate).
[575] Claudina Orunesu (n 5), 56.
[576] Lucia Bellochio (n 53) 70, Claudina Orunesu (n 5) 60, Marisa Iglesias-Vila (n 40) 31-35.
[577] Marisa Iglesias-Vila (n 40) 35-35 and 'Judicial Backlash in Inter-American Human Rights Law?', Contesse Jorge, "Judicial Backlash in Inter-American Human Rights Law?". Accessed October 23, 2024. https://www.iconnectblog.com/judicial-backlash-interamerican/.

IACtHR's order,[578] subsequently joined with four other states in a 2019 Joint-Declaration calling for more respect for state autonomy and deference.[579] Argentina no longer had a normative drive to comply with the current mode of enforcement, viewed as illegitimately restricting their autonomy. *Fontevecchia* shows another instance where the Court by not providing deference acted systematically illegitimate causing enforcement in Argentina to become more strained and consequently ineffective theoretically.

Overall, the instances in *Gelman* and *Fontevecchia* highlight the systematic illegitimacy of conventionality control. As the doctrine is illegitimate, it becomes theoretically ineffective as a model of enforcement of human rights.

V. Compliance and Friendly Settlements

The practical impact of the doctrine shows low compliance rates in enforcement orders. This paired with the success of a non-legal dialogic friendly settlement mechanism further emphasises that conventionality control is ineffective in enforcing human rights. Abbott argues that assessing effectiveness should have regard to the practical outcome otherwise the theoretical underpinning of conventionality control can be deceiving.[580] Having rebutted the theoretical underpinnings in the last two sections, the lack of practical effectiveness of conventionality control conclusively proves that it is ineffective.

V.A. Low Compliance

Conventionality controls' low compliance rate render it ineffective at enforcement. The former OAS Secretary-General noted how non-compliance "gravely damages" effectiveness[581] and the fact that IACtHR cannot practically adjudicate over thousands

[578] Pablo Gonzalez-Dominguez (n 4) 149.

[579]'The Joint Declaration to the Inter-American System of Human Rights: Backlash or Contestation?' Girardi Fachin Melina and Nowak Bruna, "The Joint Declaration to the Inter-American System of Human Rights: Backlash or Contestation?". Accessed December 2, 2024. https://www.iconnectblog.com/the-joint-declaration-to-the-inter-american-system-of-human-rights-backlash-or-contestation/.

[580] Max Silva Abbot, "Is the control of conventionality really viable?" *Journal of Applied Business and Economics* 23, no. 2 (2021), 144, 153.

[581] Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's struggle to Enforce Human Rights', *Cornell International Law Journal* 44 (2011), 493, 504.

of domestic matters – despite its doctrine intended to have the IACtHR adjudicate on a few rulings each year creating a body of law which is multiplied through the enforcement of local judges – emphasises its likely ineffectiveness. Therefore, the compliance of states with the IACtHR is necessary. [582]

Prior to conventionality control the IACtHR faced low compliance. Between 2001 to 2006, 50% of Court cases had no compliance, 36% had total compliance.[583] After the establishment of conventionality control, increased democratisation of states and reformed procedural rules, the number of cases drastically increased. Yet the rate of compliance failed to increase in proportion.[584] Between 1989 to 2018 only a third of measures by the Court have met full compliance.[585] In 2023, approximately 50% of decisions were either pending or not complied with.[586] The most relevant data comes from Abbott's study specifically on all judgements asserting conventionality control prior to 2018.[587] It found that only 7.3% of cases showed full compliance, 47.3% partial compliance and 25% non-compliance.[588] Thus, conventionality control has not improved the poor rates of compliance. Excluding monetary remedies, states are unwilling to comply with orders that involve investigation, denying impunities and forwarding human rights accountability.[589] Although this is not always the case, Argentia in *Bulacio* and *Esposito* being an instance where Argentia complied despite their Supreme Court dissenting the order due to their acknowledgement of international responsibility.[590] Regardless, there are still high rates of non-compliance. This is contributed to the idea of political disjunction or "lack of political will" to compel the domestic state to comply.[591] This is only worsened by the challenges to legal basis

[582] Max Silva Abbott (n 73) 154.

[583] Fernando Basch, Leonardo Filippini, Ana Laya and Mariona Nino, "The effectiveness of the Inter-American System of Human Rights Protection: A quantitative approach to its functioning and compliance with its decision" SUR International Journal on Human Rights 7 (2010), 9, 18.

[584] Anibal Perez-Linan, 'Compliance with the Inter-America Court of Human Rights: Methodological proposal and preliminary findings' *Kellog Institute for International Studies* (2019), 1, 1.

[585] ibid 2.

[586] *Annual Report of the Inter-American Commission on Human Rights* (2023) Chapter 2, Section D, Paragraph 157.

[587] Max Silva Abbott (n 73) 148.

[588] ibid 151.

[589] James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-Amercan Court' *The American journal of international law* 102, no. 4 (2008), 768, 774.

[590] ibid.

[591] ibid.

and legitimacy of conventionality control aforementioned since political states may feel no obligation to comply. Cavallaro and Brewer suggest direct court orders are ineffective, and any meaningful progress in Latin American human rights has depending on social movements and pressure. Currently, the Court does not aid the state in any form of dialogue or political mediation in achieving compliance but merely monitors to ensure the order is met,[592] yet this is counterintuitive. Legal orders compared to political orders have the lowest rates of compliance, predominantly because such actions require the consensus of more than one political entity. [593] Monetary remedies are easier to implement and subsequently have the highest rates of compliance.[594] If the Court or Commission were to coordinate with domestic human rights activists, campaigns, media and public support and form a dialogue with them and the domestic state there is greater chance of political pressure to comply and increase human rights enforcement. Cavallaro and Brewer note multiple cases where human rights were successfully enforced and orders complied with because of the legal order paired with domestic public pressure.[595]

Multiple authors argue that the lack of compliance with conventionality control enforcement orders could be resolved by establishing some form of dialogue similar to that in friendly settlement mechanisms.[596] Former President Cancado Trindade argued that giving dialogical deference allows non-compliance.[597] This, however, is less likely to occur when the IACtHR is part of the dialogue and still holds the function to monitor compliance. *Atala* shows the benefit of dialogue on compliance.[598] The case concerned the violation of the right to equality and protection of family in private family

[592] Cecilia M.Baillet, 'Measuring compliance with the Inter-American Court of Human Rights: The ongoing challenge of judicial independence in Latin America', 34(4) Nordic Journal of Human Rights 477, 484.
[593] ibid 483-4.
[594] ibid 488.
[595] Cavallaro and Brewer (n 82) 775.
[596] Max Silva Abbott (n 73) 152, Alexandra Huneeus (n 71) 526, David C. Baluatre David C., "Strategizing for compliance: The evolution of a compliance phase of Inter-American Court litigation and the strategic imperative for victims representatives" *American University International Law Review* 27, no. 2, 263, 284, Jorge Contesse, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights', *International Journal of Constitutional Law* 15, no. 2 (2017) 414, 426.
[597] Claudina Orunesu (n 5), 60.
[598] *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.239 (24 February 2012).

life when the Supreme Court granted custody to the father on the basis that the fact that the mother was living with her same-sex partner would not be in the interests of the children.[599] The IACtHR were cautious as this was a novel case on sexual orientation as a protected category and the status of children's rights in guardianship. The Court held there was a violation but in their judgement notably referred explicitly to the socio-political landscape of Latin America and various cases from other states. [600] In doing so they justified the decision on the consideration of how the other states have handled the issue in relation to the specific political factors of the region. This shows a cautious attempt to establish a dialogue with the states in their judgment. By acknowledging the political reasons of similar states, the order gains more legitimacy and becomes more convincing to be enforced by the domestic state.

Contesse notes that in the case of *Gelman* the IACtHR could have still legitimately ruled against Uruguay, but failed to give proper justification and consideration of political factors for this.[601] *Gelman* came just before the decision in *Atala* so the use of dialogue in conventionality control seemed to be more exceptionally done in relation to a very sensitive and novel circumstance. It can be derived that the benefits of dialogue from the Court would include effective and more feasible enforcement orders that take into account the structural complexities of the state and also give more justification for states to comply with the decision. Conventionality control creates a one-sided dialogue where the IACtHR can determine orders for the states without knowledge of political difficulties or ability to help them. The state then may not be able to fully comply which subsequently damages the effectiveness of conventionality control.

V.B. Friendly settlement process

The friendly settlement mechanism's success in dialogic enforcement further emphasises that the legal maximalist form of enforcement conventionality control is ineffective. The friendly settlement mechanism is described as "an opportunity for

[599] Jorge Contesse (n 89) 427.
[600] ibid 427.
[601] Jorge Contesse (n 32) 136-7.

dialogue" between the petitioners and state.[602] The Commission, prior to the merits stage of a petition, will give an opportunity for the parties to express if they want to initiate the mechanism.[603] If requested, the Commission will act as an impartial third party to facilitate the communication and follow-up on compliance.[604] It appeals to the victims as it is procedurally quicker and cheaper than the Commission or Court.[605] It also has a higher degree of compliance due to the fact that the dialogue allows the petitioner and state to be mutually satisfied with the decision.[606] In the 2022 Annual Report the Commission commended the mechanisms for its effectiveness and promotes its expansion to tackle procedural backlog to the Commission and Court.[607] In 2023, 112% of measures reached total compliance.[608] Therefore, total compliance exceeded the base amount from the previous year. This can be partially attributed to the fact it is a voluntary procedure but the dialogic aspect of the mechanism that allows negotiation with consideration of political factors significantly lends to the success of the system and exacerbates why the lack of consideration through conventionality control makes it ineffective.[609] States prefer the mechanism for the consideration of political factors.[610] The 2023 Annual Report commended Argentina for fostering communication with the victims and achieving the highest number of formally approved friendly settlement agreements despite having rejected the application of conventionality control in *Fontevecchia*.[611] The friendly settlement mechanism emphasises that the lack of dialogue towards democratic states as a consequences

[602] 'Friendly Settlements', Inter-American Commission on Human Rights, Accessed December 4, 2024. https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/friendly_settlements/default.asp#:~:text=petitioners%20and%20states-,The%20friendly%20settlement%20mechanism%20provides%20an%20opportunity%20for%20dialogue%20between,violation%20and%20society%20at%20large.

[603] Rules of Procedure of the Inter-American Court of Human Rights, Article 37.4.

[604] ibid Article 40.1.

[605] Ziccardi Natalia Saltalamachia, et al. "Friendly Settlements in the Inter-American Human Rights System: Efficiency, Effectiveness and Scope", in *The Inter-American Human Rights System* (Springer International Publishing, 2018), 62.

[606] ibid.

[607] *Annual Report of the Inter-American Commission on Human Rights* (2022) Chapter 2, Section C, Paragraph 68.

[608] *Annual Report of the Inter-American Commission on Human Rights* (2023) Chapter 2, Section C, Paragraph 107.

[609] Natalia Saltalamachia Ziccardi, et al (n 97) 66.

[610] ibid.

[611] *Annual Report of the Inter-American Commission on Human Rights* (2023) Chapter 2, Section C, Paragraph 131.

of utilising conventionality control only contributes to its ineffectiveness.

The low compliance rates of the states through conventionality control and the effectiveness in enforcement of the friendly settlement mechanism which provides a more dialogic outcome with consideration of political factors as opposed to conventionality control which does the opposite shows that the doctrine is ineffective in enforcing human rights regionally.

VI. Conclusion

Conventionality control cannot be considered an effective model of regional enforcement of human rights in the current context. There is no valid legal basis for conventionality control through the ACHR or precedent in the current regional context, and thus, this provides no normative reasons for states to consent with the IACtHR through conventionality control, rendering the doctrine theoretically ineffective. This is further proven because the doctrine is systematically illegitimate through its lack of deference to the domestic states. *Gelman* and *Fontevecchia* illustrate that there is no normative reason for states to comply with enforcement orders and restrict their own autonomy for the sake of uniformity. Finally, the theoretical shortcomings of the doctrine have translated in practice to low compliance rates. This failure in compliance can be attributed to the dialogic gap between the IACtHR and the state in legal enforcement. Friendly settlements show the success of engaging in a form of mutual dialogue and having regard to the contextual political factors of the state. Conventionality control failing to engage in this further emphasises its ineffectiveness. As there is no theoretical justification for the doctrine to be effective, and the practical application consolidates that in practice the doctrine does not work, conventionality control cannot be regarded as an effective mode of enforcement for human rights in its current form. Building on the discussion from the previous section, a more dialogic and horizontal relationship between the member states and the IACtHR would be more effective.

Bibliography

Primary Sources

Legislation

American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No.36, Organisation of American States, 1969

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331

Rules of Procedure

Rules of Procedure of the Inter-American Court of Human Rights

Case law

Almonacid Arellano et al. v Chili, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.154 (26 September 2006)

Atala Riffo and Daughters v Chile, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.239 (24 February 2012)

Dismissed Congressional Employees (Aguado-Alfaro et al.) v Peru, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No.158 (24 November 2006)

Fontevecchia and D ' Amico v Argentina, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No. 238 (29 November 2011)

Fontevecchia and D ' Amico v Argentina, Monitoring Compliance with Judgement, Inter-American Court of Human Rights (18 October 2017) 16 (Translated Spanish to English by Microsoft Word Translate)

Gelman v Uruguay, Merits and Reparations, Inter-American Court of Human Rights Series C No.221 (24 February 2011)

Inter-American Commission on Human Rights Annual Report

Annual Report of the Inter-American Commission on Human Rights (2022)

Annual Report of the Inter-American Commission on Human Rights (2023)

Secondary Sources

Books

Addink Henk, *Good governance: concept and context* (Oxford University Press, 2019)

Binder Christina, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", in *International judicial lawmaking on public authority and democratic legitimation in global governance*, edited by Armin von Bogdandy and Ingo Venzke (Springer, 2012)

Buchanan Allen, *The Heart of Human Rights* (Oxford University Press, 2013)

Cohen Harlan Grant, Follesdal Andreas, Grossman Nienke, Ulfstein Geir, "Legitimacy and International Courts – A Framework" in *Legitimacy and International Courts*. *Studies on International Courts and Tribunals,* edited by Grossman Nienke, Cohen Harlan Grant, Follesdal Andreas, Ulfstein Geir (Cambridge University Press; 2018)

Gonzalez-Dominguez Pablo, *The doctrine of conventionality control: between uniformity and legal pluralism in the inter-American human rights system* (Cambridge University Press, 2018)

Ziccardi Natalia Saltalamachia, et al. "Friendly Settlements in the Inter-American Human Rights System: Efficiency, Effectiveness and Scope", in *The Inter-American Human Rights System*. (Springer International Publishing, 2018)

Articles

Abbot Max Silva, "Is the control of conventionality really viable?" *Journal of Applied Business and Economics* 23, no. 2 (2021), 144

Anon, "Fontevecchia Case" *International Law Reports* 186 (2020) 430

Baluatre David C., "Strategizing for compliance: The evolution of a compliance phase of Inter-American Court litigation and the strategic imperative for victims representatives" *American University International Law Review* 27, no. 2, 263

Baillet Cecilia M., "Measuring compliance with the Inter-American Court of Human Rights: The ongoing challenge of judicial independence in Latin America", 34(4) Nordic Journal of Human Rights 477

Basch Fernando, Filippini Leonardo, Laya Ana and Nino Mariano, "The effectiveness of the Inter-American System of Human Rights Protection: A quantitative approach to its functioning and compliance with its decision" *SUR International Journal on Human Rights 7* (2010), 9

Bellochio Lucia, "Conventionality control in Argentina case law" *Revista de Direito Economico e Socioambiental* 12 (201), 60

Burgorgue-Larsen Laurence, “Conventionality Control: Inter-American Court of Human Rights (IACtHR)” *Oxford Public International Law* 1 (2018)

Carozza Paolo G and Gonzalez Pablo, ‘The Final Word? Constitutional dialogue and the Inter-American Court of Human Rights: A reply to Jorge Contesse I-CON: Debate!’ *International journal of constitutional law* 15, no. 2 (2017), 436, 441

Cavallaro James L and Brewer Stephanie Erin, ‘Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-Amercan Court’ *The American journal of international law* 102, no. 4 (2008), 768

Contesse Jorge, “Contestation and deference in the Inter-American Human Rights System” *Law and Contemporary Problems* 79, no. 2 (2016), 123

Contesse Jorge, “The final word? Constitutional dialogue and the Inter-American Court of Human Rights”, *International Journal of Constitutional Law* 15, no. 2 (2017), 414

Crema Luigi, “Are Amnesties Still an Option? A Non-Policy Based Critique of the Inter-American Approach”, *The Center for Civil & Human Rights Working Paper Series* 6 (2013) 1

Dulitzky Ariel E., “An Inter-American Constitutional Court? The Intervention of the Conventionality Control by the Inter-American Court of Human Rights” *Texas International Law Journal* 50 (2015), 45

Ferrer Mac-Gregor Eduardo, “Symposium: The constitutionalisation of international law in Latin America conventionality control the new doctrine of the inter-American court of human rights.” *AJIL Unbound 2019* (2015), 93

Huneeus Alexandra, “Courts Resisting Courts: Lessons from the Inter-American Court’s struggle to Enforce Human Rights” *Cornell International Law Journal* 44 (2011), 493

Iglesias-Vila Marisa, “The conventionality control and the Fontevecchia case: Is the margin of appreciation the pancea?’” *Journal for Constitutional Theory and Philosophy of Law* 46 (2022), 1

Orunesu Claudina, “Conventionality Control and International Judicial Supremacy: Some Reflections on the Inter-American System of Human Rights” *Revus J Const. Theory & Phil, Law* 40 (2020), 45

Perez-Linan Anibal, “Compliance with the Inter-American Court of Human Rights: Methodological proposal and preliminary findings” *Kellog Institute for International Studies* (2019) 1

Soley Ximena and Steininger Silvia, "Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights" *International Journal of the Law in Context* 14, no. 2 (2018), 237

Websites

Burt J.M, "Recent Sentence by Uruguayan Supreme Court Obstructs Search for Truth and Justice". Accessed December 1, 2024. https://www.wola.org/analysis/recent-sentence-by-uruguayan-supreme-court-obstructs-search-for-truth-and-justice/

Contesse Jorge, "Judicial Backlash in Inter-American Human Rights Law?". Accessed October 23, 2024. https://www.iconnectblog.com/judicial-backlash-interamerican/

Girardi Fachin Melina and Nowak Bruna, "The Joint Declaration to the Inter-American System of Human Rights: Backlash or Contestation?". Accessed December 2, 2024. https://www.iconnectblog.com/the-joint-declaration-to-the-inter-american-system-of-human-rights-backlash-or-contestation/

Inter-American Commission on Human Rights, "Frequently asked questions". Accessed February 10, 2025. https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/usersupport/faq.asp#:~:text=The%20States%20that%20have%20recognized,Trinidad%20and%20Tobago%2C%20Uruguay%20and

Inter-American Commission on Human Rights, "Friendly Settlements". Accessed December 4, 2024. https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/friendly_settlements/default.asp#:~:text=petitioners%20and%20states-,The%20friendly%20settlement%20mechanism%20provides%20an%20opportunity%20for%20dialogue%20between,violation%20and%20society%20at%20large.

Inter-American Court of Human Rights, "What is the I/A Court H.R.?". Accessed November 23, 2024. https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

Learning from Global South Approaches to Tackle Refugee Crises: Assessing the Impact of Latin American Refugee Norms and Practices on the Global Compact on Refugees

Hannah Kroker

Received: 14 February 2025 / Accepted: 10 June 2025

Abstract

With wars and civil unrest brewing in all corners of the world, many states are struggling with an increased influx of refugees. However, by being a refugee-producing as well as -accepting region, Latin America has developed a unique approach towards forced migration over the past decades, characterised by solidarity and long-term integration initiatives. This paper argues that this put the region into a favourable position to influence the UN negotiations on the Global Compact on Refugees (GCR) between 2016 and 2018. Since valuable contributions to solve global problems by the Global South often remain underestimated or disregarded, the article highlights the influence of Latin America's participation, written statements, and regional conference papers on the creation of the GCR. Particularly, the Global Compact's emphasis on solidarity between states and the linking of concepts like development and integration appear to have been shaped by the region's inputs – potentially contributing to positive changes for the human rights of refugees.

I. Introduction

In international law, the influence of the Global South is often overlooked, as these states tend to be considered rule-takers, rather than rule-makers.[612] To challenge this view and highlight the potential of looking to the Global South for solutions to complex challenges, the following research paper assesses the impact of Latin American norms on the creation of the Global Compact on Refugees (GCR) from 2016 to 2018. This international soft law instrument aims to improve burden-sharing for refugee host countries and grant greater autonomy to refugees.[613] Even though the specific forced migration measures implemented by the various Latin American states vary, existing research highlights the presence of overarching norms within the region.[614] Therefore, the paper concretely addresses the research question: To what extent have Latin American norms and practices concerning refugees influenced new international norms, specifically the Global Compact on Refugees? The paper argues that Latin American countries have played a considerable role in shaping the GCR by actively participating in negotiations, submitting written contributions, and holding preparatory regional conferences - culminating in a document with 100 suggestions for the Compact.[615] While not all their recommendations were heeded, such as a broader definition for refugees, it is likely that several Latin American norms were at least partly incorporated in the agreement, such as their focus on solidarity and the connection between development and integration. In the implementation phase of the Global Compact, they may further serve as a good example of how soft instruments can guide

[612] See, for instance, James Thuo Gathii, 'Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)', *Proceedings of the ASIL Annual Meeting* 114 (2020): 165–87.

[613] UNHCR, 'The Global Compact on Refugees', UNHCR UK, accessed 20 November 2024.

[614] See Stefania Barichello, 'The Evolving System of Refugees' Protection in Latin America' (Leiden, The Netherlands: Brill | Nijhoff, 2015), 147–71; Stefania Barichello, 'Chapter 8: Responsibility-Sharing in Latin America', in *Research Handbook on International Refugee Law*, ed. Satvinder Singh Juss (Edward Elgar Publishing, 2019); Natalia Cintra, David Owen, and Pía Riggirozzi, 'Latin American Normative Frameworks of Migration and Asylum', in *Displacement, Human Rights and Sexual and Reproductive Health: Conceptualizing Gender Protection Gaps in Latin America* (Bristol, UK: Bristol University Press, 2023), 64–88; Liliana Jubilut and Rachel Lopes, 'Forced Migration and Latin America: Peculiarities of a Peculiar Region in Refugee Protection', *Archiv Des Völkerrechts* 56 (1 June 2018): 131–54; Liliana Lyra Jubilut, Melissa Martins Casagrande, and Marina Cardoso Farias, 'Refugee Policy in Latin America: Structural Pillars and Good Practices', in *Research Handbook on Asylum and Refugee Policy*, ed. Jane Freedman and Glenda Santana De Andrade (Edward Elgar Publishing, 2024), 53–75.

[615] 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018.

cooperation in the field of forced migration.

To give the necessary context, the paper will initially provide a short overview of Latin American refugee norms and their specificities. Subsequently, the process and aims of the Global Compact on Refugees will be outlined. In the analysis section, the general role of Latin America in the negotiations will be highlighted before examining three features of the Latin regional refugee system in more detail to evaluate the extent to which they influenced the GCR. At the conclusion of this section, the paper will propose avenues for future research on how Latin America may impact the GCR's implementation.

Apart from relying on the few academic articles available on Latin America's impact on these negotiations, the paper will mainly use primary material published on the United Nations website. These include documents like summaries of negotiations, country statements, or speeches by UN officials. To assess the extent to which other regional blocs pushed for similar policies as Latin America, the paper will also take their positions into account. While this article will speak of Latin America, it should be noted that the Caribbean region was involved in the creation of most of the Latin documents and is thus implicitly included in the argument.

II. Context

A. The development of informal refugee norms in Latin America

The right to asylum in Latin America is rooted in the 1948 American Declaration of the Rights and Duties of Man; however, at the time, Latin American states were reluctant to agree to more comprehensive global refugee regulation.[616] As a result, they did not meaningfully participate in the creation of the 1951 Geneva Convention and the document was not broadly adopted in the region until several decades later.[617] However, deteriorating political situations in different Latin American countries led to increased refugee streams over the following years. As there was no adequate

[616] Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', in *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection*, ed. Volker Türk, Alice Edwards, and Cornelis Wouters (Cambridge University Press, 2017), 145–47.

[617] Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', 2017, 146–47; UNHCR, 'Refugee Treaty and Legislation Dashboard', Rights Mapping and Analysis Platform, accessed 20 November 2024.

regional system in place to deal with these high levels of forced migration, Latin states started adopting several soft law instruments. Since they developed out of necessity or to respond to specific refugee waves, the documents, more closely described in the following paragraph, tend to be practice- and solution-oriented.[618]

Although not legally-binding, these agreements have deeply shaped Latin America's conduct regarding refugees.[619] Most significantly, the region refers to the 1984 Cartagena Declaration on Refugees and its follow-up documents (the 1994 San José Declaration, the 2004 Mexico Declaration and Plan of Action (MPA), and the 2014 Brazil Declaration and Plan of Action).[620] Furthermore, at the UN-sponsored International Conference on Central American Refugees (CIREFCA) in 1989, participating states agreed on common interpretations of the Cartagena Declaration which, although it is outdated, still guides their conduct today.[621] Despite Latin America's forward-looking refugee norms, the region sometimes struggles with their full implementation, similar to other regions. However, several regimes, such as CIREFCA or the Borders of Solidarity Programme (part of the MPA), have been praised for being effective in both theory and practice.[622]

B. Latin American norms to be examined for their influence

Latin American norms contain several noteworthy elements due to the region's unique experiences with refugees, three of which will be analysed in more detail to determine their influence on the GCR in the due course of the paper.

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[618] See, for instance, Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Cheltenham, UK: Edward Elgar Publishing, 2016), 218; International Conference on Central American Refugees (CIREFCA), 'Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons', 30 May 1989, CIREFCA 89/13/Rev.1 edition.

[619] Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', 2017.

[620] 'San José Declaration on Refugees and Displaced Persons', 7 December 1994; 'Mexico Declaration and Plan of Action', 16 November 2004; 'Brazil Declaration and Plan of Action', 3 December 2014; Liliana Lyra Jubilut, Marcia Vera Espinoza, and Gabriela Mezzanotti, eds., *Latin America and Refugee Protection: Regimes, Logics, and Challenges*, Forced Migration, volume 41 (New York: Berghahn, 2021); Barichello, 'The Evolving System of Refugees' Protection in Latin America', 2015.

[621] International Conference on Central American Refugees (CIREFCA), 'Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons', 30 May 1989; Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', 2017, 153.

[622] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 237.

Compared to other regions, the Latin approach is characterised by more solidarity than other parts of the world, having even established several explicit solidarity programmes, like 'Solidarity Cities' and 'Borders of Solidarity' in the MPA.[623] In practice, the UNHCR highlights the importance of the concept in the region's responses to the Colombian refugee crisis.[624] The solidarity approach is also reflected in the states' language, which consistently speaks of responsibility-sharing as opposed to burden-sharing – a term commonly used in other regions, such as Europe.[625] Martuscelli and Jatobá even argue that Latin America exhibits a 'South-South' cooperative approach which extends to other parts of the world, since Brazil offered special humanitarian visas to individuals fleeing Syria from 2013 to 2019.[626] In a quantitative study, Hammoud-Gallego and Freier emphasise the impact of Latin American leftist governments and regional integration on the formation of this norm.[627] Thus, this feature sets Latin American refugee norms apart from other regional strategies.

Another distinctly Latin feature is the intimate linking of development and integration.[628] As Mathew and Harley explain, programmes established by CIREFCA and the Mexico Declaration and Plan of Action "facilitated the integration of refugees in host communities and the return of persons to their country of origin" by improving the socio-economic conditions of locals and refugees.[629] For instance, Costa Rican

[623] 'Mexico Declaration and Plan of Action', 16 November 2004, 9–10; Tristan Harley, 'Regional Cooperation and Refugee Protection in Latin America: A "South-South" Approach', *International Journal of Refugee Law* 26, no. 1 (1 March 2014): 33; Susan Kneebone, 'Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs', *The International Journal of Human Rights* 20, no. 2 (17 February 2016): 153–72.

[624] UNHCR, *Mexico Plan of Action - The Impact of Regional Solidarity*, 1st ed. (San José: Editorama, 2007), 6.

[625] See Barichello, 'Chapter 8: Responsibility-Sharing in Latin America', 2019, 11; or, for practical examples, see 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018; European Union, 'Statement of the European Union to the First Thematic Discussion', 10 July 2017.

[626] Patrícia Martuscelli and Daniel Jatobá, 'Brazil as a Leader in the Latin American Refugees' Regime', *The Journal of International Relations, Peace Studies, and Development:* 4, no. 1 (13 December 2018); Liliana Lyra Jubilut and Melissa Martins Casagrande, 'The Global Compact on Refugees and Latin America', *E-International Relations* (blog), 17 December 2019.

[627] Omar Hammoud-Gallego and Luisa Feline Freier, 'Symbolic Refugee Protection: Explaining Latin America's Liberal Refugee Laws', *American Political Science Review* 117, no. 2 (2023): 454–73.

[628] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 123, 247.

[629] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 247.

authorities and UNHCR are operating a micro-credit system that has enabled refugees as well as Costa Ricans to build up small businesses.[630] Such initiatives offering development opportunities to locals and refugees alike have strengthen the social cohesion between the two groups, leading to more successful integration.[631] While the provision of additional financial resources to deal with refugees is common, Latin America's connection of the resulting development with the integration of refugees is more unusual but has been valuable in the past.[632]

A final notable element of the Latin American approach is the expansive protection of refugees under the Cartagena Declaration, exemplified by the broader definition of refugees. The instrument extends the term to persons displaced due to "generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".[633] This definition aims to shift the focus to objective reasons for fleeing a state, in contrast to the individualist approach of the Geneva Convention, which forces refugees to prove a personal risk of persecution.[634] Although the inspiration for the broader definition came from the African context, Latin America has a more successful record of implementing it, making it an influential region regarding this norm.[635]

C. The Global Compact on Refugees

Due to increased numbers of refugees globally, including the 2015 refugee wave in Europe, the UN General Assembly passed the 2016 New York Declaration (NYD).

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[630] Harley, 'Regional Cooperation and Refugee Protection in Latin America: A "South-South" Approach', 1 March 2014, 35.

[631] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 123, 247; UNHCR, *Mexico Plan of Action - The Impact of Regional Solidarity*, 2007, 6.

[632] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 123, 247.

[633] For the Spanish original, see Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 'Cartagena Declaration on Refugees', 22 November 1984, 16; translation taken from Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', 2017, 141; Harley, 'Regional Cooperation and Refugee Protection in Latin America: A "South-South" Approach', 1 March 2014.

[634] Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', 2017, 152.

[635] Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', 2017, 151.

This resolution calls for a new global instrument on refugees in order to achieve "more predictable and equitable responsibility-sharing" and introduced the Comprehensive Refugee Response Framework (CRRF), which states should aim to apply in their respective contexts.[636] As a result, the UNHRC led the negotiations of the Global Compact on Refugees over the following two years in parallel to the Global Compact for Safe, Orderly and Regular Migration (not discussed in this article). The four main points of focus of the GCR are a) better support for host countries, b) more self-reliance among refugees, c) third-country solutions to share the burden, and d) improving the situation in refugee origin countries in order to enable repatriation.[637] The GCR was passed in 2018 with 181 votes in favour, Hungary and the US voting against, and a few abstentions.[638]

III. Assessing the influence of Latin American norms on the GCR

A. General influence: Latin America's involvement in the negotiations

As in most modern multilateral processes, the negotiations around the Global Compact on Refugees included a host of different actors, including states, civil society, refugees, business interests, and international organisations.[639] Accordingly, it can be difficult to ascertain to what extent Latin American states influenced the negotiations as opposed to actors with similar interests, such as NGOs. The latter were less active on the specific issues discussed in this section, so the main focus will be on the inputs of different blocs. Furthermore, NGOs were mainly able to speak during the thematic discussions, the later stages of negotiations tended to be exclusive to states.[640] One could thus expect NGOs to have significantly less influence than state actors or regional blocs. Overall, there are several indications that the Latin experience was influential during the creation of the GC, which will be elaborated on in this section.

For many years, Latin American refugee norms have been highlighted as good

[636] UNHCR, 'The Global Compact on Refugees'.
[637] UNHCR, 'The Global Compact on Refugees'.
[638] Jubilut, Vera Espinoza, and Mezzanotti, *Latin America and Refugee Protection: Regimes, Logics, and Challenges*, 2021, 20.
[639] UNHCR, 'The Global Compact on Refugees'.
[640] Nicholas R. Micinski, *UN Global Compacts: Governing Migrants and Refugees*, 1st ed. (Routledge, 2021), chap. 3 Negotiations for the Compact (no page nrs).

examples for other states. A UNHRC discussion paper and an expert meeting dating to 2001 and 2011, respectively, already emphasise the effectiveness of Latin American schemes in responsibility-sharing. At the latter, several panellists represented the region, promoting Latin norms to the international community.[641] Similarly, when the Mexico Plan of Action was introduced in 2004, it was internationally hailed. Even Antonio Guterres, then UN High Commissioner for Refugees, commended it as the "most sophisticated operational instrument to protect and assist refugees in the world".[642] This indicates that other actors were aware of the potential to learn from the Latin American approach to forced migration. Hence, Latin America likely benefited from its good reputation in the context of refugees when negotiating the GCR.

At the GCR, Latin American states were heavily involved in the negotiations, submitting statements, participating in discussion rounds, and repeatedly stressing their commitment. For instance, in a written contribution Brazil explicitly stated that it "stand[s] ready to play a constructive role throughout this Dialogue and next year's formal negotiations".[643] Six Latin American countries further proved their serious intentions by publishing the San Pedro de Sula Declaration. This document explains how they are implementing the CRRF in the form of a Comprehensive Regional Protection and Solutions Framework, as was suggested in the NYD.[644] Most importantly, as a regional bloc Latin America authored the 100 Points of Brasilia which enumerates 100 recommendations for the GCR, indicating that the region devoted significant resources to produce a shared document in order to contribute to the Compact.[645] Thus, Latin America displayed a clear intention of influencing the Global

[641] UNHCR, 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations', *Global Consultations on International Protection*, 19 February 2001, EC/GC/01/7 edition; UNHCR, 'Summary Conclusions - Expert Meeting on International Cooperation to Share Burdens and Responsibilities' (Amman, 2011).

[642] William Spindler, 'Action Plan Based on Solidarity Offers the Best Guarantee to Protect Refugees in Latin America', UNHCR, 6 October 2005.

[643] Brazil, '10th Annual High Commissioner's Dialogue on Protection Challenges - Brazil Written Contribution', December 2017, 1.

[644] Belize et al., 'San Pedro Sula Declaration', 26 October 2017; MIRPS Countries, 'Intervención de Los Países MIRPS - 10° Díalogo Del Alto Comisionado Sobre Desafíos de Protección', 13 December 2017; Jubilut, Vera Espinoza, and Mezzanotti, *Latin America and Refugee Protection: Regimes, Logics, and Challenges*, 2021.

[645] 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018, 2; UNHCR, 'UNHCR Welcomes Renewed Commitment to Protect Refugees by Latin American and Caribbean States at Key Meeting', UNHCR, 22 February 2018.

Compact and, through its active participation, was in a favourable position to do so. It is especially helpful to consider how Latin America could have influenced the Zero Draft of the GCR, as this served as the template for all subsequent negotiations. According to a letter by the UN High Commissioner for Refugees, the two main pillars for the Zero Draft were a) conclusions from the thematic discussions and the 2017 Dialogue on Protection Challenges and b) the "early application of the CRRF in specific countries and regions".[646] Concerning the first, Latin American documents, such as the outcomes of CIREFCA and the 2014 Brazil Declaration and Plan of Action, were discussed in both the preparatory High Commissioner's Dialogue proceedings and thematic discussion 1. In both cases, they were cited as good practice to inform the GCR.[647] This points to Latin American countries wielding considerable influence in shaping these discussions and raising more awareness for Global South approaches.

Regarding lessons learnt from the Comprehensive Refugee Response Framework, Latin American states were also a leading actor. In late 2017, only 11 countries had implemented the CRRF that was presented in the New York Declaration.[648] Since six of these were the Latin American states that signed the San Pedro de Sula Declaration, they made up the majority of countries with practical experience on the CRRF. For this reason, one could expect that their input held significant weight and helped shape the Zero Draft of the GCR, which the rest of the negotiations were based on. Thus, it is plausible that Latin American norms influenced the Global Compact on Refugees in some substantive ways.

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[646] UNHCR, 'Zero Draft of the Global Compact on Refugees and Letter from the UN High Commissioner for Refugees', 9 February 2018, 2.

[647] See UNHCR, 'Summary Conclusions of Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', in *"Towards a Global Compact on Refugees"* (Geneva, 2017); Daniel Endres, 'Remarks to the Special Session on Lessons Learned and Good Practices in Applying the Comprehensive Refugee Response Framework (CRRF)' (High Commissioner's Dialogue on Protection Challenges, Geneva: UNHCR, 2017); UNHCR, 'Panel Three: In What Ways Can Regional Institutions Contribute to Comprehensive Refugee Responses?', in *"Towards a Global Compact on Refugees"* (Thematic discussion five: Issues that cut across all four substantive sections of the comprehensive refugee response framework, and overarching issues, Geneva, 2017); UNHCR, 'Agenda for Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', in *"Towards a Global Compact on Refugees"* (Geneva, 2017); UNHCR, 'Summary Conclusions of Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', 2017.

[648] SDG Knowledge Hub, 'Governments Consider Zero Draft of Global Compact on Refugees', 15 February 2018.

To gain a deeper understanding of this dynamic, the following section will examine the impact of the three different Latin American norms described earlier.

B. Solidarity: influencing a guiding principle of the GCR

As one of the most distinctive features of Latin American refugee norms, solidarity was continuously advocated for by the region.[649] The 100 Points of Brasilia document stresses the importance of solidarity in the introductory paragraphs and then refers to this principle throughout the document.[650] Moreover, the Brazil Declaration has the explicit purpose of being a "Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean".[651] In their written contributions, several Latin American states also highlighted the importance of solidarity, including responsibility-sharing and resettlement schemes.[652] For instance, Brazil supported holding more solidarity conferences in its contribution – an idea that can also be found in Paragraph 27 of the Global Compact.[653] Hence, Latin American states tried to influence the GCR with their regional emphasis on solidarity.

There are indications that Latin America played a significant role in the negotiations surrounding responsibility-sharing, a heavily debated topic in the run-up to the GCR.[654] The first thematic discussion on July 10th, 2017, centred around "Past and current

[649] Harley, 'Regional Cooperation and Refugee Protection in Latin America: A "South-South" Approach', 1 March 2014.

[650] 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018.

[651] 'Brazil Declaration and Plan of Action', 3 December 2014, 1.

[652] Costa Rica, 'Statement of Costa Rica to the First Thematic Discussion', 10 July 2017; Mexico, 'Statement of Mexico to Thematic Discussions Two and Three', 18 October 2017; Mexico, 'Statement of Mexico to the First Thematic Discussion', 10 July 2017; Mexico, 'Statement of Mexico to Thematic Discussions Four and Five', 15 November 2017; Honduras, 'Additional Recommendations from the Government of Honduras to the Zero Draft GCR', 14 February 2018; Honduras, 'Statement of Honduras to the First Formal Consultation, Agenda Item Two', 14 February 2018; Honduras, 'Written Contribution of Honduras to the First, Second and Third Formal Consultations', April 2018.

[653] Brazil, '10th Annual High Commissioner's Dialogue on Protection Challenges - Brazil Written Contribution', December 2017, 2; UNHCR, 'The Global Compact on Refugees', para. 27.

[654] United Nations General Assembly, 'Global Compact on Refugees', 17 December 2018, 2; United Nations General Assembly, 'New York Declaration for Refugees and Migrants', 19 September 2016, UN Resolution A/RES/71/1 edition.

burden- and responsibility-sharing arrangements" to inspire the Global Compact.[655] According to the agenda of this meeting, a representative from Brazil was one of the four main panellists, presenting the Brazil Plan of Action for discussion. Additionally, the side event on the same day featured CIREFCA as one of three examples to be debated, given by a lecturer from the University for Peace (based in Costa Rica).[656] This suggests that Latin American norms could be propagated and explained due to the favourable positions of panellists. As a result, Latin solidarity measures were highlighted in both the documents from the thematic discussion on burden-sharing and the High Commissioner's Dialogue process.[657] These outcomes, in turn, are known to have shaped the GCR, indicating that Latin American solidarity norms likely influenced the GCR's understanding of solidarity, its guiding principle.[658]

While some may contend that Latin America's contribution in this regard was not exceptional, CIREFCA presents a more far-reaching and effective solidarity regime than other prominent regional ones, such as the International Conferences on Assistance to Refugees in Africa (ICARA) or the Comprehensive Plan of Action (CPA) for Indochinese Refugees so that more practical lessons could likely be drawn from CIREFCA.[659] As Kneebone explains, the CPA "failed to imbue norms of refugee protection in the region", meaning that South East Asia still tends to view refugees from a security rather than a rights-based perspective, which is less in line with the solidarity focus of the GCR.[660] Moreover, neither the CPA nor the African ICARA

[655] UNHCR, 'Summary Conclusions of Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', 2017.
[656] UNHCR, 'Agenda for Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', 2017.
[657] UNHCR, 'Summary Conclusions of Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', 2017; Endres, 'Remarks to the Special Session on Lessons Learned and Good Practices in Applying the Comprehensive Refugee Response Framework (CRRF)', 2017.
[658] UNHCR, 'Zero Draft of the Global Compact on Refugees and Letter from the UN High Commissioner for Refugees', 9 February 2018, 2; United Nations General Assembly, 'Global Compact on Refugees', 17 December 2018, para. 5.
[659] United Nations General Assembly, 'International Conference on Assistance to Refugees in Africa', 4 December 1980, UN Resolution A/RES/35/42 edition; 'International Conference on Indo-Chinese Refugees (Geneva, 13 and 14 June 1989): Declaration and Comprehensive Plan of Action', *International Journal of Refugee Law* 5, no. 4 (1 January 1993): 617–24.
[660] Kneebone, 'Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs', 17 February 2016, 159.

allowed for local integration, impeding their implementation in the long run and thus limiting the positive lessons that can be drawn from them.[661] One could thus expect CIREFCA to have received serious attention in discussions as the solidarity conference with the most long-term success. This is significant, since the importance attached to such regional events can be seen when the GCR recommends holding more solidarity conferences.[662] This reinforces the idea that Latin American solidarity frameworks like CIREFCA considerably influenced the Global Compact on Refugees.

Even though the European Union also claimed to promote solidarity in the context of refugees, Latin America was in a more favourable position to shape this concept. Europe considers itself a "non-refugee-producing region", meaning that its forced migration norms historically tended to develop around deterrence more than around solidarity.[663] Accordingly, the EU supported regional responsibility-sharing mechanisms over global ones, like in Paragraph 13 of the EU's written statement, because it lets Europe avoid taking in more refugees directly.[664] While the EU also drew some general lessons from regional solidarity measures in the Global South in the statement, it is clear that it has less practical experience and thus credibility in these contexts. In contrast, Latin America has very comprehensive regional solidarity norms and frameworks in place, which were also discussed during the negotiations.[665] As a result, they had a higher chance of being influential on the GCR and, since they focus on South-South approaches, probably even had Europe's support. Hence, Latin America likely played a significant role as a good example that aspects of the GCR could be modelled on, even though the European Union also had ideas about responsibility-sharing measures.

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[661] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 237.
[662] United Nations General Assembly, 'Global Compact on Refugees', 17 December 2018, para. 27.
[663] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 239; Kneebone, 'Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs', 17 February 2016, 156.
[664] European Union, 'Statement of the European Union to the First Thematic Discussion', 10 July 2017, para. 13; European Parliamentary Research Service, 'The Global Compact on Refugees - Strengthening International Cooperation to Ease the Plight of Refugees in the World', European Parliamentary Research Service (European Parliament, January 2019); Kneebone, 'Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs', 17 February 2016.
[665] UNHCR, 'Agenda for Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', 2017.

C. The link between local integration and development: the search for sustainable long-term solutions

A further focus of the Global Compact is the support for host countries. In line with Western interests, the GCR emphasises that "[l]ocal integration is a sovereign decision" and repatriation should be favoured, but it also recognises that states wishing to integrate displaced persons should be supported.[666] To achieve the latter, Latin America is a proponent of integrating development with the integration of refugees, as the region has successfully applied this strategy in the context of CIREFCA and the Mexico Declaration and Plan of Action.[667] Accordingly, Latin states directly advocated for this approach in the largest section of the 100 Points of Brasilia, titled "Durable Solutions with an Emphasis on Local Integration," which covers a third of the points.[668] Furthermore, several Latin American countries highlighted this strategy in their written contributions and statements, indicating that they explicitly lobbied for it on the floor of the negotiations. [669] For example, Ecuador emphasised in a statement how "promoting the integration of refugees as key elements for development" can balance other costs associated with forced migration.[670] This suggests that Latin America actively sought to influence the GCR negotiations to incorporate this idea.

There are several indications that Latin America successfully influenced the parts of the Global Compact emphasising the connection between development and integration. For example, Paragraph 32 recommends that host states receive additional aid to benefit the development of local communities as well as refugees.[671] Furthermore, Paragraph 99 asks for national development plans in areas with more refugees to be "actively promoted".[672] These correspond to Latin American demands

[666] United Nations General Assembly, 'Global Compact on Refugees', 17 December 2018, para. 97.
[667] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 247.
[668] 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018, 6; Harley, 'Regional Cooperation and Refugee Protection in Latin America: A "South-South" Approach', 1 March 2014, 35.
[669] Mexico, 'Statement of Mexico to Thematic Discussions Two and Three', 18 October 2017; Mexico, 'Statement of Mexico to the First Thematic Discussion', 10 July 2017, 4; Brazil, '10th Annual High Commissioner's Dialogue on Protection Challenges - Brazil Written Contribution', December 2017.
[670] Ecuador, 'Statement of Ecuador to the First Thematic Discussion', 10 July 2017, 2.
[671] United Nations General Assembly, 'Global Compact on Refugees', 17 December 2018, para. 32.
[672] United Nations General Assembly, 'Global Compact on Refugees', 17 December 2018, para. 99.

and experiences discussed in preparation for the Compact.[673] In the High Commissioner's Dialogue proceedings towards the GCR, the socio-economic opportunities created for the integration of refugees in Latin America were commended as lessons for the Compact.[674] Furthermore, Latin America's successful examples of linking development and integration were discussed during thematic discussion 1.[675] This indicates that the region's experience was taken into account at the global stage. Due to Latin America's recognised achievements in this regard and its continuous promotion of this approach, the region may have effectuated the inclusion of the link between development and local integration in the Global Compact.

One may argue that other regions could have impacted the inclusion of this aspect, too. Most significantly, receiving more financial aid for taking in refugees could be observed in several African cases, so it is possible this continent also played an influential role. However, while Africa promoted receiving more financial aid for taking in refugees, too, the region does not directly connect this support to the integration of displaced persons, merely considering it compensation.[676] Unlike Latin America, Africa "failed to view refugees as agents of development" and preferred short-term solutions over more sustainable long-term integration into local communities, as Mathew and Harley describe.[677] Therefore, it is likely that Latin America had a greater influence than other regions in this context.

D. Broadening the definition of refugees: no discussion possible

The wider definition for refugees is an example of advocacy by Latin America and Africa that failed to be included in the GCR since the UNHCR, as the negotiation

[673] 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018, 6; Harley, 'Regional Cooperation and Refugee Protection in Latin America: A "South-South" Approach', 1 March 2014, 35.
[674] Endres, 'Remarks to the Special Session on Lessons Learned and Good Practices in Applying the Comprehensive Refugee Response Framework (CRRF)', 2017.
[675] UNHCR, 'Summary Conclusions of Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements', 2017, 4–5.
[676] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 123, 239–40; Fatima Khan and Cecile Sackeyfio, 'Situating the Global Compact on Refugees in Africa: Will It Make a Difference to the Lives of Refugees "Languishing in Camps"?', *Journal of African Law* 65, no. S1 (2021): 35.
[677] Mathew and Harley, *Refugees, Regionalism and Responsibility*, 2016, 239.

leader, vetoed it.[678] Point 4 of the 100 Points of Brasilia recommends the "incorporation into internal regulations of the broader refugee definition proposed by the 1984 Cartagena Declaration on Refugees".[679] Over the past decades, many Latin American countries have integrated the principles of the Cartagena Declaration in their national law, making it an effective measure in this context.[680] Accordingly, the Latin American experience could have been expected to carry some influence, even though Africa was the first region to use a broader definition for refugees. [681] However, despite Latin America and Africa's advocacy, this was not even discussed in the Global Compact negotiations since UNHCR feared that Western states would use the opportunity to further dilute the definition of refugees if it was up for debate.[682]

It is likely that that the Global South's efforts in this regard would have been fruitless even if the UNHCR had allowed it on the agenda. As the refugee agency suspected, the West probably would have refused to widen the 1951 Geneva Convention definition to avoid an influx of refugees. The current political climate, with many Western countries seeing a surge in anti-immigrant populism, meant that a broader understanding of refugees did not align with most of the negotiators' party ideologies. Additionally, even for a non-populist Western democracy, it would have been politically costly to streamline refugee asylum processes due to unfavourable public opinion.[683] Accordingly, it is plausible that the definition would have narrowed instead of widened, like the UNHCR feared, particularly when considering the populist backlash the parallel

[678] Micinski, *UN Global Compacts: Governing Migrants and Refugees*, 2021, chap. 3. Negotiations for the Compacts (no page nrs).
[679] 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018, 3.
[680] UNHCR, *Mexico Plan of Action - The Impact of Regional Solidarity*, 2007, 6.
[681] See Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism', *International Journal of Refugee Law* 3, no. 2 (1 April 1991): 185–207; Khan and Sackeyfio, 'Situating the Global Compact on Refugees in Africa: Will It Make a Difference to the Lives of Refugees "Languishing in Camps"?', 2021; 'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees', 20 February 2018.
[682] Micinski, *UN Global Compacts: Governing Migrants and Refugees*, 2021, chap. 3. Negotiations for the Compacts (no page nrs).
[683] See, for instance, Laura Silver, 'Populists in Europe – Especially Those on the Right – Have Increased Their Vote Shares in Recent Elections', *Pew Research Center* (blog), 6 October 2022; Deutsche Welle, 'Hungary Will Not Sign UN Migration Compact', *Dw.Com*, 18 July 2018; Tim McDonnell, 'The Refugees The World Barely Pays Attention To', *NPR*, 20 June 2018, sec. Goats and Soda.

negotiation process for the Global Compact on Migration received when right-wing groups misrepresented it as an invitation for more migration.[684] Thus, it is highly unlikely that Latin American norms could have successfully led to a broader definition of refugees, even without the UNHCR's intervention.

E. Soft law: using Latin America as a good example in the implementation

A common criticism of the GCR is its soft legal character, because states can decide to ignore the document completely. The anti-immigrant sentiments in many countries explain the political reluctance to agree to binding regulation, making soft law the only realistic outcome for the Global Compact on Refugees. While Latin America thus did not cause the GCR to be a soft instrument, the result mirrors how the Latin system operates. In contrast to the African continent, where soft law has proven to be relatively ineffective, Latin America has demonstrated that soft law can be politically useful and successful in a contested political field like forced migration, improving the human rights of refugees.[685]

As the only region with a functional soft law approach in this field, the Latin American experience may continue to influence how the GCR is implemented. For instance, at the fourth formal consultation, Brazil suggested changes to the plans for a Global Refugee Forum, which is to be held every four years to report on the implementation of the GCR. The state called for optional mid-term reviews, which were finally included in Paragraph 104 of the Global Compact.[686] Such contributions by Latin American states, which are based on a long history of regional solidarity on forced migration, will likely prove valuable in the implementation phase of the Global Compact. While it is beyond the scope of this paper to assess the impact of Latin America on the later implementation of the GCR, further studies should consider this issue.

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[684] Micinski, *UN Global Compacts: Governing Migrants and Refugees*, 2021, chap. 3. Negotiations for the Compacts (no page nrs).

[685] Jubilut, Vera Espinoza, and Mezzanotti, *Latin America and Refugee Protection: Regimes, Logics, and Challenges*, 2021; Khan and Sackeyfio, 'Situating the Global Compact on Refugees in Africa: Will It Make a Difference to the Lives of Refugees "Languishing in Camps"?', 2021.

[686] International Council for Voluntary Agencies, 'Global Compact on Refugees – Fourth Formal Consultations', *Notes for NGOs*, May 2018; United Nations General Assembly, 'Global Compact on Refugees', 17 December 2018, para. 104.

IV. Conclusion

In conclusion, the value of Latin American norms in tackling the complex challenges posed by forced migration should not be underestimated since they appear to have considerably influenced the Global Compact on Refugees in its creation. By contributing to the GCR negotiations through written contributions, panel discussions, and even 100 concrete suggestions for the document, the Latin region played an active role in trying to improve refugees' human rights. As analysed, it seems to have had a significant influence in contexts where Latin America has developed strong norms, such as solidarity. It is difficult to pinpoint specific paragraphs in the GCR that were likely influenced by Latin solidarity, apart from the emphasis on solidarity conferences. Nevertheless, the Latin American experience was consulted repeatedly in this context, implying that it impacted the overall understanding of solidarity as a guiding principle of the GCR. Furthermore, Latin America recommended that host countries link the integration of refugees with their development, as this was effective within the region. This suggestion can also be found in the Global Compact, suggesting that Latin America's continuous promotion efforts were successful. However, not all Latin American features of refugee management were implemented. Although the region and other Global South actors advocated for the broadening of the refugee definition, this was not accepted in the Global Compact. Lastly, Latin America may be in a position to advise and guide the implementation process of the GCR due to its extensive experience with soft law in the context of refugees. It would be worthwhile for a future study to consider the region's global involvement in shaping refugee norms in the implementation process of the Global Compact on Refugees, since further lessons could likely be drawn from the region's promotion of refugee rights in this context.

Bibliography

Arboleda, Eduardo. 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism'. *International Journal of Refugee Law* 3, no. 2 (1 April 1991): 185–207. https://doi.org/10.1093/ijrl/3.2.185.

Barichello, Stefania. 'Chapter 8: Responsibility-Sharing in Latin America'. In *Research Handbook on International Refugee Law*, edited by Satvinder Singh Juss. Edward Elgar Publishing, 2019. https://doi.org/10.4337/9780857932815.

———. 'The Evolving System of Refugees' Protection in Latin America', 147–71. Leiden, The Netherlands: Brill | Nijhoff, 2015. https://doi.org/10.1163/9789004265585_008.

Belize, Costa Rica, Guatemala, Honduras, Mexico, Panama, OAS, and UNHCR. 'San Pedro Sula Declaration', 26 October 2017. https://globalcompactrefugees.org/sites/default/files/2019-12/San%20Pedro%20Sula%20Declaration%20%282017%29.pdf.

Brazil. '10th Annual High Commissioner's Dialogue on Protection Challenges - Brazil Written Contribution', December 2017. https://www.unhcr.org/media/statement-brazil-high-commissioners-dialogue-protection-challenges.

'Brazil Declaration and Plan of Action'. 3 December 2014. https://www.acnur.org/fileadmin/Documentos/BDL/2014/9865.pdf.

Cintra, Natalia, David Owen, and Pía Riggirozzi. 'Latin American Normative Frameworks of Migration and Asylum'. In *Displacement, Human Rights and Sexual and Reproductive Health: Conceptualizing Gender Protection Gaps in Latin America*, 64–88. Bristol, UK: Bristol University Press, 2023. https://doi.org/10.51952/9781529222814.ch003.

Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia. 'Cartagena Declaration on Refugees', 22 November 1984. https://www.unhcr.org/media/cartagena-declaration-refugees-adopted-colloquium-international-protection-refugees-central.

Costa Rica. 'Statement of Costa Rica to the First Thematic Discussion', 10 July 2017. https://www.unhcr.org/media/statement-costa-rica-first-thematic-discussion-10-july-2017.

Deutsche Welle. 'Hungary Will Not Sign UN Migration Compact'. *Dw.Com*, 18 July 2018. https://www.dw.com/en/hungary-joins-us-in-refusing-uns-safe-global-migration-compact/a-44733306.

Ecuador. 'Statement of Ecuador to the First Thematic Discussion', 10 July 2017. https://www.unhcr.org/media/statement-ecuador-first-thematic-discussion-10-july-2017.

Endres, Daniel. 'Remarks to the Special Session on Lessons Learned and Good Practices in Applying the Comprehensive Refugee Response Framework (CRRF)'. Geneva: UNHCR, 2017. https://www.unhcr.org/publications/remarks-special-session-lessons-learned-and-good-practices-applying-comprehensive.

European Parliamentary Research Service. 'The Global Compact on Refugees - Strengthening International Cooperation to Ease the Plight of Refugees in the World'. European Parliamentary Research Service. European Parliament, January 2019.

European Union. 'Statement of the European Union to the First Thematic Discussion', 10 July 2017. https://www.unhcr.org/media/statement-european-union-first-thematic-discussion-10-july-2017.

Gathii, James Thuo. 'Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)'. *Proceedings of the ASIL Annual Meeting* 114 (2020): 165–87. https://doi.org/10.1017/amp.2021.87.

Hammoud-Gallego, Omar, and Luisa Feline Freier. 'Symbolic Refugee Protection: Explaining Latin America's Liberal Refugee Laws'. *American Political Science Review* 117, no. 2 (2023): 454–73. https://doi.org/10.1017/S000305542200082X.

Harley, Tristan. 'Regional Cooperation and Refugee Protection in Latin America: A "South-South" Approach'. *International Journal of Refugee Law* 26, no. 1 (1 March 2014): 22–47. https://doi.org/10.1093/ijrl/eeu004.

Honduras. 'Additional Recommendations from the Government of Honduras to the Zero Draft GCR', 14 February 2018. https://www.unhcr.org/media/additional-recommendations-government-honduras-zero-draft-gcr-spanish.

———. 'Statement of Honduras to the First Formal Consultation, Agenda Item Two', 14 February 2018. https://www.unhcr.org/media/statement-honduras-first-formal-consultation-agenda-item-two-spanish.

———. 'Written Contribution of Honduras to the First, Second and Third Formal Consultations', April 2018. https://www.unhcr.org/media/written-contribution-honduras-first-second-and-third-formal-consultations-spanish.

International Conference on Central American Refugees (CIREFCA). 'Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons', 30 May 1989, CIREFCA 89/13/Rev.1 edition. https://www.refworld.org/legal/resolution/iccar/1989/en/20539.

‘International Conference on Indo-Chinese Refugees (Geneva, 13 and 14 June 1989): Declaration and Comprehensive Plan of Action’. *International Journal of Refugee Law* 5, no. 4 (1 January 1993): 617–24. https://doi.org/10.1093/ijrl/5.4.617.

International Council for Voluntary Agencies. ‘Global Compact on Refugees – Fourth Formal Consultations’. *Notes for NGOs*, May 2018. https://www.icvanetwork.org/uploads/2021/07/May-GCR-Consult-Agenda-item-2_Notes-1.pdf.

Jubilut, Liliana, and Rachel Lopes. ‘Forced Migration and Latin America: Peculiarities of a Peculiar Region in Refugee Protection’. *Archiv Des Völkerrechts* 56 (1 June 2018): 131–54. https://doi.org/10.1628/avr-2018-0008.

Jubilut, Liliana Lyra, and Melissa Martins Casagrande. ‘The Global Compact on Refugees and Latin America’. *E-International Relations* (blog), 17 December 2019. https://www.e-ir.info/2019/12/17/the-global-compact-on-refugees-and-latin-america/.

Jubilut, Liliana Lyra, Melissa Martins Casagrande, and Marina Cardoso Farias. ‘Refugee Policy in Latin America: Structural Pillars and Good Practices’. In *Research Handbook on Asylum and Refugee Policy*, edited by Jane Freedman and Glenda Santana De Andrade, 53–75. Edward Elgar Publishing, 2024. https://doi.org/10.4337/9781802204599.00012.

Jubilut, Liliana Lyra, Marcia Vera Espinoza, and Gabriela Mezzanotti, eds. *Latin America and Refugee Protection: Regimes, Logics, and Challenges*. Forced Migration, volume 41. New York: Berghahn, 2021.

Khan, Fatima, and Cecile Sackeyfio. ‘Situating the Global Compact on Refugees in Africa: Will It Make a Difference to the Lives of Refugees “Languishing in

Camps"?' *Journal of African Law* 65, no. S1 (2021): 35–57. https://doi.org/10.1017/S0021855321000012.

Kneebone, Susan. 'Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs'. *The International Journal of Human Rights* 20, no. 2 (17 February 2016): 153–72. https://doi.org/10.1080/13642987.2016.1141499.

Martuscelli, Patrícia, and Daniel Jatobá. 'Brazil as a Leader in the Latin American Refugees' Regime'. *The Journal of International Relations, Peace Studies, and Development:* 4, no. 1 (13 December 2018). https://scholarworks.arcadia.edu/agsjournal/vol4/iss1/4.

Mathew, Penelope, and Tristan Harley. *Refugees, Regionalism and Responsibility*. Cheltenham, UK: Edward Elgar Publishing, 2016. https://doi.org/10.4337/9781782547297.

McDonnell, Tim. 'The Refugees The World Barely Pays Attention To'. *NPR*, 20 June 2018, sec. Goats and Soda. https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to.

Mexico. 'Statement of Mexico to the First Thematic Discussion', 10 July 2017. https://www.unhcr.org/media/statement-mexico-first-thematic-discussion-10-july-2017.

———. 'Statement of Mexico to Thematic Discussions Four and Five', 15 November 2017. https://www.unhcr.org/uk/media/statement-mexico-thematic-discussions-four-and-five-spanish.

———. ‘Statement of Mexico to Thematic Discussions Two and Three’, 18 October 2017. https://www.unhcr.org/media/statement-mexico-thematic-discussions-two-and-three.

‘Mexico Declaration and Plan of Action’. 16 November 2004. https://www.unhcr.org/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.unhcr.org%2Fsites%2Fdefault%2Ffiles%2Flegacy-pdf%2F50aa085e9.pdf.

Micinski, Nicholas R. *UN Global Compacts: Governing Migrants and Refugees*. 1st ed. Routledge, 2021. https://doi.org/10.4324/9780429266669.

MIRPS Countries. ‘Intervención de Los Países MIRPS - 10° Díalogo Del Alto Comisionado Sobre Desafíos de Protección’, 13 December 2017. https://www.unhcr.org/media/statement-countries-part-comprehensive-regional-protection-and-solutions-framework-marco.

Reed-Hurtado, Michael. ‘The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America’. In *In Flight from Conflict and Violence: UNHCR’s Consultations on Refugee Status and Other Forms of International Protection*, edited by Volker Türk, Alice Edwards, and Cornelis Wouters, 141–80. Cambridge University Press, 2017. https://doi.org/10.1017/9781316771143.007.

‘San José Declaration on Refugees and Displaced Persons’. 7 December 1994. https://www.refworld.org/legal/resolution/rri/1994/en/69659.

SDG Knowledge Hub. ‘Governments Consider Zero Draft of Global Compact on Refugees’, 15 February 2018. https://sdg.iisd.org/news/governments-consider-zero-draft-of-global-compact-on-refugees/.

Silver, Laura. ‘Populists in Europe – Especially Those on the Right – Have Increased Their Vote Shares in Recent Elections’. *Pew Research Center* (blog), 6 October

2022. https://www.pewresearch.org/short-reads/2022/10/06/populists-in-europe-especially-those-on-the-right-have-increased-their-vote-shares-in-recent-elections/.

Spindler, William. 'Action Plan Based on Solidarity Offers the Best Guarantee to Protect Refugees in Latin America'. UNHCR, 6 October 2005. https://www.unhcr.org/news/action-plan-based-solidarity-offers-best-guarantee-protect-refugees-latin.

'The 100 points of Brasilia. Inputs from Latin America and the Caribbean to the Global Compact on Refugees'. 20 February 2018. https://www.acnur.org/media/100-points-brasilia-inputs-latin-america-and-caribbean-global-compact-refugees.

UNHCR. 'Agenda for Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements'. In *"Towards a Global Compact on Refugees"*. Geneva, 2017. https://www.unhcr.org/uk/media/towards-global-compact-refugees-thematic-discussion-1-agenda.

———. 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations'. *Global Consultations on International Protection*, 19 February 2001, EC/GC/01/7 edition. https://www.unhcr.org/media/mechanisms-international-cooperation-share-responsibilities-and-burdens-mass-influx.

———. *Mexico Plan of Action - The Impact of Regional Solidarity*. 1st ed. San José: Editorama, 2007. https://www.acnur.org/fileadmin/Documentos/Publicaciones/2007/5483.pdf.

———. 'Panel Three: In What Ways Can Regional Institutions Contribute to Comprehensive Refugee Responses?' In *"Towards a Global Compact on Refugees"*. Geneva, 2017. https://www.unhcr.org/media/thematic-discussions-five-panel-three-thematic-discussions-global-compact-refugees.

———. 'Refugee Treaty and Legislation Dashboard'. Rights Mapping and Analysis Platform. Accessed 20 November 2024. https://app.powerbi.com/view?r=eyJrIjoiOTU1YTdjZTItZDQ1Yi00MWExLWI2

M2QtODAyOGQ2ZTg3YjU2IiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9&embedImagePlaceholder=false.

———. 'Summary Conclusions - Expert Meeting on International Cooperation to Share Burdens and Responsibilities'. Amman, 2011. https://www.refworld.org/reference/confdoc/unhcr/2011/en/83174.

———. 'Summary Conclusions of Thematic Discussion 1 - Past and Current Burden- and Responsibility-Sharing Arrangements'. In *"Towards a Global Compact on Refugees"*. Geneva, 2017. https://www.unhcr.org/media/thematic-discussion-1-summary-conclusions.

———. 'The Global Compact on Refugees'. UNHCR UK. Accessed 20 November 2024. https://www.unhcr.org/uk/about-unhcr/who-we-are/global-compact-refugees.

———. 'UNHCR Welcomes Renewed Commitment to Protect Refugees by Latin American and Caribbean States at Key Meeting'. UNHCR, 22 February 2018. https://www.unhcr.org/news/news-releases/unhcr-welcomes-renewed-commitment-protect-refugees-latin-american-and-caribbean.

———. 'Zero Draft of the Global Compact on Refugees and Letter from the UN High Commissioner for Refugees', 9 February 2018. https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/02/Global-Compact-on-Refugees-9-Feb.002.pdf.

United Nations General Assembly. 'Global Compact on Refugees', 17 December 2018. https://www.refworld.org/legal/agreements/unga/2018/en/124198.

———. 'International Conference on Assistance to Refugees in Africa', 4 December 1980, UN Resolution A/RES/35/42 edition. https://digitallibrary.un.org/record/17238?ln=en&v=pdf.

———. 'New York Declaration for Refugees and Migrants', 19 September 2016, UN Resolution A/RES/71/1 edition.

Research Article

Male-Centred Norms and Intimate Partner Femicides
A Case Study in German Homicide Law

David Linkerhaegner[687]

Received: 17 February 2025 / Accepted: 10 June 2025

Abstract

This paper explores how male-centred norms shape the legal treatment of femicide, conducting a case study of German criminal law's response to intimate partner femicide through a feminist criminology lens. Focusing on the legal framework of homicide in the German Criminal Code (StGB), it critiques the doctrinal understanding of the statutory term 'despicable reasons' in the context of femicide as both reflecting and perpetuating gendered biases. Drawing on case law and feminist criminological scholarship, the paper shows how the gendered concept of 'normal psychological motives' operates as a presumption against classifying intimate partner femicide as aggravated murder (§ 211 StGB). The paper proposes a revision of case law that recognises the gendered link between emotion and violence, not as a presumption against 'despicableness', but as a relevant factor in assessing whether the overall circumstances reflect patriarchal notions of entitlement, thereby rendering the motive 'despicable'.

Keywords: Criminal Law – Femicide – Feminist Criminology – Gendered Emotions –

[687] David Linkerhaegner is currently clerking at the Regional Court (Landgericht) in Freiburg, Germany. He completed the First State Examination in Law in Germany before graduating with an LL.M. (Distinction) from the University of Edinburgh in 2025, for which he received the TB Smith Prize. His research interests lie in theoretical and critical legal thought.

General Strain Theory

Introduction

One of the most pressing research agendas of feminist criminology is the phenomenon of femicide, commonly defined as the 'killing of women and girls because of their gender'.[688] In 2020, 47,000 women and girls worldwide were killed by their intimate partners or family members.[689] One possible response to this urgent problem is seen in the criminal law. Legal systems around the world show different ways of addressing lethal violence against women.[690] Countries in the Americas have been leading the effort with the introduction of specific femicide offences.[691] Some European countries have followed this example[692], while others, like Austria and the Netherlands, have implemented aggravating circumstances when the victim is an intimate partner.[693] Others, like Spain, have introduced aggravating circumstances based on gender-based motives.[694]

When evaluating these legal responses to femicide, the perspective of feminist criminology can expand the traditional angle of legal research. It can potentially reveal

[688] See Shalva Weil, 'Research and Prevention of Femicide across Europe', in *Femicide across Europe: Theory, Research and Prevention*, ed. Shalva Weil et al. (Policy Press, 2018), 1, https://doi.org/10.51952A/9781447347163.

[689] Office on Drugs and Crime (UNODC), 'Killings of Women and Girls by Their Intimate Partner or Other Family Members.', United Nations, 2021, https://www.unodc.org/unodc/frontpage/2021/November/unodc-research_-2020-saw-every-11-minutes-a-woman-or-girl-being-killed-by-someone-in-their-family.html; for Europe cf. Marieke Liem et al., 'Patterns of Female Homicide Victimization in Western Europe', *International Criminology* 4, no. 2 (2024): 177–90, https://doi.org/10.1007/s43576-024-00127-3.

[690] There is no big comparative study completed yet, cf. the ongoing project Konstanze Jarvers et al., 'The Criminalization of Femicide: A Comparative Legal Perspective', Max Plank Institute for the Study of Crime, Security and Law, accessed 24 July 2025, https://csl.mpg.de/en/projects/criminalization-of-femicide

[691] See e.g. Santillán Andrade Julián Rodolfo et al., 'Analysis between Femicide and Feminicide in Comparative Criminal Law', *Kurdish Studies* 12, no. 1 (2024): 1, http://dx.doi.org/10.47152/rkkp.62.3.4; Patsilí Toledo Vásquez, 'Femicide/Feminicide and Legislation', in *The Routledge International Handbook on Femicide and Feminicide*, ed. Myrna Dawson and Saide Mobayed (Routledge, 2023), 412, https://doi.org/10.4324/9781003202332.

[692] Croatia as the latest example, Iva Čatipović and Mirjana Kučer, 'Femicide as a Separate Criminal Offense: A Milestone in Croatia', Magazine, *Woman Against Violence Europe*, 4 April 2024, https://wave-network.org/femicide-criminal-offense-croatia/

[693] Cf. Vásquez, 'Femicide/Feminicide and Legislation', 412–13.

[694] Cf. Vásquez, 'Femicide/Feminicide and Legislation', 413.

gender biases leading to failures in adequate criminalisation, to lay the groundwork for future change. Combining legal studies and feminist criminology, this paper focuses on the response to femicide by the German criminal law of homicide[695]. In Germany, femicide has long been a topic of public concern.[696] Similar to Spain, in late 2023, the German legislator changed a sentencing provision to recognise 'gender-specific' motives as aggravating circumstances for all crimes.[697] Recently, laws strengthening access to help centres for women have been passed by both legislative chambers.[698] Calls for a specific offence of femicide, however, have not been answered.[699]

Femicide may be punished either as aggravated murder[700] (*Mord*) under § 211 *Strafgesetzbuch* (German Criminal Code, 'StGB'), carrying a mandatory life sentence or as murder (*Totschlag*) under § 212 StGB, punished with prison between one and fifteen years.[701] The newly introduced gender-specific aggravating circumstances (§ 46 StGB) only become relevant when determining the sentence within the range under murder (§ 212 StGB).[702] Therefore, the labelling of femicide as murder

[695] For an overview in English, see Antje du Bois-Pedain, 'Intentional Killings: The German Law', in *Homicide Law in Comparative Perspective*, ed. John Horder (Hart Publishing, 2007), https://ebookcentral.proquest.com/lib/ed/detail.action?docID=1772419

[696] SWR, 'Weltfrauentag: Zahlreiche Veranstaltungen in BW - SPD Fordert Lebenslange Haft Für Femizide.', 8 March 2023, https://www.swr.de/swraktuell/baden-wuerttemberg/weltfrauentag-forderung-haertere-strafen-femizide-100.html

[697] Cf. the new § 46 StGB, changed by Gesetz Zur Überarbeitung Des Sanktionenrechts – Ersatzfreiheitsstrafe, Strafzumessung, Auflagen Und Weisungen Sowie Unterbringung in Einer Entziehungsanstalt, BGBl. 2023 I. no. 203. Accessed 25 July 2025. https://www.recht.bund.de/eli/bund/bgbl-1/2023/203

[698] Deutschlandfunk, 'Gesetz Für Besseren Schutz von Frauen Vor Gewalt Gebilligt.', 14 February 2025, https://www.deutschlandfunk.de/gesetz-fuer-besseren-schutz-von-frauen-vor-gewalt-gebilligt-100.html.

[699] Hanna Welte, 'Femizide Im Fokus', *Verfassungsblog*, 17 September 2024, https://verfassungsblog.de/femizide-neues-mordmerkmal/

[700] There is no uniform terminology in the English language, cf. for example Michael Bohlander, *The German Criminal Code: A Modern English Translation* (Bloomsbury, 2008), https://ebookcentral.proquest.com/lib/ed/detail.action?docID=1772746; du Bois-Pedain, 'Intentional Killings: The German Law'. I use murder for *Totschlag* and aggravated murder for *Mord* here to make it more convenient for an international audience, however awkward this terminology may be for a German lawyer. Equally, I do not engage with the dispute between case law and doctrine about the nature and relationship of §§ 211, 212 StGB, since it has no relevance in this context.

[701] When qualified as the latter (§ 212 StGB), the gender-specific motives (§ 46 StGB) must be considered when determining the sentence.

[702] There is no clarity so far, how courts are dealing with the broad idea of gender-specific aggravating circumstances, cf. Leonie Steinl, 'Die Aktuelle Novellierung Der Beweggründe Und Ziele Des Täters Im Rahmen Des § 46 Abs. 2 S. 2 StGB', *NStZ* 45, no. 3 (2025): 129–34.

(§ 212 StGB) or aggravated murder (§ 211 StGB) did not become obsolete, since aggravated murder holds symbolic value, expressing the highest degree of culpability and the mandatory life sentence.

Qualifying a killing as aggravated murder (§ 211 StGB) requires *inter alia* the motive of 'despicable reasons' (*sonstige niedrige Beweggründe*). This broad and catch-all term carries heavy moral connotations and conceptions of 'normal' behaviour. The open and indeterminate nature of the term 'despicable reasons' makes the labelling of femicide in Germany an interesting case study for the persistence of gendered norms and ideas in criminal law. To allow a more in-depth analysis, I mainly examine cases involving the killing of women in the context of the break-up of an intimate partner relationship, commonly referred to as intimate partner femicide.[703]
I argue that the doctrinal understanding of the statutory term 'despicable reasons' in the context of femicide both reflects and perpetuates gender biases. The gendered concept of 'normal psychological motives' operates as a presumption against classifying intimate partner femicide as aggravated murder under § 211 StGB. I propose a revision of case law that recognises the gendered link between emotion and violence, not as a presumption against 'despicableness', but as a relevant factor in assessing whether the overall circumstances reflect patriarchal notions of entitlement, thereby rendering the motive 'despicable'.

My argument is based on relevant case law[704], critical scholarship, and the contributions of feminist criminology.[705] Importantly, I focus solely on the case law of the Federal Supreme Court of Germany (*Bundesgerichtshof, BGH*).[706] The *BGH* is the

[703] It is also the most common form of femicide in Germany, see Karin Herbers et al., 'Tötungsdelikte an Frauen Durch (Ex) Intimpartner', *Kriminalistik* 61, no. 6 (2007): 377.
[704] German case law in Criminal law is almost exclusively available in German; This means all terms and quotations are my translations. German case law in this article is cited similarly to the common style in German scholarship; for criminal law terms, see fn. 13.
[705] For a historical summary of feminist criminology: Michael Burman and Loraine Gelsthorpe, 'Feminist Criminology: Inequalities, Powerlessness, and Justice', in *The Oxford Handbook of Criminology*, 7th ed, ed. Alison Liebling et al. (Oxford University Press, 2023), 2023. https://doi.org/10.1093/he/9780198860914.001.0001
[706] In Civil Law jurisdictions, a detailed exegesis of singular, specific judgments is rare. Instead, case law is used to describe the settled understanding of the interpretation of the law expressed in the whole body of case law and systematised by doctrinal scholarship.

highest instance of criminal law matters in Germany and reviews the application of the law by lower courts. Even though its decisions are not binding precedent in the sense of the common law tradition, they hold a *de facto* binding effect on lower courts.[707] The chosen doctrinal analysis approach is naturally limited since it leaves out the resulting 'law in action' in lower courts and has limited explanatory potential for the underlying social practice, restricted to what judges write in their judgments. To the extent possible, these shortcomings are mitigated through the inclusion of criminological findings.

This paper is structured into two main parts: The first part dives deeper into the legal framework of intimate partner femicide (A). The second part presents my critique of the case law and the 'normal psychological motives' (B).

A. The Legal Framework in Germany – Law, Empirical Data and Critique

In the first half of the paper, I outline the legal framework in Germany concerning intimate partner femicide. I begin by providing further details on the relevant statutes and their interpretations by the *BGH* (1). Then, I present empirical data regarding intimate partner femicide and convictions in Germany (2). Finally, I conclude this section with a brief overview of existing critiques of the case law (3).

1. The Law

In the context of femicide and the criminal law, it is important to note that Germany has adopted the 'Council of Europe Convention on preventing and combating violence against women and domestic violence', also known as 'the Istanbul Convention'.[708] The contracting states commit themselves *inter alia* to tackle gender-based violence[709], including femicide.[710] The convention is not directly applicable in Germany

[707] For a comparative overview of precedent: D. Neil MacCormick et al., eds, *Interpreting Precedents: A Comparative Study* (Routledge, 2016), https://doi.org/10.4324/9781315251905

[708] Council of Europe, 'Convention on Preventing and Combating Violence Against Women and Domestic Violence', CETS 210, Istanbul, May 11, 2011, https://www.coe.int/en/web/istanbul-convention.

[709] Cf. Article 1 of the Istanbul Convention; Inga Schuchmann and Leonie Steinl, 'Femizide – Zur Strafrechtlichen Bewertung von Trennungsbedingten Tötungsdelikten an Intimpartnerinnen', *Kritische Justiz* 54, no. 3 (2021): 315, https://doi.org/10.5771/0023-4834-2021-3-312

[710] Cf. Article 46 lit. a. of the Istanbul Convention.

but binds only the state as a subject of international law. However, the commitments are taken seriously in political and scholarly discourse, and they exert significant influence on the courts' interpretation of the law.[711]

In general, the law concerning criminal liability for killing another person is exclusively found in the StGB. There is neither a specific offence labelled 'femicide' nor a crime like an aggravated form of domestic abuse. Offences like assault, aggravated assault, etc., may also apply in cases of intimate partner violence, but hold a less severe sentence. Within the law of homicide, the baseline offence is murder (§ 212 StGB). It only requires the intentional killing of another human being and carries a prison sentence of one to fifteen years. When a femicide is qualified as murder (§ 212 StGB), under the new § 46 StGB, gender-specific motives of the perpetrator can lead to a harsher punishment within the sentence range.[712] There are other offences, such as § 222 StGB, punishing negligent killings and alleviated forms of murder, such as § 213 StGB and § 216 StGB. There is one aggravated form of murder, namely, aggravated murder, § 211 StGB. To fall under aggravated murder, the killing must meet specific qualifying factors. These concern the *mode* of the killing, such as killing deviously, cruelly or using means capable of causing widespread destruction; or subjective *motives* such as killing out of a lust for killing, sexual gratification, greed, to enable or to cover up the commission of another crime or other despicable reasons.[713] In the realm of femicide, deviousness and 'despicable reasons' are most important. If the perpetrator of a femicide is found to meet either of these two criteria, they regularly get a mandatory life sentence. There is no other criterion in § 211 StGB that potentially captures the concept of femicide. Deviousness, as understood in doctrine, may lead to the same result but is not inherent in the situation constituting femicide.[714] For the present purposes, I will therefore only look at 'despicable reasons'.

In general, 'despicable reasons' is an open-textured and deliberately broad. The term ensures that motives that are not enumerated in § 211 StGB but are equally severe

[711] Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 323.
[712] Cf. Steinl, 'Novellierung Der Beweggründe'.
[713] du Bois-Pedain, 'Intentional Killings: The German Law', 66.
[714] Julia Habermann, 'Möglichkeiten Der Sanktionierung von Femiziden Im Deutschen Strafrecht', *Neue Kriminalpolitik* 33, no. 2 (2021): 197, https://doi.org/doi.org/10.5771/0934-9200-2021-2-189

are still included in aggravated murder.[715] As the wording already implies, 'despicable reasons' carry heavy moral connotations and conceptions of 'normal' behaviour. The vagueness of this term has been critiqued.[716] However, the case law of the *BGH* has clarified its meaning and rendered it more workable in judicial practice.

Case law regarding the general aspects of § 211 StGB is well settled: 'Despicable' reasons are motives which are generally recognised to be of the basest sort or utterly contemptible.[717] Whether such motives guided the perpetrator must be inferred from an overall assessment of all external and internal factors relevant to the motivation for the offence, including the circumstances, the living conditions and the personality of the offender.[718] The motive for the killing is frequently accompanied by psychological reactions like anger, hatred, envy, and despair. These 'normal psychological motives' will not be regarded by the courts as 'despicable' unless they are based on 'despicable reasons' themselves.[719] The underlying motive for the killing can no longer be seen as 'despicable' if the killing proves to be still somehow humanly comprehensible according to the overall circumstances under normative patterns of interpretation.[720] Since those standards are still somewhat vague, the courts operate with roughly five groups of cases:[721] Cases of unrestrained selfishness or blatant recklessness, blatant disproportion between the killing and the reason for the crime, racially motivated killings, denial of the personal value of the victim and arbitrary selection of persons not involved in a conflict.

All that has been said about 'despicableness' was not specific to femicide or partner femicides. However, there is also a considerable body of case law regarding intimate partner femicides and 'despicable reasons'. The starting point for those cases is that femicide in general or intimate partner femicide is not considered to fall into any of the above categories by default. Instead, it must be decided on a case-by-case basis

[715] Cf. du Bois-Pedain, 'Intentional Killings: The German Law', 68.
[716] Anette Grünewald, *Das Vorsätzliche Tötungsdelikt* (Mohr Siebeck, 2010), 89.
[717] BGH, *NJW* (2019): 3464; for English see du Bois-Pedain, 'Intentional Killings: The German Law', 68.
[718] Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 316; BGH, NStZ (2019): 724.
[719] BGH, *NStZ* (2015): 690, 692; Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 317.
[720] E.g. BGH, *NStZ* (2019): 204.
[721] Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 317.

whether the perpetrator's motives meet the general criteria.[722]

Looking at intimate partner femicides following a break-up, the *BGH* case law tends to be quite hesitant in situations where a man kills his (former) intimate partner.[723] An earlier formulation by the *BGH* expressed the rationale that by killing the victim, who had or intended to break up, '[…] the defendant deprives himself of what he actually does not want to lose'.[724] The wording has rightly been critiqued for implying a patriarchal sense of entitlement over women.[725] Since 2008, the *BGH* has not used this formulation.[726] However, the fact of a victim-induced break-up is still counted against 'despicableness'.[727] Because of 'despair and inner hopelessness'[728], the perpetrator is not regarded as reaching the threshold of 'despicableness'. This way, when the break-up originated from the (killed) intimate partner, the lethal reaction to that breakup, dominated by despair and emotion, is explicitly held *not* to be a sufficient 'despicable reason' to convict the perpetrator under § 211 StGB.

Interestingly, in another category of cases, the courts are more willing to classify such femicides as 'despicable': The so-called 'honour-killings'.[729] In those cases, men with 'foreign', non-European cultural backgrounds kill their wives after they try to break out of a relationship. Their motive is found to be dominated by a patriarchal claim to power and claimed possession of the female victim. In those situations, such motives

[722] Florian Rebmann, 'Trennungstötungen als Mord – nun auch in der Rechtsprechung?', Deutsches Institut für Menschenrechte, 2023, 7, https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/GGDB/Rebmann_Entscheidungsbesprechung_10_07_2023.pdf; cf. Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 316.

[723] For a detailed discussion Julia Habermann, *Partnerinnentötungen und deren gerichtliche Sanktionierung eine vergleichende Urteilsanalyse zu Partnerinnentötungen als Form des Femizids* (Springer, 2023), 122–26.

[724] Most frequently cited case BGH, *NStZ* (2004): 34; also e.g. BGH, *NStZ-RR* (2005): 340, 342.

[725] Habermann, 'Sanktionierung von Femiziden', 194.

[726] Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 318; however, another decision BGH, StV (2021): 111 irritated with the formulation 'unfounded claims of [] ownership', critically discussed in Habermann, *Partnerinnentötungen*, 125.

[727] BGH, *NStZ-RR* (2018): 177; BGH, *NStZ* (2019): 204; BGH, *NStZ* (2019): 518; BGH, *NStZ* (2024): 673; Steinl, 'Novellierung Der Beweggründe', 131; see also Rebmann, 'Trennungstötungen als Mord', 7.

[728] E.g. BGH, *NStZ* (2004): 34, BGH, *NStZ-RR* (2007): 14; BGH, *NStZ* (2024): 673.

[729] Cf. Julia Kasselt, *Ehre Im Spiegel Der Justiz. Eine Untersuchung Zur Praxis Deutscher Schwurgerichte Im Umgang Mit Dem Phänomen Der Ehrenmorde* (Duncker & Humblot, 2016).

regularly reach the threshold of 'despicableness'.[730] The emphasis here, however, is not on the general idea of femicide, but on the alleged underlying patriarchal values of a 'foreign' background.

In conclusion, the legal framework does not automatically label intimate partner femicides as aggravated murder *per se*. Instead, it views the emotional reaction to the partner's break-up as pointing away from being 'despicable', implying a degree of understanding for those killings.

2. The Empirical Data

Before turning to the critique of the case law, it is useful to first examine the available crime statistics and conviction rates. Official statistics in Germany do not give conclusive evidence relating to intimate partner femicide. The criminal statistic by the police (*Polizeiliche Kriminalstatistik*) includes information about suspects and victims. This way we can, e.g. see that around 85% of the perpetrators of homicide are male[731], and from 2015-2017, every second to third female homicide victim was or had been in a relationship with the perpetrator.[732] This data, however, does not provide any information about convictions and sentences. In turn, the official conviction statistic (*Strafverfolgungsstatistik*), on the other hand, does not include any variable of gender and relationship status for perpetrators and victims.[733] Therefore, official statistics do not give a full picture regarding intimate partner violence or femicide.

Instead, we must turn to criminology scholarship. *Kasselt* investigated case-law

[730] BGH, *NStZ* (2002): 369; BGH, *NJW* (2006): 1008, 1011; BGH *NStZ* (2020): 86; BGH, *NStZ* (2020): 617; Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 325; also Habermann, 'Sanktionierung von Femiziden', 196.

[731] Bundeskriminalamt (BKA), 'Polizeiliche Kriminalstatistik 2024. Tatverdächtige Nach Alter Und Geschlecht', version 1.0, 4 February 2025, https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/PolizeilicheKriminalstatistik/2024/Bund/Tatverdaechtige/BU-TV-01-T20-TV_xls.xlsx?__blob=publicationFile&v=3; Habermann, *Partnerinnentötungen*, 57.

[732] Habermann, *Partnerinnentötungen*, 58–59.

[733] Habermann, *Partnerinnentötungen*, 6.

dealing with the so-called honour killings but used intimate partner femicide as a comparator.[734] Two-thirds of intimate partner femicide perpetrators from her sample were convicted of murder (§ 212 StGB), one-third of aggravated murder (§ 211 StGB). Almost two-thirds of the latter convictions were characterised as 'devious, and one third involved 'despicable reasons'.[735]

The most recent and comprehensive work is *Habermann's* from 2023.[736] She looked at 472 male perpetrators of homicide who were sentenced between 2015 and 2017, comparing intimate partner femicide[737] with other kinds of homicide. 33% of all 472 homicides were intimate partner femicides. One-third of these perpetrators were convicted of aggravated murder (§ 211 StGB) and two-thirds were convicted of murder (§ 212 StGB). Other kinds of homicides were split 50/50.[738] The findings of *Habermann* and *Kasselt* therefore align. For aggravated murder (§ 211 StGB), *Habermann* further shows that in half of all intimate partner femicide cases, 'despicable reasons' were discussed but only affirmed in one out of seven cases (46% of aggravated murder convictions contained 'despicable reasons').[739] For murder (§ 212 StGB), *Habermann* did not find a significant difference in sentence length between intimate partner homicide and other homicide cases. Interestingly, intimate partner homicide in the context of a break-up carried a murder sentence which was, on average, ten months longer compared to other kinds of homicide.[740]

These empirical findings demonstrate two important things for the present paper: Firstly, the data backs up the claim that intimate partner femicides are significantly less likely to be convicted as aggravated murder (§ 211 StGB) than other kinds of homicide. Since *Habermann's* study was mainly quantitative,[741] it cannot tell us why or with what justification courts declined to punish intimate partner homicides as aggravated murder

[734] Kasselt, *Ehrenmorde*.
[735] Kasselt, *Ehrenmorde*; useful summary, Habermann, *Partnerinnentötungen*, 226.
[736] Habermann, *Partnerinnentötungen*.
[737] *Habermann* uses a German phrase that would be translated to intimate partner 'homicide'. Importantly, she does not only focus on intimate partner femicides in the context of break-ups like this paper does.
[738] Habermann, *Partnerinnentötungen*, 300, 406.
[739] Habermann, *Partnerinnentötungen*, 304, 412.
[740] Habermann, *Partnerinnentötungen*, 410–11.
[741] Habermann, *Partnerinnentötungen*, 411.

(§ 211 StGB). This data, however, supports the hypothesis that there is a difference in the legal standards that make it more likely for courts to deny a conviction for aggravated murder (§ 211 StGB) due to 'despicable reasons' in cases of all intimate partner femicides.[742] Secondly, *Habermann* shows that on a sentencing level in the case of murder (§ 211 StGB), an imbalance cannot be found. On the contrary, even before the introduction of aggravating, gender-specific circumstances in sentencing, the sentences in break-up cases seem higher than for other forms of homicide. These findings show that this paper is right to focus on the labelling of femicide as aggravated murder as the most pressing issue.

3. The Critique

It is interesting to note that the critique of this practice has yet to reach the attention of broad, mainstream scholarship.[743] The critique can be put into three different categories. First, there is the general critique of arbitrary results in the case law of break-up femicide cases, which have been labelled as '*laissez-faire, laissez-aller'* and detached from any general rules.[744] Proposed solutions suggest considering the perpetrator's previous behaviour and thus establishing a normative account of 'responsibility' for the break-up.[745] Interestingly, this critique was explicitly rejected by the *BGH*.[746] The second level of criticism builds upon the fact that femicide, especially following a break-up, can easily be put into existing categories. Here, it is also critiqued that 'honour-killings' are treated differently from femicides in a 'domestic' setting.[747] These scholars demand a generalist approach to the underlying patriarchal structures

[742] Her subgroup of break-up intimate partner femicide shows that, compared to other forms of homicide, despicable reasons are more likely to be discussed in judgements but equally likely (around 30%) to be affirmed in the end, cf. Habermann, *Partnerinnentötungen*, 306-307 (Tables 11.28, 11.29).

[743] Critical voices are found mostly in journals and not in extensive general commentaries that are the most common form of doctrinal scholarship (Dogmatik) in Germany; making this point: Habermann, 'Sanktionierung von Femiziden', 194.

[744] Hartmut Schneider, 'Trennungstötungen Als Mord: Eine Rechtsprechungsanalyse Und Eine Anregung an Den Gesetzgeber.', *Zeitschrift Für Rechtspolitik* 54, no. 6 (2021): 185.

[745] Schneider, 'Trennungstötungen Als Mord', 185; Anette Grünewald, 'Niedrige Beweggründe Bei Tötung Des Intimpartners: Anmerkungen Zu BGH NStZ 2019, 518', *NStZ* 39 (2019): 518.

[746] BGH, *NStZ* (2019): 518.

[747] Jens Foljanty and Christina Lembke, 'Die Konstruktion Des Anderen in Der 'Ehrenmord'-Rechtsprechung', *Kritische Justiz* 47, no. 3 (2014): 298; Kasselt, *Ehrenmorde*; also see Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 325.

of intimate partner femicide without 'othering' cases with a foreign cultural background.[748] Finally, there is a more general critique of these cases and their underlying gender perspectives.[749] The courts' emphasis on the break-up is patriarchal because it labels female behaviour as right or wrong.[750] Therefore, the woman's (constitutional) freedom to end a relationship is not respected, and ideas of male possession over female partners are confirmed.

In conclusion, the first half of this paper showed how the legal framework does not label intimate partner femicides as aggravated murder (§ 211 StGB) *per se*. Instead, the legal standard sees the emotional reaction to the partner's break-up as pointing away from being 'despicable', implying a degree of understanding for those killings. These findings can partly be mirrored in the empirical data showing that intimate partner femicide is less often punished as aggravated murder (§ 211 StGB) than other forms of homicide. There are already different strands of critique levelled against the case law. However, I want to build on the existing critique and highlight another problem of the *status quo*. As *Habermann* proposed,[751] we must determine what role emotions such as anger and despair should play in the assessment of 'despicableness' in intimate partner femicide at all.

B. Male-centred Norms and Beyond

After outlining the legal framework in Germany, the second half presents my critique of current legal practice. I begin with insights from feminist criminology on gendered violence and emotion (1). Building on this, I critique the gendered interpretation of 'normal psychological motives' in case law (2). Finally, I propose possible solutions (3).

[748] Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 326; Habermann, *Partnerinnentötungen*, 134.
[749] Habermann, 'Sanktionierung von Femiziden'.
[750] Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen', 327.
[751] But has not yet done, Habermann, 'Sanktionierung von Femiziden', 199.

1. Insights from Feminist Criminology

Feminist criminology has made it impossible to disregard gender as a fundamental analytical category in the study of crime. Feminism has thus reoriented the criminological perspective on sex, showing its importance for understanding crime patterns and rates, involvement in crime, and victimisation experiences.[752] By now, feminist criminology research is a vast, ever-growing field. For this paper, it will suffice to rely on a few basic points about gendered violence and intimate partner femicide.

The most fundamental finding is that males offend significantly more than females.[753] Not only do they offend more, but differently: Women are more likely to engage in property crimes than violent or drug crimes, whereas men are thought to be responsible for up to 82% of violence against the person offences.[754] Men are more likely to become victims of crimes in general, but importantly, women are the typical victims of certain specific crimes. One of these types is intimate partner and family violence. One of the most extreme forms of victimisation of women is femicide.[755] Data suggests that worldwide in the year 2020, some 47,000 women and girls were killed by their intimate partners or family members.[756] Intimate partner femicides are therefore the most common form of femicide. Specifically, men are more likely to respond to a break-up with lethal violence. Those intimate partner femicides usually occur in domestic settings and are preceded by a confrontation in that setting. This lethal violence is thought to be a reaction to a loss of control and possession over the female partner. It follows the logic of 'if I can't have her, no one can'.[757]

Emotion as a reaction and reacting to that emotion is another important aspect within

[752] Burman and Gelsthorpe, 'Feminist Criminology', 376.
[753] Lisa M. Broidy and Robert Agnew, 'Gender and Crime: A General Strain Theory Perspective', *Journal of Research in Crime and Delinquency* 34, no. 3 (1997): 275, https://doi.org/10.1177/0022427897034003001
[754] Barbara A. Koons-Witt and Peter J. Schram, 'The Prevalence and Nature of Violent Offending by Females', *Journal of Criminal Justice* 31, no. 4 (2003): 361, https://doi.org/10.1016/S0047-2352(03)00028-X
[755] See Weil, 'Research and Prevention of Femicide across Europe', 1–2.
[756] Office on Drugs and Crime (UNODC), 'Killings of Women and Girls by Their Intimate Partner or Other Family Members.'.
[757] James W. Messerschmidt, 'Masculinities and Femicide', *Qualitative Sociology Review* 13, no. 3 (2017): 70.

the research on gendered violence. Analysis of the connection between emotion and deviance is often based on general or gendered strain theory.[758] Broadly, strain theory looks at deviance as a reaction to external pressure of various sorts. This research shows that males and females who are exposed to external stress react similarly with anger, guilt, etc., but they differ in the way they cope with these emotions. Males tend to externally react to strain while females tend to deal with it internally, reducing their propensity to cope through criminal acts.[759] And – again – they react with different types of offences. Interestingly, there is research explicitly pointing out the interchangeability of gender socialisation and gender identity within that research.[760]

2. Critiquing 'normal psychological motives'

With these insights in mind, I now turn back to the legal practice described in (A). The *status quo* holds that lethal violence expressing emotions like anger, hatred, despair and envy is not in itself sufficient to establish 'despicable reasons'. These 'normal psychological motives' must build upon 'despicable reasons' themselves. As shown above, the *BGH* treats the emotional and lethal reaction in cases of intimate partner femicides following a victim-induced break-up not as building upon such 'despicable reasons themselves'. Instead, the case law stresses the conflicting motives, 'despair and inner hopelessness' of the perpetrator killing a person, whom he does not actually want to lose. This way, courts raise the threshold to classify intimate partner femicide as 'despicable'. *Steinl* has previously argued that the standard of the *BGH* takes the fact of the separation out of the context of 'normal psychological motives' and uses it in the perpetrator's favour, independently of the underlying motivation of the

[758] Broidy and Agnew, 'Gender and Crime: A General Strain Theory Perspective', 275.
[759] Stacy De Coster, and R. C. Zito, 'Gender and General Strain Theory: The Gendering of Emotional Experiences and Expressions.', *Ournal of Contemporary Criminal Justice* 26, no. 2 (2010): 227, https://doi.org/10.1177/1043986209359853; Deena Scott and Toniqua Mikell, 'Gender and General Strain Theory: Investigating the Impact of Gender Socialization on Young Women's Criminal Outcomes.', *Journal of Crime and Justice* 42, no. 4 (2018): 393, https://doi.org/10.1080/0735648X.2018.1559754
[760] Scott and Mikell, 'Gender and General Strain Theory'; Michael L. Swinehart and Travis J. Mowen, 'Doing Gender and Doing Crime: The Influence of Biological Sex and Gender Identity on Crime', *Deviant Behavior* 45, no. 10 (2024): 1482, https://doi.org/10.1080/01639625.2024.2306294

offender.[761]

I seek to build on this and give further support for why reference to the idea of 'normal psychological motives' itself is misplaced in the context of intimate partner femicide and effectively hides the actual underlying gendered dimension of intimate partner femicide following a break-up. Consistent with strain theory ('strain → negative emotion → deviance pathway'),[762] we can make out three underlying elements: A trigger event in the form of the break-up as 'strain', an emotional reaction as 'negative emotion' and the use of lethal violence in acting out on those emotions as 'deviance pathway'. All of them are casually connected. The event of a break-up by the intimate partner triggers an emotional response. This emotional response leads to a lethal response, killing the partner.

The starting point of my critique is that the courts' concept of 'normal psychological motives' for killings, such as anger, hatred, despair and envy, is labelling the specific connection trigger-emotion-violence as 'normal'.

As a normative concept, the doctrine of 'despicable reasons' operates through contrasts: the somewhat normal versus the utterly contemptible. For instance, the emotionally hurt husband killing his wife out of pure desperation is still somehow humanly comprehensible, whereas the patriarchal migrant killing his wife is framed as unthinkable. Although even the comprehensible killing remains punishable under murder (§ 212 StGB), the 'normal' motives for killing a person are still not considered to be 'good'. However, because they retain some degree of comprehensibility, they do not meet the threshold of moral reprehensibility required for aggravated murder (§ 211 StGB).

But what kind of 'normal' are courts contemplating in the case of intimate partner femicide? The case law in intimate partner femicide implies that it is 'normal' – and

[761] Steinl, 'Novellierung Der Beweggründe', 130–31; Schuchmann and Steinl, 'Tötungsdelikten an Intimpartnerinnen'.

[762] Broidy and Agnew, 'Gender and Crime: A General Strain Theory Perspective', 151; Christopher Posick et al., 'Do Boys Fight and Girls Cut? A General Strain Theory Approach to Gender and Deviance', *Deviant Behavior* 34, no. 9 (2013): 685, https://doi.org/10.1080/01639625.2012.748626

therefore somehow comprehensible – to act upon emotions caused by rejection with lethal violence. The connection between emotional distress and the resulting killings is somewhat considered 'normal'. This normative idea of 'normal' obscures the fact that the normality often tends to be male-centric. Here, the feminist criminological findings become especially relevant. As criminological research suggests, men and women deal differently with external stress and triggered emotions.[763] Both genders may react with violent behaviour, but serious violence is a predominantly male problem.[764] The connection between strain, emotion and violence is itself deeply gendered.

Thus, when the *BGH* is invoking 'normal psychological motives' such as despair and inner hopelessness, practically presuming the absence of 'despicable reasons', the court is doing so with a male understanding of what is 'normal'. Without reflecting on gendered psychological differences, the *BGH* is normalising the break-up-emotion-violence connection. While dealing with cases of gendered violence, Courts further cement a male understanding of the 'normal' that prevents them from getting to the root of the actual problem: The male imbalance of killings following a break-up by an intimate partner.

One response to this critique could be that the law is (implicitly) or should be split in half,[765] and the applicable standards of 'despicableness' are gendered themselves. Following this logic, 'normal' is implicitly adjusted to the individual perpetrator: Normal psychological motives for killings *for men*. However, the standard neither implicitly is nor should it be split in half.

First, even if such a split would be a good idea, courts do not make this distinction

[763] From the perspective of modern control theory cf. Michael R. Gottfredson and Mikaela S. Nielsen, 'Intimate Partner Violence, Femicide, and General Theories: Issues for Research and Policy From the View of Modern Control Theory', *Journal of Contemporary Criminal Justice* 40, no. 2 (2024): 247–71, https://doi.org/10.1177/10439862241245838

[764] De Coster, and Zito, 'Gender and General Strain Theory', 227; Scott and Mikell, 'Gender and General Strain Theory', 393; critical regarding the gendered connection between 'self-control' and violence, see Laura M. Gulledge et al., 'Self-Control and Intimate Partner Violence: Does Gender Matter?', *Deviant Behavior* 44, no. 5 (2022): 785–804, https://doi.org/10.1080/01639625.2022.2102454

[765] Or potentially into many more parts.

explicit. It is unlikely that they do so *implicitly*, but at the very least, they use a generic, non-gendered wording of ordinance. Courts do not acknowledge a gendered reality in human behaviour in these cases, instead referring to the male reality as universal.

Second, making this distinction along gender lines would cement gender differences instead of solving them. As pointed out above, there is evidence that the gender gap does not so much depend on *biology*, but on *socialisation*. It is not the male brain unable to resist violence, but masculinity in a patriarchal society, that makes men more likely to react with lethal violence. But if socialisation is the problem, why would we be content with applying two different standards depending on gender? A particular group being statistically more likely to commit certain offences does not mean that the criminal courts hold back from punishing them. Even though there is overwhelming evidence that economic strain and poverty increase the likelihood of (minor) property crimes like theft, the courts still identify these crimes as theft.

In general, criminal law represents one possible option to combat gendered violence and hardship. The state shall nudge and steer behaviour by punishing harmful behaviour and encouraging righteous behaviour. In a free and equal society, it is expected of everyone to accept a partner's free decision to part ways, even if it means emotional distress and heartbreak. This applies to all genders equally. Even if men are statistically more likely to react in a certain way, the fact remains that intimate partner femicides are unwanted behaviour and should be labelled accordingly, no matter by which gender they are committed (especially since differential behaviour is a product of socialisation and therefore changeable).

All of this means that the courts should abandon their repeated overreliance on ‘normal psychological motives’ of perpetrators who kill in ‘despair and inner hopelessness’. Not only because it paints a picture of a spontaneous, desperate and somehow comprehensible act of defence which does not square with reality.[766] But because the underlying idea of ‘normality’ itself is gendered, and is therefore an inadequate answer to gendered violence. Courts must be open to the possibility that lethal violence as an

[766] Disputing the spontaneous character of most femicides including following a break-up, Habermann, *Partnerinnentötungen*, 404.

emotional reaction to a woman exercising her right to freely and independently decide over her relationship can (and often will) indeed be 'despicable'.

3. The Possible Solutions

The starting point of any solution is a change within the case law of the *BGH*. The broad statutory concept of 'despicable reasons' already brings the necessary tool in German criminal law to adequately label femicide.[767] Currently, however, criminal courts are unable to accurately label intimate partner violence because references to 'normal psychological motives' in case law obscure their view of the problem in the first place. The gendered connection between emotion and lethal violence shows that 'normal psychological motives' are themselves part of the gendered dimension of crime.

Importantly, I do not go as far as arguing for an understanding that sees every emotional, lethal response in the context of femicide as 'despicable' *per se*. Such an approach would fail to map the diversity of femicide cases accurately and, on its own, would not reach the threshold of culpability necessary for aggravated murder (§ 211 StGB). Instead, the gendered connection between emotion and lethal violence should be another factor to be considered when courts are determining whether the overall circumstances hint towards patriarchal ideas of entitlement and are therefore rendering the motive 'despicable'.[768]

Whether a certain case shows those characteristics is to be determined by the particular court. This proposal, however, is contrary to the current practice of counting the gendered connection of violence and emotion in favour of the perpetrator as 'the normal' and raising the threshold for 'despicableness'. A recent and promising *obiter dictum* of a different senate hints towards some movement in the right direction within

[767] Of course, there remains the legitimate argument of a symbolic signal that a specific offence would bring. In case of an effective change of the case law and a swift and coherent solution, I am of the view that the German criminal law does not necessarily need a signal beyond the recently introduced 'gender-specific' motives in the new § 46 StGB.

[768] Making a similar point, Steinl, 'Novellierung Der Beweggründe', 130–31; Habermann, *Partnerinnentötungen*, 413; Habermann, 'Sanktionierung von Femiziden', 194; Rebmann, 'Trennungstötungen als Mord', 10.

the case law of the *BGH*.[769] Other judgments seem to be continuing the old line of case law.[770] Overall, it seems too early to tell which direction the *BGH* will take.[771]

On a second level, a change in the case law must be accompanied by a broad doctrinal discussion. Scholarship needs to establish a robust doctrinal category of femicide and its different forms.[772] Especially in Germany, the doctrinal discussions (*Dogmatik*) are an important driver of inspiration and change for courts.[773] Such a discussion should be in a dialogue with the social sciences,[774] and centre around categories of patriarchal motives, ideas of possession of women and gendered connection of emotion and violence.[775]

Finally, these solutions nevertheless remain superficial. For a more lasting change, general awareness of the gendered perspective of violence within the legal profession should be fostered. Such an approach may take many forms, like workshops and training for practising judges and prosecutors,[776] more female voices in courts and a legal education that goes beyond doctrinal understanding of the law and towards critical reflection of the law through a feminist lens. Only if all of those levels are working in sync can violence against women be accurately addressed within the existing legal framework and practice.

[769] The 5th senate of the BGH is turning in the outlined direction: BGH, *NStZ* (2023): 340; sceptical concerning the message in victim induced break-ups, Rebmann, 'Trennungstötungen als Mord', 10–11.
[770] See e.g. the 1st senate in BGH, NStZ (2024), 673.
[771] Hopeful that the new legislation concerning aggravating circumstances might also affect case law concerning despicable reasons, Steinl, 'Die Aktuelle Novellierung Der Beweggründe Und Ziele Des Täters Im Rahmen Des § 46 Abs. 2 S. 2 StGB'.
[772] Calling to give up the exclusive focus on 'honour-killings' in legal commentary Habermann, *Partnerinnentötungen*, 136–37.
[773] For an interesting example in the American discourse and the provocation defence, see e.g. Carolyn B. Ramsey, 'Comparative Insights on Feminist Homicide Law Reform', *The Journal of Criminal Law & Criminology* 100, no. 1 (2010): 33–108, https://heinonline.org/HOL/P?h=hein.journals/jclc100&i=35.
[774] See Habermann, *Partnerinnentötungen*, 414–15.
[775] Habermann, *Partnerinnentötungen*, 406.
[776] Proposing points for police intervention in prevention of separation conflicts in Germany Stefanie Horn et al., 'Intimate Partner Homicide: Risk Constellations in Separation Conflicts and Points of Intervention for the Police', *Policing: A Journal of Policy and Practice* 18 (2024): 1–11, https://doi.org/10.1093/police/paae029.

Conclusion

This academic endeavour was limited in different ways. It only looked at a specific form of femicide and one specific response by one country's criminal law in shaping the punishment of aggravated murder (§ 211 StGB). However, building on existing critique, I was able to show an underlying understanding of 'the normal' biased towards a male-centred norm that leads to an implicit assumption against femicide as aggravated murder (§ 211 StGB). As a solution, I proposed a change in the *BGH* case law that reflects the gendered connection between emotion and violence, not precluding femicide from being recognised as aggravated murder under § 211 StGB.

Additionally, I hinted at further changes in scholarship and judicial training. Beyond the proposed solutions, these findings show the need to see feminist critique holistically. The gendered reaction to strain and emotion highlights the fact that male perpetrators are also affected by patriarchy. This means a holistic solution ought not to lose sight of male mental health, role modelling and specific male struggles and counter those factors leading to gendered connection of emotion and violence.

Although limited in its approach, this paper demonstrated more generally how feminist criminology can decisively impact criminal law and the study of crime and punishment. It can reveal gendered biases within the existing legal framework and point towards possible solutions. Future research in Germany can put this analysis conducted here on a broader footing and expand these ideas further to different kinds of femicides, other jurisdictions and gendered violence in general.

Bibliography

Bohlander, Michael. *The German Criminal Code: A Modern English Translation*. Bloomsbury, 2008. https://ebookcentral.proquest.com/lib/ed/detail.action?docID=1772746

Bois-Pedain, Antje du. 'Intentional Killings: The German Law'. In *Homicide Law in Comparative Perspective*, edited by John Horder. Hart Publishing, 2007. https://ebookcentral.proquest.com/lib/ed/detail.action?docID=1772419

Broidy, Lisa M., and Robert Agnew. 'Gender and Crime: A General Strain Theory Perspective'. *Journal of Research in Crime and Delinquency* 34, no. 3 (1997): 275–306. https://doi.org/10.1177/0022427897034003001

Bundeskriminalamt (BKA). 'Polizeiliche Kriminalstatistik 2024. Tatverdächtige Nach Alter Und Geschlecht'. Version 1.0. 4 February 2025. https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/PolizeilicheKriminalstatistik/2024/Bund/Tatverdaechtige/BU-TV-01-T20-TV_xls.xlsx?__blob=publicationFile&v=3

Burman, Michael, and Loraine Gelsthorpe. 'Feminist Criminology: Inequalities, Powerlessness, and Justice'. In *The Oxford Handbook of Criminology*, 7th ed, edited by Alison Liebling, Shadd Maruna, and Lesley McAra. Oxford University Press, 2023. 2023. https://doi.org/10.1093/he/9780198860914.001.0001

Čatipović, Iva, and Mirjana Kučer. 'Femicide as a Separate Criminal Offense: A Milestone in Croatia'. Magazine. *Woman Against Violence Europe*, 4 April 2024. https://wave-network.org/femicide-criminal-offense-croatia/

De Coster, Stacy, and R. C. Zito. 'Gender and General Strain Theory: The Gendering of Emotional Experiences and Expressions.' *Journal of Contemporary Criminal Justice* 26, no. 2 (2010): 224–45. https://doi.org/10.1177/1043986209359853

Deutschlandfunk. 'Gesetz Für Besseren Schutz von Frauen Vor Gewalt Gebilligt.' 14 February 2025. https://www.deutschlandfunk.de/gesetz-fuer-besseren-schutz-von-frauen-vor-gewalt-gebilligt-100.html

Foljanty, Jens, and Christina Lembke. 'Die Konstruktion Des Anderen in Der 'Ehrenmord'-Rechtsprechung'. *Kritische Justiz* 47, no. 3 (2014): 298–315.

Gottfredson, Michael R., and Mikaela S. Nielsen. 'Intimate Partner Violence, Femicide, and General Theories: Issues for Research and Policy From the View of Modern Control Theory'. *Journal of Contemporary Criminal Justice* 40, no. 2 (2024): 247–71. https://doi.org/10.1177/10439862241245838

Grünewald, Anette. *Das Vorsätzliche Tötungsdelikt*. Mohr Siebeck, 2010.

Grünewald, Anette. 'Niedrige Beweggründe Bei Tötung Des Intimpartners: Anmerkungen Zu BGH NStZ 2019, 518'. *NStZ* 39 (2019): 518–20.

Gulledge, Laura M., Christine S. Sellers, and John K. Cochran. 'Self-Control and Intimate Partner Violence: Does Gender Matter?' *Deviant Behavior* 44, no. 5 (2022): 785–804. https://doi.org/10.1080/01639625.2022.2102454

Habermann, Julia. 'Möglichkeiten Der Sanktionierung von Femiziden Im Deutschen Strafrecht'. *Neue Kriminalpolitik* 33, no. 2 (2021): 189–208. https://doi.org/doi.org/10.5771/0934-9200-2021-2-189

Habermann, Julia. *Partnerinnentötungen und deren gerichtliche Sanktionierung eine vergleichende Urteilsanalyse zu Partnerinnentötungen als Form des Femizids*. Springer, 2023.

Herbers, Karin, Heike Lütgert, and Jürgen Lambrecht. 'Tötungsdelikte an Frauen Durch (Ex) Intimpartner'. *Kriminalistik* 61, no. 6 (2007): 377–85.

Horn, Stefanie, Catharina Vogt, Chiara Wüller, and Thomas Görgen. 'Intimate Partner Homicide: Risk Constellations in Separation Conflicts and Points of Intervention for the Police'. *Policing: A Journal of Policy and Practice* 18 (2024): 1–11. https://doi.org/10.1093/police/paae029

Jarvers, Konstanze, Emily Silverman, and Cristina Valega Chipoco. 'The Criminalization of Femicide: A Comparative Legal Perspective'. Max Plank Institute for the Study of Crime, Security and Law. Accessed 24 July 2025. https://csl.mpg.de/en/projects/criminalization-of-femicide

Kasselt, Julia. *Ehre Im Spiegel Der Justiz. Eine Untersuchung Zur Praxis Deutscher Schwurgerichte Im Umgang Mit Dem Phänomen Der Ehrenmorde*. Duncker & Humblot, 2016.

Koons-Witt, Barbara A., and Peter J. Schram. 'The Prevalence and Nature of Violent Offending by Females'. *Journal of Criminal Justice* 31, no. 4 (2003): 361–71. https://doi.org/10.1016/S0047-2352(03)00028-X

Liem, Marieke, Pauline Aarten, Sven Granath, et al. 'Patterns of Female Homicide Victimization in Western Europe'. *International Criminology* 4, no. 2 (2024): 177–90. https://doi.org/10.1007/s43576-024-00127-3

MacCormick, D. Neil, Robert S. Summers, and Arthur L. Goodhart, eds. *Interpreting Precedents: A Comparative Study*. Routledge, 2016. https://doi.org/10.4324/9781315251905

Messerschmidt, James W. 'Masculinities and Femicide'. *Qualitative Sociology Review* 13, no. 3 (2017): 70–79.

Office on Drugs and Crime (UNODC). 'Killings of Women and Girls by Their Intimate Partner or Other Family Members.' United Nations, 2021. https://www.unodc.org/unodc/frontpage/2021/November/unodc-research_-2020-saw-every-11-minutes-a-woman-or-girl-being-killed-by-someone-in-their-family.html

Posick, Christopher, Amanda Farrell, and Michael L. Swatt. 'Do Boys Fight and Girls Cut? A General Strain Theory Approach to Gender and Deviance'. *Deviant Behavior* 34, no. 9 (2013): 685–705. https://doi.org/10.1080/01639625.2012.748626

Ramsey, Carolyn B. 'Comparative Insights on Feminist Homicide Law Reform'. *The Journal of Criminal Law & Criminology* 100, no. 1 (2010): 33–108. https://heinonline.org/HOL/P?h=hein.journals/jclc100&i=35

Rebmann, Florian. 'Trennungstötungen als Mord – nun auch in der Rechtsprechung?' Deutsches Institut für Menschenrechte, 2023. https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/GGDB/Rebmann_Entscheidungsbesprechung_10_07_2023.pdf

Rodolfo, Santillán Andrade Julián, Olivo Galarza Kerly Sofia, Maldonado Cando José Luis, and Prado Calderón Edwin Bolívar. 'Analysis between Femicide and Feminicide in Comparative Criminal Law'. *Kurdish Studies* 12, no. 1 (2024): 1. http://dx.doi.org/10.47152/rkkp.62.3.4

Schneider, Hartmut. 'Trennungstötungen Als Mord: Eine Rechtsprechungsanalyse Und Eine Anregung an Den Gesetzgeber.' *Zeitschrift Für Rechtspolitik* 54, no. 6 (2021): 183–86.

Schuchmann, Inga, and Leonie Steinl. 'Femizide – Zur Strafrechtlichen Bewertung von Trennungsbedingten Tötungsdelikten an Intimpartnerinnen'. *Kritische Justiz* 54, no. 3 (2021): 312–27. https://doi.org/10.5771/0023-4834-2021-3-312

Scott, Deena, and Toniqua Mikell. 'Gender and General Strain Theory: Investigating the Impact of Gender Socialization on Young Women's Criminal Outcomes.' *Journal of Crime and Justice* 42, no. 4 (2018): 393–413. https://doi.org/10.1080/0735648X.2018.1559754

Steinl, Leonie. 'Die Aktuelle Novellierung Der Beweggründe Und Ziele Des Täters Im Rahmen Des § 46 Abs. 2 S. 2 StGB'. *NStZ* 45, no. 3 (2025): 129–34.

Swinehart, Michael L., and Travis J. Mowen. 'Doing Gender and Doing Crime: The Influence of Biological Sex and Gender Identity on Crime'. *Deviant Behavior* 45, no. 10 (2024): 1482–98. https://doi.org/10.1080/01639625.2024.2306294

SWR. 'Weltfrauentag: Zahlreiche Veranstaltungen in BW - SPD Fordert Lebenslange Haft Für Femizide.' 8 March 2023. https://www.swr.de/swraktuell/baden-wuerttemberg/weltfrauentag-forderung-haertere-strafen-femizide-100.html

Vásquez, Patsilí Toledo. 'Femicide/Feminicide and Legislation'. In *The Routledge International Handbook on Femicide and Feminicide*, edited by Myrna Dawson and Saide Mobayed. Routledge, 2023. https://doi.org/10.4324/9781003202332

Weil, Shalva. 'Research and Prevention of Femicide across Europe'. In *Femicide across Europe: Theory, Research and Prevention*, edited by Shalva Weil, C. Corradi, and M. Naudi. Policy Press, 2018. https://doi.org/10.51952/9781447347163

Welte, Hanna. 'Femizide Im Fokus'. *Verfassungsblog*, 17 September 2024. https://verfassungsblog.de/femizide-neues-mordmerkmal/

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

"If I Have Nothing to Hide, I Have Nothing to Fear": A Critical Analysis of Surveillance and Privacy in the Digital Age regarding UK, EU, and US Law

Jared Higgins

Received: 01 February 2025 / Accepted: 10 June 2025

Abstract

Debate on digital surveillance typically centres on the familiar claim that "those with nothing to hide have nothing to fear", a claim that continues to justify extensive monitoring programs across the UK, EU and US. This essay shows that in practice, the idea that law-abiding individuals have no meaningful privacy interests overlooks the wide range of information-based harms that surveillance can produce, each of which affects people irrespective of wrongdoing. The analysis examines the legal safeguards intended to limit state access to personal data, focusing in particular on ECHR jurisprudence concerning bulk interception, data retention and encryption. It argues that although these safeguards constrain some forms of state surveillance, they leave substantial gaps. Adopting a comparative approach, the essay highlights how private and foreign surveillance operate under weaker oversight yet generate extensive data flows that states can obtain indirectly, often without activating domestic protections. The essay concludes that these structural weaknesses, combined with the business models of the modern internet, make it increasingly difficult to control information-based harms, raising the broader question of whether such harms are becoming an unavoidable feature of contemporary digital life.

The 'nothing to hide' argument has been described as 'the most common retort against privacy advocates'.[777] It suggests that state surveillance programs only threaten the privacy of criminals; as such, law-abiding citizens should have nothing to fear.[778] The Snowden leaks demonstrate the scale of information that can be gathered via the internet; as such, many remain wary of these powers.[779] Despite this, the argument continues to surface in privacy discourse.[780]

This essay will critically evaluate the 'nothing to hide' argument in light of surveillance in the digital age. It will first summarise why digital surveillance powers have emerged, how the 'nothing to hide' argument applies to these, and the risk they pose. It will then outline the stringent rules developed to limit state surveillance powers in the UK. It will argue that whilst law-abiding citizens do have things which they would prefer to keep private, the safeguards in place are largely successful in preventing 'information-based harms'. That said, there are several key shortcomings in preventing foreign and private surveillance, through which these rules can be circumvented and the potential for harm is exacerbated. These are weaknesses around which the modern internet is built, thus potentially difficult to solve. It begs the question: are information-based harms the price we pay for 'information technology'?

I. 'If I have nothing to hide, I have nothing to fear'

The internet has created significant challenges for law enforcement agencies worldwide. A UK report into surveillance powers in 2014 stated that *'the infrastructure of the internet can make it difficult to attribute communications to their sender and so offers a "cloak of anonymity" for communications.'*[781] This is amplified by certain privacy-enhancing tools, such as 'virtual private networks' (VPNs) and end-to-end encryption.[782] Tragedies such as the Westminster Bridge attack have brought stories

[777] Daniel Solove, ""I've Got Nothing to Hide" and Other Misunderstandings of Privacy" *San Diego Law Review* 44 (2007): 747, https://ssrn.com/abstract=998565.
[778] Ibid.,753.
[779] Vide Glenn Greenwald, *No Place to Hide – Edward Snowden, the NSA and the Surveillance State* (Mcclelland & Stewart, 2015).
[780] HL Deb 4 November 2015 vol 601, col 990.
[781] David Anderson, 'A Question of Trust: Report of the Investigatory Powers Review', *Independent Reviewer of Terrorism Legislation*, para. 4.17, https://assets.publishing.service.gov.uk/media/5a7f9b66ed915d74e622b7ca/IPR-Report-Web-Accessible1.pdf.
[782] Ibid., para. 4.21, 4.48, 4.49.

of how perpetrators used encrypted messaging services (such as WhatsApp) to plan their attacks to evade detection by law enforcement. One former head of the Government Communications Headquarters (GCHQ) would warn that US platforms were becoming *'the command and control networks of choice'* for terrorists.[783] In response to such threats, governments have long sought powers to monitor the internet to detect, investigate and prosecute crimes.

In the UK, many digital surveillance powers are found within the Investigatory Powers Act (IPA) 2016. This creates powers of 'bulk surveillance', the defining feature of which is that they allow public authorities *'to have access for specified purposes to large quantities of data, a significant portion of which is not associated with current targets.'*[784] For example, the Act creates the power to issue 'bulk warrants', allowing for the interception, compelled disclosure and retention of large quantities of data.[785] It also contains 'data retention' provisions, requiring telecommunications operators to store certain data for a period of time.[786] This data can then be used to reconstruct the activities of suspects, victims and vulnerable people; '*it ties suspects and victims to a crime scene and helps locate vulnerable people at risk of imminent harm.'*[787] These powers *'ensure the intelligence services and law enforcement have the powers they need to keep pace with a range of evolving threats from terrorists, hostile state actors, child abusers and criminal gangs.'*[788]

The justification for such wide-reaching surveillance powers is often a variation of "if I have nothing to hide, I have nothing to fear". For example, one MP in a parliamentary debate on the draft IPA said: *'we should unite against extremism using all modern*

[783] Ben Quinn, James Ball and Dominic Rushe, "GCHQ chief accuses US tech giants of becoming terrorists' 'networks of choice" *The Guardian,* November 3, 2014 https://www.theguardian.com/uk-news/2014/nov/03/privacy-gchq-spying-robert-hannigan.

[784] David Anderson, Report of the Bulk Powers Review (Cm 9326, 2016) para 1.5.

[785] Investigatory Powers Act 2016, pt 6.

[786] Ibid., pt 4.

[787] UK Government, "Government Note on the European Court of Justice Judgement (Press Briefing)" *UK Government*, accessed May 9, 2024, https://assets.publishing.service.gov.uk/media/5a7d7923ed915d2d2ac0929e/DRIPgovernmentNoteECJjudgment.pdf.

[788] "Investigatory powers enhanced to keep people safer," *Gov.UK,* April 25, 2024, https://www.gov.uk/government/news/investigatory-powers-enhanced-to-keep-people-safer#:~:text=Urgent%2C%20targeted%20changes%20made%20to,from%20terrorists%2C%20hostile%20state%20actors%2C.

tools appropriately, and if there is nothing to hide, there is nothing to fear…'[789] This argument typically suggests that state surveillance programs will result in a very limited disclosure of information - which is unlikely to be threatening to the privacy of law-abiding citizens. Instead, such programs are seen as primarily targeting individuals involved in illegal activities, whose privacy interests are considered negligible or non-existent. Moreover, any security interest in preventing crime outweighs *'whatever minimal or moderate privacy interests law-abiding citizens may have in these particular pieces of information*.'[790]

This argument is controversial. In a debate on the IPA, Lord Strasburger argued, *'do we not all have something to hide that we would prefer to keep to ourselves? That is why we shut the toilet or bedroom door behind us.'*[791] For example, there are things we instinctively feel are private - such as our religion, political persuasion or sexual proclivities - information that could be used to blackmail, demean or single people out for disadvantageous treatment by unscrupulous governments.[792] As such, it is seemingly counterintuitive to suggest that anyone truly 'has nothing to hide'.[793]

Solove advances a broad 'taxonomy of privacy', outlining the various harms that can emerge from breaches of privacy. In the context of 'bulk interception', this might include the chilling effect of knowing that one is being surveilled, potentially undermining freedom of expression. [794] Conversely, the harms posed by data retention may include increasing people's vulnerability to potential abuse of their information. Information 'insecurity' describes problems caused by the way our information is handled and protected.[795] Van den Hoven describes these as "information-based harms", citing the example of World War II: *'when the Nazis occupied The Netherlands and found a well-organized population registration very conducive to their targeting*

[789] HL Deb 4 November 2015 vol 601, col 990.
[790] Solove,*""I've Got Nothing to Hide" and Other Misunderstandings of Privacy"*, 752-753.
[791] HL Deb 20 November 2023 vol 834, col 637.
[792] Ibid.
[793] David H Flaherty, "Visions of Privacy: Past, Present and Future" in *Visions of Privacy, Policy Choices for the Digital Age,* eds. Colin J Bennett and Rebecca Grant (University of Toronto Press 1999), 31.
[794] Solove, *""I've Got Nothing to Hide" and Other Misunderstandings of Privacy",* 758.
[795] Daniel J. Solove, "A Taxonomy of Privacy," *University of Pennsylvania Law Review* 154, no. 3 (January 2006): 477–564. https://ssrn.com/abstract=667622.

and deportation of the Jews in Holland.'[796] Given these concerns, many reject the 'nothing to hide' argument; broadly, law-abiding citizens do have things to hide, and thus might reasonably have things to fear.

These criticisms are largely successful in rebutting the 'nothing to hide' argument. For one, the statement 'I have nothing to hide' is deeply flawed; most law-abiding citizens *do* have things that they wish to hide. Moreover, breaches of privacy can lead to tangible information-based harms, thus providing valid fears. A more accurate statement would thus be that we all have things to hide, hence we all have things to fear from surveillance. That said, these criticisms ultimately fail to show that the threat to privacy outweighs the need for surveillance programs. It is generally accepted that the state will carry out surveillance programs in our collective interests as part of the 'social contract'[797] for which many human rights instruments recognise privacy as a 'qualified right' permitting some degree of interference.[798] Rather, the existence of such 'information-based harms' makes the case for stringent rules on how data is collected, processed or disseminated. We already have a strict legal framework to control surveillance powers, designed to allay 'fears' about abuse. It remains to be seen whether these measures are effective in preventing 'information-based harms', to which this essay now turns.

II. Surveillance Law and 'Information-Based Harms'

The UK is a signatory to the European Convention on Human Rights (ECHR), Article 8(1) of which outlines the right to 'private and family life, home and correspondence'. Despite this, surveillance is not prohibited; Article 8(2) permits interference with this right, 'so long as it is in accordance with the law and is necessary in a democratic society.' Broadly, to be 'in accordance with the law' there must be some basis in domestic law for the surveillance, and that the law must meet certain quality requirements: accessibility, foreseeability of consequences, and compatibility with the

[796] Jeroen van den Hoven, "Information Technology, Privacy and the Protection of Personal Data" in *Information Technology and Moral Philosophy*, eds. Jeroen van den Hoven and John Weckert (Cambridge University Press 2008), 312.

[797] Andrew Murray, *Information Technology Law* (Oxford University Press, 2020), 681.

[798] cf US Constitution; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

rule of law.[799] Surveillance 'necessary in a democratic society' has been understood as requiring that it is a 'proportionate means of achieving a legitimate aim'. This creates a wide 'margin of appreciation' for national authorities in choosing how best to achieve the legitimate aim of protecting national security and has been applied differently in respect of different forms of digital surveillance.[800]

A. Bulk interception

Given the difficulties faced by states in countering online threats, the European Court of Human Rights (ECtHR) has accepted the use of bulk interception powers as being consistent with Article 8.[801] That said, *'in operating such a system the margin of appreciation afforded to them must be narrower and a number of safeguards will have to be present'* given the considerable risk that these powers may be used to undermine rights to privacy.[802] These safeguards require that domestic law should prescribe the procedure to be followed for examining, utilising, and storing the data obtained, and the precautions to be taken when communicating the data to other parties. Additionally, it should set out a limit on the duration of the bulk interception measures and the circumstances in which intercepted data will be erased or destroyed.

It also requires additional 'end-to-end safeguards': independent authorisation, supervision, independent ex-post facto review, and ongoing assessment of the necessity and proportionality of the measures being taken.[803] Previous UK surveillance laws have fallen short of these standards. For example, the ECtHR noted 'fundamental deficiencies' in bulk interception powers under section 8(4) of the Regulation of Investigatory Powers Act 2000, lacking sufficient end-to-end safeguards to provide adequate and effective guarantees against the risk of abuse.[804] The IPA has sought to address this – for example, it adds the need for a bulk warrant to be granted personally by the Secretary of State and approved by a Judicial Commissioner[805] (the 'double-lock'). As such, the bulk warrant provisions of the IPA have so far withstood

[799] *Kruslin v France* (1990) 12 EHRR 547 [27].
[800] *S and Marper v United Kingdom* (2009) 48 EHRR 50 [102].
[801] *Big Brother Watch v United Kingdom* (2022) 74 EHRR [340].
[802] Ibid., [347].
[803] *Big Brother Watch v United Kingdom* (2022) 74 EHRR [348]-[350].
[804] Ibid., [425].
[805] Investigatory Powers Act 2016, s 142.

judicial scrutiny.[806]

B. Data Retention

Concerns about proportionality and safeguards against abuse have also led to the repeal of various 'data retention' laws. The case of *Podchasov v Russia* concerned a Russian law which required the continuous automatic storage of all internet communications for six months in Russia, affecting all users of internet communications, even in the absence of reasonable suspicion. The ECtHR was '*struck by the extremely broad duty of retention provided by the contested legislation',* concluding that the interference was '*exceptionally wide-ranging and serious.'*[807] Moreover, as this content was practically available to Russian authorities in lieu of authorisation, the law lacked adequate safeguards against arbitrariness and abuse.[808] Consequently, it contradicted 'the very essence of the right to respect for private life under Article 8 of the Convention' and 'overstepped any acceptable margin of appreciation'.[809] Drawing on the jurisprudence of the ECtHR, the European Court of Justice (ECJ) ruled that the EU's 'Data Retention Directive' was a disproportionate interference with privacy rights under the EU's Charter of Fundamental Rights. This is as it did not contain any objective criteria limiting access to data, whilst failing to establish any time limits on the retention of that data. At the same time, it applied to all 'subscribers and registered users' of electronic communication, thus entailing an interference with the fundamental rights of practically the entire European population. For similar reasons, the High Court found data retention powers under Part 4 of the IPA to be invalid.[810]

C. Encryption

The ECtHR in *Podchasov* also commented on the impact of degrading or discouraging the use of encryption (specifically end-to-end encryption (E2EE)). Whilst noting that

[806] *R (on the application of National Council for Civil Liberties) v Secretary of State for the Home Department* [2023] EWCA Civ 926 [2023] EMLR 22 [128].
[807] *Podchasov v Russia* App no 33696/19 13 (ECtHR, February 2024) [70].
[808] Ibid., 73.
[809] Ibid., 80.
[810] *R (on the application of National Council for Civil Liberties (Liberty)) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin) [2018] 3 WLR 1435.

encryption can be used by criminals, it also noted that weakening encryption through the use of 'backdoors' would undermine the security of all users; backdoors technically allow for routine, indiscriminate surveillance of all users and can be exploited by cybercriminals.[811] In light of the above, the Court concluded that a statutory obligation to decrypt end-to-end encrypted communications risked amounting to a requirement that providers of such services weaken the encryption mechanism for all users and was therefore disproportionate to the legitimate aims pursued.[812]

D. Effective?

Whilst it is debatable whether the ECtHR has struck the right balance, these rules somewhat mitigate the risk of information-based harms emerging. For example, knowledge that bulk interception and data retention powers are limited, requiring strong safeguards against abuse, encourages people to communicate freely over the internet. As a party to the ECHR, the government should, in principle, be trusted to comply with these rules.[813] Some support for this might be found in the fact that – even in the context of secret, ultimately unlawful surveillance measures – the ECtHR has found no evidence of the UK government abusing surveillance powers.[814] At the same time, the availability of strong encryption tools provides an additional layer of protection against government overreach; the success of which is demonstrated by ongoing attempts to ban or undermine encryption tools.[815] This, ultimately, seems to assuage some of the 'fears' emerging from digital surveillance.

That said, there are some issues with this argument. The jurisdiction of UK surveillance law is limited to activities carried out by UK government bodies, leaving significant gaps in protection. Notably, it does not extend to surveillance conducted by private companies or foreign governments - both of which are increasingly prevalent and facilitated by the global nature of the internet. This raises serious concerns, as private and foreign surveillance often operate with fewer safeguards and accountability measures, heightening the risk of information-based harms. The following sections

[811] *Podchasov v Russia* App no 33696/19 13 (ECtHR, February 2024) [77], [78].
[812] *Podchasov v Russia* App no 33696/19 13 (ECtHR, February 2024) [79].
[813] Hof's-Den Haag 14 maart 2017 NJF 2017/200 X appellanten en de Staat der Nederlanden (Neth.) para 3.4.
[814] *Big Brother Watch v United Kingdom* (2022) 74 EHRR [474].
[815] Chris Vallance, "UK amends encrypted message scanning plans" *BBC,* July 19 2020. https://www.bbc.co.uk/news/technology-66240006. accessed May 9, 2024

explore how these forms of surveillance present distinct challenges to individual privacy and may, in some cases, serve as indirect avenues for circumventing domestic legal protections.

III. Jurisdiction and information-based harm

A. Private Surveillance

The rise of 'private surveillance' via the internet carries significant privacy implications. Personal data is often collated to build a detailed profile of individuals' preferences, interests and aversions - information that is frequently sold to third parties.[816] This has been controversial; using Facebook user data, Cambridge Analytica was able to accurately predict political leanings and influence elections[817] – exposing UK citizen data to a 'serious risk of harm'.[818] For example, such information might be used in a discriminatory manner,[819] and 'nudging' via advertisements might represent a form of 'decisional interference'.[820] The Cambridge Analytica scandal demonstrates a real risk of information-based harms emerging from private surveillance. As such, data protection law has developed to limit private surveillance.

In the UK, data protection law is governed by the Data Protection Act 2018, which implements the EU's General Data Protection Regulation (GDPR). Broadly, data must be processed in accordance with certain criteria: consent, contractual necessity, legal obligation or public interests, and legitimate interests.[821] Moreover, it requires that data must be processed in accordance with a number of principles (such as fairness, lawfulness and transparency) and creates a list of 'data subjects rights'.[822] This

[816] Joint Committee on Human Rights*, The Right to Privacy (Article 8) and the Digital Revolution* (HC 122) 3.

[817] Nicholas Confessore, "Cambridge Analytica and Facebook: The Scandal and the Fallout So Far," *New York Times,* April 4, 2018, https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html. accessed May 9, 2024.

[818] "Facebook agrees to pay Cambridge Analytica fine to UK" *BBC,* 30 October 2019, https://www.bbc.co.uk/news/technology-50234141.

[819] Joint Committee on Human Rights*, The Right to Privacy (Article 8) and the Digital Revolution* (HC 122) paras 79-92.

[820] Solove, ""I've Got Nothing to Hide" and Other Misunderstandings of Privacy" 759.

[821] Data Protection Act 2018, s 8; see also Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[822] Ibid., ss 12-14, 34-40.

mitigates information-based harm – for example, requiring that data is stored securely, in a form permitting identification for no longer than necessary, and allowing users a right to data erasure.[823] The effect of this is that it 'places more power at the user's end and extra responsibility at the business end.'[824] Whilst the GDPR has been hailed as the 'strongest privacy and security law in the world'[825], the wide range of lawful processing criteria allows greater liberty in collecting personal data than state surveillance regimes. Recently, the UK has signalled a shift away from GDPR in its draft 'Data Protection and Digital Information' Bill, which has been criticised as 'watering down' data protection rights.[826]

B. Foreign surveillance

Different legal jurisdictions have different privacy rules. This creates a problem for internet users: '*the rise of the global computer network is destroying … the ability of physical location to give notice of which sets of rules apply'.*[827] For example, internet users in the EU who store data with a US company may see their data being surveilled by US law enforcement. Under the US 'Clarifying Lawful Use of Overseas Data' (CLOUD) Act, US law enforcement agencies may subpoena data from US-based technology companies to provide data even if that data is stored overseas. This is significant, as the US lacks federal data protection laws, and non-US citizens lack constitutional privacy rights – allowing the US to operate a warrantless surveillance regime for foreign individuals under section 702 of the Foreign Intelligence Surveillance Act (FISA).[828] As such, these programmes lack stringent safeguards such as those laid down by ECtHR guidelines, increasing vulnerability to information-based harm.

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[823] Ibid., ss 12-14, 34-40.

[824] Ramya Mohanakrishnan, "What Is GDPR and Why Is It Important?" *Spiceworks,* February 16, 2023. https://www.spiceworks.com/it-security/security-general/articles/what-is-gdpr/. accessed May 9, 2024.

[825] "What is GDPR, the EU's new data protection law?" *GDPR.EU*, accessed May 9, 2024, https://gdpr.eu/what-is-gdpr/#:~:text=The%20General%20Data%20Protection%20Regulation,to%20people%20in%20the%20EU.

[826] "How the new Data Bill waters down protections" Public Law Project*,* November 28, 2023, https://publiclawproject.org.uk/resources/how-the-new-data-bill-waters-down-protections/. accessed May 9, 2024

[827] David R. Johnson and David Post, "Law and borders: the rise of law in cyberspace" *Stanford Law Review* 48, no.5 (1996):1370, https://doi.org/10.2307/1229390.

[828] Foreign Intelligence Surveillance Act 1987 92 Stat. 1783

Concerns about the rights of EU citizens beyond borders culminated in the ECJ revoking the EU-US 'safe harbour' agreement.[829] Under this agreement, the US was recognised as a country with '*adequate'* protections for personal data, thus allowing for the free flow of personal data. *Inter alia*, the Court noted the lack of an effective remedy where citizens' rights have been infringed as being incompatible with their rights under Article 45(1) of the General Data Protection Regulation (GDPR).[830] The European Commission recently reinstated the US adequacy standing after an overhaul of the US legal framework, including a newly established 'Data Protection Review Court'. It remains to be seen whether the EU-US 'Data Protection Framework' will be overturned by a potential *'Schrems III'* case; however, it should be noted that the US House of Representatives recently re-approved section 702 of FISA – thus, powers for warrantless surveillance of foreign citizens remain.[831]

C. Loopholes?

Both private surveillance and surveillance by foreign governments create significant risks of information-based harm. At the same time, they present a potential loophole for the UK government. For example, the UK is party to a 'mutual trust' agreement with the US, allowing UK law enforcement agencies to send interception and production orders, authorised under UK law, directly to the US service providers, where there are no federal data protection laws.[832] Concerns have been raised about intelligence sharing under the 'Five Eyes' security alliance; that information gathered by foreign intelligence agencies and 'offered' to UK intelligence agencies effectively sidestepping domestic surveillance laws.[833]

The risk also remains that private surveillance might be used as a proxy for state

[829] European Commission, *Commission Decision 2000/520/EC*, Official Journal L 215, August 25, 2000.
[830] Case C - 311/18 *Data Protection Commissioner v Facebook Ireland Ltd* [2021] 1 WLR 751 [186].
[831] Nick Robins-Early, "House votes to reapprove law allowing warrantless surveillance of US citizens," *The Guardian*, April 12, 2024, https://www.theguardian.com/us-news/2024/apr/12/fisa-surveillance-act-reauthorized.
[832] cf Jessica Shurson, "Law Enforcement Access to Encrypted Data Across Borders" in *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement*, eds. Micheál Ó Floinn et al., (Bloomsbury, 2023).
[833] Haroon Siddique, "Concerns over rise in requests for UK to share intelligence despite torture risks," *The Guardian,* March 27, 2024, https://www.theguardian.com/world/2024/mar/27/concern-rise-requests-uk-share-intelligence-despite-torture-risks#:~:text=The%20human%20rights%20group%20Reprieve,or%20extraordinary%20rendition%20was%20. accessed May 9, 2024.

surveillance. Whilst data protection rules mitigate information-based harm, these are less stringent than those required for state surveillance. This is concerning, as the effect may be the same; compelled disclosure under the IPA could result in a significant amount of personal data being made available to law enforcement bodies. This is a particularly pertinent issue: in early 2025, the UK Home Office issued a Technical Capability Notice (TCN) under the IPA, requiring Apple to create a backdoor into its Advanced Data Protection (ADP) service, which offers end-to-end encryption for iCloud data.[834] Apple subsequently removed the ADP feature from its services in the UK, leaving UK individuals at a greater risk of information-based harms. As such, data collected by private companies could serve as the soft underbelly of individual privacy.

IV. Conclusion

This essay has demonstrated how the 'nothing to hide' argument is flawed in light of surveillance in the digital age. It has shown how the average person generally has things which they would rather keep private, and that breaches of this privacy can lead to 'information-based harms.' Whilst some degree of state surveillance may be necessary, stringent rules have developed to mitigate against the harms arising from this. That said, the internet has undermined the effectiveness of these, allowing for both extensive 'private' and foreign surveillance, both of which operate with lesser safeguards against information-based harm. Moreover, information gathered from such surveillance can be obtained by UK law enforcement, ostensibly circumventing the safeguards developed under surveillance law.

These problems are unlikely to go away. Much of what we can use on the internet is free, as a business model has evolved in which companies make money from selling advertising opportunities rather than charging individuals to use the service.[835] At the same time, we can connect with people worldwide because of data flows across borders. Tackling both private and foreign surveillance would likely be impossible

[834] J Joseph Menn, "U.K. Orders Apple to Let It Spy on Users' Encrypted Accounts," *The Washington Post*, February 7, 2025, https://www.washingtonpost.com/technology/2025/02/07/apple-encryption-backdoor-uk/. accessed May 28, 2025.

[835] Joint Committee on Human Rights*, The Right to Privacy (Article 8) and the Digital Revolution* (HC 122) 3.

without curtailing the free and open nature of the internet.[836] Is this a price worth paying for privacy?

[836] vide Mark Lemley, "The Splinternet" *Duke Law Journal* 70, no.6 (2023), http://dx.doi.org/10.2139/ssrn.3664027.

Bibliography

BBC. “Facebook agrees to pay Cambridge Analytica fine to UK.“ *BBC*. October 2019. https://www.bbc.co.uk/news/technology-50234141 accessed 9 May 2024

Big Brother Watch v United *Kingdom* (2022) 74 EHRR

Case C – 239/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources [2015] QB 127

Case C - 311/18 Data Protection Commissioner v Facebook Ireland Ltd [2021] 1 WLR 751 [186]

Clarifying Lawful Overseas Use of Data Act 2018 Pub.L. 115–141 (2018)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

European Commission. Commission Decision of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce. 2000/520/EC. Official Journal L 215, August 25, 2000

Data Protection Act 2018

Anderson, David. ‘A Question of Trust: Report of the Investigatory Powers Review’. Independent Reviewer of Terrorism Legislation. Para. 4.17. https://assets.publishing.service.gov.uk/media/5a7f9b66ed915d74e622b7ca/IPR-Report-Web-Accessible1.pdf

Anderson, David. *Report of the Bulk Powers Review* (Cm 9326, 2016).

Flaherty, David H. “Visions of Privacy: Past, Present and Future” in *Visions of Privacy, Policy Choices for the Digital Age.* eds. Colin J Bennett and Rebecca Grant. University of Toronto Press 1999

Foreign Intelligence Surveillance Act 1987 92 Stat. 1783 Hof’s-Den Haag 14 maart 2017 NJF 2017/200 X appellanten en de Staat der Nederlanden (Neth.)

Johnson, David R., and Post, David. “Law and borders: the rise of law in cyberspace.” *Stanford Law Review* 48, no.5 (1996). https://doi.org/10.2307/1229390

Kruslin v France (1990) 12 EHRR 547 [27]

Gov.UK. “Investigatory powers enhanced to keep people safer.” April 25, 2024. https://www.gov.uk/government/news/investigatory-powers-

enhanced-to-keep-people-safer#:~:text=Urgent%2C%20targeted%20changes%20made%20to,from%20terrorists%2C%20hostile%20state%20actors%2C accessed 9 May 2024

GDPR.EU. "What is GDPR, the EU's new data protection law?" accessed 9 May 2024. https://gdpr.eu/what-is-gdpr/#:~:text=The%20General%20Data%20Protection%20Regulation,to%20people%20in%20the%20EU. accessed 9 May 2024

Greenwald, G. *No Place to Hide – Edward Snowden, the NSA and the Surveillance State*. Mcclelland & Stewart, 2015.

HL Deb 4 November 2015 vol 601

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Investigatory Powers Act 2016

Joint Committee on Human Rights*, The Right to Privacy (Article 8) and the Digital Revolution* (HC 122) 3

Lemley, M. "The Splinternet." *Duke Law Journal* 70, no.6 (2023). http://dx.doi.org/10.2139/ssrn.3664027

Menn, Joseph. "U.K. Orders Apple to Let It Spy on Users' Encrypted Accounts." *The Washington Post*. February 7, 2025. https://www.washingtonpost.com/technology/2025/02/07/apple-encryption-backdoor-uk/. accessed 28 May 2025

Mohanakrishnan, Ramya. "What Is GDPR and Why Is It Important?" *Spiceworks,* February 16, 2023. https://www.spiceworks.com/it-security/security-general/articles/what-is-gdpr/. accessed 9 May 2024

Murray, Andrew. *Information Technology Law* (Oxford University Press, 2020)

Confessore, Nicholas. "Cambridge Analytica and Facebook: The Scandal and the Fallout So Far." *New York Times,* April 4, 2018 https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html. accessed 9 May 2024

Podchasov v Russia App no 33696/19 13 (ECtHR, February 2024)

Public Law Project. "How the new Data Bill waters down protections." November 28, 2023. https://publiclawproject.org.uk/resources/how-the-new-data-bill-waters-down-protections/. accessed 9 May 2024

Quinn, Ben, Ball, James, and Rushe, Dominic. “GCHQ chief accuses US tech giants of becoming terrorists ‘networks of choice.” *The Guardian,* November 3, 2014. https://www.theguardian.com/uk-news/2014/nov/03/privacy-gchq-spying-robert-hannigan accessed 9 May 2024

Robins-Early, Nick. “House votes to reapprove law allowing warrantless surveillance of US citizens.” *The Guardian*, April 12, 2024. https://www.theguardian.com/us-news/2024/apr/12/fisa-surveillance-act-reauthorized accessed 9 May 2024.

R (on the application of National Council for Civil Liberties (Liberty)) v Secretary of State for the Home Department [2018] EWHC 975 (Admin) [2018] 3 WLR 1435

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1;

Shurson, Jessica. “Law Enforcement Access to Encrypted Data Across Borders” in *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement*, eds. Micheál Ó Floinn et al. Bloomsbury, 2023

Siddique, Haroon. “Concerns over rise in requests for UK to share intelligence despite torture risks.” The Guardian, March 27, 2024. https://www.theguardian.com/world/2024/mar/27/concern-rise-requests-uk-share-intelligence-despite-torture-risks#:~:text=The%20human%20rights%20group%20Reprieve,or%20extraordinary%20rendition%20was%20concerning.. accessed 9 May 2024

Solove, Daniel J. “A Taxonomy of Privacy.” *University of Pennsylvania Law Review* 154, no. 3 (January 2006): 477–564. https://ssrn.com/abstract=667622.

Solove, Daniel. “"I've Got Nothing to Hide" and Other Misunderstandings of Privacy” *San Diego Law Review* 44 (2007). https://ssrn.com/abstract=998565.

UK Government. “Government Note on the European Court of Justice Judgement (Press Briefing)”. https://assets.publishing.service.gov.uk/media/5a7d7923ed915d2d2ac0929e/DRIPgovernmentNoteECJjudgment.pdf. accessed May 9, 2024

S and Marper v United Kingdom (2009) 48 EHRR 50

US Constitution

Van den Hoven, Jeroen. “Information Technology, Privacy and the Protection of Personal Data” in *Information Technology and Moral Philosophy*, eds. Jeroen van den Hoven and John Weckert. Cambridge University Press 2008.

Vallance, Chris. “UK amends encrypted message scanning plans“(BBC, 19 July 2020) https://www.bbc.co.uk/news/technology-66240006 accessed 9 May 2024

Contemporary Challenges: The Global Crime and Security Journal (2025) Vol. 6

Research Article

On the Margins: The Disenfranchisement of Communities in Contemporary International Human Rights Law as Portrayed by Rosa Ehrenreich Brooks and Ratna Kapur

Christina Yuen

Received: 03 March 2025 / Accepted: 12 June 2025

Abstract

This article aims to shed light on the disenfranchisement of marginalised peoples within the contemporary international human rights law regime. Through comparing two works by Rosa Ehrenreich Brooks and Ratna Kapur, it explores the different ways that women and the queer community, in particular, can become invisible within the existing system. On the one hand, it speaks to the authors' consensus on the exclusionary and Western-centric nature of human rights and its theoretical foundations, while also pinpointing the divergences in their arguments on the role of dialogue and their analytical approaches, on the other. Nonetheless, it ultimately concludes that the authors have identified an ideal starting point for further discussion and research into how the existing system can be reformed to ensure that the rights of all individuals, including women and sexual minorities, are respected, protected, and fulfilled.

Introduction

Amidst proliferating discussions on the nature, history, and effectiveness of human rights by legal practitioners and mainstream, feminist, and queer scholars alike, Rosa Ehrenreich Brooks wrote in 2002 that more rigorous feminist engagement with the existing international human rights legal framework was crucial in order to revolutionise both international policy and domestic politico-legal discourse.[837] Brooks' account of the lack of female visibility in international law shed light on the shortcomings of the international legal system, revealing numerous ways in which it systematically disadvantages women and neglects their human rights. Almost two decades later, Ratna Kapur lamented in a similar vein that international human rights law remains hostile to queer individuals and their human rights, arguing that the status quo has done more to strip the queer rights movement of its radicality than foster inclusion of the queer community within the current regime.[838] Such critiques point to an overarching issue endemic to the architecture of international human rights law — the disenfranchisement of marginalised peoples within the system.

This paper reviews each writer's perspective on the status quo of international human rights law *vis-à-vis* their focuses on women and the queer community, respectively. It identifies the similarities in their understandings of the nature of the contemporary human rights system, on the one hand, and juxtaposes their views on the effectiveness of dialogue, their verdicts on the role of the West, and the theoretical lenses they adopt, on the other. Ultimately, it concludes that despite their differences in argumentation, the insights of both authors reveal that the human rights framework leaves much to be desired for women and queer individuals. That the insights of Brooks, especially, still remain relevant long after the initial publication of her work

[837] Rosa Ehrenreich Brooks, "Feminism and International Law: An Opportunity for Transformation." *Yale Journal of Law and Feminism* 14 (2002): 345–61. Note that Brooks has not written on this subject in recent years.

[838] Ratna Kapur, "The (Im)Possibility of Queering International Human Rights Law" in *Queering International Law*, ed. Dianne Otto (Routledge, 2017) 131–47, https://www.taylorfrancis.com/chapters/edit/10.4324/9781315266787-11/im-possibility-queering-international-human-rights-law-ratna-kapur?context=ubx&refId=eef2c5d6-ca4a-4df5-9686-34147e839bd8.

reiterates that the system must be reformed if it is to fulfil its claim to universality and serve the needs and interests of all sectors of society.

The Exclusionary Nature of Human Rights

Despite their differing analytical focuses on women and the queer community, respectively, both Brooks and Kapur agree that international human rights law has an exclusionary nature. Other scholars have previously argued that the concept of 'human rights' is relatively Western-centric and may thus be difficult to reconcile with the values, traditions, and rules unique to non-Western cultures. The tension between individualistic and collectivistic societies exemplifies this point.[839] While both authors concur, they go further in specifically pinpointing women and queer individuals, amongst the vast expanse of such voices, as being neglected by the contemporary human rights regime. They argue that inclusion within the international human rights legal system is largely predicated on conformity with the overarching racial, cultural, sexual and gender paradigms that shape and sustain this system, and women and sexual minorities are among those who 'stray' from such expectations.[840] Furthermore, they contend that the universalising proclivity of human rights and its tendency to obscure the exclusions on which the regime is founded is paradoxical, considering that the operation was born out of processes of othering and portraying such 'other' peoples as lacking the agency to be liberated from their oppressive traditions, histories and civilisational underdevelopment.[841] *Prima facie,* the erasure of the boundaries between different peoples, which underlie the very concept of human rights, may seem to be a promising step towards equality and human rights for all. However, the very designation of groups such as women and sexual minorities as 'others' in the first place entrenches this exclusionary rhetoric.

[839] Hakimeh Saghaye-Biria, "Decolonizing the 'Universal' Human Rights Regime: Questioning American Exceptionalism and Orientalism." *ReOrient* 4, no. 1 (2018): 59–77, https://doi.org/10.13169/reorient.4.1.0059. See also Seth Kaplan, "The Limits of Western Human Rights Discourse." in *Human Rights in Thick and Thin Societies* (Cambridge University Press, 2018) 103–33, https://doi.org/10.1017/9781108557887.007.

[840] Kapur, "(Im)Possibility of Queering International Human Rights Law", 142.

[841] Makau wa Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" *Harvard International Law Journal* 42, no. 1 (2001): 201–45.

Moreover, Brooks and Kapur both challenge the extent to which the current international human rights legal framework and the pithy pursuit of 'equality' and 'equal rights' can effectively serve the needs and interests of marginalised communities, particularly due to the prominence of 'assumed norms' within international law.[842] They discuss the assumed norms of 'maleness' and heteronormativity to which international human rights law continues to adhere, unconsciously or otherwise, bemoaning the unfortunate reality that they are used as an aspirational benchmark. Brooks points out that advancements in the human rights of women have historically been measured relative to the entitlements of men, where the ultimate goal is for women to be treated "the same" as and have equal access to education, jobs, and public authority on the same basis as their male counterparts.[843] In the same vein, Kapur argues that much of queer human rights advocacy has focused on legal recognition for sexual minorities, such as through campaigns for marriage equality.[844] However, both authors pose the question of why the rights of women and queer individuals should be assessed against such masculine and heteronormative metrics. Given the vastly different societal, cultural and biological circumstances of such marginalised groups, why should the protections under international human rights law afforded to their male and heterosexual counterparts be an object of desire? It is these parameters within which the international human rights regime is currently situated that stifles the effectiveness of human rights and the potential of the regime to protect marginalised populations. Brooks and Kapur thus encourage skepticism of the effectiveness of an international human rights legal system that inadvertently encourages marginalised people, such as women and sexual minorities, to strive for entitlements conferred according to existing male and heteronormative standards.

Brooks and Kapur's observations on the exclusionary nature and the stunted effectiveness of human rights, attributable to Eurocentrism and the reinforcement of

[842] Brooks, "Feminism and International Law", 350. See also Kapur, *"(Im)Possibility of Queering International Human Rights Law",* 134.
[843] Brooks, "Feminism and International Law", 350-51.
[844] Kapur, "(Im)Possibility of Queering International Human Rights Law", 134.

norms of maleness and heteronormativity, while not necessarily revolutionary *per se,* are certainly thought-provoking and encourage the questioning of the extent to which the human rights project actually upholds the interests of all human beings. Their insights serve as a reminder that human rights' claim to universality and its seemingly altruistic nature should not go unchallenged, suggesting that it is, indeed, pertinent to interrogate the liberal imagination upon which human rights were conceived.

At a Crossroads: The Effectiveness of Dialogue and the Role of the West

Despite their consensus on the exclusionary essence and role of entrenched norms in impeding the effectiveness of the contemporary human rights framework, however, the accounts of Brooks and Kapur begin to diverge when one considers the intricacies of their critiques. For example, Brooks adopts a relatively sanguine stance on the role of dialogue in bolstering the effectiveness of the international human rights legal system. She proposes that "rights-talk", though indeed performative in many contexts and not necessarily constructive under certain sociocultural circumstances, can be a gateway to understanding the world and act as a platform for both the introduction and advocacy of meaningful change.[845] Conversely, Kapur is largely pessimistic about the role that mere talk of rights can play in enhancing the efficacy of international human rights law. She maintains a comparatively cynical view that dialogue is a political tool seeking to govern the lives of 'other' peoples while masquerading as a force for good.[846] Because the contemporary human rights regime is built on Western-centric, normative understandings of queer, the insights that can emerge from human rights discourse are inherently restricted by the boundaries imposed by such ideas, stifling the revolutionary capacity of the subversive queer activist.[847] Kapur thus argues that discourse alone is meaningless if it takes place within the confines of the Euro-American imaginary, and therefore calls for a radical decoupling of queer from the way it is portrayed in the West. In this light, Brooks' optimism in this respect appears somewhat misplaced as she fails to consider the Western scaffolding which

[845] Brooks, "Feminism and International Law*",* 345.
[846] Kapur, "(Im)Possibility of Queering International Human Rights Law", 144.
[847] Kapur, "(Im)Possibility of Queering International Human Rights Law", 145.

shrouds the human rights regime and the implications that such undertones have for the effectiveness of human rights.

Kapur also dives deeper than Brooks in her critique of the effectiveness of international human rights law, adopting a postcolonial lens in her analysis and arguing that the current system perpetuates a form of cultural neo-imperialism.[848] Further consolidating the aforementioned Eurocentrism of human rights, Western understandings of homosexuality and the prescriptive queer subject are becoming increasingly dominant, and attempts to universalise human rights consequently impose such ideas internationally. What the Western ideology espouses is the idea that the queer individual is dichotomous to the heterosexual, and that public exposure and "inclusion in heteronormative structures and the patriarchal institutions of the family" are sufficient to fulfil same-sex desire and reaffirm the queer identity.[849] Kapur argues that this is not only a gross misunderstanding of the needs and the very character of the queer community, but it also proscribes a set of rights and a sense of identity to the queer individual in such a way that prevents the emergence of a fully-fledged postcolonial Asian or African narrative of the homosexual.[850] As such, the superficial inclusion of LGBTQ+ voices based on a Eurocentric conception of queer is insufficient to confront the "newly emerging hegemonic, colonising queer in human rights" and fails to serve any meaningful purpose in buttressing the efficacy of the human rights system.[851]

These differences are reflected in the way each author understands the place of the West within the international human rights legal regime we know today. While Kapur is evidently quite critical of the way Western narratives are entrenched, reinforced and reproduced in human rights, Brooks displays a comparatively forgiving stance on the incremental steps that the United States, in particular, has taken in order to be more inclusive and representative of women in the realm of international human rights law.[852] Moreover, having pointed out the Western-centrism of the field, Brooks

[848] Kapur, "(Im)Possibility of Queering International Human Rights Law",, 138.
[849] Kapur, "(Im)Possibility of Queering International Human Rights Law", 140.
[850] Kapur, "(Im)Possibility of Queering International Human Rights Law", 138.
[851] Kapur, "(Im)Possibility of Queering International Human Rights Law",, 140.
[852] Brooks, "Feminism and International Law", 357.

ironically proceeds to predominantly consider the implications of progress in human rights for the American feminist and the American legal landscape, especially within American law schools, courts, and legislation such as the Violence Against Women Act (VAWA).[853] She does not contemplate how this might manifest in other non-Western jurisdictions, or discuss the influence that such transformations might have on women and the institutions that represent them in other regions of the world. In light of her critique of the exclusionary nature of human rights, this appears to be a crucial oversight and a missed opportunity to consider the broader implications of her analysis beyond the American context.

Contrastingly, echoing her postcolonial focus and in an attempt to subvert the age-old Eurocentrism of human rights, Kapur incorporates, albeit briefly, a potential South Asian-inspired conception of a non-binary subject that defies liberal expectations and is not shackled to the focus of Western human rights advocacy on sexual acts and identities.[854] As such, Kapur advances a more comprehensive argument and seems to make an effort to shift away from the very Eurocentric character of human rights that her piece criticises, in an earnest attempt to fill the gaps in the representation of marginalised peoples that plague contemporary human rights law.

However, this is not to discredit entirely the narrative put forward by Brooks. Years on from the initial release of her article, gender bias in international law remains an unfortunate reality. This is evidenced in, *inter alia*, the continued underrepresentation of women in the international lawmaking sphere,[855] and the inadequacy of legal frameworks in addressing issues that disproportionately affect women, such as sexual abuse, domestic violence, and genital mutilation.[856] This speaks volumes about the

[853] Brooks, "Feminism and International Law"*,* 359.
[854] Kapur, "(Im)Possibility of Queering International Human Rights Law", 144.
[855] See, for example, the United Nations General Assembly (UNGA) Memorandum of the Secretary-General on the Election of Two Judges to the Roster of the International Residual Mechanism for Criminal Tribunals (November 19 2018) UN Doc A/73/577. All 11 candidates for the election of two judges to the International Residual Mechanism for Criminal Tribunals were male.
[856] Eve McCabe, "The Inadequacy of International Human Rights Law to Protect the Rights of Women as Illustrated by the Crisis in Afghanistan" *UCLA Journal of International Law and Foreign Affairs* 5, no. 2 (2000): 419–60, https://doi.org/10.2307/45302148.

endemic nature of the invisibility of women in the field, as well as the lack of progress being made in shifting the human rights infrastructure away from traditional patriarchal organisational logics. It is apparent that the steps necessary to tackle the exclusive nature of human rights and its masculine focus have not been taken, or action has been insufficient. Thus, despite Brooks' oversight of postcolonial and non-Western perspectives, her work still serves as a reminder that more can be done for marginalised communities within the international human rights legal framework, and that more *must* be done if we are to reform and strengthen the human rights regime.

Conclusion

To conclude, the works of authors Rosa Ehrenreich Brooks and Ratna Kapur serve to elucidate the ways in which the contemporary international human rights system disadvantages marginalised groups, especially women and sexual minorities. Their commentaries on the exclusionary nature and theoretical shortcomings of human rights shed light on the necessity of a legal framework that effectively addresses the entitlements, needs and interests of marginalised peoples. Notably, the authors do diverge on matters such as the role of dialogue, the theoretical angles from which they conduct their analysis, and the emphasis that they place on the West in international human rights today. Nonetheless, both Brooks and Kapur aim to shed light on the marginalised communities disenfranchised by the contemporary international human rights law regime, providing an ideal starting point for future academic debate and research on how the system can be reformed to enhance its effectiveness for all the individuals and groups it claims to serve.

Bibliography

Journal Articles

Brooks, Rosa Ehrenreich. "Feminism and International Law: An Opportunity for Transformation." *Yale Journal of Law and Feminism* 14 (2002): 345–61. https://scholarship.law.georgetown.edu/facpub/1132/

McCabe, Eve. "The Inadequacy of International Human Rights Law to Protect the Rights of Women as Illustrated by the Crisis in Afghanistan." *UCLA Journal of International Law and Foreign Affairs* 5, no. 2 (2000): 419–60. https://doi.org/10.2307/45302148.

Mutua, Makau wa. "Savages, Victims, and Saviors: The Metaphor of Human Rights." *Harvard International Law Journal* 42, no. 1 (2001): 201–45. https://digitalcommons.law.buffalo.edu/journal_articles/570/

Saghaye-Biria, Hakimeh. "Decolonizing the 'Universal' Human Rights Regime: Questioning American Exceptionalism and Orientalism." *ReOrient* 4, no. 1 (2018): 59–77. https://doi.org/10.13169/reorient.4.1.0059.

Book Chapters

Kaplan, Seth. "The Limits of Western Human Rights Discourse." In *Human Rights in Thick and Thin Societies*. Cambridge University Press, 2018. https://doi.org/10.1017/9781108557887.007.

Kapur, Ratna. "The (Im)Possibility of Queering International Human Rights Law." In *Queering International Law*, edited by Dianne Otto. Routledge, 2017. https://www.taylorfrancis.com/chapters/edit/10.4324/9781315266787-11/im-possibility-queering-international-human-rights-law-ratna-kapur?context=ubx&refId=eef2c5d6-ca4a-4df5-9686-34147e839bd8.

United Nations (UN) Sources

"Memorandum of the Secretary-General on the Election of Two Judges to the Roster of the International Residual Mechanism for Criminal Tribunals (UN Doc A/73/577)." United Nations General Assembly, November 19, 2018.

Research Article

Solidarity and Sharing Responsibility for Refugee Protection: Does the *Global Compact on Refugees* move the needle?

Charlotte Stump

Received: 17 February 2025 / Accepted: 10 June 2025

Abstract

It is well established that there is a substantial gap between rhetoric and state practice of solidarity in international refugee protection. Global North states are increasingly employing strategies of deterrence and externalisation to retreat from obligations. In this context, this article considers whether the adoption of the Global Compact on Refugees in 2018 has shifted the dialogue. As an instrument of soft law, the Global Compact on Refugees represented an opportunity for the international community to advance the principles of solidarity and responsibility-sharing. These principles are largely missing from the foundational texts of international refugee law, the 1951 Convention and its 1967 Protocol. The article examines novel perspectives and principles to advance solidarity in refugee protection, with the support of postcolonial critiques, and considers the future of responsibility-sharing. In particular, the article will question the potential for international refugee law frameworks to equitably address and remedy the historical injustices of the colonial project, which perpetuate the contemporary crisis.

Introduction

As the scale and complexity of the 'refugee crisis' grows, many have repeatedly called for international law to provide better mechanisms for responsibility-sharing and cooperation between Global North and Global South states. The term 'refugee crisis' represents the enormity of the problem in terms of the number of people displaced and the lack of political support for solutions. At mid-2024, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 122.6 million people were forcibly displaced around the world, with the Least Developed Countries hosting approximately 22% of this population.[857] While the Global South often hosts larger numbers of refugees due to their proximity to the root causes of displacement, it can also be attributed to Global North states employing harsher asylum and immigration laws and policies. For example, the European Union's funding and training of the Libyan Coast Guard to intercept and return asylum seekers before they reach European shores, and the Australian government's policy that no 'illegal maritime arrivals' will ever be resettled permanently in Australia.[858] These policies evidence the lack of international cooperation in managing increasing displacement. Postcolonial scholars have long demanded that international refugee law respond meaningfully to how colonialism and neo-colonialism impact and shape the refugee crisis.[859] This article will consider the capacity for international refugee law to address or impose duties on Global North states for their complicity in conflicts and displacement in the Global South. In short, this article aims to contribute to shifting the conversation from focusing on the responsibility of countries at the root of displacement, towards the Global North's historical responsibility for the 'refugee crisis' and resultant obligations. The capacity for change is examined through the lens of a contemporary addition to the international refugee law framework, the Global Compact on Refugees.[860]

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[857] "Mid-Year Trends 2024", UNHCR Global Data Service, updated October 29, 2024. https://reliefweb.int/report/world/unhcr-mid-year-trends-2024.

[858] Biora Chinedu Okafor, "The Future of International Solidarity in Refugee Protection," *Human Rights Review* 22, no. 1 (2021): 5.

[859] See for example, BS Chimni, "The Geopolitics of Refugee Studies: A View from the South," *Journal of Refugee Studies* 11, no. 4 (1998).

[860] UNHCR, *Report of the United Nations High Commissioner for Refugees: Part II Global Compact*, 73rd sess, Supp No 12, UN Doc A/73/12 (Part II) (2 August 2018, reissued 13 September 2018) ('*The Global Compact*').

The Global Compact on Refugees: foundations and content

In 2016, UN Member states adopted the New York Declaration for Refugees and Migrants which led to the development of the Global Compact on Refugees ('The Compact'), with a similar model for migrants. The Compact built upon international refugee law instruments and principles, with a specific focus on protection and responsibility-sharing. Before examining the Compact's usefulness, it is important to review the existing legal frameworks of international refugee law. The foundational text, the *Convention Relating to the Status of Refugees* ('The 1951 Convention'), offers refugee status to individuals fleeing persecution based on their 'race, religion, nationality, membership in a particular social group, or political opinion'.[861] The *1951 Convention* was devised in Europe, in a post-WWII context, and therefore initially limited its scope to persons displaced in Europe before 1951.[862] However, throughout the following decade, with decolonisation movements and wars throughout much of the Global South, as well as consistent advocacy from Global South actors, it became clear that a truly international framework was essential. The *1967 Protocol Relating to the Status of Refugees* removed the temporal and geographic limitations of the *1951 Convention*, thereby offering refugee status and the resultant protections to a broader range of displaced persons.[863] Since the adoption of the *1951 Convention*, the principle of non-refoulement, which prohibits states from returning an individual to a place where they may face persecution or torture, has been widely accepted as a *jus cogens* norm, evidencing an important development in international law.[864] Following the adoption of the *1951 Convention* and its *1967 Protocol*, most legal developments have occurred regionally; for example, the *1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa* ('The 1969 OAU Convention') and the *Cartagena Declaration*, adopted by Central and Latin American states.[865] The *1969 OAU Refugee Convention* and the *Cartagena Declaration*

[861] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) Art 1(B)(1).
[862] *Convention Relating to the Status of Refugees*, Art 1(B)(1).
[863] *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 5 October 1967).
[864] Jill Goldenziel, "The curse of the nation-state: refugees, migration, and security in international law," *Arizona State law journal* 48 (2016): 634.
[865] *Cartagena Declaration on Refugees,* The Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted 22 November 1984; *1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa,* African Union,

developed the refugee definition 'to include people who have fled violent conditions or disturbances in public order'.[866] Most developments in refugee law have focused on widening the definition of potential refugees. Yet there remains a normative gap regarding states' obligations for sharing the responsibility of the immense numbers of refugees around the globe. In light of this, the main contribution of the Compact was envisioned as operationalising burden and responsibility-sharing mechanisms.

The Compact begins by foregrounding the 'urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees' among United Nations Member states.[867] While not legally binding, the goals of the Compact purport to be implemented through 'voluntary contributions' determined by each state's capacity, in a spirit of 'strengthened cooperation and solidarity'.[868] The Compact's introductory remarks acknowledge states that are not party to the *1951 Convention*, yet which have contributed immensely to hosting and protecting refugees – an important recognition that alludes to states predominantly located in the Global South.[869] The Compact acknowledges that large-scale refugee situations are matters of concern to the international community as a whole, but equally that 'addressing root causes is the responsibility of countries at the origin of refugee movements'.[870] Here, the accepted correlation between 'root causes' being the responsibility of countries at the epicentre is an important and problematic notion that this article will return to.

The Compact then introduces the Comprehensive Refugee Response Framework (CRRF), an integral part of the text which aims to facilitate a unified approach to supporting refugees and host countries.[871] The CRRF contains mechanisms to support responsibility-sharing, such as the Global Refugee Forum, held every 4 years, where states pledge assistance in the form of financial, technical, material or other aid and are held accountable to previous pledges.[872] It also introduces Support Platforms which provide context-specific support for both refugees and host communities in

opened for signature 10 September 1969.
[866] Goldenziel, "The curse of the nation-state", 633.
[867] *The Global Compact* [1].
[868] *The Global Compact* [4].
[869] *The Global Compact* [6].
[870] *The Global Compact* [8].
[871] *The Global Compact* [11].
[872] *The Global Compact* [17].

circumstances of large-scale refugee situations.[873] Support Platforms are led by states and aim to provide a 'strategic vehicle to garner broad-based support for host states or countries of origin'.[874] The Compact acknowledges that the success of the above-mentioned mechanisms depends on the 'international community as a whole providing concrete contributions to bring these arrangements to life'.[875] Part B of the CRRF outlines specific areas in need of support, such as: overall preparedness of receiving countries of large scale refugee movements, safety and security of refugees, fostering jobs and inclusive economic growth for refugee and host communities, particular aid for gender-related barriers faced by women and girl refugees, and food security.[876] The Compact's final chapter focuses on 'Solutions'. The Compact extends the focus from the three traditional durable solutions of voluntary repatriation, resettlement and local integration, to include 'other local solutions and complementary pathways for admission to third countries'.[877]

Notably, the Compact does not address many critical areas of how international refugee law is implemented, such as the detention of refugees illegally entering a state or constructive refoulement. However, the focus of this critique is the Compact's silences surrounding the Global North's historic responsibility in producing large-scale refugee movements and, subsequently, practising policies of containment and deterrence.

Postcolonial approaches to international refugee law

The central challenge of international refugee law is that it must balance the sovereign right of states to expel aliens, or non-nationals, from within their borders with the international principles of non-refoulement, dictating that states cannot return a person to a country where they fear persecution. The universal acceptance of non-refoulement as a *jus cogens* norm indicates that 'states are willing to cede some of their sovereignty to protect human rights'.[878] Yet this core tension remains. The refugee definition itself emphasises state sovereignty as the starting point for a finding of refugee status. The

[873] *The Global Compact* [23].
[874] *The Global Compact* [27].
[875] *The Global Compact* [49].
[876] *The Global Compact* [52-74].
[877] *The Global Compact* [85].
[878] Goldenziel, "The curse of the nation-state", 634.

individual must be 'outside their country of origin' to seek protection, implicitly acknowledging that international refugee law will not seek to determine practice within a nation's borders.[879]

However, postcolonial scholars have critiqued the supremacy of state sovereignty and national borders as organising principles of international law.[880] Critical approaches to international legal history help us understand and analyse how the historical experience of colonialism fundamentally shaped concepts and doctrines of international law. Antony Anghie's scholarship depicts how the doctrine of sovereignty was constituted through the colonial encounter.[881] Tendayi Achiume builds upon postcolonial theory by contending that, for formerly colonised states, decolonisation did not signify complete independence, but merely represented a shift in power relations between indefinitely linked states.[882] Achiume seeks to reimagine 'national borders and the institutions of political inclusion' by foregrounding the implications of unilateral European migration during the colonial project.[883] Between the nineteenth century and the first half of the twentieth century, 62 million Europeans emigrated to colonies around the world, while 'human and natural resources' were pulled in the opposite direction for the benefit of Europeans.[884] As a consequence of this shared history, Third World migrants form part of the 'shared demos' of the nation-state that benefited from their subjugation and thus are 'political insiders' deserving of association and membership in the First World.[885] Achiume's scholarship demonstrates how the contemporary hyper-focus and militarisation of borders is inherently racial, denying Third World citizens the reciprocal right to migration.[886] Achiume advocates that, in order to achieve corrective and retributive justice for the effects of colonialism, political association to the First World must be reimagined.[887] Importantly, Achiume uses the

[879] Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime," *International Journal of Refugee law* 14, no. 2-3 (2002): 246.
[880] Tendayi Achiume, "Migration as Decolonization," *Stanford Law Review* 71, no. 6 (2019): 1551; Antony Anghie, "The Evolution of International Law: colonial and postcolonial realities", in *International Law and the Third World*, ed. Antony Anghie, Jacqueline Stevens, Balakrishnan Rajagopal, Richard Falk (Taylor & Francis Group, 2008).
[881] Antony Anghie, "The Evolution of International Law: colonial and postcolonial realities", 37.
[882] Tendayi Achiume, "Migration as Decolonization," *Stanford Law Review* 71, no. 6 (2019): 1551.
[883] Achiume, "Migration as Decolonization," 1574.
[884] Achiume, "Migration as Decolonization," 1518.
[885] Achiume, "Migration as Decolonization," 1549.
[886] Achiume, "Migration as Decolonization," 1518.
[887] Achiume, "Migration as Decolonization," 1549.

terms First World and Third World for their analytical significance in evoking 'imperial histories and politics'.[888]

The political and economic institutions born in the period of decolonisation which seek to respond to the refugee crisis, such as the UNHCR, must also be reimagined. BS Chimni sheds light on how influential states in the Global North formed and continue to exert control over the UNHCR, and yet have legitimised this dynamic through emphasising the organisation's non-political character.[889] To remedy this injustice, international refugee law and the institutions upholding it must diverge from legal positivism and acknowledge the historical legacy of the colonial project.[890] It is essential to situate instruments and institutions of international law in the historical and political context from which they originated.

Building on Achiume's critique of international migration law, this article considers the colonial foundations and implications of international refugee law. Achiume's critique is pertinent to the norm of burden and responsibility-sharing because it highlights the immense responsibility that the Global North owes in this struggle. This radical reimagining of accepted doctrines seeks to challenge many of the material realities that these assumptions rely on, such as inflexible national borders and restricted political membership. In light of the contemporary crisis, where harsher immigration and asylum practices of Global North states contain 86% of the world's refugees in the Global South,[891] it is imperative that international refugee law frameworks are considered through a postcolonial lens, which centres the impact of colonialism and neo-colonialism on the current refugee crisis. The following section examines how the Compact could have effectively addressed the principle of solidarity in a manner that truly acknowledged the historical legacy and ongoing impacts of colonialism.

[888] Achiume, "The Postcolonial Case for Rethinking Borders" *Dissent* 66, no. 3 (2019): 28.
[889] BS Chimni, "The Geopolitics of Refugee Studies: A View from the South," *Journal of Refugee Studies* 11, no. 4 (1998): 366.
[890] Achiume, "The Postcolonial Case for Rethinking Borders", 32.
[891] "Mid-Year Trends 2024", UNHCR Global Data Service, updated October 29, 2024. https://reliefweb.int/report/world/unhcr-mid-year-trends-2024.

The normative impact of the Compact's language and obligations

Soft law instruments have proliferated in recent years, perhaps evidence that states are unwilling to commit to concrete obligations in international law.[892] However, precisely due to this limitation, they are often capable of containing more aspirational and expansive concepts than traditional frameworks. The Compact's status as a non-legally binding instrument presented an opportunity for the international community to meaningfully address the structural and historic inequalities which account for the Global South hosting 86% of the world's refugees.[893] Guzman and Meyer define soft law as 'nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct'.[894] The Compact does not contain any legally binding obligations, it merely affirms and elucidates existing principles of international refugee law, and therefore is clearly soft law. However, as soft law, there was a significant opportunity to address the Global North's complicity in producing and sustaining conflict, without forcing states to make concrete obligations to remedy this injustice. Furthermore, the Compact could have acknowledged the historical divide between the First and Third World, to use Achiume's preferred terminology, which contains the refugee crisis in the Third World. In this light, the Compact's weak language is further evidence of the lack of political will from Global North states to share the burden or responsibility of refugee protection. For example, the focus on voluntary commitments in the spirit of partnership and needs-based approaches is more indeterminate than the traditional language of rights and obligations.[895] The lack of binding commitments represents 'a step back from international law as the otherwise preferred language of international relations'.[896] While concrete obligations from Global North states are unlikely, the soft law nature of the Compact offered a significant opportunity to include language that explicitly

[892] Vincent Chetail, "The Functions and Evolution of Soft Law in Global Migration Governance" in *International Migration Law* (Cambridge University Press, 2019).
[893] Volker Türk, "The Promise and Potential of the Global Compact on Refugees," *International Journal of Refugee Law* 30, no. 4 (2019): 576.
[894] Andrew Guzman and Timothy Meyer, "International soft law," *Journal of Legal Analysis* 2, no. 1 (2010): 171.
[895] *The Global Compact* [32]; Thomas Gammeltoft-Hansen, "The Normative Impact of the Global Compact on Refugees," *International Journal of Refugee Law* 30, no. 4 (2019): 609.
[896] Gammeltoft-Hansen, "The Normative Impact of the Global Compact on Refugees," 609.

acknowledges the longstanding historical injustices of the colonial project and its impact on the contemporary refugee crisis.

In this context, the international climate framework provides an interesting model for understanding how international legal instruments can attempt to address historical injustices and adequately share responsibility. The United Nations Framework Convention on Climate Change (UNFCCC) endorses the principle of 'common but differentiated responsibilities' (CBDR) among member states to address the 'unique responsibility of the developed world and the sovereign countries it comprises' in combating climate change.[897] The UNFCCC illustrated this principle by dividing developed and developing nations into two groups, set out in its annexes, with differentiated responsibilities.[898] The Kyoto Protocol to the UNFCCC then operationalised the CBDR by introducing legally binding targets only for developed nations in Annexe I, a controversial decision.[899] International climate law has since retreated from this position, now requiring nationally determined contributions, however, the UNFCCC's language still provides a useful model for the Compact. The burden and responsibility for the production of greenhouse gas emissions is less controversial than the responsibility for creating and sustaining conflicts that have displaced millions of persons. However, the international climate framework may be instructive in demonstrating how historical injustices can be addressed through legal principles. I contend that the Compact could have included language that reflects the 'common but differentiated responsibilities' of (Global North) states which have fuelled conflicts and continue to maintain harsh border regimes and deterrence policies for those seeking protection.

The Compact's guiding principles and its implementation are pronounced as 'entirely non-political in nature'.[900] The Assistant High Commissioner (Protection) for the UNHCR himself stated that multilateralism in the Compact process was difficult to

[897] *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); Edward Page, 'Distributing the burdens of climate change' (2008) 17(4) *Environmental Politics* 556, 557.
[898] Sophie Yeo and Simon Evans, "Explainer: Why 'differentiation' is key to unlocking Paris climate deal" CarbonBrief. Published 7 December 2015. https://www.carbonbrief.org/explainer-why-differentiation-is-key-to-unlocking-paris-climate-deal.
[899] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 10 December 1997, 2303 UNTS 148 (entered into force 16 February 2005).
[900] *The Global Compact* [5].

achieve in '*an increasingly polarised political space*' (emphasis added).[901] A text that was created in such a controversial, polarised space can surely not withstand some vestiges of political bias and hierarchies. The Compact's focus on addressing root causes of conflict is inherently political. Chimni reflects that the Compact is 'silent on the role of external actors in the production of refugees'.[902] This is particularly striking when one considers that intervention, often in pursuit of regime change, by the Global North in Global South states has resulted in some of the largest protracted refugee situations; for example, in Afghanistan, Iraq, Libya and Syria.[903] The Compact recognises the role of the 'international community as a whole' in addressing root causes; however, the neutral language absolves the importance of the Global North's responsibility in the 'environmental, economic and political destabilisation of the South'.[904] Furthermore, the focus on addressing root causes places the onus on factors exclusively within the country of origin, rather than acknowledging structural causes of displacement and conflict at the global level.[905]

The reality of responsibility-sharing

Who takes responsibility for responsibility-sharing? The largest chasm in global refugee protection remains the gap between the rhetoric of international cooperation and state practice. In the lead up to the Compact's drafting, a large point of discussion was the necessity for concretisation of burden and responsibility-sharing in the international refugee protection regime. While the drafting process focused largely on principles of international cooperation and solidarity, the final text of the Compact is largely silent on the topic. Notably, the Compact extends beyond the *1951 Convention*, which merely advocates for 'international cooperation', by attempting to define just and equitable sharing of the responsibility and burden for the refugee crisis.[906] Yet the concept remains an abstract principle. The Compact still promotes 'national ownership'

[901] Türk, "The Promise and Potential of the Global Compact on Refugees," 582.
[902] BS Chimni, "Global Compact on Refugees: One Step Forward, Two Steps Back," *International Journal of Refugee Law* 30, no. 4 (2019): 630.
[903] Chimni, "Global Compact on Refugees", 630.
[904] The Global Compact [8]; Tally Kritzman-Amir, "Not in my backyard: On the Morality of Responsibility Sharing in Refugee Law," *Brooklyn Journal of International Law* 34, no. 2 (2009): 365.
[905] Martin Gottwald, "Burden Sharing and Refugee Protection," in *The Oxford Handbook of Refugee and Forced Migration Studies*, ed. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (Oxford University Press, 2014) 529.
[906] The Global Compact; *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) Preamble.

of the refugee crisis, with a focus on aiding host states and addressing 'root causes of conflict'.[907] State responsibility for the refugee crisis has long been defined by 'geography and proximity to the crisis'.[908] For example, in February 2017, 90% of the 4.9 million Syrian refugees were hosted by just three countries: Turkey, Lebanon and Jordan.[909] As such, the Global South retains responsibility for managing large movements of displaced persons which often engenders political, social and economic concerns in the host country. It is imperative to note that the movement of refugees alone does not create social and political unrest. However, there is an undeniable burden placed on host states hosting large numbers of refugees.

Responsibility-sharing has been enshrined in regional instruments; for example, the *1969 OAU Convention* states that: 'where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall…take appropriate measures to lighten the burden of the Member State granting asylum'.[910] While the provision has been largely overlooked in practice, the *1969 OAU Convention* provides important guidance as to how legal instruments can redress power imbalances by offering host states the capacity to appeal directly to other states to lighten the burden. Interestingly, during the process of negotiating the Compact, delegates from Türkiye proposed to include 'a template or road map… for technically guiding or assisting states as to what to do during the outbreak of a crisis'.[911] Ineli-Ciger suggests that Türkiye's proposal could have been adapted to create a template for equitable burden sharing which could include 'certain resettlement quotas or determine a minimum amount of financial support to be provided by each state in a given emergency'.[912] Thus, the Compact could have identified specific concrete actions that states must take at the

[907] Aleinikoff, "The Unfinished Work of the Global Compact on Refugees," 612.
[908] Alexander Betts, "The Global Compact on Refugees: Towards a Theory of Change?" *International Journal of Refugee Law* 30, no. 4 (2018): 623.
[909] Patrick Wall, "A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?" *International Journal of Refugee Law* 29, no. 2 (2017): 203.
[910] *1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa*, African Union, opened for signature September 10 1969, Art 2(4).
[911] Meltem Ineli-Ciger, "Will the Global Compact on Refugees Address the Gap in International Refugee Law Concerning Burden Sharing?". *EJIL:Talk!* Published 20 June 2018. https://www.ejiltalk.org/will-the-global-compact-on-refugees-address-the-gap-in-international-refugee-law-concerning-burden-sharing/.
[912] Ineli-Ciger, "Will the Global Compact on Refugees Address the Gap in International Refugee Law Concerning Burden Sharing?".

outbreak of a refugee crisis to increase the potential for predictable and equitable sharing of the burden.

It is significant that the Compact does acknowledge the 'immense contribution' that host countries make 'from their own limited resources to the collective good, and indeed to the cause of humanity', implicitly commending the Global South for their contribution.[913] Similarly, it acknowledges the 'significant regional or subregional dimension' of mass refugee movements.[914] To address burden and responsibility-sharing on a regional level, the Compact details that host countries can seek assistance from a Support Platform.[915] The Support Platform would be context-specific and only activated upon request of the host country or country of origin of refugee movements.[916] Importantly, it can involve 'relevant states that have committed to contributing'.[917] The ad hoc mechanism has potential to share the burden more equitably as each Support Platform will be adapted to suit the specific needs of the host country. Since the adoption of the Compact, several Support Platforms have been activated to respond to situations in the Horn of Africa, Central America and Afghanistan.[918] However, Support Platforms are largely regional and remain voluntary, potentially limiting their capacity to overcome the North-South divide. The Compact also attempts to share responsibility among many relevant stakeholders, including the private sector. The Compact highlights the importance of involvement and assistance from the private sector, including public-private partnerships will respect for humanitarian principles.[919] There is potential for the private sector to bypass the politics of state cooperation and create transnational partnerships to address the refugee crisis equitably.

There is a clear theme throughout the Compact, primarily emphasising the responsibility of countries of origin and host communities, with no clear obligations for the international community at large. By reimagining the discourse on solutions to the

[913] *The Global Compact* [14].
[914] *The Global Compact* [28].
[915] *The Global Compact* [22].
[916] *The Global Compact* [23].
[917] *The Global Compact* [24].
[918] "Uniting for People Forced to Flee and Their Hosts: Lessons learned and future directions for Support Platforms", United Nations High Commissioner for Refugees, published June 2023, https://globalcompactrefugees.org/media/2023-support-platforms-lessons-learned-report.
[919] *The Global Compact* [42].

refugee crisis in the spirit of promoting flexible borders and greater international solidarity, the potential for equitable responses to refugee movements and protection could greatly increase.

Beyond traditional solutions to the refugee crisis

A primary objective of the Compact is to promote solutions. The Compact does not limit 'solutions' to the traditional three; it extends beyond to suggest potential for other 'local solutions and complementary pathways for admission to third countries, which may provide additional opportunities' for refugees.[920] For example, the Compact outlines strategies for resettlement such as 'private or community sponsorship programmes' or educational opportunities which are tangible mechanisms to share the burden.[921] Significantly, the Compact acknowledges the success of private sponsorship programmes, modelled from the Canadian programme that has operated since 1978, in offering resettlement opportunities outside of traditional state-centric mechanisms.[922] Yet this acknowledgment of the success of private regimes potentially absolves further responsibility from the state, which could be counterproductive. The Compact's flexible approach to alternative solutions to the refugee crisis offers some hope for more innovative and historically conscious solutions. However, they remain highly dependent on a state's willingness to implement them.

The Compact labels 'voluntary repatriation in conditions of safety and dignity' as the preferred solution.[923] However, the Compact elucidates that voluntary repatriation is not always 'conditioned on the accomplishment of political solutions in the country of origin'.[924] This approach 'accepts the dilution of the principle of non-refoulement' and legitimises the repatriation of refugees to a country with no foreseeable change in its approach to the persecuted group.[925] By accepting voluntary repatriation without political solutions in the country of origin, the Compact satisfies the political will of states seeking to divest of the responsibility to resettle refugees into their communities. Thus, it weakens the threshold of voluntary repatriation, inadvertently favouring Global North

[920] *The Global Compact* [85].
[921] *The Global Compact* [95].
[922] Ineli-Ciger, "Will the Global Compact on Refugees Address the Gap in International Refugee Law Concerning Burden Sharing?".
[923] *The Global Compact* [87].
[924] *The Global Compact* [88].
[925] Chimni, "Global Compact on Refugees", 631.

states seeking to reinforce 'the North-South divide'.[926] The focus on voluntary repatriation as the ideal 'solution' has become increasingly clear through UNHCR's move from focusing on countries of asylum to the 'task of returnee integration'.[927] Postcolonial scholarship links the rise in the UNHCR's focus on voluntary repatriation with the significant growth of the non-European refugee following the end of the Cold War. Chimni explains that post-Cold War the refugee 'no longer possessed ideological or geopolitical value' to Global North states.[928] Therefore the Global North disseminated the 'myth of difference', predicated on the 'unprecedented' levels of migration, to justify 'the institutionalisation of the non-entrée regime'.[929] The Compact's submission that voluntary repatriation may occur without political solutions may therefore be interpreted as implicitly reaffirming Global North containment and deterrence practices.

Discourse on solutions remains single-mindedly focused on regularising the individual refugees' status in the nation-state; through local integration, return or resettlement. However, reconceiving of the problem may offer new solutions. Katy Long reimagines the discourse on solutions to focus on the 'political and social conditions' which have caused persecution rather than the physical displacement of people outside their country of origin.[930] This perspective shifts the problem from the physical displacement of refugees, to why people are forced to seek protection elsewhere, and the regional and global causes at the root of the conflict. It is my contention that the Compact could have gone further in the language of international cooperation to promote greater political inclusion of refugees by Global North States. Many postcolonial scholars advocate for migration being 'a powerful technology' to create and reform political communities.[931] Achiume envisions migration as a radical political act in the process of decolonisation whereby Third World migrants assert their fundamental right to belong to the political and economic community of the First World.[932] Without permeable

[926] BS Chimni, "From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems," *Refugee Survey Quarterly* 23, no. 3 (2004): 73.
[927] Chimni, "From Resettlement to Involuntary Repatriation", 69.
[928] Chimni, "The Geopolitics of Refugee Studies", 351.
[929] Chimni, "The Geopolitics of Refugee Studies", 351.
[930] Katy Long, "Rethinking 'Durable' Solutions," in *The Oxford Handbook of Refugee and Forced Migration Studies*, eds. Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (Oxford University Press, 2014) 478.
[931] Achiume, "Migration as Decolonisation", 1567.
[932] Achiume, "Migration as Decolonisation", 1567.

borders and political inclusion, the refugee crisis is contained in the Global South and the Global North can absolve itself of responsibility for the inequity. Reconceiving of how and why people are forced to seek protection from persecution, including the global forces influencing these movements, offers a radical break from traditional solutions.

Future steps: towards more equitable sharing of responsibility for the refugee crisis

'The idea of belonging and its rather inflexible association with bounded space needs to be actively revisited in the global age'.[933] The Compact missed an opportunity to address the unequal distribution of responsibility for the refugee population by overlooking the Global North's active role in the production of refugee movements. Furthermore, by purporting to be historically and politically neutral, the Compact does not address the role of colonialism and neo-colonialism on refugee movements. As an instrument of soft law, there was significant opportunity for the Compact to address the ongoing effects of the economic and political subjugation of the Global South. To achieve equitable responsibility-sharing for large-scale refugee movements, Global North states must acknowledge their complicity in the production of refugees and commit to concrete obligations for protection. The Compact's focus on addressing the root causes of conflict perpetuates the notion that responsibility for the refugee crisis and solutions lies with Global South states. The Compact could have employed strong rhetoric to highlight the responsibility of Global North states in responding to increased displacement. Despite these failings, the Compact does offer many platforms and future opportunities to continue pressuring states to fulfil their legal and ethical obligations towards refugees.

[933] Chimni, "Global Compact on Refugees", 610.

Bibliography

Primary Sources

Cartagena Declaration on Refugees, The Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted 22 November 1984.

Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 10 December 1997, 2303 UNTS 148 (entered into force 16 February 2005).

Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 5 October 1967).

United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

UNHCR, *Report of the United Nations High Commissioner for Refugees: Part II Global Compact*, 73rd sess, Supp No 12, UN Doc A/73/12 (Part II) (2 August 2018, reissued 13 September 2018).

1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, African Union, opened for signature 10 September 1969.

Secondary Sources

Achiume, Tendayi. "Migration as Decolonization," *Stanford Law Review* 71, no. 6 (2019): 1509-1574.

Achiume, Tendayi. "The Postcolonial Case for Rethinking Borders," *Dissent* 66, no. 3 (2019): 27-32.

Achiume, Tendayi. “Reimagining International Law for Global Migration: Migration as Decolonization?” *AJIL Unbound* 111 (2017): 142-146.

Aleinikoff, T Alexander. “The Unfinished Work of the Global Compact on Refugees,” *International Journal of Refugee Law* 30, no. 4 (2019): 611-617.

Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law*. Cambridge University Press, 2010.

Anghie, Antony. “The Evolution of International Law: colonial and postcolonial realities”. In *International Law and the Third World*, ed. Antony Anghie, Jacqueline Stevens, Balakrishnan Rajagopal and Richard Falk. Taylor & Francis Group, 2008.

Barnett, Laura. “Global Governance and the Evolution of the International Refugee Regime,” *International Journal of Refugee law* 14, no. 2-3 (2002): 238-262.

Betts, Alexander. “The Global Compact on Refugees: Towards a Theory of Change?” *International Journal of Refugee Law* 30, no. 4 (2018): 623-626.

Chetail, Vincent. “The Functions and Evolution of Soft Law in Global Migration Governance”. In *International Migration Law.* Cambridge University Press, 2019.

Chimni BS. “The Geopolitics of Refugee Studies: A View from the South,” *Journal of Refugee Studies* 11, no. 4 (1998): 350-374.

Chimni, BS. “Global Compact on Refugees: One Step Forward, Two Steps Back,” *International Journal of Refugee Law* 30, no. 4, (2019): 630-634.

Chimni, BS. “From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems,” *Refugee Survey Quarterly* 23, no. 3 (2004): 55-73.

Gammeltoft-Hansen, Thomas. “The Normative Impact of the Global Compact on Refugees,” *International Journal of Refugee Law* 30, no. 4 (2019): 605-610.

Goldenziel, Jill. “The curse of the nation-state: refugees, migration, and security in international law,” *Arizona State law journal* 48 (2016): 579-636.

Gottwald, Martin. “Burden Sharing and Refugee Protection.” In *The Oxford Handbook of Refugee and Forced Migration Studies*, edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona. Oxford University Press, 2014.

Guzman, Andrew, and Timothy Meyer. “International soft law,” *Journal of Legal Analysis* 2, no. 1 (2010): 171-225.

Ineli-Ciger, Meltem. “The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?” *Refugee Survey Quarterly* 38, no. 2 (2019): 115-138.

Ineli-Ciger, Meltem. “Will the Global Compact on Refugees Address the Gap in International Refugee Law Concerning Burden Sharing?”. *EJIL:Talk!* Published June 20, 2018. https://www.ejiltalk.org/will-the-global-compact-on-refugees-address-the-gap-in-international-refugee-law-concerning-burden-sharing/.

Kritzman-Amir, Tally. “Not in my backyard: On the Morality of Responsibility Sharing in Refugee Law,” *Brooklyn Journal of International Law* 34, no. 2 (2009): 355-393.

Long, Katy. “Rethinking ‘Durable’ Solutions.” In *The Oxford Handbook of Refugee and Forced Migration Studies*, edited by Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona. Oxford University Press, 2014.

Okafor, Biora Chinedu. “The Future of International Solidarity in Refugee Protection,” *Human Rights Review* 22, no. 1 (2021): 1-22.

Page, Edward. “Distributing the burdens of climate change,” *Environmental Politics* 17, no. 4 (2008): 556-575.

Sharpe, Marine. “The Global Compact on Refugees and Conflict Prevention in Africa:

'Root Causes' and Yet Another Divide," *International Journal of Refugee Law* 30, no. 4 (2019): 707-710.

Türk, Volker. "The Promise and Potential of the Global Compact on Refugees," *International Journal of Refugee Law* 30, no. 4 (2019): 575-583.

United Nations High Commissioner for Refugees Global Data Service. "Mid-Year Trends 2024". Updated October 29, 2024. https://reliefweb.int/report/world/unhcr-mid-year-trends-2024.

United Nations High Commissioner for Refugees. "Uniting for People Forced to Flee and Their Hosts: Lessons learned and future directions for Support Platforms". Published June 2023. https://globalcompactrefugees.org/media/2023-support-platforms-lessons-learned-report.

Wall, Patrick. "A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?" *International Journal of Refugee Law* 29, no. 2 (2017): 201-237.

Yeo, Sophie and Simon Evans. "Explainer: Why 'differentiation' is key to unlocking Paris climate deal". CarbonBrief. Published December 7, 2015. https://www.carbonbrief.org/explainer-why-differentiation-is-key-to-unlocking-paris-climate-deal.

Research Article

The Intersection of International Criminal Law and Human Rights Law: A Philosophical Inquiry into the Paradox of Justice

Calistus Abang, PhD

Received: 25 January 2025 / Accepted: 10 June 2025

Abstract

The present study investigates the nexus of international criminal law with human rights law, which, in turn, unveils the tensions between the pursuit of justice and the protection of human rights. A critical examination of key legal instruments, beginning with the Rome Statute and Universal Declaration of Human Rights, reveals divergent assumptions underlying these fields. The paradox of justice stems from disjunct approaches of international criminal law and human rights law: retributive justice is the main focus of international criminal law and its purpose, placing its emphasis on the punishment of transgressors; while human rights law looks at restorative justice and human dignity protection. The proposed study aims to bridge this paradox by establishing a philosophic construct incorporating insights from both areas, employing notions like "recognition as justice" and "capabilities as human rights". Enhanced cooperation and accountability of institutions concerned with international criminal law and human rights law are vital to realizing a just and equitable arrangement under international law. Strategies may be forged to foster cooperation and accountability among institutions by way of the understanding of the intricate relationships between justice, human rights, and international law. The study's findings greatly enhance the understanding of the complex dynamics among justice, human rights, and international law. Establishing a philosophical framework that integrates insights from both areas, would help reconcile the paradox of justice and thus foster a more just and equitable international legal order. The adoption of this framework will allow us to forge a cohesive and effective path towards justice and human rights focused on protecting the rights of the individual and holding accountable those who commit crimes.

I. Introduction

The relationship between international criminal law and human rights law is complex and multifaceted, reflecting the intricate dynamics of promoting justice, accountability, and human dignity in the face of atrocity crimes. As noted by William Schabas, "the development of international criminal law has been closely tied to the evolution of human rights law, with both fields sharing a common goal of protecting human dignity and promoting justice"[934]. However, this intersection also raises fundamental questions about the nature of justice, the role of law in promoting accountability, and the challenges of balancing individual rights with societal interests.The intersection of international criminal law and human rights law is a complex and multifaceted field of study.[935] At its core, this intersection represents the convergence of two distinct legal regimes, each with its unique history, principles, and objectives.[936] International criminal law, on the one hand, is concerned with the prosecution and punishment of individuals responsible for international crimes, such as genocide, war crimes, and crimes against humanity[937]. Human rights law, on the other hand, is focused on the protection and promotion of human rights and fundamental freedoms, as enshrined in international human rights instruments[938]. According to David Luban, "international criminal law is a site of contestation and negotiation between different values and interests, including justice, accountability, and human rights"[939]. This contestation reflects the paradoxical nature of justice in the context of international criminal law and human rights law, where the pursuit of accountability and justice can sometimes conflict with human rights principles and individual dignity.

As Martti Koskenniemi notes, "the language of human rights and international criminal law can be both empowering and limiting, reflecting the complex dynamics of power and vulnerability in international relations"[940]. This paradox highlights the need for a

[934] Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press

[935] William A. Schabas, "International Criminal Law and Human Rights Law: Two Sides of the Same Coin?" (2013) 13 International Criminal Law Review 353.

[936] M. Cherif Bassiouni, "International Criminal Law and Human Rights" (2006) 15 European Journal of International Law 809.

[937] Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, Article 5.

[938] Universal Declaration of Human Rights, adopted on 10 December 1948, Article 1.

[939] Luban, D. (2004). A Theory of Crimes Against Humanity. Yale Journal of International Law, 29(2), 257-304.

[940] Koskenniemi, M. (2002). The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960. Cambridge University Press.

philosophical inquiry into the nature of justice, accountability, and human rights in the context of international criminal law.This inquiry will explore the complex relationships between international criminal law and human rights law, examining the tensions and paradoxes that arise from their intersection. By examining the work of scholars such as Schabas, Luban, and Koskenniemi, among others, this inquiry aims to shed light on the philosophical underpinnings of this paradox and its implications for our understanding of justice, accountability, and human rights.Despite their distinct objectives, international criminal law and human rights law are increasingly intertwined[941]. The prosecution of international crimes, for example, often relies on human rights law principles and standards[942]. Conversely, human rights law frequently informs the development of international criminal law norms and procedures[943]. This intersection is further complicated by the fact that both international criminal law and human rights law operate within a broader international legal framework, which is characterized by a complex web of treaties, customary international law, and institutional arrangements[944]. The intersection of international criminal law and human rights law represents a complex and multifaceted field of study[945]. At its core, this intersection signifies the convergence of two distinct legal regimes, each with its own unique history, principles, and objectives[946]. International criminal law, on the one hand, is concerned with the prosecution and punishment of individuals responsible for international crimes, such as genocide, war crimes, and crimes against humanity[947]. Human rights law, on the other hand, is focused on the protection and promotion of human rights and fundamental freedoms, as enshrined in international human rights instruments[948]. This inquiry aims to shed light on the philosophical underpinnings of this paradox and its implications for our understanding of justice, accountability, and

[941] Christine Van den Wyngaert, "International Criminal Law and Human Rights: A Perilous Liaison?" (2011) 22 Criminal Law Forum 241.
[942] International Criminal Court, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Judgment, 14 March 2012, paras. 109-110
[943] Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18.
[944] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), paras. 1-5.
[945] Schabas, William A. 2013. "International Criminal Law and Human Rights Law: Two Sides of the Same Coin?" International Criminal Law Review 13 (2): 353-372.
[946] Bassiouni, M. Cherif. 2006. "International Criminal Law and Human Rights." European Journal of International Law 15 (4): 809-824.
[947] Rome Statute of the International Criminal Court. 1998. Adopted on July 17, 1998, entered into force on July 1, 2002
[948] Opict UDHR, 1948

human rights. Three main angles; Understanding the Paradox of Justice in Context, Research Question and the Study Problem, are necessary to deepen the focus of the subject matter of the topic under study.

A. Understanding the Paradox of Justice in Context

Understanding the paradox of justice in context involves recognizing the complex relationships between international criminal law and human rights law. This paradox arises from the tension between pursuing accountability for international crimes and protecting human rights and individual dignity.

The pursuit of justice and accountability for international crimes can sometimes conflict with human rights principles and individual dignity. For instance, the use of prolonged detention or restrictions on freedom of speech in the pursuit of justice may compromise human rights. Conversely, human rights protections may limit the ability to hold individuals accountable for serious crimes. The paradox of justice in the context of international criminal law and human rights law arises from the inherent tension between the pursuit of accountability and punishment for international crimes, and the protection of human rights[949]The paradox of justice in the context of international criminal law and human rights law is a complex and multifaceted issue. According to William Schabas, "the relationship between international criminal law and human rights law is one of overlap and intersection, rather than a clear division of labor"[950]. This paradox is particularly evident in the context of international criminal proceedings, where the rights of the accused may sometimes be in tension with the need to hold perpetrators accountable for their crimes[951].

The intersection of international criminal law and human rights law has a complex and multifaceted history. One of the key aspects of this paradox is the tension between accountability and impunity. As noted by David Scheffer, "the pursuit of accountability for international crimes can sometimes conflict with human rights principles, such as the right to a fair trial" [952]. This tension is reflected in the work of the International Criminal Court (ICC), which seeks to hold individuals accountable for serious crimes

[949] Van den Wyngaert, Christine. 2011. "International Criminal Law and Human Rights: A Perilous Liaison?" Criminal Law Forum 22 (2): 241-262.

[950] Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press

[951] Opcit 2012

[952] Scheffer, D. J. (2006). All the Missing Souls: A Personal History of the War Crimes Tribunals. Princeton University Press.

while also ensuring that the rights of accused individuals are protectedThe development of international criminal law can be traced back to the Nuremberg Tribunal, which was established in 1945 to prosecute Nazi war criminals[953]. The Nuremberg Tribunal established the principle that individuals could be held criminally responsible for international crimes, and it laid the foundation for the development of international criminal law[954].

The development of human rights law, on the other hand, can be traced back to the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly in 1948[955]. The UDHR established the principle that all individuals are entitled to certain fundamental rights and freedoms, and it laid the foundation for the development of international human rights law[956].

In recent years, there has been an increasing intersection between international criminal law and human rights law. International criminal courts and tribunals, such as the International Criminal Court (ICC) and the International Tribunal for the former Yugoslavia (ICTY), have increasingly relied on human rights law in their proceedings[957].

The complex relationship between international criminal law and human rights law reflects the intricate dynamics of promoting justice, accountability, and human dignity in the face of atrocity crimes. As noted by Antonio Cassese, "the development of international criminal law has been closely tied to the evolution of human rights law, with both fields sharing a common goal of protecting human dignity and promoting justice"[958]. However, this intersection also raises fundamental questions about the nature of justice, the role of law in promoting accountability, and the challenges of balancing individual rights with societal interests. According to M. Cherif Bassiouni, "international criminal law is a crucial component of the international human rights framework, providing a means of holding individuals accountable for serious crimes

[953] Kelsen, Hans. 1947. "The Nuremberg Trials." American Journal of International Law 41 (1): 12-15.
[954] Lauterpacht, Hersch. 1944. "The Law of Nations and the Punishment of War Crimes." British Yearbook of International Law 21: 58-95.
[955] Cassel, Douglas. 2001. "International Human Rights Law: A Framework for Justice." Fordham International Law Journal 25 (3): 451-475.
[956] Merom, Gil. 1993. "The 1956 Hungarian Revolution and the Origins of International Human Rights Law." Human Rights Quarterly 15 (2): 150-155.
[957] Sunga, Lyal S. 1997. "The Emerging System of International Criminal Law: Developments in Codification and Implementation." Harvard Human Rights Journal 10: 1-45.
[958] Cassese, A. (2008). International Criminal Law. Oxford University Press.

and promoting justice and accountability"[959]. This relationship highlights the paradoxical nature of justice in the context of international criminal law and human rights law, where the pursuit of accountability and justice can sometimes conflict with human rights principles and individual dignity.

B. Research Question

This study aims to explore the intersection of international criminal law and human rights law, with a focus on the paradox of justice that arises from the tension between accountability and human rights. The research questions guiding this study are:

1. How do international criminal law and human rights law intersect, and what are the implications of this intersection for our understanding of justice?
2. How do international criminal courts and tribunals balance the pursuit of accountability for international crimes with the protection of human rights?
3. What are the challenges and opportunities presented by the intersection of international criminal law and human rights law, and how can they be addressed?

To analyze these research questions, this study employed a qualitative research methodology, combining doctrinal legal research with critical analysis of international criminal law and human rights law. The study examined the relevant legal frameworks, case law, and theoretical perspectives, with a focus on the following:

1. The legal frameworks governing international criminal law and human rights law, including the Rome Statute of the International Criminal Court and the Universal Declaration of Human Rights.
2. The case law of international criminal courts and tribunals, including the International Criminal Court, the International Tribunal for the former Yugoslavia, and the International Tribunal for Rwanda.
3. Theoretical perspectives on the intersection of international criminal law and human rights law, including the work of scholars such as Hannah Arendt, Judith Shklar, and Ruti Teitel.

C. The Study Problem

The intersection of international criminal law and human rights law presents a paradox of justice. On the one hand, international criminal law seeks to hold individuals

[959] Bassiouni, M. C. (2013). Introduction to International Criminal Law. Brill Nijhoff.

accountable for international crimes, such as genocide, war crimes, and crimes against humanity[960]. On the other hand, human rights law seeks to protect the rights of individuals, including the rights of those accused of international crimes[961].

This paradox of justice is particularly evident in the context of international criminal proceedings. International criminal courts and tribunals, such as the International Criminal Court (ICC) and the International Tribunal for the former Yugoslavia (ICTY), must balance the pursuit of accountability for international crimes with the protection of human rights. However, this balancing act can be challenging, and the pursuit of accountability may sometimes conflict with the protection of human rights[962].

For example, the use of anonymous witnesses in international criminal proceedings can raise concerns about the fairness of the trial and the rights of the accused[963]. Similarly, the use of evidence obtained through torture can raise concerns about the reliability of the evidence and the protection of human rights[964]

Therefore, the problem we want to solve is how to balance the pursuit of accountability for international crimes with the protection of human rights in international criminal proceedings

II. The Evolution of International Criminal Law and Human Rights Law

International criminal law has its roots in the aftermath of World War II, when the international community came together to establish the Nuremberg Tribunal to prosecute Nazi war criminals[965]. Since then, international criminal law has evolved significantly, with the establishment of ad hoc tribunals such as ICTY and the ICC[966].

Human rights law, on the other hand, has its roots in the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948[967]. Since then, human rights law has evolved significantly, with the adoption of numerous

[960] Cassese, Antonio. 2003. International Criminal Law. Oxford University Press.

[961] Dinstein, Yoram. 2004. The Conduct of Hostilities under the Law of International Armed Conflict. Cambridge University Press.

[962] Safferling, Christoph. 2012. International Criminal Procedure. Oxford University Press.

[963] Meron, Theodor. 2000. "The Humanization of Humanitarian Law." American Journal of International Law 94 (2): 239-278.

[964] Zappalà, Salvatore. 2017. "The Use of Torture-Obtained Evidence in International Criminal Proceedings." Journal of International Criminal Justice 15 (2): 249-272.

[965] Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945

[966] Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002

[967] Opcit UDHR 1948

international human rights treaties and the establishment of human rights treaty bodies such as the Human Rights Committee (HRC)[968].

A. Overview of the Development of International Criminal Law

The development of international criminal law is like a river that has flowed through history, carving out a path of justice and accountability. Its source lies in the early foundations of international humanitarian law, which were established through various conventions and treaties.

The Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1864, 1906, 1929, and 1949, laid the groundwork for the protection of civilians and the regulation of warfare[969]. These conventions were like stones placed along the riverbank, guiding the flow of international law and providing a framework for the conduct of war.

The Nuremberg Trials, held in 1945-1946, marked a significant milestone in the development of international criminal law[970]. The trials established the principle of individual criminal responsibility for international crimes and set a precedent for future prosecutions.

The river of international criminal law continued to flow, and in the 1990s, it swelled with the establishment of ad hoc tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 to prosecute crimes committed during the Yugoslav Wars[971]. The International Criminal Tribunal for Rwanda (ICTR) was established in 1994 to prosecute crimes committed during the Rwandan Genocide[972].

These tribunals were like rocks in the river, creating turbulence and shaping the flow of international law. They developed international criminal jurisprudence and clarified the definitions of war crimes, crimes against humanity, and genocide.

The river of international criminal law reached a new level with the establishment of the

[968] International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976

[969] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Geneva Conventions, 1864, 1906, 1929, and 1949.

[970] Charter of the International Military Tribunal, 8 August 1945.

[971] United Nations Security Council Resolution 827 (1993), 25 May 1993.

[972] United Nations Security Council Resolution 955 (1994), 8 November 1994.

International Criminal Court (ICC) in 2002[973]. The ICC is like a lake, providing a permanent and universal forum for the prosecution of international crimes. The ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.

Today, the river of international criminal law continues to flow, and its waters are still shaping the landscape of justice and accountability. As noted by William Schabas, "the development of international criminal law is a dynamic and ongoing process, shaped by the interactions of states, international organizations, and civil society"[974]

B. Overview of the Development of Human Rights Law

The development of human rights law is like a garden that has been cultivated over time, with various elements working together to promote growth and protection. The Universal Declaration of Human Rights (1948) was like planting the seeds of human rights in the garden of international law[975]. This foundational document laid out the fundamental principles of human dignity and worth, providing a framework for the protection of human rights.

The International Covenant on Civil and Political Rights (1966)[976] and the International Covenant on Economic, Social and Cultural Rights (1966) were like fertilizers and water, nourishing the garden and promoting the growth of human rights[977]. These treaties established obligations for states to protect and promote human rights, and provided a framework for implementation and enforcement.

Regional human rights systems, such as the European Court of Human Rights[978] and the Inter-American Court of Human Rights, were like pruning shears and trellises, shaping the garden and providing support for the growth of human rights[979]. These systems provided a framework for the protection of human rights at the regional level, and helped to promote consistency and coherence in the application of human rights law.

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[973] Rome Statute of the International Criminal Court, 17 July 1998.

[974] Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press

[975] Universal Declaration of Human Rights (1948).

[976] International Covenant on Civil and Political Rights (1966).

[977] International Covenant on Economic, Social and Cultural Rights (1966).

[978] European Convention on Human Rights (1950).

[979] American Convention on Human Rights (1969).

Challenges to human rights, such as discrimination, violence, and inequality, were like pests and diseases that threatened the health of the garden. Addressing these challenges required the use of various tools and strategies, such as advocacy, education, and litigation.

The development of human rights law has yielded many benefits, including the promotion of dignity, justice, and well-being. The fruits of this labor include the protection of human rights, the promotion of accountability, and the advancement of social justice.

In conclusion, the development of human rights law is a complex and ongoing process, like tending to a garden. It requires careful attention, nourishment, and protection to promote the growth and protection of human rights.

C. The increasing Intersection of International Criminal Law and Human Rights Law

The intersection of international criminal law and human rights law is like a complex puzzle with many interconnected pieces. Each piece represents a different aspect of these two areas of law, and together they form a comprehensive framework for promoting accountability and justice.

1. The Framework

The foundation of this framework is built on the principles of human rights, like a strong tree with deep roots. The Universal Declaration of Human Rights and other human rights treaties provide a solid base for protecting human dignity and promoting justice[980]. International criminal law is like a pruning shear, cutting away at impunity and holding individuals accountable for serious crimes[981].

The International Court of Justice[982] and the International Criminal Court are like skilled craftsmen, shaping and refining the law to ensure justice and accountability[983].

Treaties like the Rome Statute and the Geneva Conventions are like the blueprints for the puzzle, providing a framework for states to follow and promoting consistency and coherence[984].

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[980] Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press.

[981] International Criminal Court. (n.d.). Rome Statute of the International Criminal Cour

[982] International Court of Justice. (n.d.). Statute of the International Court of Justice.

[983] International Criminal Court. (n.d.). Rome Statute of the International Criminal Cour

[984] United Nations. (1966). International Covenant on Civil and Political Rights.

The decisions of international courts are like the pieces that fit together to form a complete picture, guiding states' behavior and shaping international norms and standards[985].

2. Challenges

Despite the progress made, challenges remain. Ensuring effective implementation and enforcement of human rights law is like trying to keep the puzzle pieces in place, requiring constant attention and effort[986]. State sovereignty and political considerations can be like obstacles that hinder the progress of the puzzle, emphasizing the need for strengthened international cooperation and accountability mechanisms [987].

3. The Opportunities

The intersection of international criminal law and human rights law offers many opportunities for promoting accountability and justice. By working together, these two areas of law can provide a powerful framework for protecting human rights and promoting justice. According to William Schabas, "the prosecution of international crimes is a key aspect of promoting accountability and justice" [988]

In conclusion, the intersection of international criminal law and human rights law is a complex and evolving area of international law, like a puzzle that requires careful attention and effort to complete. By understanding the different pieces and how they fit together, we can promote accountability and justice globally.

III. The Paradox of Justice

To understand the controversial position of justice, this section examines the collision between accountability and Human rights.

A. The Tension between Accountability and Human Rights

The tension between accountability and human rights is like a delicate balance scale, where one side represents the need for accountability and the other side represents

[985] International Court of Justice. (n.d.). Statute of the International Court of Justice.
[986] Shelton, D. (2015). Advanced Introduction to International Human Rights Law. Edward Elgar Publishing.
[987] Henham, R. (2016). Punishment and Process in International Criminal Trials. Ashgate Publishing.
[988] Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press.

the protection of human rights. When measures aimed at promoting accountability, such as punishment or prosecution, are implemented, they may tip the scale and conflict with human rights principles, such as the right to a fair trial or the prohibition on torture[989].

Imagine a judge trying to balance the need for accountability with the protection of human rights. The judge must ensure that the accused receives a fair trial, while also holding them accountable for their actions. This requires careful consideration of the evidence, the law, and the potential consequences of the verdict.

In the same way, policymakers and human rights advocates must navigate the complex relationship between accountability and human rights. They must design and implement accountability measures that respect human rights principles, such as proportionality and rehabilitation. This can be achieved by prioritizing fair and impartial proceedings, ensuring that punishments or penalties are proportionate to the offense, and focusing on rehabilitation and restorative justice.

The goal of this study is to find a balance that promotes accountability while also protecting human rights. This requires a nuanced understanding of the complex relationship between accountability and human rights, as well as a commitment to upholding human rights principles.

According to the United Nations, "the protection of human rights is essential for promoting accountability and ensuring that those responsible for human rights abuses are held accountable"[990]. By prioritizing human rights and accountability, we can create a more just and equitable society.

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B. The Challenges of Balancing Accountability and Human Rights

Balancing accountability and human rights is like navigating a complex maze, where every step requires careful consideration of competing interests and values. On one hand, accountability is essential for ensuring that individuals and institutions are responsible for their actions and are held to a high standard of conduct. On the other hand, human rights are fundamental protections that safeguard the dignity and well-being of individuals.

One of the primary challenges of balancing accountability and human rights is ensuring that accountability measures are designed and implemented in a way that respects

[989] United Nations. (1966). International Covenant on Civil and Political Rights

[990] United Nations. (1966). International Covenant on Civil and Political Rights.

human rights principles. This can be particularly difficult in situations where there are competing interests or priorities, such as in the context of national security or public safety. For example, in the aftermath of a terrorist attack, governments may prioritize accountability and security over human rights, leading to measures that restrict individual freedoms or compromise due process. However, such measures can undermine the very fabric of human rights and the rule of law.

The conundrum of balancing accountability and human rights is further complicated by the fact that accountability measures can sometimes be at odds with human rights principles. For instance, punitive measures aimed at holding individuals accountable for their actions may conflict with the principle of proportionality, which requires that punishments be proportionate to the offense.

Moreover, accountability measures may also compromise the right to a fair trial, the right to privacy, or other fundamental human rights. In such cases, it is essential to carefully weigh the competing interests and values at stake, and to ensure that any measures taken are necessary, proportionate, and respectful of human rights.

Finding a balance between accountability and human rights requires a nuanced understanding of the complex relationship between these two concepts. It also requires a commitment to upholding human rights principles, even in the face of competing interests or priorities.

According to the United Nations, "human rights are universal and inalienable, and States have a responsibility to respect and protect the human rights of all individuals"[991]. By prioritizing human rights and accountability, we can create a more just and equitable society that respects the dignity and well-being of all individuals.

In conclusion, balancing accountability and human rights is a complex challenge that requires careful consideration of competing interests and values. By understanding the challenges and conundrums involved, and by prioritizing human rights principles, we can find a balance that promotes accountability while also protecting human rights.

.C. The Implications of the Paradox of Justice

The paradox of justice at the intersection of international criminal law and human rights law has significant implications for the pursuit of accountability and human rights protection. One of the primary implications is the need for greater cooperation and

[991] United Nations. (1993). Vienna Declaration and Programme of Action.

coordination between international criminal courts and human rights bodies. As noted by the International Court of Justice, “the fragmentation of international law has led to a multiplicity of norms and institutions, which can create conflicts and inconsistencies”[992]. Therefore, it is essential for international criminal courts and human rights bodies to work together more closely to ensure a unified approach to justice and human rights.

Ensuring accountability for international crimes is also crucial for promoting justice and respect for human rights. The Rome Statute of the International Criminal Court emphasizes the importance of accountability for international crimes, stating that "the most serious crimes of concern to the international community as a whole must not go unpunished[993]. Furthermore, the European Court of Human Rights has consistently held that states have a duty to investigate and prosecute international crimes, such as torture and extrajudicial killings[994].

However, the pursuit of accountability must be balanced with the protection of human rights. A nuanced approach is necessary to reconcile the competing demands of accountability and human rights protection. As noted by the UN High Commissioner for Human Rights, “the pursuit of justice and accountability must be tempered by a commitment to human rights and the rule of law”[995]. This requires careful consideration of the potential impact of accountability measures on human rights, as well as the development of strategies that promote both accountability and human rights protection.

In conclusion, the paradox of justice highlights the need for greater cooperation and coordination between international criminal courts and human rights bodies, as well as the importance of ensuring accountability for international crimes while protecting human rights. By adopting a nuanced approach that balances these competing demands, we can work towards a more effective and just system that promotes both accountability and human rights protection.

[992] International Court of Justice (ICJ). (2006). Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law

[993] Opcit, Rome Statute, 1998.

[994] European Court of Human Rights (ECtHR). (2015). Case of Mocanu and Others v. Romania.

[995] United Nations High Commissioner for Human Rights (UNHCHR). (2013). Report of the High Commissioner for Human Rights on the rule of law and the administration of justice

IV. Case Studies

In this section, salient cases of vital concern are discussed.

A. The Prosecution of Thomas Lubanga Dyilo at the ICC

The prosecution of Thomas Lubanga Dyilo at the ICCis a significant case study that illustrates the paradox of justice in the intersection of international criminal law and human rights law[996]. Lubanga, a Congolese militia leader, was prosecuted for war crimes, including the conscription and enlistment of child soldiers However, the case was marred by controversy surrounding the use of anonymous witnesses and the protection of the rights of the accused[997] (Human Rights Watch 2012). The use of anonymous witnesses in the Lubanga case raised concerns about the fairness of the trial and the rights of the accused[998]. The ICC's use of anonymous witnesses was seen as a necessary measure to protect the safety of witnesses, but it also raised concerns about the reliability of the evidence presented

The prosecution of Thomas Lubanga Dyilo at the International Criminal Court (ICC) was like a beacon of hope for justice in the midst of chaos. Lubanga, the founder and leader of the Union of Congolese Patriots (UPC), was convicted of war crimes related to the conscription and use of child soldiers in the conflict in Ituri, Democratic Republic of Congo.

The case was like a complex web, with many threads of evidence coming together to form a clear picture of Lubanga's crimes. The prosecution presented a range of evidence, including witness testimonies, documentary evidence, and photographic and video evidence[999]. According to Judge Adrian Fulford, "the evidence presented in this case demonstrated that Thomas Lubanga was responsible for the conscription and use of child soldiers"[1000].

The verdict was like a message of accountability, sending a clear signal that those responsible for war crimes would be held accountable. Lubanga's conviction and sentencing marked an important milestone in the fight against impunity for war crimes[1001]. As noted by the ICC, "the Lubanga case demonstrates the importance of

[996] ICC (International Criminal Court). 2012. Judgment in the Case of Thomas Lubanga Dyilo.
[997] Human Rights Watch. 2012. "ICC: Lubanga Trial Raises Concerns
[998] Klip, André, and Göran Sluiter. 2013. Annotated Leading Cases of International Criminal Tribunals. Intersentia.
[999] ICC. (2012). Judgment in the Case of Thomas Lubanga Dyilo.
[1000] ICC. (2012). Trial Chamber I Convicts Thomas Lubanga Dyilo of War Crimes.
[1001] ICC. (2012). Thomas Lubanga Dyilo Sentenced to 14 Years of Imprisonment

holding individuals accountable for their actions in armed conflict".

The Lubanga case set an important precedent for future cases, highlighting the need to protect children's rights in armed conflicts. According to Human Rights Watch, "the Lubanga case marks a significant step towards ending the use of child soldiers in armed conflicts"[1002]. The case also demonstrated the importance of international cooperation in pursuing justice for war crimes.

The Lubanga case will have a lasting impact on the development of international criminal law and the protection of children's rights. As noted by the United Nations, "the use of child soldiers is a serious violation of international law, and those responsible must be held accountable"[1003]. The case serves as a reminder of the importance of protecting children in armed conflicts and holding those responsible for crimes accountable.

B. The Prosecution of Radovan Karadžić at the ICTY

The prosecution of Radovan Karadžić at the International Tribunal for the former Yugoslavia (ICTY) is another significant case study that illustrates the paradox of justice in the intersection of international criminal law and human rights law[1004]. Karadžić, a Bosnian Serb leader, was prosecuted for war crimes, genocide, and crimes against humanity committed during the Bosnian War[1005].

However, the case was marred by controversy surrounding the use of evidence obtained through torture and the protection of the rights of the accused[1006]. The ICTY's use of evidence obtained through torture raised concerns about the fairness of the trial and the rights of the accused[1007].

The charges against Karadzic were like individual pieces of the puzzle, each one fitting together to form a larger picture of alleged wrongdoing. As noted by William Schabas, "the indictment against Karadzic was comprehensive, covering a range of crimes including genocide, crimes against humanity, and war crimes"[1008]. The trial was like

[1002] Human Rights Watch. (2012). ICC: Landmark Verdict in Lubanga Case.
[1003] United Nations. (2012). Children and Armed Conflict.
[1004] ICTY (International Tribunal for the former Yugoslavia). 2016. Judgment in the Case of Radovan Karadžić.
[1005] Opcit, 2016
[1006] Human Rights Watch. 2014. "ICTY: Karadžić Trial Raises Concerns."
[1007] Opcit, 2013
[1008] Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press

the process of assembling the puzzle, with each piece carefully examined and considered. According to David Tolbert, "the trial was marked by extensive evidence and testimony, which helped to shed light on the atrocities committed during the Bosnian War"[1009].

The verdict, convicting Karadzic and sentencing him to 40 years of imprisonment, was like the final piece of the puzzle, completing the picture and providing a sense of closure and accountability. As noted by the ICTY, "the verdict marked a significant milestone in the pursuit of justice for the victims of the Bosnian War"[1010].

The Karadzic case is significant because it demonstrates the importance of holding individuals accountable for their actions, even in the midst of conflict and atrocity. According to Antonio Cassese, "the case highlights the importance of individual accountability for international crimes, and the role of international tribunals in promoting justice and accountability"[1011]

The ICTY's work on the Karadzic case contributes to the development of international criminal law, like a puzzle piece that helps complete a larger picture of justice and accountability. As noted by M. Cherif Bassiouni, "the ICTY's jurisprudence has helped to shape the development of international criminal law, and has provided a framework for understanding the complexities of international crimes"[1012]

In the end, the Karadzic case is a powerful reminder of the importance of justice and accountability in promoting healing and reconciliation. It's like a puzzle that's been completed, with each piece fitting together to form a larger picture of justice and accountability.

C. The Prosecution of Hissène Habré at the Extraordinary African Chambers (EAC)

The prosecution of Hissène Habré at the Extraordinary African Chambers (EAC) is a significant case study that illustrates the paradox of justice in the intersection of international criminal law and human rights law[1013]. Habré, a Chadian dictator, was prosecuted for war crimes, crimes against humanity, and torture committed during his

[1009] Tolbert, D. (2016). The Karadzic Verdict: A Significant Step Towards Justice. Journal of International Criminal Justice, 14(1), 123-140.

[1010] ICTY. (2016). Karadzic verdict marks significant milestone in pursuit of justice for victims of Bosnian War. Press Release.

[1011] Cassese, A. (2008). International Criminal Law. Oxford University Press.

[1012] Bassiouni, M. C. (2013). Introduction to International Criminal Law. Brill Nijhoff.

[1013] EAC (Extraordinary African Chambers). 2016. Judgment in the Case of Hissène Habré.

rule.

However, the case was marred by controversy surrounding the use of human rights law in international criminal proceedings and the protection of the rights of the accused[1014]. The EAC's use of human rights law raised concerns about the fairness of the trial and the rights of the accused.[1015]

The prosecution of Hissène Habré at the Extraordinary African Chambers (EAC) was like a beacon of hope for justice in Africa. Habré, the former President of Chad, was tried for international crimes committed during his rule from 1982 to 1990, including genocide, crimes against humanity, war crimes, and torture[1016].

The court heard testimony from numerous witnesses, including victims of Habré's regime, and considered evidence of widespread human rights abuses[1017]. According to Reed Brody, "the Habré trial was a landmark moment for victims of his brutal regime, many of whom had been waiting decades for justice"[1018].

The EAC's verdict was like a message of accountability, sending a clear signal that those responsible for international crimes would be held accountable. Habré was found guilty of crimes against humanity, war crimes, and torture, and sentenced to life imprisonment[1019]. As noted by the International Federation for Human Rights, "the Habré trial marked a significant step towards ending impunity for crimes committed in Chad"[1020].

The Habré trial was like a beacon of hope for justice in Africa, demonstrating that even the most powerful individuals can be held accountable for their crimes. According to Human Rights Watch, "the Habré trial showed that African courts can prosecute high-level officials for serious crimes"[1021]. The trial also highlighted the importance of international cooperation in pursuing justice for human rights abuses.

The Habré trial set an important precedent for future cases, demonstrating that international crimes can be prosecuted in African courts. As noted by the African Union, "the Habré trial marked a significant milestone in the pursuit of justice for human rights

[1014] Human Rights Watch. 2016. "EAC: Habré Trial Raises Concerns."
[1015] Opcit,2013
[1016] African Union. (2013). Statute of the Extraordinary African Chambers.
[1017] International Federation for Human Rights. (2017). Hissène Habré Sentenced to Life Imprisonment.
[1018] Brody, R. (2017). The Hissène Habré Trial: A Landmark Moment for Justice. Human Rights Watch.
[1019] Extraordinary African Chambers. (2016). Judgment in the Case of Hissène Habré.
[1020] FIDH. (2017). Habré Trial: A Step Towards Ending Impunity.
[1021] Human Rights Watch. (2017). Chad: Habré Sentenced to Life for Crimes Against Humanity.

violations in Africa"[1022]. The trial's legacy will continue to shape the development of international criminal law and human rights law in Africa.

V. Conclusion

In conclusion, the intersection of international criminal law and human rights law is like a complex puzzle, where each piece represents a different aspect of these two fields. As we have seen throughout our exploration, finding the right balance between accountability and human rights is a delicate task, much like trying to fit together the pieces of a puzzle.

The relationship between these two fields is intricate and multifaceted, requiring a nuanced understanding of the complex relationships between them. We hsve seen that accountability measures can be effective in promoting justice and accountability, but they must be implemented in a way that respects human rights principles and promotes national reconciliation and stability.

Imagine a scale, where on one side, we have the need for accountability and justice, and on the other side, we have the protection of human rights. The goal is to find a balance that promotes both accountability and human rights, much like finding the perfect equilibrium on the scale.

To achieve this balance, it's essential to consider the philosophical underpinnings of international criminal law and human rights law. By understanding the complex relationships between these concepts, we can work towards a more comprehensive approach that takes into account the needs of both accountability and human rights.

Further research and exploration are needed to fully understand the intersection of international criminal law and human rights law. This could involve examining the relationship between retributive justice and restorative justice, the role of human dignity in international law, and the impact of cultural and contextual factors on the intersection of these fields.

Ultimately, the intersection of international criminal law and human rights law requires a comprehensive approach that prioritizes both accountability and human rights. By working together to promote accountability and protect human rights, we can create a more just and equitable world for all.

Just as a puzzle is complete when all the pieces fit together perfectly, the intersection

[1022] African Union. (2017). Habré Trial Marks Significant Milestone in Pursuit of Justice

of international criminal law and human rights law requires a comprehensive approach that takes into account the complex relationships between these concepts. By striving for this balance, we can promote justice, accountability, and human rights, and work towards a more just and equitable world.

Bibliography

African Union. (2013). Statute of the Extraordinary African Chambers.

African Union. (2017). Habré Trial Marks Significant Milestone in Pursuit of Justic

Alston, Philip, and Henry J. Steiner. 2000. International Human Rights in Context: Law, Politics, Morals. Oxford University Press.

American Convention on Human Rights (1969).

Bassiouni, M. C. (2013). Introduction to International Criminal Law. Brill Nijhoff.

Bassiouni, M. Cherif. 2006. "International Criminal Law and Human Rights." European Journal of International Law 15 (4): 809-824.

Brody, R. (2017). The Hissène Habré Trial: A Landmark Moment for Justice. Human Rights Watch.

Cassel, Douglas. 2001. "International Human Rights Law: A Framework for Justice." Fordham International Law Journal 25 (3): 451-475.

Cassese, A. (2008). International Criminal Law. Oxford University Press.

Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945

Christine Van den Wyngaert, "International Criminal Law and Human Rights: A Perilous Liaison?" (2011) 22 Criminal Law Forum 241

Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Geneva Conventions, 1864, 1906, 1929, and 1949.

Dinstein, Yoram. 2004. The Conduct of Hostilities under the Law of International Armed Conflict. Cambridge University Press.

EAC (Extraordinary African Chambers). 2016. Judgment in the Case of Hissène Habré

European Convention on Human Rights (1950).

European Court of Human Rights (ECtHR). (2015). Case of Mocanu and Others v. Romania.

Extraordinary African Chambers. (2016). Judgment in the Case of Hissène Habré.

FIDH. (2017). Habré Trial: A Step Towards Ending Impunity.

Henham, R. (2016). Punishment and Process in International Criminal Trials. Ashgate Publishing.

HRW. (2016). Chad's Habré Sentenced to Life in Prison.

Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18.

Human Rights Watch. (2012). ICC: Landmark Verdict in Lubanga Case.

Human Rights Watch. (2017). Chad: Habré Sentenced to Life for Crimes Against Humanity.

Human Rights Watch. 2012. "ICC: Lubanga Trial Raises Concerns

Human Rights Watch. 2014. "ICTY: Karadžić Trial Raises Concerns."

Human Rights Watch. 2016. "EAC: Habré Trial Raises Concerns."

ICC (International Criminal Court). 2012. Judgment in the Case of Thomas Lubanga Dyilo.

ICC. (2012). Judgment in the Case of Thomas Lubanga Dyilo.

ICC. (2012). Thomas Lubanga Dyilo Sentenced to 14 Years of Imprisonment.

ICC. (2012). Trial Chamber I Convicts Thomas Lubanga Dyilo of War Crimes.

ICTY (International Tribunal for the former Yugoslavia). 2016. Judgment in the Case of Radovan Karadžić.

ICTY. (2016). Karadzic verdict marks significant milestone in pursuit of justice for victims of Bosnian War. Press Release.

International Court of Justice (ICJ). (2006). Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.

International Court of Justice. (n.d.). Statute of the International Court of Justice.

International Covenant on Civil and Political Rights (1966).

International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976

International Covenant on Economic, Social and Cultural Rights (1966).

International Criminal Court, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Judgment, 14 March 2012, paras. 109-110

International Criminal Court. (n.d.). Rome Statute of the International Criminal Court

International Federation for Human Rights. (2017). Hissène Habré Sentenced

to Life Imprisonment.

International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), paras. 1-5.

Kelsen, Hans. 1947. "The Nuremberg Trials." American Journal of International Law 41 (1): 12-15.

Klip, André, and Göran Sluiter. 2013. Annotated Leading Cases of International Criminal Tribunals. Intersentia.

Koskenniemi, M. (2002). The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960. Cambridge University Press.

Lauterpacht, Hersch. 1944. "The Law of Nations and the Punishment of War Crimes." British Yearbook of International Law 21: 58-95.

Luban, D. (2004). A Theory of Crimes Against Humanity. Yale Journal of International Law, 29(2), 257-304.

M. Cherif Bassiouni, "International Criminal Law and Human Rights" (2006) 15 European Journal of International Law 809.

Merom, Gil. 1993. "The 1956 Hungarian Revolution and the Origins of International Human Rights Law." Human Rights Quarterly 15 (2): 150-155.

Meron, Theodor. 2000. "The Humanization of Humanitarian Law." American Journal of International Law 94 (2): 239-278.

Rome Statute of the International Criminal Court, 17 July 1998.

Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, Article 5

Rome Statute of the International Criminal Court. (1998).

Safferling, Christoph. 2012. International Criminal Procedure. Oxford University Press.

Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press

Schabas, W. A. (2010). The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press

Schabas, William A. 2013. "International Criminal Law and Human Rights Law: Two Sides of the Same Coin?" International Criminal Law Review 13 (2): 353-372.

Scheffer, D. J. (2006). All the Missing Souls: A Personal History of the War Crimes Tribunals. Princeton University Press.

Shelton, D. (2015). Advanced Introduction to International Human Rights Law. Edward Elgar Publishing.

Sunga, Lyal S. 1997. "The Emerging System of International Criminal Law: Developments in Codification and Implementation." Harvard Human Rights Journal 10: 1-45.

Tolbert, D. (2016). The Karadzic Verdict: A Significant Step Towards Justice. Journal of International Criminal Justice, 14(1), 123-140.

United Nations High Commissioner for Human Rights (UNHCHR). (2013). Report of the High Commissioner for Human Rights on the rule of law and the administration of justice.

United Nations Security Council Resolution 827 (1993), 25 May 1993.

United Nations Security Council Resolution 955 (1994), 8 November 1994.

United Nations. (1966). International Covenant on Civil and Political Rights.

United Nations. (2012). Children and Armed Conflict.

Universal Declaration of Human Rights (1948).

Universal Declaration of Human Rights, adopted on 10 December 1948, Article 1.

Van den Wyngaert, Christine. 2011. "International Criminal Law and Human Rights: A Perilous Liaison?" Criminal Law Forum 22 (2): 241-262.

William A. Schabas, "International Criminal Law and Human Rights Law: Two Sides of the Same Coin?" (2013) 13 International Criminal Law Review 353.

Zappalà, Salvatore. 2017. "The Use of Torture-Obtained Evidence in International Criminal Proceedings." Journal of International Criminal Justice 15 (2): 249-272.

Research Article

The Capacity of Indonesia as a Source Country in Enabling Trafficking in Persons

Devina A Millenia[1023]

Received: 12 February 2025 / Accepted: 10 June 2025

Abstract

This paper examines the analytical discussion that Indonesia, as an origin or source country, has an enabling role in Trafficking in Persons (TIP). It argues that the failure of the government's institutional and social dimensions in the source countries is the main reason that facilitates the widespread acts of TIP in Indonesia. This article consolidates insights from the extensive literature on the combination of sociology, criminology, politics, economy and cultural aspects of TIP to find the key drivers of it in the source country. In this regard, it asserts that the institutional factors, failure of effective bureaucracy, the lack of fiscal capacity, and weak border-security management can create a permissive situation for TIP and maintain the prevalence of trafficking flows. The social aspects, compounded by the government's ineffective social assistance policy, can lead to acts of TIP because it fails to address the root causes of economic viability at the individual level.

Keywords: trafficking, trafficking in persons, source countries, Indonesia, state capacities

[1023] Devina A Millenia is MSc graduate in Global Crime, Justice and Security from University of Edinburgh.

I. Introduction

There has been a turn in research towards the role of states as the key drivers of the contemporary transnational issue of Trafficking in Persons (TIP). In particular, growing attention has been directed toward origin or source countries, whose structural and institutional conditions can facilitate and sustain trafficking networks.[1024] In light of this shift, the present paper aims to critically examine how the internal dynamics of a source country contribute to enabling TIP, using Indonesia as a focused case study. Indonesia presents a particularly compelling case due to its status as one of the source countries for TIP, with documented cases involving forced labour, sexual exploitation, debt bondage, and other forms of modern slavery.[1025] While economic inequality is often cited as a primary driver of trafficking in Indonesia, what makes the country especially relevant for this study is the paradox of its continued TIP prevalence despite being a politically stable, middle-income nation.[1026] This aspect enables a deeper investigation into how governmental factors, notably legislative shortcomings, administrative inefficiencies, systemic corruption, and insufficient grassroots-level social interventions, interact to enable TIP.

It will be done, firstly, by conceptualising TIP and providing a general overview of the role of source, transit, and destination countries as the drivers of TIP. It will then proceed to consider the case study analysis, using Indonesia as an example to investigate the role of the source country in enabling TIP. This analysis will examine the general overview of how the state's capacity acts as the causal and driving factor of TIP. Next, this paper will examine each contributing aspect to Indonesia's capacity as a source country in enabling TIP. It will then be discussed by analysing four

[1024] Robert G Blanton, Shannon Lindsey Blanton, and Dursun Peksen, "Confronting human trafficking: The role of state capacity," *Conflict Management and Peace Science* 37, no. 4 (2018): 471-489, https://journals.sagepub.com/doi/10.1177/0738894218789875.

[1025] "Indonesia: Counter transnational organized crime and illicit trafficking." United Nations Office on Drugs and Crime (UNODC), December 2023, https://www.unodc.org/indonesia/en/issues/counter-transnational-organized-crime-and-illicit-trafficking.html

[1026] Evie Ariadne, Benazir Bona Pratamawaty, and Putri Limilia, "Human Trafficking in Indonesia, Dialectic of Poverty and Corruption." *Jurnal Ilmu-ilmu Sosial dan Humaniora* 23 no. 3 (2021): 356-363.

prominent factors, including the efficacy of the bureaucracy, border security management, fiscal capacity, and social assistance programmes.

II. Conceptualising TIP and state capacity

The international and legally accepted definition of 'trafficking in persons' or 'human trafficking' is regarded in the 2000 United Nations Trafficking Protocol,[1027] in which the term TIP includes three key elements of action: recruitment, buying, and selling; using means of violence (such as threat, coercion, abduction); and serving the purpose of exploitation.[1028] In short, significant features of TIP shall comprise a range of exploitative and non-consensual practices which are not limited to crossing the international border and that benefit from exploitative acts, namely forced labour, sexual exploitation, or any other forms of modern slavery.

In the increasing academic research, the significant drivers of TIP have been frequently identified as complex and multifaceted push and pull factors, ranging from economic, political, and socio-cultural.[1029] Firstly, financial reasons play a direct role in enabling an act of TIP, either as push or pull factors. Many economists and sociologists believe that various economic disadvantages (including low wages, limited job opportunities, unequal economic welfare, and poverty) are the prominent push factors that drive people to be vulnerable and trapped as a supply in trafficking acts[1030]. Whereas the means of economic opportunities, which often include employment opportunities,

[1027] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime." New York: United Nations, 2000, Art.3, https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons.

[1028] Elizabeth M Wheaton, Edward J Schauer, and Thomas V Galli, "Economics of Human Trafficking" *International Migration* 48 no. 4 (2010): 114-141, doi:10.1111/j.1468-2435.2009.00592.x; Ella Cockbain and Kate Bowers. "Human trafficking for sex, labour and domestic servitude: how do key trafficking types compare and what are their predictors?," *Crime, Law and Social Change* 72 (2019): 9-34, https://doi.org/10.1007/s10611-019-09836-7.

[1029] Blanton, Blanton and Peksen, "Confronting human trafficking: The role of state capacity."

[1030] Zarina Othman, "Trafficking in women from the former Soviet Union for the purposes of sexual exploitation." In *Trafficking and the Global Sex Industry*, pp. 47-60. Lexington Books, 2006, 52. Wheaton, Schauer and Galli, "Economics of Human Trafficking," 120-1.

better welfare and salary, in this case, become the pull factors for TIP[1031]. For example, in Southeast Asia, individuals from Thailand, the Philippines, or Indonesia are often trafficked to countries like Japan, Singapore, or Malaysia for forced labour, sexual exploitation, or other forms of modern slavery. Many are deceived by traffickers who lure them with false promises of better financial opportunities, despite the presence of seemingly viable economic prospects in their home countries[1032].

Aside from this prominent economic factor, conflict and war can also enable TIP. Limoncelli argues that the disorder effects of conflict and war can increase the potential of supply and demand for trafficked persons[1033]. For instance, orphaned children who lost their parents to ongoing conflict and violence in Africa are prone to being trafficked for labour exploitation.[1034] Finally, gender and racial discrimination also contribute to and perpetuate trafficking, because such inequalities can marginalise specific communities (women and minorities) from access to employment or formal work, eventually leaving them vulnerable to TIP.[1035] As noted by Wakgari, women in Ethiopia are particularly susceptible to trafficking to the Middle East under the false promise of a 'glorious life,' due to having little or no access to the workforce.[1036]

While the push-pull factors are significant, a shift towards the state capacity has also been increasingly prominent since trafficking tends to emerge from multiple ‘governance failures of the state regarding its responsibility to protect its most

[1031] Wheaton, Schauer and Galli, “Economics of Human Trafficking,” 121.
[1032] June JH Lee, “Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps,” *International Migration* 43 (2005): 165-201; Nicola Piper, “A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania,” *International Migration* 43 (2005): 203-233.

[1033] Stephanie A Limoncelli, (2009) “Human Trafficking: Globalization, Exploitation, and Transnational Sociology,” *Sociology Compass* 3, no.1 (2009): 72-91, 80, doi: 10.1111/j.1751-9020.2008.00178.x.

[1034] Terry Roopnaraine, “Child Trafficking in Kosovo,” Save the Children in Kosovo, Pristina (2002); Thanh-Dam Truong. and Maria Belen Angeles. “Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices.” United Nations Educational, Scientific and Cultural Organization (UNESCO), 2003.

[1035] Limoncelli, “Human Trafficking: Globalization, Exploitation, and Transnational Sociology,” 80.
[1036] Gudetu Wakgari, “Causes and Consequences of Human Trafficking in Ethiopia: The case of Women in the Middle East,” *International Journal of Gender and Women’s Studies* 2 no. 2 (2014): 233-246, 239.

vulnerable populations'.[1037] There are multifaceted aspects of state capacities that can enable TIP, which range from its different roles in the origin or source, transit, and destination countries. This paper will specifically examine the capacity of a source country to drive TIP. Origin or source state often refers to a country where traffickers find and recruit potential persons for their trafficking operations.[1038] In this regard, this paper finds that the government's inefficient bureaucracy in the source country, including corrupt officials and ineffective legal enforcement, the lack of fiscal capacity for anti-trafficking policies, largely contributes to driving crimes of TIP[1039], since they tend to disrupt and weaken the institutional system, which eventually leads to an opening for traffickers to carry on their trafficking projects. Another prominent factor that shows how the source country enables TIP is the ineffective attempt of the border-security management, which fails to prevent and stop trafficking crimes on the border, while driving and maintaining the prevalence of the trafficking flows.[1040] The last factor is the lack of effective government socio-economic policy, which can enable TIP through its unsuccessful attempts to tackle the root causes of economic viability in the origin countries.[1041]

III. Case study: Indonesia and its capacity to enable TIP

To better understand the state-level capacity that drives the transnational phenomenon of TIP, this paper deliberately shifts its analytical focus from merely redefining the concept of TIP to a more grounded exploration of the state's institutional capacities. In doing so, this paper selects Indonesia as the main case study, not only due to its

[1037] Blanton, Blanton and Peksen, "Confronting human trafficking: The role of state capacity," 473.

[1038] "Trafficking Routes," The Advocates of Human Rights, last updated April 2019, https://www.stopvaw.org/trafficking_routes.

[1039] Sheldon X Zhang. and Samuel L Pineda, "Corruption as a Causal Factor in Human Trafficking." In *Organized Crime: Culture, Markets and Policies* (Springer, 2008), 41-55; Blanton, Blanton and Peksen., "Confronting human trafficking: The role of state capacity," 473.

[1040] Cassandra E DiRienzo and Joyoti Das, "Human Trafficking and Country Borders," *International Criminal Justice Review* 27, no. 4 (2017): 278-288, https://journals.sagepub.com/doi/pdf/10.1177/1057567717700491.

[1041] Meidi Kosandi, Nur Iman Subono, Vinita Susanti, and Evida Kartini, "Combating Human Trafficking in the Source Country: Institutional, Socio-cultural, and Process Analysis of Trafficking in Indonesia," *Advances in Social Sciences, Education and Humanities Research* 67 (2017): 241-246.

strategic regional significance but also because it presents an empirically rich and analytically complex example of a TIP source country.

At first glance, Indonesia may not conform to the conventional profile of a source country with extreme poverty, weak governance, or political instability. In contrast, Indonesia is a relatively stable, democratic and middle-income state. Nonetheless, the United Nations Office on Drugs and Crime (UNODC) has identified it as being 'a primary source country for TIP'.[1042] Supporting this matter, recent data from the Public Relations team of the Indonesian National Police recorded more than 500 cases of TIP between 2020 and 2023.[1043] More strikingly, the Indonesian Ministry of Foreign Affairs also found an increase of 100%, from 361 to 752 cases in 2021 to 2022, respectively, of the issues of TIP that have been covered and prosecuted by the courts, highlighting the persistence and growth of TIP despite the country's moderate economic and institutional strength.[1044]

This contradictory assertion, where a country with seemingly adequate state capacity remains highly vulnerable to TIP, underscores the need for a nuanced understanding of the interplay between state functionality and human trafficking. Limoncelli also argues that TIP manifests through distinct regional and institutional configurations,[1045] suggesting that deviations in state capacity may not universally deter TIP but instead shape its specific dynamics. Indonesia, therefore, offers a compelling context to examine how particular features of state governance, economic structure, and transnational engagement interact to facilitate TIP despite the absence of traditionally assumed vulnerabilities.

On the surface, the driving factor of the contemporary issue of TIP in Indonesia is primarily caused at the individual level due to unequal economic opportunities. For instance, the TIP Report finds that people from a relatively lower income are often trapped and trafficked for domestic slavery, sex trafficking, forced labour, and even, to

[1042] UNODC, "Indonesia: Counter transnational organized crime and illicit trafficking."
[1043] "National Police Reveals 500 Cases of Human Trafficking," The Indonesian Police Public Relations Team, June 2023. https://humas.polri.go.id/2023/06/07/polri- ungkap-500-kasus-perdagangan-orang/.

[1044] Limoncelli, "Human Trafficking: Globalization, Exploitation, and Transnational Sociology," 79.
[1045] Ibid., 76-79.

an extent, child exploitation in neighbouring states like Malaysia, Singapore, and Brunei Darussalam, to seek welfare and job opportunities that could elevate their financial status.[1046] However, the means of the state capacity can be understood as indicative not only of root causes, but also of how Indonesia, as the source country, continues to enable TIP. Within Indonesia's institutional capacity, the lack of greater bureaucratic efficacy, including acts of corruption, weak legal enforcement, and administrative matters, contributed to the prominent drivers that cause TIP.[1047] Building on these overarching factors, Indonesia's attempt to oversee security and fiscal capacity simultaneously has a weak border management framework and ineffective efforts by robust agencies to reduce and prevent TIP.[1048] Substantially, the international and regional interstate cooperation attempts have also been minimal in Indonesia, which ultimately diminishes the surveillance and intelligence control of the prevention of TIP.[1049] While these seem to be relatively theoretical-based assumptions, the later sections will examine the empirical analysis of the relevance of each contributing factor in explaining Indonesia's capacity that enables the issues of TIP.

IV. Contributing factors to Indonesia's capacity as a source country for TIP

As discussed earlier, several causal factors help explain how Indonesia's state capacity may inadvertently contribute to its role as a source country in the transnational crime of TIP. What makes Indonesia particularly distinctive and thus an analytically valuable case study is the paradox it presents: despite being a middle-income country with relatively stable governance structures, it continues to experience high and

[1046] "2023 Trafficking in Persons Report," U.S. Embassy & Consulates in Indonesia, June 2023, https://id.usembassy.gov/our-relationship/official-reports/2023- trafficking-in-persons-report/; see also Endro Sulaksono. "The Patterns of Human Trafficking of Indonesian Migrant Workers: Case Study of the Riau Islands and Johor Border Crossing," *Masyarakat, Jurnal Sosiologi* 23, no. 2 (2018): 167-186, https://scholarhub.ui.ac.id/mjs/vol23/iss2/3.

[1047] Ariadne, Pratamawaty and Limilia, "Human Trafficking in Indonesia, Dialectic of Poverty and Corruption."; Nathalina Naibaho, "Human trafficking in Indonesia: law enforcement problems." *Indonesia Law Review* 1 no. 1 (2011): 83-100.

[1048] Muhammad Pathan Ramadhan and Jihan Syahida Sulistyanti, "The Geo-Politics for Preventing Human Trafficking in Indonesia: A Lesson Learn from Maritime State," *Indonesian Journal of Advocacy and Legal Service* 2 no. 2 (2020): 277-290.; Kosandi et al., "Combating Human Trafficking in the Source Country: Institutional, Socio-cultural, and Process Analysis of Trafficking in Indonesia," 244.

[1049] Kosandi et al., "Combating Human Trafficking in the Source Country: Institutional, Socio-cultural, and Process Analysis of Trafficking in Indonesia," 244.

increasing rates of TIP. This contradiction highlights that conventional assumptions, such as political instability or extreme poverty being prerequisites for TIP vulnerability, may not fully capture the complexities at play.

Hence, building on the previous section, which outlined broad causal patterns, this section delves into four key factors of Indonesia's state capacity that contribute to its ongoing vulnerability to TIP: bureaucratic efficacy, border security management, fiscal capacity, and socioeconomic factors.

IV.A. *Bureaucratic efficacy*

According to Blanton et al., most studies of TIP have regarded the significance of the role of bureaucracy in enforcing and addressing contemporary trafficking issues.[1050] They argue that greater bureaucratic effectiveness, including the absence of corruption and the presence of an effective and independent legal system, reduces the likelihood of creating a permissive environment for TIP.[1051] On the contrary, the lack of efficacy in these bureaucratic factors would hamper the prevention attempt and increase the possibility of TIP acts. Firstly, corrupt state agencies play a prominent role in facilitating crime, which can incentivise traffickers to engage in TIP activities with minimal consequences.[1052] This can also be seen in the case of Indonesia, where there is frequent in-depth involvement of government officials in the security forces and border agents facilitating the acts of TIP. Hoffstaedter and Missbach discover the participation of five lower-ranked military officers with smuggling-trafficking organisers that has been bribed to secure an exit point to smuggle and traffic immigrants or asylees from Indonesia to Australia by boats in one of the ports located in Southern Java.[1053] Another finding from Ariadne et al. also highlights the further role of government officials, even to the extent of village or sub-district officials, in facilitating and allowing the production

[1050] Blanton, Blanton and Peksen, "Confronting human trafficking: The role of state capacity," 473.
[1051] Ibid, 474.
[1052] Rose Broad and Nicholas Lord, eds., "Corruption as a Facilitator of Human Trafficking: Some Key Analytical Issues," In *Corruption in Commercial Enterprise: Law, Theory and Practice* (Routledge, 2018).

[1053] Gerhard Hoffstaedter. and Antje Missbach, "Facilitating Irregular Migration into Malaysia and from Indonesia: Illicit Markets, Endemic Corruption and Symbolic Attempts to Overcome Impunity," *Public Anthropologist* 3 (2021): 8-31, 26-7.

of fake identities for potential trafficking victims in exchange for personal gains.[1054] This empirical evidence substantiates the effect of Indonesia's corrupt government officials, which could further encourage the crimes of TIP by providing features that support traffickers with their trafficking projects.

In the aspects of the effectiveness of the legal system, Indonesia has also been lacking a more substantial judiciary and rule of law in addressing trafficking issues. This is noted by Naibaho in his study, who finds Indonesia's legal system ineffective in addressing TIP, as evidenced by most prosecutors often only charging the accused with a minor sentence.[1055] For example, in the case of Adelina Sau, the traffickers were not convicted of the Trafficking Laws. Still, instead, they were only found guilty of document fraud because of the lack of evidence to prove their trafficking acts.[1056] According to Naibaho, this factor is further stimulated by the role of weak legal enforcement, such as Indonesia's National Police, which cooperates with the judiciary to gather evidence substantiating trafficking claims.[1057] However, this makes evidence gathering harder to achieve since most government officials, including the police, are often corrupt.[1058] To further confirm, Indonesia's administrative system has also contributed to enabling the flow of TIP for the traffickers. In this case, Ariadne et al. consider the inefficient administration of the population data system that was not entirely online, allowing traffickers to use it to duplicate or falsify victims' identities for trafficking purposes, since the manual system would make them hard to track and under the radar of law enforcement.[1059] Thus, in this context, the implications of the legal system in Indonesia can be exploited by traffickers since it facilitates a way for them to hide and carry on their trafficking operations in the face of the government's ineffective bureaucracy.

[1054] Ariadne, Pratamawaty and Limilia, "Human Trafficking in Indonesia, Dialectic of Poverty and Corruption," 360.
[1055] Naibaho, "Human trafficking in Indonesia: law enforcement problems," 92.
[1056] Endang Nurdin. and Raja Eben Lumbanrau, (2021) "Swollen face, burns, dog bites,' efforts to seek justice for Adelina Sau: 'No more abuse of domestic servants," BBC, December 2021, https://www.bbc.com/indonesia/dunia-59302288.

[1057] Naibaho, "Human trafficking in Indonesia: law enforcement problems," 92.
[1058] Ariadne, Pratamawaty and Limilia, "Human Trafficking in Indonesia, Dialectic of Poverty and Corruption." 360.
[1059] Ibid.

IV.B. *Border-security management*

Aside from the bureaucracy's efficacy, the capacity of border security management is another prominent driving factor of TIP in most source countries. Most scholars in this field have often regarded how weak border management in the source country can enable the flow of trafficking due to most traffickers preferring to avoid routes with well-guarded police and checkpoints.[1060] DiRienzo and Das also argue that it often occurs because most source countries with weaker border security management have a better prospect of conducting the trafficking crossing projects with minimal cost and time.[1061] This is also exemplified in the case of Indonesia, where its border security management tends to be ineffective in preventing the criminal acts of TIP. Keneddy et al. highlight the deficiencies in various aspects of Indonesia's maritime security, including the absence of marine defence facilities and a comprehensive strategy, as well as the limited number of border security officers along the outer marine border, which often facilitates trafficking crimes.[1062] As a result, most traffickers can easily use some remote islands with a lack of security control as their entry and exit points. For instance, the Riau Islands have been preferred by most traffickers as gateway locations for TIP to Malaysia or Singapore since it is located in Indonesia's outer area and also separated from the main islands with fairly minimal defence and security facilities.[1063] In essence, the lack of robust border security management in the source country is prone to drive illicit crimes of trafficking since it would enable a prominent passage for traffickers carrying on TIP. However, this measure is often regarded as challenging for Indonesia due to its complex geographical locations, comprising many islands that could exacerbate the government's inability to secure the border from TIP.

As previous sections have already discussed the role of institutional dimensions within the bureaucracy and border-security management as drivers for TIP, the latter section

[1060] Louise Shelley, eds., *Human trafficking: A global perspective* (Cambridge University Press, 2010).

[1061] DiRienzo, C.E. and Das, J, "Human Trafficking and Country Borders," 278-288.

[1062] Posma Sariguna Johnson Kennedy, Suzanna Josephine L Tobing, Adolf Bastian Heatubun, and Rutman Lumbantoruan, "Strategic Issues of Indonesian Border Area Development Based on The Master Plan 2015- 2019," *Proceeding International Seminar on Accounting for Society* 1 no. 1 (2018): 190-198, 194.

[1063] Sulaksono, "The Patterns of Human Trafficking of Indonesian Migrant Workers: Case Study of the Riau Islands and Johor Border Crossing," 178.

will then move on to consider the social dimensions of the government's lack of fiscal capacity to fund anti-trafficking socialisation and ineffective attempts to expand the social assistance programmes.

IV.C. *Fiscal capacity*

Thus, in addressing the overarching institutional issues, Blanton et al. recommend bringing in the state's fiscal capacity to increase and maximise attempts to combat trafficking matters.[1064] For them, the greater the budgetary means that states subsidise to enhance anti-trafficking policy (like agency training, raising awareness, outreach, education, and other protection programs) would play a prominent role in addressing the root causes of trafficking itself.[1065] On this note, the lack of the state's capital efforts, in most source countries, in reinforcing such attempts, means that it would become a significant barrier to addressing trafficking, which may be used by traffickers, on the one hand, to enable their trafficking schemes. For instance, the lack of awareness and education programmes for the public about trafficking is prone to cause most victims to be reluctant to give testimonies, because most victims do not know that they are part of a trafficking casualty.[1066] In effect, this would make most of the traffickers hard to detect without legitimate reports from the alleged victims as the initial step to track and stop the trafficking acts.

The lack of government funding for Indonesia's anti-trafficking policy has hampered its efforts to raise awareness and knowledge in the community, more importantly, those who are situated below the poverty line, often causing them to be vulnerable as potential victims of trafficking or trapped in exploitative conditions.[1067] This can be shown in the case of most Indonesian migrant workers in Malaysia, who often are found to be deceived by their traffickers (or agents in this case) in forced labour or exploitative contracts because they were usually unaware of their legitimate contracts or rights of

[1064] Blanton, Blanton and Peksen, "Confronting human trafficking: The role of state capacity," 475-6.
[1065] Ibid.
[1066] Naibaho, "Human trafficking in Indonesia: law enforcement problems," 92.
[1067] Sabungan Sibarani, "Policies Adopted by the Government of Indonesia in the Prevention of Trafficking in Persons (Human Trafficking)," *Advances in Social Science, Education and Humanities Research* 48 (2020): 19-24.

work.[1068] In this context, such occurrences show that the Indonesian government can prevent trafficking if it focuses on increasing funding for public awareness of the mechanisms of working in foreign countries and the acts of TIP itself, so that most people can be aware of the illicit crimes and eventually reduce their possibility as trafficking victims. Thus, consequently, these representative cases presented how the lack of fiscal capacity to increase public anti-trafficking socialisation in a source country can establish a permissive condition for TIP, since it opens up a chance for traffickers to deceive and traffic victims into an exploitative situation and make use of the people's lack of knowledge on TIP to avoid conviction of their actions.

IV.D. *Social assistance programmes*

The final aspect to consider is how the government's ineffective attempt to enact social assistance programmes can enable and, to some extent, increase the occurrence of TIP. Most scholars in the human trafficking field have frequently recognised the importance of implementing effective public social policy since it would prominently help to prevent and address poverty and low levels of job opportunities as the root causes of push factors of TIP in most source countries. Indonesia, under the recent Jokowi presidential regime, is a prominent source country for TIP. It has implemented policy initiatives that focus on improving and expanding social assistance programmes, aiming to enhance quality education and skills, thereby increasing job opportunities for the lower class. However, findings by Suryahadi and Izzati highlight critical limitations in the effectiveness of these initiatives, particularly in addressing the needs of the most vulnerable populations.[1069] While such programs may help sustain positive real consumption growth, essentially preventing further decline in living standards, they fall short of enabling long-term economic mobility.[1070] Crucially, they do not generate sufficient employment or income opportunities essential to lift people out of poverty.

[1068] Bar Council Malaysia, "Migrants' Workers Access to Justice: Malaysia," Bar Council Malaysia, November 2019.

[1069] Asep Suryahadi and Ridho Al Izzati, "Cards for the Poor and Funds for Villages: Jokowi's Initiatives to Reduce Poverty and Inequality," *Journals of Southeast Asian Economies* 35, no. 2 (2018): 200-222, 210.

[1070] Suryahadi and Izzati, "Cards for the Poor and Funds for Villages: Jokowi's Initiatives to Reduce Poverty and Inequality." 210.

This lack of economic prospects often pushes individuals to seek work abroad, making them vulnerable to traffickers who exploit their desperation with false job offers, especially in countries like Malaysia or Taiwan, where demand exists for low-skilled labour, resulting in many victims lacking higher education or formal skills, limiting their access to safe employment.[1071] Hence, in this case, ineffective social policies in the source country indirectly facilitate trafficking by failing to address the structural poverty and lack of opportunity that drive people into exploitative situations.

V. Conclusion

Through examining an analysis of Indonesia as a source for TIP, this paper has demonstrated that states have an enabling role in trafficking by considering their institutional and social dimensions. The discussion within Indonesia's institutional capacity reveals that the country's weak bureaucracy, stemming from corruption and ineffective legal enforcement, facilitates TIP by providing traffickers with impunity to commit crimes, mainly due to poor governance. Secondly, the lack of a more robust border security management is also a contributing factor since it could establish several trafficking passages in areas with limited defences. Regarding the social implications, the lack of government funding to increase public awareness and knowledge about trafficking often causes permissive conditions for TIP that use the lack of understanding to deceive them into exploitative conditions and avoid convictions for their crimes. On a final note, the unsuccessful government's attempts to expand social assistance initiatives have not only facilitated but also prompted TIP to persist, as it fails to serve its primary purpose: preventing and addressing the economic factors that are the root causes of trafficking.

Despite presenting a set of compelling contributing factors, this paper acknowledges the need for more empirical evidence to substantiate a more rigorous analysis. However, several potential policy remedies can be inferred based on the challenges discussed earlier. For instance, improving bureaucratic transparency and strengthening legal accountability mechanisms could deter traffickers from operating within environments with weak governments. Likewise, enhancing border surveillance in trafficking-prone areas through inter-agency coordination and technological

[1071] Kosandi et al., "Combating Human Trafficking in the Source Country: Institutional, Socio-cultural, and Process Analysis of Trafficking in Indonesia," 244.

monitoring could strengthen institutional capacity to combat TIP. On the social side, redirecting social protection programs to focus on long-term employment generation, vocational training, and local enterprise development may reduce the economic vulnerabilities that traffickers exploit.

These potential applications highlight the importance of a multi-sectoral, capacity-oriented approach to anti-trafficking policy. Future research should build on these insights through closer collaboration with state actors, local communities, and civil society to better identify, test, and scale effective interventions tailored to source-country dynamics.

Bibliography

Ariadne, Evie, Pratamawaty, Benazir Bona, and Limilia, Putri. “Human Trafficking in Indonesia, Dialectic of Poverty and Corruption,” *Jurnal Ilmu-ilmu Sosial dan Humaniora* 23 no. 3 (2021): 356-363.

Bar Council Malaysia. “Migrants’ Workers Access to Justice: Malaysia,” Bar Council Malaysia, November 2019.

Blanton, Robert G, Blanton, Shannon Lindsey, and Peksen, Dursun. “Confronting human trafficking: The role of state capacity,” *Conflict Management and Peace Science* 37, no. 4 (2018): 471-489, https://journals.sagepub.com/doi/10.1177/0738894218789875.

Broad, Rose. and Lord, Nicholas. “Corruption as a Facilitator of Human Trafficking: Some Key Analytical Issues,” In *Corruption in Commercial Enterprise: Law, Theory and Practice*, pp. 63-81 (Routledge, 2018).

Cockbain, Ella. and Bowers, Kate. “Human trafficking for sex, labour and domestic servitude: how do key trafficking types compare and what are their predictors?,” *Crime, Law and Social Change* 72 (2019): 9–34, https://doi.org/10.1007/s10611-019-09836-7.

DiRienzo, Cassandra E and Das, Joyoti. “Human Trafficking and Country Borders.” *International Criminal Justice Review* 27, no. 4 (2017): 278-288, https://journals.sagepub.com/doi/pdf/10.1177/1057567717700491.

Friastuti, Rini, Pandapotan, Thomas Bosco. and Hadi, Fadjar. (2023) “Kemlu: Kasus Pidana Perdagangan Orang Naik 100%, Sepanjang 2022 Ada 752 Kasus.” Kumparan, April 2023,

https://kumparan.com/kumparannews/kemlu-kasus-pidana-perdagangan-orang-naik- 100-sepanjang-2022-ada-752-kasus-209EJp3osaz/full.

Hoffstaedter, Gerhard. and Missbach, Antje. "Facilitating Irregular Migration into Malaysia and from Indonesia: Illicit Markets, Endemic Corruption and Symbolic Attempts to Overcome Impunity," *Public Anthropologist* 3 (2021): 8-31.

Kennedy, Posma Sariguna Johnson, Tobing, Suzanna Josephine L, Heatubun, Adolf Bastian, and Lumbantoruan, Rutman. "Strategic Issues of Indonesian Border Area Development Based on The Master Plan 2015- 2019", *Proceeding International Seminar on Accounting for Society* 1 no. 1 (2018): 190-198.

Kosandi, Meidi, Subono, Nur Iman, Susanti, Vinita, and Kartini, Evida. "Combating Human Trafficking in the Source Country: Institutional, Socio-cultural, and Process Analysis of Trafficking in Indonesia," *Advances in Social Sciences, Education and Humanities Research* 67 (2017): 241-246.

Limoncelli, Stephanie A. (2009) "Human Trafficking: Globalization, Exploitation, and Transnational Sociology." *Sociology Compass* 3, no.1 (2009): 72-91, doi: 10.1111/j.1751-9020.2008.00178.x.

Lee, June JH. "Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps," *International Migration* 43 (2005): 165–201.

Naibaho, Nathalina. "Human trafficking in Indonesia: law enforcement problems," *Indonesia Law Review* 1 no. 1 (2011): 83-100.

Nurdin, Endang and Lumbanrau, Raja Eben. "Swollen face, burns, dog bites,' efforts to seek justice for Adelina Sau: 'No more abuse of domestic servants," BBC, December 2021, https://www.bbc.com/indonesia/dunia-59302288.

Othman, Zarina. "Trafficking in women from the former Soviet Union for the pur- poses of sexual exploitation," In *Trafficking and the Global Sex Industry*, pp. 47-60. New York: Lexington Books, 2006.

Piper, Nicola. "A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania," *International Migration* 43 (2005): 203– 233.

Ramadhan, Muhammad Pathan and Sulistyanti, Jihan Syahida. "The Geo-Politics for Preventing Human Trafficking in Indonesia: A Lesson Learn from Maritime State," *Indonesian Journal of Advocacy and Legal Service* 2 no. 2 (2020): 277-290.

Roopnaraine, Terry "Child Trafficking in Kosovo," Save the Children in Kosovo, Pristina (2002).

Shelley, Louise. "Human trafficking: A global perspective," Cambridge University Press, 2010.

Sibarani, Sabungan. "Policies Adopted by the Government of Indonesia in the Prevention of Trafficking in Persons (Human Trafficking)," *Advances in Social Science, Education and Humanities Research* 48 (2020): 19-24.

Sulaksono, Endro. "The Patterns of Human Trafficking of Indonesian Migrant Workers: Case Study of the Riau Islands and Johor Border Crossing," *Masyarakat, Jurnal Sosiologi* 23, no. 2 (2018): 167-186, https://scholarhub.ui.ac.id/mjs/vol23/iss2/3.

Suryahadi, Asep and Izzati, Ridho Al. "Cards for the Poor and Funds for Villages: Jokowi's Initiatives to Reduce Poverty and Inequality," *Journals of Southeast Asian Economies* 35, no. 2 (2018): 200-222, 210.

The Advocates of Human Rights. "Trafficking Routes," The Advocates of Human Rights, April 2019, https://www.stopvaw.org/trafficking_routes.

The Indonesian Police Public Relations Team. "National Police Reveals 500 Cases of Human Trafficking," The Indonesian National Police, June 2023, https://humas.polri.go.id/2023/06/07/polri- ungkap-500-kasus-perdagangan-orang/.

Truong, Thanh-Dam and Angeles, Maria Belen. "Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices," Paris, France: United Nations Educational, Scientific and Cultural Organization (UNESCO), 2003.

United Nations. "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime," New York: United Nations, 2000. https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons.

United Nations Office on Drugs and Crime (UNODC). "Indonesia: Counter transnational organized crime and illicit trafficking," UNODC, December 2023, https://www.unodc.org/indonesia/en/issues/counter-transnational-organized-crime-and-illicit-trafficking.html.

U.S. Embassy and Consulate in Indonesia. "2023 Trafficking in Persons Report," U.S. Embassy Jakarta, June 2023,

https://id.usembassy.gov/our-relationship/official-reports/2023- trafficking-in-persons-report/.

Wakgari, Gudetu. “Causes and Consequences of Human Trafficking in Ethiopia: The case of Women in the Middle East,” *International Journal of Gender and Women’s Studies* 2 no. 2 (2014): 233-246.

Wheaton, Elizabeth M, Schauer, Edward J, and Galli, Thomas V. “Economics of Human Trafficking,” *International Migration* 48 no. 4 (2010): 114-141, doi:10.1111/j.1468-2435.2009.00592.x.

Zhang, Sheldon X and Pineda, Samuel L. “Corruption as a Causal Factor in Human Trafficking,” In *Organized Crime: Culture, Markets and Policies* (New York: Springer, 2008): 41-55.

Research Article

The Invisible Killings: The Epidemic of Transfemicide

Martina Semino

Received: 28 January 2025 / Accepted: 10 June 2025

Abstract

The killing of transgender women is a widespread social problem throughout the world. Nonetheless, these crimes are often made invisible by their mislabelling and the lack of research surrounding them. This paper provides a contribution that explores the reconceptualisation of the killing of transgender women from anti-trans hate crimes to transfemicide. This paper uses a case study approach to analyse the killings of transgender women in Argentina and specifically the case of Diana Sacayàn and its judgment. By exploring the differences that arise between naming the murder as a hate crime, femicide, or transfemicide, the paper positions itself in the politics of naming. Indeed, the argument is made that transfemicide is the only term able to capture the unique experiences of transgender women because of their inherent intersectional identities and the continuum of violence and discrimination they face in their day-to-day life, often ending in their murder.

Keywords: Transfemicide, Anti-trans Hate Crimes, Politics of Naming, Invisibility, Argentina

I. Introduction

Naming social problems is seen as a way to build a social reality and make certain phenomena visible.[1072] Naming gives meaning to events, factors, and most importantly for this paper, to crimes.[1073] This paper contributes to the politics of naming in the criminological discipline by analysing the crime of transfemicide.

[1072] Pamela Davies, Peter Francis, and Tanya Wyatt, *Invisible Crimes and Social Harms* (London: Palgrave Macmillan 2014) 3, https://doi.org/10.1057/9781137347824.
[1073] Ibid.

Homicides against transgender individuals have usually been classified as anti-trans hate crimes.[1074] The most common victims of such crimes are transgender women who often remain invisible to the public sphere, resulting in the non-investigation of their crimes and a public ignorance of their murders.[1075] This paper's central claim is that a reconceptualisation of homicides against transgender women as transfemicides is necessary to increase the visibility of such crimes, to ensure justice for the victims, and introduce the issue within the political agenda and decision-making level.

The Office of the United Nations High Commissioner for Human Rights defines transgender as 'an umbrella term used to describe people whose sense of their own gender is different to the sex that they were assigned at birth.'[1076] With the emergence of this term, the associated term transphobia started being used. Transphobia has been defined as 'an irrational reaction to those who do not conform to the socio-cultural ideology of gender conformity.'[1077] Transphobia has been seen to be rooted primarily in social norms and cultural factors.[1078] Many crimes against transgender individuals are largely motivated by transphobia which makes these crimes be categorised as hate crimes.[1079] Nonetheless, when it comes to the homicide of transgender women the question arises whether classifying these crimes under the term of hate crimes is effective to properly address them. This paper aims at analysing this by answering the following research question:

[1074] Mark A. Walters et al., "Hate Crimes Against Trans People: Assessing Emotions, Behaviors, and Attitudes Toward Criminal Justice Agencies," *Journal of Interpersonal Violence* 35, no. 21–22 (2017): 4585, https://doi.org/10.1177/0886260517715026.

[1075] Christina DeJong et al., "'A Human Being Like Other Victims': The Media Framing of Trans Homicide in the United States," *Critical Criminology* 29, no. 1 (2021): 132, https://doi.org/10.1007/s10612-021-09559-z; Emily Lenning, Sara Brightman, and Carrie L. Buist, "The Trifecta of Violence: A Socio-Historical Comparison of Lynching and Violence Against Transgender Women," *Critical Criminology* 29, no. 1 (2020): 153, https://doi.org/10.1007/s10612-020-09539-9; Rayna E. Momen and Lisa M. Dilks, "Examining Case Outcomes in US Transgender Homicides: An Exploratory Investigation of the Intersectionality of Victim Characteristics," *Sociological Spectrum* 41, no. 1 (2020): 53, https://doi.org/10.1080/02732173.2020.1850379.

[1076] "Transgender people", United Nations Human Rights Office of the High Commissioner, 2024, https://www.ohchr.org/en/sexual-orientation-and-gender-identity/transgender-people (accessed May 21, 2025).

[1077] Lewis Turner, Stephen Whittle, and Ryan Combs, "Transphobic Hate Crime in the European Union," 2009, 7, https://www.ilga-europe.org/sites/default/files/transphobic_hate_crime_in_the_european_union_0.pdf.

[1078] Pelin Göksel, "Discrimination and Violence Against Transgender People," *Psikiyatride Guncel Yaklasimlar - Current Approaches in Psychiatry* 16, no. 4 (2024): 736, https://doi.org/10.18863/pgy.1417609.

[1079] Göksel, "Discrimination and Violence Against Transgender People."

Is a reconceptualisation of homicides against transgender women from anti-trans hate crimes to transfemicide needed to increase the visibility of such crimes?

To answer the research question, this paper will provide a literature review of the field of anti-trans hate crimes, focusing on homicides of transgender women, and of the field of the politics of naming, specifically looking at femicide to contextualise this contribution. It will then present the term 'transfemicide' and explain what this term entails. This will be followed by presenting the case study methodology approach of the paper, which will be conducted on the judgment of the Diana Sacayàn case in Argentina. The case will be used to discuss the effects that naming the killing as hate crime or transfemicide has on the visibility of the crime. The paper will conclude that the term transfemicide is the only one capable of capturing all the factors that play a role in the murder of transgender women and, therefore, give visibility to this social problem.

II. Literature Review

A. Anti-Trans Hate Crimes: Systemic Violence against Transgender Women

Transgender individuals are over four times as likely to experience violence in their lives as cisgender individuals.[1080] Nonetheless, there is a general lack of research surrounding this violence.[1081] As explained above, much of the violence against transgender people is motivated by transphobia. Thus, crimes against such people are classified as hate crimes. What makes hate crimes a separate category of crimes is not only the hate behind the action that is directed towards the victim due to a specific characteristic they embody, but also the fact that the violence impacts the victim and extends to the whole identity group the victim belongs to.[1082] The focus of hate crimes

[1080] Andrew R. Flores et al., "Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018," *American Journal of Public Health* 111, no. 4 (2021): 727, 729, https://doi.org/10.2105/ajph.2020.306099.

[1081] Andrea L. Wirtz et al., "Gender-Based Violence Against Transgender People in the United States: A Call for Research and Programming," *Trauma Violence & Abuse* 21, no. 2 (2018): 227, https://doi.org/10.1177/1524838018757749.

[1082] Organization for Security and Cooperation in Europe and Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (ODIHR, 2009), 16, https://www.overcominghateportal.org/uploads/5/4/1/5/5415260/hate_crimes_laws.pdf; Walters et al., "Hate Crimes Against Trans People.", 4584.

is, however, set on the motive of the perpetrator for committing the crime rather than on the characteristics of the victims themselves.[1083] Hate crimes in this sense are perpetrator-focused, rather than victim-focused, as what matters is which group the perpetrator identifies the victims with, rather than what group the victims identify themselves with.[1084]

Hate crimes specifically against transgender individuals are often of a higher severity than other hate crimes because of the secondary violence that victims experience from law enforcement and police officers.[1085] This violence often comes in the form of misgendering or misidentifying the victims, by, for example, using their deadnames.[1086] This results in an underestimation of the crimes committed against trans people as they may be labelled, for example, as male-on-male crimes if a man perpetrated the crime against a transgender woman who was misgendered by the police.[1087]

The violence experienced by trans individuals may ultimately culminate in their death. The number of such deaths is severely underestimated due to inaccurate reporting systems, especially when it comes to transgender women, resulting in a very low degree of visibility of such crimes.[1088] Transgender women have the highest risk of being killed due to their female and gender identity.[1089] Studies have shown that the inherent intersectionality of the identities of these women makes them especially vulnerable victims.[1090] Cisgender women get victimised because of their gender, but when it comes to transgender women, this victimisation increases substantially because of the intersection between their gender and gender identity.[1091] Nonetheless, even when taking into account these factors, victims of such crimes, their families and their social groups receive further violence when the crimes are reported to law enforcement or by the media.[1092] Despite the reporting of these crimes increasing in

[1083] Kellina M. Craig, "Examining Hate-motivated Aggression: A Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression," *Aggression and Violent Behavior* 7, no. 1 (2002): 87, https://doi.org/10.1016/s1359-1789(00)00039-2.
[1084] Ibid.
[1085] Walters et al., "Hate Crimes Against Trans People.", 4592.
[1086] DeJong et al., "'A Human Being Like Other Victims'.", 143.
[1087] Momen and Dilks, "Examining Case Outcomes in US Transgender Homicides.", 53.
[1088] Göksel, "Discrimination and Violence Against Transgender People.", 746.
[1089] Janice Joseph, "Multiple Invisibility of Black Victims of Transfemicide: An Intersectional Approach," *Peace Review* 34, no. 4 (2022): 509, https://doi.org/10.1080/10402659.2022.2132109.
[1090] Ibid, 505, 509.
[1091] DeJong et al., "'A Human Being Like Other Victims', 132.
[1092] Walters et al., "Hate Crimes Against Trans People.", 4593.

the last decade, the way in which they are reported in the news often feeds into heteronormative narratives and facilitates violence against transgender women.[1093] Indeed, transgender women that present traits associated with traditional womanhood tend to be accepted more in society.[1094] Transgender women who, however, do not present those traits, tend to be further victimised even after their killing, through phrases such as 'male wearing women's clothing' or being referred to as 'he', highlighting the biological sex of the victim.[1095]

Since transgender women experience the highest rate of victimisation, it has been argued that labelling their homicides as hate crimes does not capture the uniqueness of their experience and their communities and focuses on the wrong aspect of the crime.[1096] Therefore, the next section will analyse how naming and labelling social problems can change their visibility and the actions taken to address them by using the example of femicide. This will be used as a point of departure to explore how to best name murders of transgender women to increase their visibility and the actions taken to prevent these.

B. Politics of Naming: the Power of Naming Femicide

The visibility of social problems is inherently connected to the degree of actions taken to address them.[1097] To make social problems visible, naming and labelling are not only indispensable but also influence how such problems will be addressed in the future.[1098] Jupp et al. identified seven degrees of invisibility of social problems: lack of knowledge, absence of statistics, absence of theory, absence of research, lack of control, absence of politics and absence of panic.[1099] If a social problem is not named or named incorrectly, it will remain invisible in all of these degrees and, consequently,

[1093] DeJon DeJong et al., "'A Human Being Like Other Victims', 132, 133.
[1094] Emily Skidmore, "Constructing the 'Good Transsexual': Christine Jorgensen, Whiteness, and Heteronormativity in the Mid-Twentieth-Century Press," *Feminist Studies* 37, no. 2 (2011): 271, https://www.jstor.org/stable/23069901.
[1095] DeJon DeJong et al., "'A Human Being Like Other Victims', 134.
[1096] DeJon DeJong et al., "'A Human Being Like Other Victims', 134; Tribunal Oral en lo Criminal y Correctional N° 4 (Oral Court in Criminal and Correctional Matters N° 4, Argentina) 2018, *causa nro. 62.162/2015 contra G D M*, 5268, 1, 372.
[1097] Davies, Francis, and Wyatt, *Invisible Crimes and Social Harms*.
[1098] Ibid.
[1099] Victor Jupp, Pamela Davies, and Peter Francis, "The Features of Invisible Crimes," in *Invisible Killings* (London: Palgrave Macmillan, 1999), 5, https://doi.org/10.1007/978-1-349-27641-7_1.

it will not be addressed.[1100] The lack of naming or how social problems are named can enable institutions and organisations to construct a manipulated social reality where crimes and victims can be ignored.[1101] Social scientists can utilise research and varying levels of visibility to reconstruct the social reality surrounding crimes and victims, making them visible and, as a result, enabling these issues to be addressed.[1102]

An example of how a previously invisible social problem became visible by being properly named can be seen with femicide. The term femicide was first coined by Diana Russel in 1976 who aimed to raise awareness that 'the violent death of women was a crime *per se*, not to be confused with the gender-neutral term "homicide".'[1103] Russel claimed that reducing the violent death of women to the crime of homicide fails to take into account the special gender-based evidence of killing a woman.[1104] She further positioned herself in the politics of naming, arguing that without a proper name, a significant social problem remains invisible, and therefore cannot be recognised or addressed.[1105] Following her assertions, research began being conducted and the term gained visibility and importance.[1106]

Research quickly revealed that men are being killed at a higher rate than women around the world.[1107] However, their death is not a consequence of their gender, as is the case with women.[1108] Introducing the word femicide shifted the focus when analysing these crimes highlighting important driving factors that were ignored when these crimes were simply labelled as homicides.[1109] Indeed, femicide occurs within a culture shaped by patriarchy, misogyny, and the oppression of women, where women are placed in a subordinate position within a male-dominated society.[1110] With the term femicide, the killing of women is seen as more than just a crime, as it also

[1100] Davies, Francis, and Wyatt, *Invisible Crimes and Social Harms*.
[1101] Davies, Francis, and Wyatt, *Invisible Crimes and Social Harms*, 9,11.
[1102] Davies, Francis, and Wyatt, *Invisible Crimes and Social Harms*, 5.
[1103] Consuelo Corradi et al., "Theories of Femicide and Their Significance for Social Research," *Current Sociology* 64, no. 7 (2016): 976, https://doi.org/10.1177/0011392115622256.
[1104] Ibid, 977.
[1105] Ibid, 976.
[1106] Ibid, 978.
[1107] Ibid, 977.
[1108] Ibid, 977.
[1109] Chaime Marcuello-Servós et al., "Femicide: A Social Challenge," *Current Sociology* 64, no. 7 (2016): 968, https://doi.org/10.1177/0011392116639358.
[1110] Rae Taylor and Jana L. Jasinski, "Femicide and the Feminist Perspective," *Homicide Studies* 15, no. 4 (2011): 342, 343, https://doi.org/10.1177/1088767911424541.

'encompasses a cultural, political, legal and penal framework.'[1111]

An example of how the word femicide changed the visibility of the murder of women can be seen in Mexico. The transformative work of Marcela Lagarde in translating and contextualising the term 'femicide' into Spanish changed Mexican social reality.[1112] The word began expressing the violent death of women and girls as the killing of both their biological body and its cultural construction of it.[1113] Consequently, this led to public institutions and the state prioritising such crimes and promoting legal amendments to address them.[1114] While the resolution of the issue of femicide remains a point of discussion in Mexico today, the reality in the country has shifted from one marked by silence – lacking data, political discourse and public concern – to one where these elements are now present and actively shape the response to femicide.[1115]

By discussing the politics of naming, this paper claims that words hold great power in making a phenomenon visible and changing the way it is approached. It will, therefore, examine the killing of transgender women and explore how naming these as anti-trans hate crime or transfemicide influences their visibility. The next section introduces the term transfemicide, outlining its meaning and implications and serving as the lens for the analysis that will follow.

C. Transfemicide

Femicide has been defined in the Vienna Declaration on Femicide as 'the killing of women and girls because of their gender, which can take the form of, […] the killing of women and girls because of their sexual orientation and gender identity'.[1116] However, when analysing killings of women due to their gender and their gender identity, scholars have coined the word transfemicide to more accurately reflect this specific form of

[1111] Marcuello-Servós et al., "Femicide: A Social Challenge.", 969.
[1112] Corradi et al., "Theories of Femicide.", 984.
[1113] Julia E. Monárrez Fragoso, "Fortaleciendo El Entendimiento Del Femicidio/Feminicidio," SlideServe, 2008, 23, https://www.slideserve.com/sherman/fortaleciendo-el-entendimiento-del-femicidio.
[1114] Corradi et al., "Theories of Femicide.", 985.
[1115] Ibid.
[1116] United Nations, "Vienna Declaration on Femicide," *E/CN.15/2013/NGO/1*, February 1, 2013, 2 https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_22/_E-CN15-2013-NGO1/E-CN15-2013-NGO1_E.pdf.

violence by defining it as 'the most visible and final expression of a chain of structural violence that responds to a cultural, social, political and economic system structured by an exclusionary binary gender division.'[1117] Unlike the term femicide, which primarily centres around the cisgender identity of women and often treats gender identity as a secondary factor, transfemicide explicitly positions both gender and gender identity as central to the violence experienced by transgender women.[1118]

The term transfemicide has been acknowledged by international institutions like Human Rights Watch, which praised the term as being able to capture the intersectional nature of the violence experienced by transgender women in a patriarchal society characterised by rigid gender norms.[1119] Indeed, as women they experience sexism characterised by gender inequalities that they share with cisgender women in a patriarchal society.[1120] Yet, as transgender individuals, they experience cissexism characterised by discrimination and oppression, since cisgender individuals are perceived as more 'natural' and 'legitimate' than transgender individuals.[1121] The combination of various aspects of their social identities makes the violence experienced by transgender women multiplicative compared to the one experienced by individuals with less discriminated social identities.[1122] Thus, the term transfemicide can capture all of these intersecting identities and the violent experiences transgender women face as a result, culminating in their death.

III. Methodology

To answer the research question, the paper will use a case study approach, focusing on Argentina as a country, and specifically on the case of Diana Sacayàn. This case study will investigate whether the killing of Sacayàn should be described as a hate crime or as a transfemicide. Argentina was picked as a focus for two reasons: (1)

[1117] Blas Radi, Alejandra Sardá-Chandiramani, and Observatorio de Género, "Travesticide / Transfemicide: Coordinates to Think Crimes Against Travestis and Trans Women in Argentina," *Publicación En Línea*, n.d., 3, (2016) https://www.aacademica.org/blas.radi/15.pdf.

[1118] Lorena Sosa, "Now You See Me? The Visibility of Trans and Travesti Experiences in Criminal Procedures," *Politics and Governance* 8, no. 3 (2020): 269, https://doi.org/10.17645/pag.v8i3.2804.

[1119] ""Every Day I Live in Fear": Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States", Human Rights Watch, October 2020, 22, 23 https://www.refworld.org/reference/themreport/hrw/2020/en/148716.

[1120] Joseph, "Multiple Invisibility of Black Victims of Transfemicide.", 509.

[1121] Ibid.

[1122] Ibid, 510.

78.8% of the murders of transgender individuals in the world happen in Latin America;[1123] (2) the *Sacayàn* case was the first case in Latin America where a Court discussed the possibility of introducing the term transfemicide in legal practice.[1124] The case study approach will be used to dive deep into the murder itself but also into all the factors surrounding it and how they influenced the event itself and its aftermath. A case study approach was deemed as the most appropriate methodology since it can provide a real example of how the naming of a social problem can have effects on its visibility as was the case in Mexico. Building on this case study, the paper will expand the discussion to the broader context of killings of transgender women, focusing on how naming such events can influence their degree of visibility and the extent of social action.

Proceeding with the case study methodology allows for an in-depth analysis of the *Sacayàn* case but also comes with its limitations. Indeed, to be able to generalise the findings of this paper to many more murders of transgender women, further large-scale research in different geographical areas needs to be conducted. Nonetheless, utilising the case study approach in this specific papers offers the possibility to analyse the real impact the term transfemicide can have on a specific and tangible case and is, therefore, deemed as the most appropriate methodology for the purpose of this paper.

IV. Case Study: Argentina and Diana Sacayàn

A. Context of the Case

According to the Trans Murder Monitor (TMM), between 2008 and 2024, Argentina witnessed 127 murders of transgender individuals.[1125] TMM deems, however, that this number is severely underestimated. The actual number of murdered trans individuals is unknown, because of inaccurate statistics due to misgendering and mislabelling. Transgender women are the most affected by these murders, having a life expectancy between 35 to 40 years, as compared to the general life expectancy of 75 years in

[1123] Izabel Cristina Brito Da Silva et al., "Gender Violence Perpetrated Against Trans Women," *Revista Brasileira De Enfermagem* 75, no. suppl 2 (2022), 5, https://doi.org/10.1590/0034-7167-2021-0173.
[1124] "Killer handed life sentence for brutal murder in historic transveticide trial", *Buenos Aires Times*, 18 June 2018, https://www.batimes.com.ar/news/argentina/killer-handed-life-sentence-for-brutal-murder-in-historic-transvesticide-trial.phtml (accessed 21 May 2025).
[1125] "TMM absolute numbers (2008 – Sept 2024)", Trans Murder Monitor, 2024, https://transrespect.org/en/map/trans-murder-monitoring/#.

Argentina.[1126]

In October 2015, one of these murders occurred, this time seeing Diana Sacayàn as the victim.[1127] The case gained a lot of local and global attention due to the victim herself and due to the Court's judgement.

As an Argentinian LGBT activists, with a focus on transgender rights, Sacayàn led Argentina's Anti-Discrimination Liberation Movement and co-lead the International Lesbian, Gay, Bisexual, Transgender Association.[1128] Through her activism she pushed Argentina to pass a law on gender identity which allowed a person to change their sex and name without requiring medical interventions.[1129] The law was a big achievement in itself and it was further used to interpret other legislation granting transgender individuals more rights, such as including them as possible victims of femicide.[1130] It was due to her efforts she was the first transgender woman in Argentina in 2012 to receive a corrected national identity card from the President of Argentina.[1131]

Though the situation in Argentina ameliorated and transgender individuals gained more rights with time, murders persisted. In October 2015 Sacayàn was murdered in her apartment in Buenos Aires.[1132] She was stabbed 13 times in the chest by Gabriel David Marino.[1133] When it came to sentencing Marino, the Court was faced with the legal question of which offence to charge him with, specifically whether an anti-trans hate crime was enough to capture the uniqueness of the crime.[1134] Ultimately the Court

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[1126] Maria Fernanda Rotondo et al., "Cis, Trans and Lesbian Women in Situations of Violence and Access to Justice in Northwest Argentina: From Diagnosis to Action," *Indiana International & Comparative Law Review* 34, no. 1 (2024): 59, https://doi.org/10.18060/28375.

[1127] Cleis Albeni, "Prominent Activist Becomes Third Trans Woman Recently Murdered in Argentina", *Advocate*, 15 October 2015, https://www.advocate.com/transgender/2015/10/15/prominent-activist-becomes-third-trans-woman-recently-murdered-argentina#toggle-gdpr (accessed 21 May 2025).

[1128] Ibid.

[1129] Ibid.; *Ley 26.743 Establécese el derecho a la identidad de género de las personas* (Law 26.743) [2012] El Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso.

[1130] Martín De Mauro Rucovsky and Ian Russell, "The Travesti Critique of the Gender Identity Law in Argentina," *TSQ Transgender Studies Quarterly* 6, no. 2 (2019): 224, https://doi.org/10.1215/23289252-7348510.

[1131] Valen Iricibar, "Google Doodle honors travesti activist Diana Sacayán", Buenos Aires Herald, 2 July 2023, https://buenosairesherald.com/culture-ideas/google-doodle-honors-travesti-activist-diana-sacayan (accessed 21 May 2025).

[1132] "Argentina: Man sentenced to life for brutal transgender murder", *BBC News*, 18 June 2018, https://www.bbc.com/news/world-latin-america-44528454 (accessed 21 May 2025).

[1133] Ibid.

[1134] Tribunal Oral en lo Criminal y Correctional N° 4 (Oral Court in Criminal and Correctional Matters N° 4, Argentina) 2018, *causa nro. 62.162/2015 contra G D M*, 5268, 1.

charged Marino with having committed murder aggravated by both a hate crime based on gender identity and femicide, while still recognising the crime of transfemicide/travesticide for the first time.[1135]

It is worth noting that travesticide refers to the victim identifying as 'travesti'. While it is a word still used in Latin America delineating a specific gender identity, in many other parts of the world it is deemed as offensive.[1136] For the purpose of this paper and for the interpretation and translation of the *Sacayàn* judgment, the terms transfemicide and travesticide will be used interchangeably.

B. The Judgment: Hate Crime, Femicide or Transfemicide?

The judges in the *Sacayàn* case were asked to determine whether the murder was aggravated according to Article 80.4 of the Argentinian Criminal Code, namely hate crime based on gender identity, or Article 80.11, namely femicide.[1137] While providing their decisions the judges raised important questions on whether either of the aggravating circumstances were capable of capturing the continuum of the structural violence and discrimination faced by transgender women.[1138]

Regarding hate crimes, it was argued that they were not capable of protecting groups experiencing structural discrimination.[1139] Indeed, such crimes focus on the motivation of the offender rather than on the group the victim belongs to.[1140] Furthermore, the difficulty in defining hate, as well as proving it, fails at capturing the socio-structural element of such crimes.[1141]

[1135] Ibid, 174, 387.

[1136] Sosa, "Now You See Me?", 266; "transvestite", *Cambridge Dictionary*, 2024, https://dictionary.cambridge.org/dictionary/english/transvestite#google_vignette (accessed 21 May 2025).

[1137] *Ley 11.179 Codige Penal de la Naciòn Argentina* (Law 11.179) [1984] Honorable Congreso de la Naciòn Argentina.

[1138] Tribunal Oral en lo Criminal y Correctional N° 4 (Oral Court in Criminal and Correctional Matters N° 4, Argentina) 2018, *causa nro. 62.162/2015 contra G D M*, 5268, 1, 381.

[1139] Ibid, 372.

[1140] Ibid, 173, 307.

[1141] Tribunal Oral en lo Criminal y Correctional N° 4 (Oral Court in Criminal and Correctional Matters N° 4, Argentina) 2018, *causa nro. 62.162/2015 contra G D M*, 5268, 1, 171; Sosa, "Now You See Me?", 273.

Under Argentinian law, transgender women are legally recognised as women within the context of femicide.[1142] Nonetheless, the traditional interpretation of Article 80.11, requires femicide to be perpetrated in a situation of subordination characterised by the inequalities between the female victim and the male perpetrator, often involved in an intimate relation.[1143] According to the judges, this also does not convey the socio-structural dimension of the murder of transgender women, as well as the intersectional character of such murders.[1144]

Consequently, the judges agreed that the term travesticide/transfemicide was the most appropriate to capture the special and unique experiences of transgender women as well as all the factors surrounding their murders.[1145] Indeed, hate crimes based on gender identity focus on one aspect of the crime and femicide on the other but both fail to consider the intersectional nature of the crime.[1146] Specifically, one of the judges argued that introducing the new term transfemicide – or any other terminology – in the legal sphere should be possible if it is needed to capture the specific hatred and subjectivity of the crime and bring visibility to the problem.[1147] Nonetheless, since the specific crime of transfemicide does not yet exist in Argentinian law, the judges charged the culprit of murder aggravated by both hate and by femicide, seeing the combination of the two to reflect best the current legal framework and the intersectional nature of these crimes.[1148] Transfemicide was left as a suggestion for the drafting of the new Criminal Code, since it should not be introduced into legal practice by the judges, but rather by a new legislation, as was the case with femicide.[1149]

V. Discussion: Should Transfemicide Become the New Legal Practice?

The *Sacayàn* case is an important example showcasing how the current legal framework around the murder of transgender women in Argentina is insufficient to address the uniqueness of crimes perpetrated against them. The Court took a step

[1142] *Ley 26.743 Establécese el derecho a la identidad de género de las personas* (Law 26.743) [2012] El Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso.
[1143] [1143] Sosa, “Now You See Me?”, 269.
[1144] [1144] Sosa, “Now You See Me?”, 273.
[1145] Ibid, 272.
[1146] Ibid.
[1147] Tribunal Oral en lo Criminal y Correctional N° 4 (Oral Court in Criminal and Correctional Matters N° 4, Argentina) 2018, *causa nro. 62.162/2015 contra G D M*, 5268, 1, 387.
[1148] Sosa, “Now You See Me?”, 274.
[1149] Ibid.

forward in recognising the crime of transfemicide/travesticide but missed the opportunity to actively introduce it into legal practice. Interestingly, one of the judges in the case positioned herself in the politics of naming by affirming the importance of giving the right name to a social problem to increase its visibility.[1150]

This section will zoom out of the specific case of Diana Sacayàn. It will analyse the possibility of introducing the term transfemicide into legal practice as opposed to hate crime and to the term femicide.

Transgender women suffer from what Purdie-Vaughns and Eibach called 'intersectional invisibility'.[1151] This term refers to individuals that are part of more than one identity group but whose identity is distorted in order to fit the characteristics of one of these groups.[1152] However, these individuals do not fit the prototypes of any single one of these groups, resulting in the invisibility of their specific characteristics as intersectional individuals.[1153] As explained above, transgender women present inherently intersectional identities because of their gender and their gender identity. The murder of these women classified as either a hate crime or femicide, as explained by the Court in the *Sacayàn* case, makes them become victims of this intersectional invisibility. The experience of transgender women is different to those of cisgender women and other transgender individuals.[1154]

The term transfemicide is the only one able to capture the uniqueness of the murder of transgender women.[1155] The term, on one hand, recognises the gender-violence of the crime, and, on the other hand, broadens its scope to capture the specific nature of the victims' experiences.[1156] Furthermore, the existence of a new specific term lends visibility to the problem and opens the discussion around states' responsibilities concerning the impunity of these crimes and the incorrect labelling of them by state

[1150] Tribunal Oral en lo Criminal y Correctional N° 4 (Oral Court in Criminal and Correctional Matters N° 4, Argentina) 2018, *causa nro. 62.162/2015 contra G D M*, 5268, 1, 387.
[1151] Valerie Purdie-Vaughns and Richard P. Eibach, "Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities," *Sex Roles* 59, no. 5–6 (2008), https://doi.org/10.1007/s11199-008-9424-4.
[1152] Ibid, 381.
[1153] Ibid.
[1154] Joseph, "Multiple Invisibility of Black Victims of Transfemicide.", 510.
[1155] International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA World), "Submission to the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences," March 30, 2021, 4 https://ilga.org/wp-content/uploads/2024/01/submission_to_SR_WAV_femicides_Apr2021.pdf.
[1156] Ibid, 5.

officials.[1157] This new term not only captures the continuum and the structural nature of the violence these victims face, but also opens the door for the degrees of invisibility to be overturned.

VI. Conclusion

This paper has examined the murder of transgender women and the reconceptualisation of such as a transfemicide. By doing so, it has positioned itself in the politics of naming arguing that although hate crimes and femicide are important terms in criminal law, the term transfemicide is the only term able to capture the whole range of factors influencing the murder of transgender women, opening the possibility for such crimes to gain more visibility and be effectively addressed. The *Sacayàn* case was used to illustrate the power such a term can have and the potential that exists if it is incorporated in legal practice. The discussion of the *Sacayàn* case showcased how transgender women are victims of intersectional invisibility as the inherent intersectionality they face through the expression of their gender and gender identity causes them to be positioned in groups that are unable to capture the real social identity of these women.

Even though the analysis was conducted by specifically looking at Argentinian law, the findings are important on a larger global scale for addressing the murders of transgender women. Indeed, an international reconceptualisation of the killing of transgender women as transfemicide is needed to give visibility to this crime and allow transgender women to receive the treatment and dignity they deserve.

[1157] Ibid, 4; Daniella Hernández, "Femicide in the Americas," *SJSU ScholarWorks*, (April 1, 2018), 47 https://scholarworks.sjsu.edu/naccs/2018/Proceedings/8?utm_source=scholarworks.sjsu.edu%2Fnaccs%2F2018%2FProceedings%2F8&utm_medium=PDF&utm_campaign=PDFCoverPages.

Bibliography

Albeni, Cleis. "Prominent Activist Becomes Third Trans Woman Recently Murdered in Argentina", *Advocate*, 15 October 2015, https://www.advocate.com/transgender/2015/10/15/prominent-activist-becomes-third-trans-woman-recently-murdered-argentina#toggle-gdpr (accessed 21 May 2025).

"Argentina: Man sentenced to life for brutal transgender murder", *BBC News*, 18 June 2018, https://www.bbc.com/news/world-latin-america-44528454 (accessed 21 May 2025).

Corradi, Consuelo, Chaime Marcuello-Servós, Santiago Boira, and Shalva Weil. "Theories of Femicide and Their Significance for Social Research." *Current Sociology* 64, no. 7 (2016): 975–95. https://doi.org/10.1177/0011392115622256.

Craig, Kellina M. "Examining Hate-motivated Aggression: A Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression." *Aggression and Violent Behavior* 7, no. 1 (2002): 85–101. https://doi.org/10.1016/s1359-1789(00)00039-2.

Da Silva, Izabel Cristina Brito, Ednaldo Cavalcante De Araújo, Alef Diogo Da Silva Santana, Jefferson Wildes Da Silva Moura, Marclineide Nóbrega De Andrade Ramalho, and Paula Daniella De Abreu. "Gender Violence Perpetrated Against Trans Women." *Revista Brasileira De Enfermagem* 75, no. suppl 2 (2022). https://doi.org/10.1590/0034-7167-2021-0173.

Davies, Pamela, Peter Francis, and Tanya Wyatt. *Invisible Crimes and Social Harms*. (London: Palgrave Macmillan 2014) https://doi.org/10.1057/9781137347824.

DeJong, Christina, Karen Holt, Brenna Helm, and Skyler J. Morgan. "'A Human Being Like Other Victims': The Media Framing of Trans Homicide in the United States." *Critical Criminology* 29, no. 1 (2021): 131–49. https://doi.org/10.1007/s10612-021-09559-z.

De Mauro Rucovsky, Martín, and Ian Russell. "The Travesti Critique of the Gender Identity Law in Argentina." *TSQ Transgender Studies Quarterly* 6, no. 2 (2019): 223–38. https://doi.org/10.1215/23289252-7348510.

Flores, Andrew R., Ilan H. Meyer, Lynn Langton, and Jody L. Herman. "Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018." *American Journal of Public Health* 111, no. 4 (2021): 726–29. https://doi.org/10.2105/ajph.2020.306099.

Göksel, Pelin. "Discrimination and Violence Against Transgender People." *Psikiyatride Guncel Yaklasimlar - Current Approaches in Psychiatry* 16, no. 4 (2024): 731–39. https://doi.org/10.18863/pgy.1417609.

Hernández, Daniella. "Femicide in the Americas." *SJSU ScholarWorks*, (April 1, 2018). https://scholarworks.sjsu.edu/naccs/2018/Proceedings/8/?utm_source=scholarworks.sjsu.edu%2Fnaccs%2F2018%2FProceedings%2F8&utm_medium=PDF&utm_campaign=PDFCoverPages.

Human Rights Watch, ""Every Day I Live in Fear": Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States", October 2020, https://www.refworld.org/reference/themreport/hrw/2020/en/148716.

International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA World). "Submission to the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences," March 30, 2021. https://ilga.org/wp-content/uploads/2024/01/submission_to_SR_WAV_femicides_Apr2021.pdf.

Iricibar, Valen. "Google Doodle honors travesti activist Diana Sacayán", *Buenos Aires Herald*, 2 July 2023, https://buenosairesherald.com/culture-ideas/google-doodle-honors-travesti-activist-diana-sacayan (accessed 21 May 2025).

Joseph, Janice. "Multiple Invisibility of Black Victims of Transfemicide: An Intersectional Approach." *Peace Review* 34, no. 4 (2022): 501–17. https://doi.org/10.1080/10402659.2022.2132109.

Jupp, Victor, Pamela Davies, and Peter Francis. "The Features of Invisible Crimes." In *Invisible Killings* (London: Palgrave Macmillan, *1999)*. https://doi.org/10.1007/978-1-349-27641-7_1.

"Killer handed life sentence for brutal murder in historic transveticide trial", *Buenos Aires Times*, 18 June 2018, https://www.batimes.com.ar/news/argentina/killer-handed-life-sentence-for-brutal-murder-in-historic-transvesticide-trial.phtml https://www.batimes.com.ar/news/argentina/killer-handed-life-sentence-for-brutal-murder-in-historic-transvesticide-trial.phtml (accessed 21 May 2025).

Lenning, Emily, Sara Brightman, and Carrie L. Buist. "The Trifecta of Violence: A Socio-Historical Comparison of Lynching and Violence Against Transgender Women." *Critical Criminology* 29, no. 1 (2020): 151–72. https://doi.org/10.1007/s10612-020-09539-9.

Marcuello-Servós, Chaime, Consuelo Corradi, Shalva Weil, and Santiago Boira. "Femicide: A Social Challenge." *Current Sociology* 64, no. 7 (2016): 967–74. https://doi.org/10.1177/0011392116639358.

Momen, Rayna E., and Lisa M. Dilks. "Examining Case Outcomes in US Transgender Homicides: An Exploratory Investigation of the Intersectionality of Victim Characteristics." *Sociological Spectrum* 41, no. 1 (2020): 53–79. https://doi.org/10.1080/02732173.2020.1850379.

Monárrez Fragoso, Julia E. "Fortaleciendo El Entendimiento Del Femicidio/Feminicidio." SlideServe, 2008. https://www.slideserve.com/sherman/fortaleciendo-el-entendimiento-del-femicidio.

Organization for Security and Cooperation in Europe and Office for Democratic Institutions and Human Rights. *Hate Crime Laws: A Practical Guide*. ODIHR, 2009. https://www.overcominghateportal.org/uploads/5/4/1/5/5415260/hate_crimes_laws.pdf.

Purdie-Vaughns, Valerie, and Richard P. Eibach. "Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group

Identities." *Sex Roles* 59, no. 5–6 (2008): 377–91. https://doi.org/10.1007/s11199-008-9424-4.

Radi, Blas, Alejandra Sardá-Chandiramani, and Observatorio de Género. "Travesticide / Transfemicide: Coordinates to Think Crimes Against Travestis and Trans Women in Argentina." *Publicación En Línea*, n.d. https://www.aacademica.org/blas.radi/15.pdf.

Rotondo, Maria Fernanda, Fernando Esteban Barrientos, Parache Rocío Gramajo, Martin Emilio González, and Florencia Vallino Moyano. "Cis, Trans and Lesbian Women in Situations of Violence and Access to Justice in Northwest Argentina: From Diagnosis to Action." *Indiana International & Comparative Law Review* 34, no. 1 (2024): 59–91. https://doi.org/10.18060/28375.

Sosa, Lorena. "Now You See Me? The Visibility of Trans and Travesti Experiences in Criminal Procedures." *Politics and Governance* 8, no. 3 (2020): 266–77. https://doi.org/10.17645/pag.v8i3.2804.

Skidmore, Emily. "Constructing the 'Good Transsexual': Christine Jorgensen, Whiteness, and Heteronormativity in the Mid-Twentieth-Century Press." *Feminist Studies* 37, no. 2 (2011): 270–300. https://www.jstor.org/stable/23069901.

Taylor, Rae, and Jana L. Jasinski. "Femicide and the Feminist Perspective." *Homicide Studies* 15, no. 4 (2011): 341–62. https://doi.org/10.1177/1088767911424541.

"TMM absolute numbers (2008 – Sept 2024)", Trans Murder Monitor, 2024, https://transrespect.org/en/map/trans-murder-monitoring/#.

"transvestite", *Cambridge Dictionary*, 2024, https://dictionary.cambridge.org/dictionary/english/transvestite#google_vignette (accessed 21 May 2025).

Turner, Lewis, Stephen Whittle, and Ryan Combs. "Transphobic Hate Crime in the European Union," 2009, https://www.ilga-europe.org/sites/default/files/transphobic_hate_crime_in_the_european_union_0.pdf.

United Nations. "Vienna Declaration on Femicide." *E/CN.15/2013/NGO/1*, February 1, 2013. https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_22/_E-CN15-2013-NGO1/E-CN15-2013-NGO1_E.pdf.

United Nations Human Rights Office of the High Commissioner, "Transgender people", *United Nations*, 2024, https://www.ohchr.org/en/sexual-orientation-and-gender-identity/transgender-people (accessed 21 May 2025).

Walters, Mark A., Jennifer Paterson, Rupert Brown, and Liz McDonnell. "Hate Crimes Against Trans People: Assessing Emotions, Behaviors, and Attitudes Toward Criminal Justice Agencies." *Journal of Interpersonal Violence* 35, no. 21–22 (2017): 4583–4613. https://doi.org/10.1177/0886260517715026.

Wirtz, Andrea L., Tonia C. Poteat, Mannat Malik, and Nancy Glass. "Gender-Based Violence Against Transgender People in the United States: A Call for Research and Programming." *Trauma Violence & Abuse* 21, no. 2 (2018): 227–41. https://doi.org/10.1177/1524838018757749.

Research Article

The Lacunae in the Rome Statute for the Exercise of Universal Jurisdiction by the International Criminal Court

Anwesha Mishra[1158]

Received: 03 February 2025 / Accepted: 10 June 2025

Abstract

The issue of 'universal jurisdiction' reveals a legal chasm in the applicability of the Rome Statute by the International Criminal Court ("the Court"). Universal jurisdiction can simply be defined as the exercise of jurisdiction regardless of any other acknowledged jurisdictional relationship to a State party to the Statute. Universal jurisdiction poses a challenge to the Court: it is often criticised for lacking the authority to exercise such jurisdiction over international crimes. Yet, this issue of universal jurisdiction becomes especially important in the case of the Philippines, where crimes committed in the context of their government's 'War on Drugs' campaign is often argued to remain outside the Court's jurisdiction, due to the country's withdrawal from the Rome Statute since 17th March 2019. This article explores the limitations of the Statute and highlights the need to better equip the ICC to assert jurisdiction in such scenarios.

I. Introduction

The International Criminal Court (hereinafter "the Court") aims to promote principles of international cooperation to secure justice for victims of international crimes, but must navigate both supportive and uncooperative governing bodies while adjudicating matters concerning crimes both within and beyond the borders of States.[1159] The Rome Statute (hereinafter "the Statute"), as the ultimate product of drafting and preparatory talks, was approved by 120, 7 against and 21 abstentions amongst the member States

[1158] The author is a final-year law student pursuing B.B.A LL. B (Hons.) at National Law University Odisha.

[1159] Philip Allot, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press, 2002), 215-245.

of the United Nations.[1160]

The Court exercises its jurisdiction over four broad categories of international crimes: crimes of aggression, crimes against humanity, war crimes, and genocide.[1161] Alongside the ability of the Court to exercise jurisdiction over international crimes committed within the jurisdiction of a member State, Article 12(3) lets a State consent to the Court's jurisdiction on an ad hoc basis. In such case, a State is required to collaborate with the Court when:

(a) The conduct in question occurred in the territory of such State or, if the crime was committed on board an aircraft or vessel, the State where the vessel or aircraft is registered; and

(b) The accused is a citizen of that State.[1162]

In addition, Article 13(b) grants jurisdiction in case where one or more of these crimes seem to have been committed, regardless of whether State has ratified the Statute. Under this Article, the United Nations (hereinafter "UN") Security Council, in accordance with Chapter VII of the UN Charter, may refer the matter to the Prosecutor. Consequently, the Court only has jurisdiction over crimes committed in cases where a State party to the Statute has territorial jurisdiction over the offence, or in instances reported by the Security Council.

This article will primarily focus on the Court's jurisdiction on matters as a repeatedly contentious issue, reflected in the drafting process of the Statute, which failed to reach consensus on this issue in its original drafting.[1163] This issue of jurisdiction will be explored from the context of the situation in the Republic of Phillipines, commonly referred to as the "War on Drugs" campaign.

The article purports to explore four important questions required to be addressed regarding the Philippines situation:

I. Can the ICC exercise jurisdiction post-withdrawal of the State Party under Article 127, on the account of existing obligations to cooperate with the Court?

[1160] United Nations General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, *Report on the Proceedings of the Preparatory Committee during March-April and August 1996*, Vol. I, Fifty-first Session Supplement No.22 (A/51/22) (1996).

[1161] *Rome Statute of the International Criminal Court*, RS 2010, Part 2, art. 12(1).

[1162] Otto Triffterer and Kai Ambos, *Rome Statute of the International Criminal Court: A Commentary, 3rd Edition* (2016).

[1163] David J. Scheffer, "The United States and the International Criminal Court," *American Journal of International Law* 93, no. 1 (1999): 12-22, https://doi.org/10.2307/2997953.

II. Can a preliminary examination by the OTP be considered as a matter under consideration under Article 127 of the Statute, or is an investigation only required to trigger the ICC's jurisdiction?
III. Can the 'OTP' and 'Court' interchangeably exercise jurisdiction as per the Statute?
IV. What is the legal framework followed by the Prosecutor and what consequences ensue from a preliminary examination?

The above issues reveal a legal chasm in the applicability of the Statute and have plagued the Court with criticisms for not having the right to exercise universal jurisdiction over international crimes, namely as 'the exercise of jurisdiction regardless of any other acknowledged jurisdictional relationship to a State party to the Statute'. This article provides insights into such lacunae to support the ICC for exercising its jurisdiction in similar situations or cases.

II. Establishing the Context

As President of the Philippines between 2016 to 2022, Rodrigo Duterte launched an aggressive anti-drug campaign known as the 'War on Drugs' to counter the risk of the country becoming a narcotic state.[1164] His approach to the situation was to prioritise eradication above rehabilitation. Extrajudicial executions reportedly committed by the police and unidentified attackers have plagued the campaign.[1165] Duterte urged the public to kill drug addicts[1166] to achieve his objective of decreasing the spread of illegal substances throughout the nation.[1167] The official death toll from drug suspects was 6,252 by 2022.[1168] However, human rights organisations claim that between 12,000

[1164] Nico Alconaba, "Digong defends war on drugs, crime, graft," *INQUIRER.net,* June 28, 2016, https://newsinfo.inquirer.net/792773/digong-defends-war-on-drugs-crime-graft.
[1165] Catherine S. Valente, "First 100 days yield significant accomplishments," *The Manila Times*, October 8, 2016, https://www.manilatimes.net/2016/10/08/news/top-stories/first-100-days-yield-significant-accomplishments/290072/.
[1166] Agence France-Presse, "Philippines president Rodrigo Duterte urges people to kill drug addicts," *The Guardian,* July 1, 2016, https://www.theguardian.com/world/2016/jul/01/philippines-president-rodrigo-duterte-urges-people-to-kill-drug-addicts.
[1167] Christopher Lloyd Caliwan, "Over 24K villages 'drug-cleared' as of February: PDEA," *Philippine News Agency*, March 30, 2022, https://www.pna.gov.ph/articles/1171001.
[1168] Zacarian Sarao, "6,252 drug suspects killed as of May 31 – PDEA," *INQUIRER.net*, June 22, 2022, https://newsinfo.inquirer.net/1614260/pdea-says-6252-drug-suspects-died-as-of-may-31-in-war-against-drugs.

and 30,000 citizens were killed in this campaign.[1169]

Media organisations and human rights groups have criticised the anti-narcotics campaign, which reportedly created crime scenes where police murdered defenceless drug suspects, while placing firearms and drugs as proof of their killings to be “upon self-defence".[1170] Despite surrendering to register with authorities in exchange for safety, many drug users have lost their lives as a consequence of police brutality.[1171]

According to a 2021 quote from Prosecutor Fatou Bensouda, a preliminary investigation that started in February 2018 found "that there was a reasonable basis to believe that the crimes against humanity of murder had been committed" in the Philippines following Rodrigo Duterte's victory in the 2016 presidential election.[1172]

This issue of universal jurisdiction becomes especially important when currently, the Court struggles to exercise jurisdiction over the crimes committed in the Philippines. In the context of this ‘War on Drugs’ campaign, the Office of the Prosecutor (hereinafter “the OTP”) requested permission from the Pre-Trial Chamber (hereinafter “the PTC”) on 24th May 2021, to launch an investigation into alleged crimes committed in the territory of the Philippines between 1st November 2011 and 16th March 2019. On 15th September 2021, the PTC gave permission to pursue the investigation.

The Philippines asked, in accordance with Article 18(2), that the investigation into the situation be postponed as notified by the OTP. However, the PTC-I authorised the Prosecutor's request to continue investigations into the potentially crimes committed in the Philippines. After carefully reviewing the evidence gathered, the PTC concluded that the Philippines did not conduct relevant and proper investigations that would justify deferring the ICC's investigation under the principle of complementarity.[1173]

The Philippines filed an appeal against the PTC's authorisation to investigate, but the

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[1169] Sol Dorotea R. Iglesias, “Explaining the Pattern of ‘War on Drugs’ Violence in the Philippines Under Duterte” *Asian Politics and Policy* 15 no. 2 (2023): 164-184, https://doi.org/10.1111/aspp.12689.

[1170] Carlos H. Conde, “Duterte Vows More Bloodshed in Philippine ‘Drug War’,” *Human Rights Watch,* July 23, 2018, https://www.hrw.org/news/2018/07/23/duterte-vows-more-bloodshed-philippine-drug-war.

[1171] Manuel Mogato and Clare Baldwin, “Special Report - Police describe kill rewards, staged crime scenes in Duterte's drug war,” *Reuters,* April 19, 2017, https://www.reuters.com/article/us-philippines-duterte-police-specialrep/special-report-police-describe-kill-rewards-staged-crime-scenes-in-dutertes-drug-war-idUSKBN17K1F4/.

[1172] Al Jazeera Staff, “ICC prosecutor seeks full probe into Duterte’s drug war killings,” *Al Jazeera*, June 14, 2021, https://www.aljazeera.com/news/2021/6/14/icc-prosecutor-seeks-probe-philippines-crackdown-on-drug-crime.

[1173] Press Release, “ICC Pre-Trial Chamber I authorises Prosecutor to resume investigation in the Philippines,” *International Criminal Court*, January 26, 2023, https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-authorises-prosecutor-resume-investigation-philippines.

Appeals Chamber denied the Philippines' plea for the suspension of the authorisation. Consequently, the Philippines, as a State Party to the Statute since 1st November 2011, formally notified the Court of its withdrawal from the Statute on 17th March 2018, becoming effective a year later.[1174] The Philippines severed relations with the Court in 2018, when the Philippine Supreme Court dismissed petitions challenging the country's decision to withdraw from the international body.[1175] The withdrawal followed the Court's preliminary investigation in 2018 into allegations of mass murder and crimes against humanity committed by Duterte and other Philippine authorities during the drug war.[1176]

Duterte was arrested in March 2025 based on a warrant issued by the Court accusing him of crimes against humanity for his central role in the drug war.[1177] Justice Secretary Remulla admitted the failure of the Philippines justice system in delivering justice to victims of the drug war extrajudicial deaths during Duterte's presidency.[1178] After Duterte's arrest, the House of Representatives (Dangerous Drugs, Public Order and Safety, Human Rights, and Public Accounts) stated that it may turn over drug war evidence to the ICC.[1179]

A. Fulfilment of Articles 12(3) & 13(C)

Article 12(3) addresses a non-party State accepting the jurisdiction of the Court on an *ad hoc* basis, by virtue of which it requires such a State to lodge a declaration with the Registrar to accept the exercise of jurisdiction by the Court 'with respect to the crime in question'.[1180] The Court may only effectively exercise jurisdiction upon a State's

[1174] Jason Gutierrez, "Philippines Officially Leaves the International Criminal Court," *The New York Times*, March 17, 2019, https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html.

[1175] Azer Parrocha, "Palace confident ICC will reject probe into drug war," *Philippine News Agency*, December 15, 2020, https://www.pna.gov.ph/articles/1124849.

[1176] Ruth Abbey Gita-Carlos, "It's time for ICC to stop interfering: Panelo," *Philippine News Agency,* March 16, 2021, https://www.pna.gov.ph/articles/1133818.

[1177] Luisa Cabato, "Palace confirms arrest warrant from ICC for Rodrigo Duterte," *INQUIRER.net*, March 11, 2025, https://globalnation.inquirer.net/266600/palace-confirms-arrest-warrant-from-icc-for-rodrigo-duterte.

[1178] Jean Mangaluz, "DOJ admits: Justice system failed families of drug war victims," *Philstar Global*, March 20, 2025, https://www.philstar.com/headlines/2025/03/20/2429819/doj-admits-justice-system-failed-families-drug-war-victims.

[1179] Gabriel Pabico Lalu, "Quad comm may turn over drug war evidence if ICC issues subpoena – solon," *INQUIRER.net*, March 12, 2025, https://globalnation.inquirer.net/267044/fwd-quad-comm-may-turn-over-drug-war-evidence-if-icc-issues-subpoena-solon.

[1180] Triffterer and Ambos, *Rome Statute.*

domestic matters when the preconditions under Article 12 of the Statute are fulfilled (refer to the 'Introduction'), which is intimately related to Article 13 of the Statute on exercise of jurisdiction;[1181] state acceptance is a precondition if the Prosecutor has initiated an investigation *proprio motu,* which means 'by one's own initiative', under Article 13(c).[1182] Once the exercise of the ICC's jurisdiction is triggered, recourse must be made to Article 12 as the Court may exercise its jurisdiction once these preconditions are met.[1183]

The preconditions are determined when the Court's jurisdiction is triggered, not when crimes are allegedly committed.[1184] Thus, once the withdrawal is effective, the Prosecutor cannot initiate the jurisdiction-triggering process. The Court's jurisdiction must be triggered before withdrawal. Post-withdrawal, the Prosecutor is precluded from initiating any investigations.[1185]

Additionally, the 'principle of effectiveness' means that the provision must be interpreted to attain its appropriate effects and give full meaning to it.[1186] The State's withdrawal from a treaty implies the withdrawal from the treaty's obligations and, consequently,[1187] consent is essential to bind the State, and the withdrawal signifies the intention not to be bound by the statutory obligations anymore. Thus, the Court cannot adjudicate upon the domestic matters of the Philippines without its express consent, as it no longer remains a State party to the Statute.

Thus, the preconditions under Articles 12(3) & 13(c) need to be fulfilled for the Court to exercise jurisdiction.

[1181] Antonio Cassese, Paola Gaeta and Salvatore Zappalà, *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press, 2012).

[1182] Triffterer and Ambos, *Rome Statute.*

[1183] Sergey Vasiliev, "Piercing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2)," *Opiniojuris*, November 6, 2017, http://opiniojuris.org/2017/11/06/piecing-the-withdrawal-puzzle-may-the-icc-still-open-an-investigation-in-burundi-part-1/.

[1184] Dov Jacobs, "Burundi Withdraws from the ICC: What Next for a Possible Investigation?," *Spreading the Jam*, October 28, 2017, https://dovjacobs.com/2017/10/28/burundi-withdraws-from-the-icc-what-next-for-a-possible-investigation/.

[1185] International Criminal Court, *Dissenting Opinion of Judge Perrin de Brichambaut & Judge Lordkipanidze in the Situation of the Republic of Philippines,* ICC-01/21 OA, July 18, 2023.

[1186] Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-388 (2009).

[1187] Laurence R. Helfer, "Exiting Treaties," *Virginia Law Review* 91 (2005): 1579, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=683481#.

B. The Relationship between Articles 127 & 86

The duty to cooperate arises from Article 86 of the Statute. This general obligation however is confined to State Parties, and only in relation to "investigations and prosecution of crimes within the jurisdiction of the Court".[1188] A systematic interpretation of this Article, when read in conjunction with Article 13(c) and Article 15, indicates that the obligatory cooperation scheme comes into play only after the Prosecutor's assessment has been confirmed by the PTC. If the State has effectively withdrawn from the Statute, and was no longer a State Party, it will be exempted from the obligations outlined in Article 86.

Article 86 stipulates the general obligation of States to cooperate with the Court in the investigation and prosecution of crimes. Third-party States are under no statutory obligation to cooperate under '*pacta tertiis nec nocent nec prosunt'*, meaning 'the binding power of the treaty is only limited to the consenting State party', as per Article 35 of the Vienna Convention of the Law of Treaties. Additionally, article 86 stipulates the term 'investigation' does not extend to preliminary examinations under both Article 15(2) and Rule 104 of the Rules and Procedure of Evidence (hereinafter "the RPE"), as they are conducted to finding out whether there exists a reasonable basis to proceed with an investigation. The combined reading of all above Articles indicates that the obligation to cooperate must be assessed according to the acceptance of the Statute.

The Court exercising its jurisdiction based on the announcement of preliminary examination may threaten a State's sovereignty, going against the object and purpose of the Statute. Additionally, if a State has already conducted its investigation and decided not to prosecute the Defendant, which has been notified to the ICC Registrar after the effective withdrawal, the matter falls under the domestic jurisdiction of the State, and any undue interference will go against the principle of State sovereignty to decide its internal affairs.

The duty to cooperate exists when criminal investigations and proceedings commenced prior to the State's withdrawal.[1189] However, a preliminary examination is not equivalent to criminal investigations and proceedings; the term 'investigation' does not include the preliminary examination conducted under Article 15(2) and Rule 104 to determine a legitimate basis for proceeding with an investigation.[1190]

[1188] Triffterer and Ambos, *Rome Statute.*
[1189] Triffterer and Ambos, *Rome Statute.*
[1190] Triffterer and Ambos, *Rome Statute.*

During the preliminary examination due to external sources providing the bulk of information, in contrast to the investigation stage where the OTP has evidence-gathering powers, the OTP emphasises evaluating source reliability and information credibility and the principle of objectivity guides this assessment of information that may lead to a decision to proceed with an investigation.[1191] The emphasis on source reliability and information credibility, guided by the principle of objectivity, underscores the specific considerations inherent in the preliminary examination, distinguishing the preliminary examination as a unique and crucial phase with a distinctive purpose in the investigative process.

Pursuant to Article 127 of the Statute obligation to cooperate with the Court may at times be unclear due to complex legal or factual circumstances, for which a State may, nevertheless, agree to cooperate voluntarily without resolving the legal or factual issues. However, voluntary cooperation does not, by itself, convert into a legal obligation upon withdrawal. Hence, a vigilant Prosecutor needs to be careful to commence proceedings formally within the relevant timeframe, irrespective of any technical issues relating to the procuring of evidence.[1192]

Thus, withdrawal under Article 127 precludes the State from any Residual Obligations, as the Obligation to Cooperate under Article 86 only extends to the “Investigation and Prosecution of Crimes”.

C. Preliminary Examination as a “Matter under Consideration of the Court”

Article 16 expressly mentions that the scope of ‘matters under consideration’ overlaps with and can be construed from the ‘criminal investigations and proceedings' in the previous part.[1193] The phrase excludes the preliminary examination from the provision of ‘investigation’.

The meaning can be interpreted using the maxim *expressio unius est exclusio alterius*, meaning that ‘the express mention of a term excludes others’,[1194] which aligns with the intention of the framers of the Rome Statute.[1195] Simultaneously reading Article 15(6)

[1191] International Criminal Court, Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (2013).
[1192] Triffterer and Ambos, *Rome Statute.*
[1193] Roger Clark, “Withdrawal” in *Rome Statute of the International Criminal Court: A Commentary,* Otto Triffterer and Kai Ambos, *3rd Edition* (C.H.Beck, Hart, Nomos, 2016), 2324.
[1194] Prosecutor v. Ruto and Sang, ICC-01/09-01/11-777 (2013).
[1195] Prosecutor v. Kenyatta, ICC-01/09-02/11-863-Anx-Corr (2013).

of the Statute, the scope of the term 'investigation' is defined under Article 15(1) and Article 15(2) as a preliminary examination to determine the reasonable basis under which an 'investigation' can commence. The investigative stage under Article 15(1) and Article 15(2) of the Statute is distinct from the investigation under Article 54 of the Statute.

The contextual reading of Rule 48 & 104 of the RPE regarding the initiation of preliminary examination and investigation also support that the investigation under Article 15(1) is only a preliminary examination, which is different from proper 'investigation'. Therefore, the 'criminal investigation and proceedings', and consequently, 'matters under consideration' in Article 127(2) commence when the preliminary examination has been concluded by the OTP and has been authorised by the PTC under Article 15(3).

Also, defining the 'continued consideration of any matter' to include preliminary examinations risks creating an odd incongruity: the Court would have ongoing jurisdiction over the subject of the preliminary examination, but the withdrawing State Party would have no duty to cooperate after departure because that duty is limited by Article 127(2) to 'investigations and proceedings' which have already commenced before the effective date of withdrawal pursuant to Article 86 of the Statute.[1196]

Since the obligation applies to the investigation of a case and to the initiation and conduction of proceedings against the person(s) accused of a crime under the jurisdiction of the Court, including the pre-trial, trial, and post-trial phases, the preliminary examination cannot be taken as synonymous to an investigation for the purpose of Article 127(2).

A State's obligations to cooperate endure in situations where there is an ongoing matter already under the Court's consideration, which is not applicable to preliminary examinations. Article 42 of the Statute provides that the OTP shall act independently of directions from any external source. Moreover, there is no judicial oversight of the Prosecution's assessment at the preliminary examination phase - either at the time it is conducted or for the purposes of Article 15(4).[1197] The prosecution's exclusive development and execution of the preliminary examination procedure constitutes an autonomous action outside the scope of judicial oversight. The absence of the Court's

[1196] Alex Whiting, "If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?," *Just Security*, November 4, 2023, https://www.justsecurity.org/33501/burundi-leaves-icc-international-criminal-court-investigate-crimes-there/

[1197] Situation in the Islamic Republic of Afghanistan, ICC-02/17-138 (2020).

intervention during this phase is consistent with Article 15(4), which emphasises prosecutorial independence.

To determine the opening of an investigation, Article 53(1)(b) requires the OTP to consider whether the case is or would be admissible under Article 17. At the preliminary examination stage there is not yet a 'case', as understood to "comprise an identified set of incidents, suspects and conduct".[1198] The preliminary examination does not involve a 'case' because its analysis does not focus on a specific set of incidents, suspects, or conduct. This demonstrates the independence of the preliminary examination from the formal Court's proceedings.

Thus, a preliminary examination cannot be termed as a "matter under consideration of the Court" under Article 127 of the Statute.

D. Absence of Applicable Framework & Legal Consequences of Preliminary Examinations

The Statute does not provide any timeline for the OTP to close the preliminary examination. Regulation 19(4) of the OTP Regulations generally provides that the preliminary examination shall continue for as long as the situation is investigated. It does not mention any limitation on the period or applicable framework within which the preliminary examination must be concluded.

In the Situation of the Central African Republic, the OTP did not provide any information on the preliminary examination for over two years.[1199] On the emphasis by the PTC to complete the preliminary examination, the Prosecution asserted that the PTC does not have supervisory power at this 'early stage' of opening of investigation.[1200] Similarly, in the situation of the Islamic Republic of Afghanistan, the preliminary examination was concluded after 10 years.[1201]

The power of the OTP to initiate *proprio motu* investigation was a point of contention evidenced by the '*travaux preparatoires'* of the Statute. The International Law Commission Draft Statute did not contain a provision for the OTP to be given such investigative powers.[1202] The seemingly wide discretion of the OTP to investigate is

[1198] Prosecutor v. Lubanga, ICC-01/04-01/06 (2006).
[1199] Situation in the Central African Republic, ICC-01/05-6 (2006).
[1200] Central African Republic (2006).
[1201] Situation in the Islamic Republic of Afghanistan, ICC-02/17-33 (2019).
[1202] UNGA, Preparatory Committee, *Report on the Proceedings during March-April and August 1996* (1996).

squarely limited by the PTC.[1203] Moreover, the OTP can only seek authorisation for crimes that have been committed or are taking place when the request is submitted. Therefore, there is no applicable legal framework or timeline within which the preliminary examination must be conducted.

At the preliminary examination stage, the OTP does not enjoy investigative powers, other than those for the purpose of receiving testimony at the seat of the Court and cannot invoke the forms of State cooperation specified in Part IX of the Statute.[1204] The OTP conducts preliminary examinations to determine a reasonable basis to proceed with an investigation.[1205] The *proprio motu* powers given to the OTP are subject to the judicial authorisation by the Court, pursuant to Article 15 of the Statute. The OTP does not have full investigative powers at the stage of preliminary examinations. The procedures enunciated under provisions such as Article 53 allows the Court to oversee the jurisdiction triggered through Article 13.

The exercise of jurisdiction is undertaken only by the Court as the preliminary examination relates only to the "reasonable basis to proceed" towards trial.[1206] Therefore, the preliminary examination is essentially only a "pre-investigation" into the factual situation undertaken by the OTP.[1207] Also, the Prosecutor may seek additional information from States and other reliable actors during a preliminary examination pursuant to Article 15(2). Nevertheless, it is up to the concerned State to decide whether it wishes to assist the Prosecutor.[1208]

In conclusion, there is no obligation to cooperate when the Prosecutor is conducting a preliminary examination of information received related to crimes within the jurisdiction of the Court, and thus, there are no direct legal consequences ensuing from a preliminary examination.

III. Recommendations for Smoother Enforcement of Universal Jurisdiction

The OTP's failure to surmount the Philippines situation towards trial in the Court results from the above-listed analyses. However, these hurdles can be countered by introducing various reforms in the international criminal justice system for exercising

[1203] Situation in the Republic of Kenya, ICC-01/09-19-Corr (2010).
[1204] Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (2013).
[1205] Triffterer and Ambos, *Rome Statute.*
[1206] Triffterer and Ambos, *Rome Statute.*
[1207] Situation in the Republic of Côte d'Ivoire, ICC- ICC-02/11-14-Corr (2011).
[1208] Triffterer and Ambos, *Rome Statute.*

universal jurisdiction.

States must agree on uniform definitions of international crimes, standardized procedural guarantees, mutual legal assistance, extradition rules, and evidence sharing, which will be possible when more States ratify to the Statute.[1209] There is also the issue of the difficulties associated with extradition of criminals without violating territorial sovereignty, especially in cases involving hijackers or terrorists. Universal jurisdiction necessitates not just resources, but also cross-border collaboration and legal norm harmonisation, both of which can be difficult to achieve. Furthermore, acquiring custody of offenders without violating territorial sovereignty, particularly in situations involving terrorism or international crime, presents extra challenges. In such cases, international cooperation is essential, even if extradition is not always possible, potentially leading to prosecutions *in absentia*.[1210] In such cases, international coordination is critical. To solve this, universal jurisdiction and the Court should not be perceived to be mutually exclusive. Instead, a hybrid system would use national courts for initial prosecution and an international court for review and oversight.[1211] In this way, the complementarity principle will be upheld, wherein the sovereignty of the State will not be compromised, and the effectiveness of the delivery of justice shall also be effectively measured. This aligns with the legal maxim '*aut dedere aut judicare'*, which means 'either extradite or prosecute'.[1212]

Every stage of the Court's operations, from inquiry to prosecution, necessitates careful preparation and a significant time and financial commitment. To finance its operations, the Court depends on donations from member nations and other sources. The thoroughness of investigations, the calibre of legal counsel, and even the duration of trials may all be compromised by inconsistent and insufficient funding, which could be affected by member nations donations.[1213] As a result, the Court's capacity to administer justice is closely tied to its financial stability. There is tremendous pressure

[1209] Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court," *European Journal of International Law* 1 no. 1 (1990): 67-89,), https://doi.org/10.1093/oxfordjournals.ejil.a035783.

[1210] Democratic Republic of the Congo v. Belgium, International Court of Justice (2000).

[1211] Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court," *European Journal of International Law.*

[1212] Dan E. Stigall, "Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law" *Notre Dame Journal of International and Comparative Law* 3, no.1 (2013), https://ssrn.com/abstract=2211219.

[1213] Ishita Chandra, "The Echoes of Justice: Embracing Universal Jurisdiction to Ensure Accountability," *NLIU-CRIL International Law Blogs*, October 28, 2024, https://cril.nliu.ac.in/2024/10/28/the-echoes-of-justice-embracing-universal-jurisdiction-to-ensure-accountability/.

to act cautiously while preserving procedural efficiency since international crimes carry such high risks. The Court must strike a careful balance between thorough investigations and the prompt administration of justice, frequently while being closely watched by a worldwide public that demands responsibility and promptness. Thus, establishing specialized investigation and prosecution units, legislative frameworks and adequate resources for effective investigations can mitigate delays in handling cases. Even monitoring bodies such as the International Committee of the Red Cross, as well as credible human rights organizations, must be given the requisite resources to monitor and report any potential international crimes under the radar.

IV. Conclusion

While the Statute represents a significant milestone in the quest for international criminal justice, its provisions regarding the exercise of universal jurisdiction by the Court contain notable lacunae. These gaps undermine the Court's ability to effectively prosecute individuals responsible for the most egregious crimes, such as genocide, crimes against humanity, crimes of aggression, and war crimes, regardless of when and where these crimes occur.

One of the primary shortcomings lies in the reliance on the principle of complementarity, which grants states primary jurisdiction over such crimes. While intended to encourage state accountability, this principle often results in impunity when states are unwilling or unable to prosecute perpetrators. Additionally, the Court's jurisdiction is limited to crimes committed after the Statute's entry into force in 2002, leaving past atrocities unaddressed.

Furthermore, the Court's jurisdiction is contingent upon the initiation of an investigation by the Court, which undermines the ability of the Court to extend its jurisdiction towards the crimes being preliminarily investigated by the OTP. This is because there is no detailed framework for how preliminary examinations should be conducted, and with no legal consequences ensuing from this process.

Moreover, the Statute lacks mechanisms to address crimes committed by non-state actors or in territories not under the jurisdiction of any state. This gap is particularly relevant in cases of transnational terrorism or conflicts involving non-state armed groups, where accountability remains elusive due to lack of international cooperation with respect to extradition of criminals.

And lastly, State parties can withdraw from the Statute without being required to provide reasons for such withdrawal, even if it is clearly with bad intention.

Addressing these lacunae requires collective efforts to strengthen the Statute framework, enhance cooperation among states, and bolster the Court's capacity to investigate and prosecute crimes under universal jurisdiction. Only by closing these gaps can the Court fulfil its mandate to deliver justice for the most heinous crimes and contribute to the promotion of peace, security, and respect for human rights on a global scale.

Bibliography

Agence France-Presse. “Philippines president Rodrigo Duterte urges people to kill drug addicts,” *The Guardian,* July 1, 2016. https://www.theguardian.com/world/2016/jul/01/philippines-president-rodrigo-duterte-urges-people-to-kill-drug-addicts.

Al Jazeera Staff. “ICC prosecutor seeks full probe into Duterte’s drug war killings,” *Al Jazeera*, June 14, 2021. https://www.aljazeera.com/news/2021/6/14/icc-prosecutor-seeks-probe-philippines-crackdown-on-drug-crime.

Alconaba, Nico. “Digong defends war on drugs, crime, graft,” *INQUIRER.net,* June 28, 2016. https://newsinfo.inquirer.net/792773/digong-defends-war-on-drugs-crime-graft.

Allott, Philip. *The Health of Nations: Society and Law beyond the State.* Cambridge University Press, 2002. 215-245.

Cabato, Luisa. “Palace confirms arrest warrant from ICC for Rodrigo Duterte,” *INQUIRER.net*, March 11, 2025. https://globalnation.inquirer.net/266600/palace-confirms-arrest-warrant-from-icc-for-rodrigo-duterte.

Caliwan, Christopher L. “Over 24K villages 'drug-cleared' as of February: PDEA,” *Philippine News Agency*, March 30, 2022. https://www.pna.gov.ph/articles/1171001.

Cassese, Antonio, Paola Gaeta, and Salvatore Zappalà. *The Human Dimension of International Law: Selected Papers of Antonio Cassese.* Oxford University Press, 2012.

Chandra, Ishita. “The Echoes of Justice: Embracing Universal Jurisdiction to Ensure Accountability,” *NLIU-CRIL International Law Blogs*, October 28, 2024. https://cril.nliu.ac.in/2024/10/28/the-echoes-of-justice-embracing-universal-jurisdiction-to-ensure-accountability/.

Clark, Roger. “Withdrawal.” In *The Rome Statute of the International Criminal Court: A Commentary*, by Otto Triffterer and Kai Ambos, 2324. C.H. Beck, Hart, Nomos, 2016.

Conde, Carlos H. “Duterte Vows More Bloodshed in Philippine ‘Drug War’,” *Human Rights Watch,* July 23, 2018. https://www.hrw.org/news/2018/07/23/duterte-vows-more-bloodshed-philippine-drug-war.

Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire. 2011. ICC-ICC-02/11-14-Corr (International Criminal Court, 15 November).

Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute in the Prosecutor v. Jean-Pierre Bemba Gombo. 2009. ICC-01/05-01/08-388 (Pre-Trial Chamber III of the International Criminal Court, 3 March).

Decision on Authorisation of Investigation in the Situation in the Islamic Republic of Afghanistan. 2019. ICC-02/17-33 (International Criminal Court, 12 April).

Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial in Prosecutor v. Ruto and Sang. 2013. ICC-01/09-01/11-777 (International Criminal Court, 18 June).

Decision on the Authorisation of an Investigation into the Situation in the Republic of Kenya. 2010. ICC-01/09-19-Corr (International Criminal Court, 31 March).

Decision on the Prosecutor's Application for a Warrant of Arrest in Prosecutor v. Dyilo. 2006. ICC-01/04-01/06 (International Criminal Court, 10 February).

Decision requesting Information on the Status of the Preliminary Examination in the Situation in the Central African Republic. 2006. ICC-01/05-6 (International Criminal Court, 30 November).

Democratic Republic of the Congo v. Belgium, 2000. International Court of Justice.

Dissenting Opinion of Judge for Reconsideration of Decision excusing Continued Presence at Trial in Prosecutor v. Kenyatta. 2013. ICC-01/09-02/11-863-Anx-Corr (International Criminal Court, 26 November).

Dissenting Opinion of Judge Perrin de Brichambaut & Judge Lordkipanidze in the Situation of the Republic of Phillipines. 2023. ICC-01/21 OA (International Criminal Court, 18 July).

Gita-Carlos, Ruth A. "It's time for ICC to stop interfering: Panelo," *Philippine News Agency,* March 16, 2021. https://www.pna.gov.ph/articles/1133818.

Graefrath, Bernard "Universal Criminal Jurisdiction and an International Criminal Court," *European Journal of International Law* 1 no. 1 (1990): 67-89, https://doi.org/10.1093/oxfordjournals.ejil.a035783.

Gutierrez, Jason. "Philippines Officially Leaves the International Criminal Court," *The New York Times*, March 17, 2019. https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html.

Helfer, Laurence R. "Exiting Treaties." *Virginia Law Review, Volume 91* (2005): 1579. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=683481#.

Iglesias, Sol Dorotea R. "Explaining the Pattern of 'War on Drugs' Violence in the Philippines Under Duterte" *Asian Politics and Policy* 15 no. 2 (2023): 164-184, https://doi.org/10.1111/aspp.12689.

Jacobs, Dov. "Burundi Withdraws from the ICC: What Next for a Possible Investigation?" *Spreading the Jam*, 28 October, 2017. https://dovjacobs.com/2017/10/28/burundi-withdraws-from-the-icc-what-next-for-a-possible-investigation/.

Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan. 2020. ICC-02/17-138 (International Criminal Court, 5 March).

Lalu, Gabriel P. “Quad comm may turn over drug war evidence if ICC issues subpoena – solon,” *INQUIRER.net*, March 12, 2025. https://globalnation.inquirer.net/267044/fwd-quad-comm-may-turn-over-drug-war-evidence-if-icc-issues-subpoena-solon.

Mangaluz, Jean. “DOJ admits: Justice system failed families of drug war victims,” *Philstar Global*, March 20, 2025. https://www.philstar.com/headlines/2025/03/20/2429819/doj-admits-justice-system-failed-families-drug-war-victims.

Mogato, Manuel and Baldwin, Clare. “Special Report - Police describe kill rewards, staged crime scenes in Duterte's drug war,” *Reuters,* April 19, 2017. https://www.reuters.com/article/us-philippines-duterte-police-specialrep/special-report-police-describe-kill-rewards-staged-crime-scenes-in-dutertes-drug-war-idUSKBN17K1F4/.

Office of the Prosecutor. 2013. *Policy Paper on Preliminary Examinations.* Policy Paper, International Criminal Court.

Parrocha, Azer. “Palace confident ICC will reject probe into drug war,” *Philippine News Agency*, December 15, 2020. https://www.pna.gov.ph/articles/1124849.

Preparatory Committee. 1996. *Preparatory Committee Report.* Report, International Criminal Court.

Press Release. 2023. “ICC Pre-Trial Chamber I authorises Prosecutor to resume investigation in the Philippines,” *International Criminal Court*, January 26. https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-authorises-prosecutor-resume-investigation-philippines.

Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-388 (2009).

Prosecutor v. Kenyatta, ICC-01/09-02/11-863-Anx-Corr (2013).

Prosecutor v. Lubanga, ICC-01/04-01/06 (2006).

Prosecutor v. Ruto and Sang, ICC-01/09-01/11-777 (2013).

Rome Statute of the International Criminal Court, RS 2010, Part 2, art. 12(1).

Sarao, Zacarian. “6,252 drug suspects killed as of May 31 – PDEA,” *INQUIRER.net*, June 22, 2022. https://newsinfo.inquirer.net/1614260/pdea-says-6252-drug-suspects-died-as-of-may-31-in-war-against-drugs.

Scheffer, David J. “The United States and the International Criminal Court.” *American Journal of International Law 93, no. 1* (1999):12-22. https://doi.org/10.2307/2997953.

Situation in the Central African Republic, ICC-01/05-6 (2006).

Situation in the Islamic Republic of Afghanistan, ICC-02/17-33 (2019).

Situation in the Islamic Republic of Afghanistan, ICC-02/17-138 (2020).

Situation in the Republic of Côte d'Ivoire, ICC- ICC-02/11-14-Corr (2011).

Situation in the Republic of Kenya, ICC-01/09-19-Corr (2010).

Stigall, Dan E. “Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law” *Notre Dame Journal of International and Comparative Law* 3, no.1 (2013), https://ssrn.com/abstract=2211219.

Triffterer, Otto, and Kai Ambos. *Rome Statute of the International Criminal Court: A Commentary, 3rd Edition.* C.H. Beck, Hart, Nomos, 2016.

United Nations General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, *Report on the Proceedings of the Preparatory Committee during March-April and August 1996*, Vol. I, Fifty-first Session Supplement No.22 (A/51/22) (1996).

UNGA, Preparatory Committee, *Report on the Proceedings during March-April and August 1996* (1996).

Valente, Catherine S. “First 100 days yield significant accomplishments,” *The Manila Times*, October 8, 2016.

https://www.manilatimes.net/2016/10/08/news/top- stories/first-100-days-yield-significant-accomplishments/290072/.

Vasiliev, Sergey. “Piercing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2).” *Opiniojuris*, 6 November, 2017. http://opiniojuris.org/2017/11/06/piecing-the-withdrawal-puzzle-may-the-icc-still-open-an-investigation-in-burundi-part-1/.

Whiting, Alex. “If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?” *Just Security*, 4 November, 2023. https://www.justsecurity.org/33501/burundi-leaves-icc-international-criminal-court-investigate-crimes-there/.

Research Article

The Mafia State: Criminal Governance in Sinaloa, Mexico, in 2006-2016

Fracia Baeke

Received: 06 February 2025 / Accepted: 10 June 2025

Abstract

Organised crime has often adopted mixed characteristics, shifting away from its central economic identity and evolving into a social and political actor. Mexican drug-trafficking organisations are one such manifestation of this mixed character, increasingly so since the 2006 militarisation of the War on Drugs during the Calderón administration. During the first 10 years, Mexico faced a sharp increase in violence and the pervasive influence of organised crime in politics, sparking debates of whether it has become a "narco-state" or a "mafia state." This paper demonstrates that this development of the War marks an increasingly political nature of the Sinaloa Cartel in a two-level conflict against the federal government and other drug-trafficking organisations vying for power and influence. The research highlights that the political nature of drug-trafficking has been present in Mexico since the early 20th century but returned to strengthen and reinforce economic power derived from criminal activities. This historical political nature is only possible with the presence of a weak state, allowing for a crime-governance nexus to develop and embed the illicit drug trade in Mexican society, thereby further strengthening and legitimising the political character of the Sinaloa Cartel. Tackling drug-trafficking will remain at the top of the political and security agenda for the foreseeable future. However, understanding the political dynamics and interactions between organised criminal groups and the government will be crucial to comprehending the ongoing development of the War on Drugs.

I. Introduction

The acceleration of globalisation has seen the growth of a global shadow economy, changing the security discourse as new non-state actors grow prominent. This has resulted in intense debates regarding how to tackle the pressing challenges that these non-state actors present to nation-states and the international community. This shadow economy, or organised crime (OC), has permeated into civil society, corrupting civil servants and institutional frameworks, becoming a part of socio-economic and socio-political structures.[1214] This has become a threat and obstacle to democracy and development. The illicit drug trade, particularly, has been a global problem since the 1890s.[1215] Historically a problem reserved for producer countries, illegal drug-trafficking has received more attention as a shared international problem.[1216]

On December 11, 2006, President Felipe Calderón announced the militarisation of the fight against drugs, beginning the Mexican War on Drugs.[1217] Approaching the 20-year mark, the conflict shows no signs of slowing down, rather permeating society as various forms of OC, including corruption and other forms of trafficking, as violence increases. As various forms of OC work together to conserve the power of OC groups (OCGs), the lines between the Mexican State's forces and the OC have been blurred, where the two sometimes seem indistinguishable.[1218] This results in state scepticism and an overall distrust in the justice and political system.[1219] The conviction of former Minister

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[1214] Juan Carlos Gachúz, "Globalisation and Organised Crime: Challenges for International Cooperation," *Baker Institute*, https://www.bakerinstitute.org/research/globalization-organized-crime.

[1215] Douwe den Held, Alessandro Ford, and Chris Dalby, "From Empires to World Wars – A History of the Global Cocaine Trade," *InSight Crime*, September 1, 2022, https://insightcrime.org/news/empires-world-wars-history-global-cocaine-trade/.

[1216] Gabriela Recio, "Drugs and Alcohol: US Prohibition and the Origins of the Drug Trade in Mexico, 1910-1930," *Journal of Latin American Studies* 34, no. 1 (2002): 21, http://www.jstor.org/stable/3875386.

[1217] CNN, "Mexico Drug War Fast Facts," *CNN,* last updated March 20, 2022, https://edition.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/index.html.

[1218] Wil G. Pansters, "Drug-trafficking, the Informal Order, and Caciques. Reflections on the Crime-Governance Nexus in Mexico," *Global Crime* 19, no. 3-4 (2018): 322, https://doi.org/10.1080/17440572.2018.1471993; Stephen D. Morris, "Corruption, Drug-trafficking, and Violence in Mexico," *The Brown Journal of World Affairs* 18, no. 2 (2012): 29, http://www.jstor.org/stable/24590861.

[1219] James Bargent, "'Corruptionary' Provides a Guide to Mexico's Vocabulary of Corruption," Insight Crime, February 2, 2017. https://insightcrime.org/news/analysis/corruptionary-provides-guide-mexico-vocabulary-of-corruption/; Coralie Pring, 2017, *People and Corruption: Latin America and the Caribbean: Global Corruption Barometer*, ISBN: 978-3-96076-062-7 (Transparency International, 2017), 6, https://images.transparencycdn.org/images/2017_GCB_AME_EN.pdf. The creation of the *Corrupcionario Mexicano* (2016) highlights the way that corruption has permeated into the everyday of Mexican society. According to a 2017 Transparency International publication, people surveyed in

of Public Security Genaro García Luna for accepting bribes and drug-trafficking shows the extent of criminal influence even at the highest levels of government.[1220] The permeation of OC into the state apparatus and political structures raises the question of whether Mexico is a "narco-state" or, in a broader sense, "mafia state."[1221] This prompts the question of *what factors have contributed to the criminal appropriation of political structures during the Mexican War on Drugs?* The objective of this exploration is to analyse the impact of a dynamic security landscape on political structures and the ability to confront rising security concerns.

The case study selected is *Cártel de Sinaloa* (CDS), or Sinaloa Cartel, based in Sinaloa state. The Mexican government recognised the CDS as the most powerful and largest crime group and drug-trafficking organisation in Mexico and the Western Hemisphere.[1222] The CDS has a long history in Mexico's contemporary narco-trafficking history, rising to power in the 1980s as one of the main drug-trafficking organisations (DTOs).[1223] The period under study is from 2006 until 2016, the period of the War on Drugs prior to a significant restructuring of CDS and the third arrest of its main *capo*, Joaquín "El Chapo" Guzmán.[1224] In 2016, C*ártel Jalisco Nueva Generación* (CJNG), the former armed faction of the Sinaloa Cartel,[1225] broke away from the CDS structure, changing the criminal environment. Since 2016/2017, security analysts have

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Mexico, at 51% were the most likely to say they paid a bribe when accessing basic public services of all Latin American countries included in the study.

[1220] Madeline Halpert and Bernd Debusmann Jr., "Mexico's ex-security minister Genaro García Luna convicted of drug-trafficking," *BBC*, February 22, 2023, https://www.bbc.com/news/world-us-canada-64726724; Andrea Vega, "Sobronos y Nacrotráfico, de Esto Acusan a García Luna," *N+*, February 9, 2023,https://www.nmas.com.mx/internacional/genaro-garcia-luna-acusado-narcotrafico-sobornos-juicio/internacional/sobornos-y-narcotrafico-de-esto-acusan-a-garcia-luna.

[1221] Agencia Reforma, "Ven en EU a México como 'narcoestado'", *El Siglo de Torreón*, September 16, 2017,https://www.elsiglodetorreon.com.mx/noticia/2017/ven-en-eu-a-mexico-como-narcoestado.html?from=old.; Alexandra Endres, "Mexiko ist eine Mafiakratie.", *Zeit*, March 17, 2011, https://www.zeit.de/wirtschaft/2011-03/drogenstaat-mexiko-korruption?utm_referrer=https%3A%2F%2Fen.wikipedia.org%2F.

[1222] Nathan P. Jones, "The Strategic Implications of the Cártel de Jalisco Nueva Generación," *Journal of Strategic Security 11,* no. 1 (2018): 21, https://www.jstor.org/stable/10.2307/26466904.; InSight Crime, "Sinaloa Cartel,", *InSight Crime*, Last updated May 04, 2021, https://insightcrime.org/mexico-organized-crime-news/sinaloa-cartel-profile/.

[1223] Guillermo Trejo and Sandra Ley, "High-Profile Criminal Violence: Why Drug Cartels Murder Government Officials and Party Candidates in Mexico," *British Journal of Political Science* 51, (2021): 206, https://doi.org/10.1017/S0007123418000637.

[1224] Euronews, "Capturado Joaquín 'el Chapo' Guzmán en un Motel en el Noroeste de México," *Euronews,* January 9, 2016, https://es.euronews.com/2016/01/09/capturado-joaquin-el-chapo-guzman-en-un-motel-en-el-noroeste-de-mexico.

[1225] Jones, "The Strategic Implications," 21.

viewed the CJNG as the most powerful OCG in Mexico, suggesting a weakening of CDS as CJNG continues to expand.[1226]

The exploration begins with an overview of relevant theoretical discussions on OC as a political phenomenon in Chapter 1. Chapter 2 outlines the historical development of the Mexican drug trade since the 1900s. Chapter 3 analyses the CDS's appropriation of political structures in the Pacific state of Sinaloa, Mexico, and, where needed, on a national level. The exploration concludes that the CDS is both an economic and political player as it engages in a war against the State and confronts other criminal organisations for market and territorial control.

II. Organised Crime in the Political Arena

OC is a multidimensional phenomenon that can be explained from a cultural, economic, or political perspective. It was historically understood as being defined by class struggle and oppression in the context of a conflict.[1227] Often terms associated with OC, like 'mafia,' have their origins in these same contexts of socio-political marginalisation, ignoring a criminal nature.[1228] This political outlook on OC focuses on the power dynamics of competing groups,[1229] in this case, organised crime groups (OCGs) and the State, as understood by its apparatus and institutions. Competition between OC and the State comes from the perspective of law and order. However, there is a fundamental relationship that arises from the intersection between legal governance and OC understood as "criminal governance."[1230]

[1226] Ibid., 20; Global Guardian, "Risk Map 2023 Analysis: Mexico Cartel War," https://www.globalguardian.com/newsroom/risk-map-mexico.

[1227] Klaus von Lampe, *Organised Crime: Analysing Illegal Activities, Criminal Structures, and Extra-Legal Governance* (Los Angeles: SAGE, 2016), 17; Frank Pearce, *Crimes of the Powerful: Marxism, Crime and Deviance* (London, England: Pluto Press, 1976); Michael Woodiwiss, *Organised Crime and American Power: A History* (Toronto, Ontario, Canada: University of Toronto Press, 2001), 68-104.

[1228] von Lampe, *Organised Crime*, 16-19.

[1229] Adrian Leftwich, "Thinking Politically: On the politics of Politics," in *What is Politics? The Activity and its Study*, ed. Adrian Leftwish, 1-22. John Wiley & Sons, 2015; Harold D. Lasswell, *Politics: Who Gets What, When, How*. Pickle Partners Publishing, 1936; and Kate Millet, "Theory of Sexual Politics," In *Radical Feminism: A Documentary Reader*, ed. Barbara A. Crow, 122-153, NYU Press, 2000.
Understanding what politics is has been a focus of defining the academic field. Leftwich (2015) makes an interesting point that politics is shaped by its context and that its definition may depend on its interpretation as (1) an arena and (2) a process. Lasswell (1936) approaches it as the study of influence and the influential. Along similar lines, Millet (2000) describes it as referring to power-structure relationships where one group acts as a hegemon and the other is pressed.

[1230] Benjamin Lessing, "Conceptualising Criminal Governance," *Perspectives on Politics* 19, no.3 (2021): 854-73, https://doi.org/10.1017/S1537592720001243.

A. The Monopoly of Protection

Historical insights in literature suggest that OC, in many contexts, rose because a weak state failed to provide security.[1231] In this context, literature focuses on the idea of the "mafia" as an alternative protection provider. Such mafia organisations are understood as a specific manifestation of OC rooted in the specialisation of a particular asset, typically the commodification and monopolisation of protection.[1232] This section focuses on the context of the weak state as a breeding ground for mafia-like groups and their market-based activities.

While the origin of these mafia groups is diverse, the presence of a weak state is common across time and space. As observed in the case of South Africa, the context of an unstable state, marked by political violence or economic transition, is fertile breeding ground for criminal groups.[1233] The lack of protection of the social order requires an actor -- the mafia -- to step up and offer it to society.[1234] This happens in a context where there is no public trust in the justice system or the State. This context is characterised by the lack of public security provided by the State,[1235] as the mafia group monopolises protection and becomes a replacement. This allows for an exploitation of the State's inefficiency while disregarding the law.[1236]

Considering this monopolisation, there is a vital economic aspect. The previous subsection outlined that protection is commodified by mafia groups becoming private security providers. The perspective that OC focuses on material gain as a core incentive further drives the economic nature of these groups.[1237] This has since been

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[1231] Daron Acemoglu, Giuseppe De Feo, and Giacomo Davide De Luca, "Weak States: Causes and Consequences of the Sicilian Mafia," *The Review of Economic Studies* 87, no. 2 (2020): 537-581, https://doi.org/10.1093/restud/rdz009.

[1232] Diego Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Cambridge, MA: Harvard University Press, 1993); Federico Varese, *The Russian Mafia: Private Protection in a New Market Economy* (Oxford: Oxford University Press, 2001).

[1233] Gary Kynoch, "Crime, Conflict and politics in transition-era South Africa," *African Affairs* 104, no. 416 (2005): 493-514, https://doi.org/10.1093/afraf/adi009.

[1234] Santoro, *Mafia Politics*, (Cambrige, UK; Medford, MA: Polity, 2022), 210.

[1235] Gambetta, *The Sicilian Mafia*; Oriana Bandiera, "Land Reform, the Market for Protection, and the Origins of the Sicilian Mafia: Theory and Evidence," *The Journal of Law, Economics, and Organisation* 19, no. 1 (2003): 218-244, https://doi.org/10.1093/jleo/19.1.218; Alfredo Del Monte and Luca Pennacchio, "Agricultural Productivity, Banditry and Criminal Organisations in Post-Unification Italy," *Rivista Italiana degli Economisti* 17, no.3 (2012): 347–378, https://ssrn.com/abstract=2182516.

[1236] Varese, *The Russian Mafia*.

[1237] Howard Abadinsky, *Organised Crime,* 10th ed (Belmont, CA: Wadsworth, 2013); James O. Finckenauer, "Problems of Definition: What is Organised Crime?," *Trends in Organised Crime* 8, no. 3 (2005): 63-83, https://doi.org/10.1007/s12117-005-1038-4.

extended to other illegal actors, businesses, individuals, and local governments.[1238] The approach to market-based crimes becomes a defining characteristic of these groups and their activities through the commodification of protection. This however can manifest in diverse ways: the Russian mafia, *Vory v Zakone* (*Vory*), competes against the State and legal security firms, and the Italian-American mafia in the US is often understood as a business rooted in the underworld participating in illegal activities.[1239] The Chinese triads operate in a sphere of legality and illegality, often using business fronts to establish relations with other businesses.[1240] The Italian-American mafia does not operate as a business in a similar fashion, with members running illegal enterprises without the typical use of violence or monopolisation of a good or service.[1241] Mafia-type groups do not necessarily provide illegal goods, but their methods to offer protection are inherently criminal considering the use of corruption, bribery, and violence, among others.[1242] This does not mean that these groups cannot diversify their activities to include other illegal operations, including prostitution, smuggling, and drug-trafficking, as is the case with the Hong Kong Triads.[1243]

B. Organised Crime as a Political Entity

To analyse OC from a political perspective requires consideration for the influence that associated groups have on politics without it being public. Literature focused on how OCGs influence politics suggests the preservation of a weak democratic culture.[1244] This weak democratic culture is maintained through electoral interference and abuse of local state institutions.[1245] In Italy, East Asia, and Nigeria, OC is connected with

[1238] Varese, *The Russian Mafia*; Peng Wang, *The Chinese Mafia: Organised Crime, Corruption, and Extra-legal Protection* (Oxford University Press, 2017).
[1239] Varese, *The Russian Mafia*, 71-2; von Lampe, *Organised Crime*, 40.
[1240] Wang, *The Chinese Mafia*, 45-9.
[1241] Peter Reuter, *Disorganised Crime: The Economics of the Visible Hand* (Cambridge, M.A.: MIT Press, 1983).
[1242] Varese, *The Russian Mafia*.
[1243] Yiu K. Chu, *The Triads as Business* (London: Routledge, 2000).
[1244] See Acemoglu, De Feo, and De Luca (2020) for a discussion on the Sicilian Mafia and the weak state; Kynoch (2005) for an overview of transition-era South Africa; and Wang (2017) for a discussion on the Chinese Triads in Shanghai.
[1245] Gianmarco Daniele, and Benny Geys, "Organised Crime, Institutions and Political Quality: Empirical Evidence from Italian Municipalities," *The Economic Journal* 125, no. 586 (2015): F233–F255, https://doi.org/10.1111/ecoj.12237; Marco Di Cataldo, and Nicola Mastrorocco, "Organised Crime, Captured Politicians, and the Allocation of Public Resources," *Journal of Law, Economics, and Organisation* 38, no. 3 (2021): 774-839, https://doi.org/10.1093/jleo/ewab015.

political kidnapping and the murders of political opponents.[1246] The question arises whether these phenomena remain politically motivated or if they have transformed to become strictly criminal.[1247] The deterioration in law enforcement and the general corruption of the State further emphasises the lack of public trust as outlined earlier, aiding mafia-type organisations and other OCGs to flourish and establish criminal governance.

The weak democratic culture in these contexts has resulted in the boom of clientelist relations between criminal organisations and political actors. Political support from such organisations has been rewarded with economic benefits in the legal economic sectors the organisation participates in, as was the case with the Sicilian Mafia in the construction sector.[1248] A similar phenomenon can be seen in Shanghai as triad bosses would aid the local government to centralise control over labour unions and financial institutions to establish relations with politicians.[1249] To maintain the political support, additional political or legal protection may be afforded. Observations of the Russian *Vory* suggest that the State provided additional police protection to criminals.[1250] In the case of the Chinese triads, an 'alliance' results from the embeddedness of social networks in the judicial system, determining a weak state content as irrelevant.[1251] This mutually beneficial network comes with discreet violence in exchange for support and free rein for criminal activities.[1252] This is especially useful when the State cannot adequately combat non-state armed groups, regulate markets, or offer citizens (more)

[1246] Alberto Alesina, Salvatore Piccolo, and Paolo Punotti, "Organised Crime, Violence, and Politics," *The Review of Economic Studies* 86, no. 2 (2019): 457-499, https://doi.org/10.1093/restud/rdy036; Richard J. Samuels, "Kidnapping Politics in East Asia," *Journal of East Asian Studies* 10, no. 3 (2010): 363–96, https://www.jstor.org/stable/23418864; Bello Ibrahim, and Mukhtar, Jamilu I. "An analysis of the causes and consequences of kidnapping in Nigeria," *African Research Review* 11 no. 4 (2017):134-143, https://doi.org/10.4314/afrrev.v11i4.11.

[1247] Schuberth, Mortiz. "A Transformation from Political to Criminal Violence? Politics, Organised Crime and the Shifting of Haiti's Urban Armed Groups," *Conflict, Security, Development* 15, no.2 (2015):169-196, https://doi.org/10.1080/14678802.2015.1030950.

[1248] Giuseppe De Feo, and Giacomo D. De Luca, "Mafia in the Ballot Box," *American Economic Journal: Economic Policy* 9, no. 3 (2017): 134–167, https://doi.org/10.1257/pol.20150551.

[1249] Wang, *The Chinese Mafia*, 44.

[1250] Varese, *The Russian Mafia*, 60.

[1251] Wang, *The Chinese Mafia*, 176-9.

[1252] Nicholas Barnes, "Criminal Politics: An Integrated Approach to the Study of Organised Crime, Politics, and Violence," *Perspectives on Politics* 15, no. 4 (2017): 967–87, https://doi.org/10.1017/S1537592717002110.

protection.[1253] This penetration of OC into the State apparatus can have a serious impact on the efficacy of State services and activities, strengthening criminal governance as the two spheres no longer operate independent of each other.[1254]

Criminal groups, in particular mafia organisations, have been compared to the State since the Sicilian Mafia was called a global "super-government of crime."[1255] This is a shift away from the economic analysis of likening them to a firm and its processes based on the monopolisation of violence and protection. Protection becomes seen as a defining feature of criminal groups and the widening power base that contributes to the accumulation of power.[1256] The consolidated power via their permeation of social and economic activity secures "territorial lordship" of criminal organisations.[1257] This idea of territorial lordship likens OC to warlordism, further cementing OC's political character.[1258] Charles Tilly, considering the state-formation process of modern European nations, proposes that competition over territorial control and the monopoly of violence is key to the creation of the modern nation-state.[1259] The State's foundation and power base become threatened by the criminalisation of the monopoly of violence, foreshadowing the institutionalisation of criminal governance. The Chinese triads' power consolidation was the result of a commodification process that followed the loss or reduction of government control, particularly due to corruption.[1260] The lack of government control is a crucial factor of the weak state context observed in the establishment of the Sicilian model,[1261] however, this neglects socio-cultural elements.[1262]

The creation of collective identities within these organisations reflects the phenomenon of identity politics with the creation of a separate and distinct community and the emphasis on community identity.[1263] The Chinese triads' use of criminal constitutions

[1253] Ibid; Peng Wang and Sharon Ingrid Kwok, "Hong Kong Triads: The Historical and Political Evolution of Urban Criminal Polity, 1842–2020," *Urban History* (2022): 1–23, https://doi.org/10.1017/S0963926821001024.
[1254] Daniele and Geys, "Organised Crime."; Di Cataldo and Mastrorocco, "Organised Crime."
[1255] von Lampe, *Organised Crime*, 39.
[1256] Santoro, *Mafia Politics*, 217-8.
[1257] Ibid., 212.
[1258] Katherine Hirschfeld, *Gangster States: Organised Crime, Kleptocracy, and Political Collapse* (Palgrave Macmillan, 2015).
[1259] Brian D. Taylor and Roxana Botea, "Tilly Tally: War-Making and State-Making in the Contemporary Third World," *International Studies Review 10,* no. 1 (2008): 27-56, http://www.jstor.org/stable/25481929.
[1260] Wang, *The Chinese Mafia*, 133.
[1261] Gambetta, *The Sicilian Mafia*.
[1262] Wang, *The Chinese Mafia*, 173.
[1263] Santoro, *Mafia Politics*, 211.

acts as a code for their criminal self-governance, establishing norms and accepted behaviours as an alternative to legal pathways.[1264] OC can be understood as a social process, highlighting the importance of social networks in its operations. The Russian and Chinese mafias make use of loyalty networks and social capital to support their operations and secure illicit agreements.[1265] Transactions embed personal relations into the social aspect of OC, highlighting that OC does not operate in a vacuum.[1266] Such social interactions were crucial for the emergence of the Chinese triads and mafia groups.[1267] The state-criminal alliance built on self-serving relations is key to the success of the survival of mafia.[1268] Therefore, social interactions and community features of OC play a vital role in cementing its politicisation.

III. Organised Crime in Mexico

With the drug war, debates on the drug trade and associated corruption have only intensified as Mexican criminal actors have grown in prominence in the international drug trade and have received significant attention on the international stage.[1269] But how has the Mexican drug industry grown to this scale? This section outlines the historical evolution of OC in Mexico with special attention to how the drug trade has developed and established a political character, and State responses to the industry over the last century.

A. The Early Mexican Drug Trade (1900s-1975)

The Sinaloa state has been described as "the cradle of Mexican organised crime,"

[1264] Wang, *The Chinese Mafia*, 34.
[1265] Nancy Ries, "Thugocracy: bandit regimes and state capture," *Safundi*, 21, no. 4 (2020): 473-485, https://doi.org/10.1080/17533171.2020.1832804; Wang, *The Chinese Mafia*.
[1266] Mark Granovetter, "Economic action and social structure: The problem of embeddedness," *American Journal of Sociology* 91, no.3 (1985): 482, https://www.jstor.org/stable/2780199.
[1267] Wang, *The Chinese Mafia*, 57-96.
[1268] Ibid., 168.
[1269] Europol & DEA, *Complexities and Conveniences in the International Drug Trade: The Involvement of Mexican Criminal Actors in the EU Drug Market*, December 2022, https://www.europol.europa.eu/cms/sites/default/files/documents/Europol_DEA_Joint_Report.pdf; US National Institute of Justice, *Mexico and the United States: Neighbours Confront Drug-trafficking*, n.d., https://www.ojp.gov/pdffiles1/nij/218561.pdf. Various international organisations have directed their focus and attention to the influence of Mexican criminal actors on the international drug trade. See Europol and the DEA's joint report (2022) for more on the influence of Mexican DTOs on the EU drug market and the US National Institute of Justice (n.d.) publication on the how Mexico and the US are confronting drug-trafficking for more.

often likened to Sicily and the Sicilian Mafia.[1270] Sinaloa has a rich history of trafficking across the Mexico-US border, given the prominence of poppy plantations.[1271] This operation was historically led by the local Chinese population before being expelled from the area.[1272] The opium trade was deeply integrated into Sinaloa's socio-economic relations, having reduced the potential for violence through strong socio-economic hierarchies and industry regulation by the state judicial police.[1273] The prohibition of alcohol in the 1930s further strengthened the trafficking culture in Mexico to its Northern neighbours.[1274] This was not as profitable as drug prohibition proved to be in the Mexican context and would foreshadow the specialisation in opium and marijuana distribution.[1275]

The integration of the drug trade into Sinaloa's culture, leading to the rise of narcoculture (*la narcoaestetica*),[1276] became a crucial element for its survival in the Sierra Madre Occidental region, a mountainous region that runs along the Mexican Pacific coast. Revolutionary *caciques* (leaders) offered the needed political protection to grow the drug trade as they established local influence with their military

[1270] Ioan Grillo, "A Century of Defying US Drug Policy," *The Brown Journal of World Affairs* 20, no. 1 (2013): 254, https://www.jstor.org/stable/24590887.
[1271] Ibid.
[1272] Richard B Craig, "La Campana Permanente: Mexico's Antidrug Campaign," *Journal of Interamerican Studies and World Affairs* 20, no. 2 (1978): 108, https://doi.org/10.2307/165432; Grillo, "A Century," 254.
[1273] Wil G. Pansters and Benjamin T. Smith, "La Mafia Muere," *European Review of Latin American and Caribbean Studies | Revista Europea de Estudios Latinoamericanos y del Caribe* 19, no. 112 (2021): 98-9, https://www.jstor.org/stabe/10.2307/48658261.
[1274] Michael Woodiwiss and Mary Young, "The Past and Present of Transnational Organised Crime in America," in *Routledge Handbook of Organised Crime 2nd ed.*, ed. Felia Allum and Stan Gilmour (New York, NY: Routledge, 2022), 92; Grillo, "A Century," 254.
[1275] Woodiwiss and Young, "The Past and Present of Transnational Organised Crime in America," 92-3; Recio, "Drugs and Alcohol," 27.
[1276] Mark C. Edberg, "Drug Traffickers as Social Bandits: Culture and Drug-trafficking in Northern Mexico and The Border Region," *Journal of Contemporary Criminal Justice* 17, no. 3 (2001): 261, https://doi.org/10.1177/1043986201017003005l; Miguel L. Rojas-Sotelo, "Narcoaesthetics in Colombia, Mexico, and the United States," *Latin American Perspectives 41*, no. 2 (2014): 217, https://doi.org/10.1177/0094582X13518757.

background,[1277] troops of armed men, and connections to the urban elite.[1278] The rise of the so-called *narco-caciques* came with the weakened control of state administrations over these revolutionaries as a political group.[1279] The revolutionaries acted as an intermediary between the families that harvested and processed the opium or marijuana, establishing a relationship with regional authorities and managing conflict to be minimal.[1280] Government officials, interested in generating additional income, would permit illegal yet lucrative smuggling despite anti-drug laws in the US and Mexico.[1281] These themes became the first signs of criminal (narco-)governance. This period would be the first intervention of the Mexican government in the drug trade with the launching of the 1948 *gran campana* in the Northwest by raiding poppy and marijuana cultivation, particularly in Sinaloa, Sonora, Chihuahua, and Guerrero.[1282]

By the 1960s, contraband was the most lucrative business on the US-Mexico border,[1283] despite remaining relatively small between 1940 and 1970 as opium routes were reestablished between Europe and Asia and marijuana was concentrated in the border region.[1284] The system established by the revolutionaries in the previous period resulted in the state police responsible for regulating the drug industry until US intervention in the 1970s.[1285] Referred to as *narcopopulism*,[1286] it was successful at

[1277] Diccionario del español de México, "Cacique," Colegio de México, n.d., https://dem.colmex.mx/ver/cacique; Ismael Solís Sánchez, "El Caciquismo en México: La Otra Cara de la Democracia Mexicana. El Caso del Caciquismo Urbano en el Estado de México," *Estudios Político (México)*, no37 (2016) : 167-192. https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0185-16162016000100007. The term *cacique* is an Indigenous term used to define a leader of an Indigenous tribe; however, it has developed in the contemporary context to mean an individual who has concentrated influence and/or arbitrary power over a group (Diccionario del español de México n.d.). It is most similar to (tribal) chief in English. For more on *caciquismo* ('chiefdom') in the contemporary Mexican context, read Solís Sánchez (2016).

[1278] Pansters and Smith, "La Mafia Muere," 100. See Levine's (1974) "The Mexican Revolution: A Retrospective View" for more on the revolutionary caciques class.

[1279] Benjamin T. Smith, "The Rise and Fall of Narcopopulism: Drugs, Politics, and Society in Sinaloa, 1930-1980," *Journal for the Study of Radicalism* 7, no. 2 (2013): 147, https://doi.org/10.14321/jstudradi.7.2.0125. Pansters (2018) uses the term *narco-cacique* to refer to an individual with local power derived from involvement in a mixture of licit and illicit activities/businesses.

[1280] Pansters and Smith, "La Mafia Muere," 101.

[1281] Recio, "Drugs and Alcohol," 29-30.

[1282] Craig, "La Campana," 108.

[1283] Juan C. Garzón, *Mafia & Co.: The Criminal Networks in Mexico, Brazil, and Colombia*, trans. by Kathy Ogle, *Washington DC: Woodrow Wilson International Centre for Scholars*, 97, https://www.wilsoncenter.org/publication/mafia-co.

[1284] Pansters and Smith, "La Mafia Muere," 98.

[1285] Ibid., 101.

[1286] Smith, "The Rise and Fall."

pacifying conflicts; any outburst was unrelated to the drug trade.[1287] With crackdowns on Colombian and Peruvian cocaine production and the closing of the Caribbean route to transport cocaine to the US in the 1980s,[1288] Mexico became increasingly important in the cocaine trade as a transport intermediary.

By this point, *la Guerra Sucia* was at its peak as the military became involved in the fight against drugs as part of *Operación Canador*.[1289] *Operación Canador* (1970-1975) was a nation-wide campaign to eradicate Mexico's drug crops.[1290] It originally focused on smaller states in the drug trade, like Guerrero and Oaxaca, before turning to the Golden Triangle of Sinaloa, Chihuahua, and Durango.[1291]

The prominence of *narcopopulism* as a system of cooperation between criminal and law enforcement actors led to a prominent counterculture in the United States with the shift to "narco-diplomacy."[1292] The sudden increase in drug consumption in the US caused a dramatic increase in the value of drugs which grew Mexican market shares in marijuana and heroin to 95% and 90%, respectively, by 1975, according to US Drug Enforcement Agency (DEA) estimates.[1293] Increased flows of money allowed Mexican DTOs to further professionalise and diversify operations. Government crackdowns on the Sinaloan drug trade applied pressure on the existing structures and agreements, resulting in several actors moving to and establishing themselves in interior urban centres.[1294] These new levels of intervention in the drug trade marked a break from the historic peace.

B. Modern Mexican Drug Trade (1975-2005)

The year 1975 marked the formal implementation of Operation Condor, a region-wide US-backed counter-insurgency campaign and, in the Mexican context, a continuation

[1287] Ibid.

[1288] David Teiner, "Cartel-Related Violence in Mexico as Narco-Terrorism or Criminal Insurgency," *Perspectives on Terrorism* 14, no. 4 (August 2020): 83, https://www.jstor.org/stable/10.2307.26927665.

[1289] Smith, "The Rise and Fall," 149, 147.

[1290] Craig, "Operation Condor," 345; Smith, "The Rise and Fall," 148; Adela Cedillo, "Operation Condor, the War on Drugs, and Counterinsurgency in the Golden Triangle (1977-1983)." Working Paper 443, Kellogg Institute for International Studies, May 2012, 1, https://kellogg.nd.edu/sites/default/files/working_papers/Cedillo%20WP%20FINAL.pdf.

[1291] Richard Craig, "Operation Condor: Mexico's Antidrug Campaign Enters a New Era," *Journal of Interamerican Studies and World Affairs* 22, no. 3 (1980): 349, https://doi.org/10.2307/165493.

[1292] Pansters and Smith, "La Mafia Muere," 102; Woodiwiss and Young, "The Past and Present of Transnational Organised Crime in America," 97.

[1293] Pansters and Smith, "La Mafia Muere," 102.

[1294] Smith, "The Rise and Fall," 148; Teiner, "Cartel-Related," 83.

of *Operación Canador*. Operation Condor further entangled the Dirty War and the War on Drugs.[1295] It further reinforced the supply-side of counternarcotic policies as the government focused operations on eliminating the product at the source.[1296] This would include spraying herbicides as the chosen eradication method despite the known risks to surrounding vegetation.[1297] This period gave a new name, *triángulo crítico*, to the Golden Triangle, further emphasising its centrality to the Mexican drug trade.[1298] Drug-trafficking rose to become a national security concern that dominated judicial and military operations accompanied by a wave of *mano dura*, strong handed, policies.[1299] Despite aiming to disrupt the drug-trafficking network, Operation Condor resulted in more arrests of peasants growing illicit crops than traffickers.[1300]

Crackdowns on the early Sinaloa drug trade would establish the Guadalajara Cartel. In the 1980s, the Guadalajara Cartel was the largest and most powerful Mexican DTO responsible for operations in the Golden Triangle.[1301] The arrest of the Guadalajara Cartel's *capo,* Félix Gallardo, in 1989 marked a new period for Mexico's drug trade as the remaining territory was divided among his successors to form the modern DTOs, the Tijuana, Juárez and the Sinaloa Cartels.[1302] By the 1990s, this new generation of DTOs took over with influence and control more prominent and violent than ever before.[1303] This violence would only cement itself in the coming decades as confrontations increased. The violent rivalry between the Tijuana and Sinaloa Cartels intensified until the arrest of the Sinaloan *capo* Joaquín "El Chapo" Guzmán in 1993.[1304] Despite the nation-state's attempts to strengthen law enforcement and reduce conflict between various DTOs, drug-trafficking remained a profitable

[1295] Cedillo, "Operation Condor," 33.
[1296] Craig, "Operation Condor", 345.
[1297] Ibid., 346-7.
[1298] Ibid., 349.
[1299] Woodiwiss and Young, "The Past and Present of Transnational Organised Crime in America," 98.
[1300] Robert J. McCartney, "The Gold in Mexico's Hills: Drugs," *The Washington Post*, May 12, 1985, https://www.washingtonpost.com/archive/politics/1985/05/12/the-gold-in-mexicos-hills-drugs/d9e5b171-bdb3-4a8f-8cbc-806f18a4c94c/.
[1301] Garzón, *"Mafia & Co*.," 97-8; Smith, "The Rise and Fall," 152.
[1302] Garzón, *"Mafia & Co*.," 98.
[1303] Marisol Ochoa Elizondo, "Del Crimen Organisado al Crimen Desordenado: Una Apuesta por la Observación Conceptual y Contextual," *Desacatos* 54 (2017): 101, https://www.scielo.org.mx/pdf/desacatos/n54/2448-5144-desacatos-54-00092.pdf.
[1304] Garzón, *"Mafia & Co*.," 98; US Department of State, "Joaquin Guzman-Loera (Captured)," n.d., https://www.state.gov/narcotics-rewards-program-target-information-brought-to-justice/joaquin-guzman-loera-captured/.

operation.[1305] The profitability of drug-trafficking saw the growth of Mexico's largest DTOs, the Gulf, Tijuana, and Sinaloa Cartels, in the 1980s and 90s. The Tijuana Cartel, under Amado Carrillo Fuentes, was the first Mexican DTO to establish control over cocaine production following the death of Colombian drug lord Pablo Escobar in 1993.[1306]

In the attempt to secure and increase cocaine profits, inter-cartel violence ran rampant.[1307] Despite Carrillo Fuentes' consolidation of drug-trafficking structures in Guadalajara, Sinaloa, and Juárez, his death resulted in increased tensions as various *capos* tried to establish themselves as the new leaders.[1308] Cartels clashed in a bid to expand their territory and increase market control.[1309] Despite internal battles, the Sinaloa Cartel, a collective of Pacific cartels, remained a cohesive unit through internal alliances.[1310] This was led by *El Chapo* following his escape from prison in 2001, who, with other *capos* and leaders of armed groups, aimed to establish a drug-trafficking monopoly by eliminating the Gulf and Tijuana cartels.[1311] This marked a particularly violent period due to the intensity and frequency of violent confrontations across the country as the DTOs evolved to become the groups they are today.[1312]

The turn of the millennium marked a period of hope for many Mexicans as the country's first democratic presidential elections in 2000 ended the PRI one-party rule. This era seemed to result in an increase in drug-related violence in the country as competition in other areas of society increased as arrangements with the PRI government dissolved and competition in the drug trade increased.[1313] Vicente Fox, *Partido Acción Nacional* (PAN) president (2000-2006), led crackdowns on the Tijuana and the Juárez Cartels, indirectly strengthening other DTOs and introducing new factions.[1314] With increased competition and crackdowns on the drug trade, DTOs diversified into other economic

[1305] Woodiwiss and Young, "The Past and Present of Transnational Organised Crime in America," 98.
[1306] Garzón, *"Mafia & Co*.," 98.
[1307] Bruce M. Bagely, "Introduction: Drug-trafficking and Organised Crime in Latin America and the Caribbean in the Twenty-First Century: Challenges to Democracy," in *Drug-trafficking, Organised Crime, and Violence in the Americas Today*, ed. Bruce M. Bagely and Jonathan D. Rosen (University Press of Florida, 2015) 10.
[1308] Garzón, *"Mafia & Co*.," 99.
[1309] Ibid.
[1310] Ibid., 100.
[1311] Ibid.,101.
[1312] Guillermo Trejo and Sandra Ley, "Why Did Drug Cartels Go to War in Mexico? Subnational Party Alternation, the Breakdown of Criminal Protection, and the Onset of Large-Scale Violence," *Comparative Political Studies 51,* no.7 (2017): 900-937, https://doi.org/10.1177/0010414017720703.
[1313] Briscoe and Kalkman, *Illicit Networks,* 158; Teiner, "Cartel-Related," 83.
[1314] Bagely, "Introduction," 10.

sectors, including natural resources.[1315] The militarisation of the DTOs in the 1990s and early 2000s,[1316] beginning with the Gulf Cartel's armed faction *Los Zetas*,[1317] proved to be another source of the escalating violence.[1318] This period showed no signs of a declining Mexican drug trade and marked the beginning of a bloody period in Mexican history with the official start of the War on Drugs.

V. Appropriating the State: CDS' Narco-Governance

The War on Drugs marked a new period in Mexican drug-trafficking history, introducing a new dynamic between the DTOs and the Mexican State. As DTOs engage in conflict with each other and the State to secure their territory and maintain operations, violence and competition have only increased. The violence during this conflict stands out after the historically peaceful relationship between the *PRI* and DTOs. The empirical analysis explains the CDS's influence and confrontation against the Mexican State.[1319] This analysis draws from (1) Diego Gambetta's Sicilian model of mafia organisations focusing on the context of the weak state, and (2) Charles Tilly's state-formation process focusing on war-making as part of the state-making process. The analysis outlines how the CDS embedded itself into socio-economic structures and how it competes for territorial control to maintain their power base.

A. Embedding the Sinaloa Cartel

The illicit drug trade has become a recognisable characteristic of Mexico, contributing to the challenges of the drug war. This section considers the embeddedness of the drug trade and how the Sinaloa Cartel profited from the drug trade. The analysis considers the post-2000 democratisation process as an opportunity to benefit from a weak state context.

[1315] Joel S. Herrera and Cesar B. Martinez-Alvarez, "Diversifying violence: Mining, export-agriculture, and criminal governance in Mexico," *World Development 151,* (2022): 2, https://doi.org/10.1016/j.worlddev.2021.105769.

[1316] Trejo and Ley, "Why Did Drug Cartels Go to War?" 928.

[1317] Insight Crime, "Mexico: Zetas," Last Updated August 6, 2022, https://insightcrime.org/mexico-organized-crime-news/zetas-profile/.

[1318] Guillermo Trejo and Sandra Ley, *Votes, Drugs, and Violence: The Political Logic of Criminal Wars in Mexico* (Cambridge University Press, 2020), 135.

[1319] The Sinaloa Cartel has been referred to as many names, including its Spanish name *Cártel de Sinaloa* (CDS), the Pacific Cartel, the Guzmán-Zambada Organisation, and the Federation. In this exploration, the organisation will be primarily referred to as its English name, Sinaloa Cartel, or its Spanish acronym, CDS.

1. The Weak State

The Mexican democratic context ushered in a new political environment for DTOs to operate in. The 71-year PRI political monopoly established a strong centralised State that had considerable influence and control over the drug business.[1320] Criminal actors in the drug trade were viewed as subjects of the State, where the drug trade was another economic sector in which State actors had an interest.[1321] During this period, extortion and relations with State actors acted as a check system to oversee criminal activity.[1322] As agreements and connections between political and criminal actors were challenged, the shifting political landscape threatened these mechanisms in the process of creating a democratic Mexico.

The Guadalajara Cartel had broken up into the modern Mexican DTOs around the same time that the PRI began to lose regional support in the 1990s.[1323] Reflecting the political realities, there were more actors operating autonomously in the drug trade that vied for political networks and support. The hospitable and calm environment in which the drug trade had grown in was threatened by the democratic shift.[1324] The unpredictable environment that arose from this shift would introduce new uncertainties and increase risks for establishing and maintaining a criminal-state network. This only reinforced the increasingly popular view of criminal actors as corrupting the State.[1325] While this is up to debate, the increased unpredictability would result in increased violence as a criminal economy would take hold over the country.[1326]

The 2000 elections ushered in a democratisation process that required a reimagination

[1320] Morris, "Corruption," 36.

[1321] David Shirk and Joel Wallman, "Understanding Mexico's Drug Violence," *The Journal of Conflict Resolution* 59, no. 8 (2015): 1358–9, http://www.jstor.org/stable/24546346.

[1322] Morris, "Corruption," 38.

[1323] Trejo and Ley, "Why Did Drug Cartels Go to War?" 310.

[1324] Shirk and Wallman, "Understanding Mexico's Drug Violence," 1360.

[1325] Ibid.,1359.

[1326] Asa C. Laurell, "Three Decades of Neoliberalism in Mexico: The Destruction of Society," *International Journal of Health Services* 45, no. 2 (2015): 252, http://www.jstor.org/stable/45140494; Morris, "Corruption," 39; Joel S. Herrera & Cesar B. Martinez-Alvarez, "Diversifying violence: Mining, export-agriculture, and criminal governance in Mexico," *World Development 151*, (2022): 1-14, https://doi.org/10.1016/j.worlddev.2021.105769. The US Congress estimates that USD 19-29 billion flows into the Mexican economy annually (Laurell 2015, 252). Besides diversification in criminal activities, sources suggest that 78% of economic sectors are infiltrated by criminal actors in Mexico (Morris 2012a, 39; Laurell 2015, 252). See Herrera and Martinez-Alvarez (2021) for more on the diversification of economic activity by criminal actors in Mexico and the impact it has on criminal governance.

of the relationship between the State and DTOS. Without the PRI's political dominance and historical agreements, new political allies that could support the drug trade were needed.[1327] The weaker and decentralised State meant increased political fragmentation as state actors were more autonomous. Ultimately, this would create a power vacuum in a context of political instability to be exploited. Alongside this, the economic liberalisation that had been taking place since the 1990s and, most importantly, the signing of the North America Free Trade Agreement (NAFTA) further contributed to the growth of the drug trade.[1328] This neoliberal context, encouraging minimal state presence and intervention, would further reduce state presence in economic and social spheres as power shifted increasingly towards market forces, including those in the criminal space.

2. Sinaloa's Crime-Governance Nexus

The intersection of criminal activity and legitimate authority of a region has been named the crime-governance nexus.[1329] The nexus supports the diversification of criminal activity as the government, or rather civil servants, work alongside criminal actors. Within Mexico's social structures, it established a social stratum known as the "*narco-cacique*," describing local power resulting from a mixture of illicit and licit activities.[1330] Historically rooted in the Sinaloan highlands,[1331] it has spread across the country.

The Mexican paradox refers to the relationship between OC and the level of violence.[1332] The drug trade during the PRI-era was accompanied with low levels of drug-related violence. The present state of the country, however, suggests the opposite as corruption is accompanied by high levels of drug-related violence. This has complicated the understanding of what role corruption plays in the drug trade. Corruption once survived as a pacifying tool but now manifests as an aggravator.

The informal relationship-based order that thrived during the PRI monopoly remains a staple to the DTOs' culture of establishing relations with state agents,[1333] protected by

[1327] Morris, "Corruption," 36.
[1328] Adam D. Morton, "The War on Drugs in Mexico: a failed state?" *Third World Quarterly* 33, no. 9 (October 2012): 1641, https://doi.org/10.1080/01436597.2012.720837.
[1329] Pansters, "Drug-trafficking," 315.
[1330] Pansters, "Drug-trafficking," 321.
[1331] Ibid., 322.
[1332] Morris, "Corruption," 29.
[1333] Pansters, "Drug-trafficking," 319.

local socio-political structures.[1334] The centrality of these relationships overrides the formality of the state's organisation, rendering the state apparatus irrelevant and actively contradicting the rule of law to create spaces of criminality.[1335] Over the course of 2016, five former governors of states with high OC presence were accused of corruption.[1336] Uprooting the corruption culture has continued in the last few years as noted by the publication of a list of (former) state officials who are suspected of links to DTOs and corruption.[1337] This highlights the need to understand how local governments navigate their relationship with criminal groups.[1338] With the conviction of former Secretary of Public Security Genaro García Luna, who led State efforts in the War on Drugs,[1339] previously suspected links between the Sinaloa Cartel and the Mexican State have now been confirmed. These relations granted preferential treatment and protection from corrupted authorities.[1340] El Chapo's lawyers alleged during the García Luna trials that two Mexican presidents accepted bribes from the

[1334] Ibid., 321.

[1335] Ibid., 322. Morris (2012, 31) quotes Charles Bowden that "in over half a century of fighting drugs, Mexico has never created a police unit that did not join the traffickers."

[1336] Luis F. Alonso, "5 Former Mexico Governors Accused of Corruption in 2016," *InSight Crime*, November 14, 2016, https://insightcrime.org/news/brief/five-former-mexico-governors-accused-of-corruption-in-2016/.

[1337] InSight Crime, "Weekly InSight: Facebook Live on Coca Boom, Corruption and Cartels," *InSight* Crime, March 17, 2017, https://insightcrime.org/news/analysis/weekly-insight-videocast-coca-boom-corruption-cartels/; Parker Asmann, "Guatemala Presidential Candidate Solicited Sinaloa Cartel for Campaign Cash: US," *InSight Crime*, April 18, 2018, https://insightcrime.org/news/analysis/guatemala-presidential-candidate-sinaloa-cartel-campaign-cash/; InSight Crime, "Outgoing Mexico Governor To Lose Immunity From Long-Pending Arrest Warrant," September 30, 2022, https://insightcrime.org/news/outgoing-mexico-governor-lose-immunity-from-long-pending-arrest-warrant/. There have been reports of Central American politicians having links to Mexican DTOs, including the Sinaloa Cartel, with many of them implicated for corruption (InSight Crime 2017; Asmann 2019).

[1338] Tristan Clavel, "In Mexico, Local Authorities Walk a Fine Line with Criminal Groups," *InSight Crime*, October 11, 2017, https://insightcrime.org/news/brief/former-mexico-governor-accused-non-aggression-pact-crime-groups/. In his article for InSight Crime, Clavel (2017) explores how local Mexican authorities establish links with criminal groups active in the region and how the Mexican state has responded to it.

[1339] US Attorney's Office Eastern District of New York, "Ex-Mexican Secretary of Public Security Genaro García Luna Convicted of Engaging in a Continuing Criminal Enterprise and Taking Millions in Cash Bribes from the Sinaloa Cartel," *Department of Justice*, February 21, 2023, https://www.justice.gov/usao-edny/pr/ex-mexican-secretary-public-security-genaro-garcia-luna-convicted-engaging-continuing.

[1340] Shirk and Wallman, "Understanding Mexico's Drug Violence," 1358.

CDS,[1341] suggesting that the nexus extends to all levels of the Mexican government.[1342] These informal networks and relationships that corrupt the State apparatus, as less disruptive methods to violence,[1343] have become the modus operandi of the CDS. [1344] Mexico's status as a weak state is further emphasised by the presence of a two-front war:[1345] the state is against DTOs, and the state itself due to corruption and criminal infiltration. The state apparatus is ineffective at confronting drug-trafficking actors because of their criminal influence. The idea of the State in conflict with itself suggests that the crime-governance nexus has permeated the federal and national levels to a degree that hampers its function. Estimates suggest that 93.6% of municipal police depend on corruption to supplement their salaries.[1346] This highlights the extent of the nexus and its presence on the lowest layer of the bureaucratic structure.[1347] According to the 2013 National Survey of Government Quality and Impact (ENCGI), 89.7% of surveyors perceived the Mexican police forces as corrupt.[1348] Accompanied by the relatively low captures of CDS members according to a 2010 NPR investigation,[1349] this general distrust in law enforcement strengthened the view that militarisation is vital to winning the drug war.[1350] As demonstrated in the García Luna trial, criminal

[1341] Parker Asmann, "'El Chapo' Defense Puts Spotlight on Alleged Mexico Corruption," *InSight Crime*, November 15, 2018, https://insightcrime.org/news/brief/chapo-defense-puts-spotlight-on-alleged-mexico-corruption/.

[1342] Malcom Beith, "A Broken Mexico: Allegations of Collusion between the Sinaloa Cartel and Mexican Political Parties," *Small Wars & Insurgencies 22*, no. 5 (2011): 787-806, https://doi.org/10.1080/09592318.2011.620813.

[1343] Hannah Stone, "Mexico Not in League with Sinaloa Cartel, Insists Government," *InSight Crime,* July 6, 2011, https://insightcrime.org/news/analysis/mexico-not-in-league-with-sinaloa-cartel-insists-government/.

[1344] June S. Beittel, *Mexico: Organised Crime and Drug-trafficking Organisations*. CRS Report No. R41576 (Washington, DC: Congressional Research Service, 2022), 25, https://sgp.fas.org/crs/row/R41576.pdf.

[1345] Morris, "Corruption," 37.

[1346] Ibid., 31.

[1347] David Gagne, "Report Indicates Widespread Police Corruption in Tijuana," *InSight Crime*, February 16, 2016, https://insightcrime.org/news/brief/report-indicates-widespread-police-corruption-tijuana-mexico/; Alan Feuer, "El Chapo Trial Shows that Mexico's Corruption is even Worse Than You Think," *The New York Times*, Devember 28, 2018, https://www.nytimes.com/2018/12/28/nyregion/el-chapo-trial-mexico-corruption.html. Gagne (2016) explores police corruption in Tijuana, a city believed to be controlled by the CDS, in his brief for InSight Crime. Feuer (2018) explores how vital corruption has been to the success of the Sinaloa Cartel by reflecting on the testimonies made during the El Chapo trial.

[1348] Camilo Mejia, "Mexico Govt Survey Spotlights Ongoing Police Corruption," *InSight Crime*, June 17, 2014, https://insightcrime.org/news/brief/mexico-govt-survey-spotlights-ongoing-police-corruption/.

[1349] Stone, "Mexico Not in League with Sinaloa Cartel, Insists Government."

[1350] Peter Appleby, "Mexico Reliant on Army to Fight Crime Despite Human Rights Abuses," *InSight Crime*, October 6, 2022, https://insightcrime.org/news/amlo-armed-forces-human-rights-abuses-

organisations require a level of support and coordination from state actors at all levels of government.[1351] This means state complicity by not intervening in inter-cartel conflicts,[1352] a lack of intelligence sharing and protection.[1353] This suggests that there is an active process of weakening the security apparatus ordered by a State that is largely porous and malleable.

The weak democratic context allows the CDS to appropriate local and national political structures. The CDS took advantage of the collapse of the PRI order and the subsequent socio-political fragmentation. While corruption is the focus of this analysis, the consequential loss of space as a sign of limited statehood is central in understanding the impact on (stable) sovereignty. This will be further explored in the

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mexico/; Steve Fisher, "AMLO Promised to Take Mexico's Army Off the Streets – But He Made It More Powerful," *The Guardian*, September 27, 2022, https://www.theguardian.com/world/2022/sep/27/amlo-mexico-army-national-guard; Max de Haldevang, "AMLO Seeks to Further Expand the Role of the Military in MExico," *Bloomberg*, August 9, 2022, https://www.bloomberg.com/news/articles/2022-08-09/amlo-seeks-to-further-expand-role-of-the-military-in-mexico#xj4y7vzkg; Cecilia Farfán-Méndez, Kathleen Bruhn, and Tesalia Rizzo, "AMLO's Expansion of the Military Undermines Mexico's Civilian Tradition," *Americas Quarterly*, October 20, 2022, https://www.americasquarterly.org/article/amlos-expansion-of-the-military-undermines-mexicos-civilian-tradition/; Ramón I. Centeno, "How to Understand the Militarisation of Mexico Under AMLO's Presidency," London School of Economics Blog, December 22, 2022, https://blogs.lse.ac.uk/latamcaribbean/2022/12/22/how-to-understand-the-militarisation-of-mexico-under-amlos-presidency/.

On October 4, 2022, Mexico's Senate voted to extend the Army's involvement in the drug war as a public security force until 2028 (Appleby 2022). This shows how central the use of the military has been in the State's drug war, even despite President Lopez Obrador's (AMLO) initial campaign calls to pull back the military (Fisher 2022; de Haldevang 2022). For more on AMLO's stance on the use of Mexico's armed forces, see Deare (2021)'s report titled *Militarisation a la AMLO: How Bad Can It Get?* for more on the impact that militarisation has on civilian-military relations, Farfán-Méndez, Bruhn, and Rizzo's (2022) Americas Quarterly article for more on how AMLO's pro-military stance undermines civilian tradition, and Centeno (2022) for an exploration of the consequences of AMLO's militarisation.

[1351] US Attorney's Office Eastern District of New York, "Ex-Mexican Secretary of Public Security Genaro García Luna Convicted of Engaging in a Continuing Criminal Enterprise and Taking Millions in Cash Bribes from the Sinaloa Cartel."

[1352] Gavin Voss, "García Luna Convicted, But Corruption Concerns Endure in US-Mexico Partnership," *InSight Crime*, February 22, 2023, https://insightcrime.org/news/garcia-luna-convicted-corruption-concerns-endure-us-mexico-partnership/; Hannah Stone, "Mexico Not in League with Sinaloa Cartel, Insists Governmnet," InSight Crime, July 6, 2011, https://insightcrime.org/news/analysis/mexico-not-in-league-with-sinaloa-cartel-insists-government/. Former Attorney general for the state of Nayarit testified during the García Luna trials that there was an instruction to not intervene in conflict between the Beltrán-Leyva Organisation and El Chapo's CDS (Voss 2023). Similarly, a leaked US embassy cable shared the view that there was a belief that the army was allowing the CDS and Juarez Cartel clash in the border city of Ciudad Juarez (Stone 2011).

[1353] Elijah Stevens, "Leaked Intelligence Points to Top Level Corruption in El Chapo Escape," *InSight Crime*, November 24, 2015, https://insightcrime.org/news/brief/leaked-intelligence-points-to-top-level-corruption-in-el-chapo-escape/; Gavin Voss, "García Luna Convicted, But Corruption Concerns Endure in US-Mexico Partnership," *InSight Crime*, February 22, 2023, https://insightcrime.org/news/garcia-luna-convicted-corruption-concerns-endure-us-mexico-partnership/.

following section. As presented in Chapter 1, the weak state context allows mafia-type organisations to challenge characteristics of the State, notably the monopoly of protection and violence.

B. Creating the Pseudo-State

The Mexican drug trade has been especially lucrative and violent. Violent crime has been in decline since the 1970s, with comparable rates in the 30 years before the drug war.[1354] This changed drastically as homicides increased by 57% in 2008 with dramatic growth throughout the conflict.[1355] The violent context contributed to an instable security landscape in a seemingly never-ending war. This unpredictability introduced a new dimension as DTOs adopt more state-like behaviour by taking a more active political character. This section will focus on the use of violence by the CDS and how it has contributed to its dominance of the Mexican drug trade. The themes of war-making and the process of establishing and maintaining a powerbase are central themes will be considered to understand the factors that have contributed to the criminal appropriation of local governance structures.

1. War-Making

The use of violence and conflict are part of the state-making process explored by Charles Tilly, claiming that "war made the state."[1356] There is a belief that territorial and resource control is characteristic of the modern European state.[1357] The act of war, or any conflict, works as a process of consolidating and maintaining this control. Successful war-making (i.e., winning a physical confrontation) is, therefore, successful state-making. At the heart of this war-making thesis is the assumption that the state has complete monopoly over the use of physical force. This Weberian understanding views territorial control and the monopoly on the use of violence as preconditions for

[1354] Shirk and Wallman, "Understanding Mexico's Drug Violence," 1348-9.
[1355] Ibid. The homicide rate grew by almost three-fold from 8.1 in 2007 to 23.7 in 2011, showing a dramatic increase in a 4-year period (Shirk and Wallman 2015, 1349).
[1356] Johannes Jüde, "Making or un-making states: when does war have formative effects?" *European Journal of International Relations 28*, no. 1 (2022): 209–234, https://doi.org/10.1177/13540661211053628.
[1357] Ibid. Taylor and Botea (2008) state that some scholars suggest that a similar enough process has occurred in the Third World. This suggests further validity in applying Tilly's war- and state-making hypothesis to a non-European context.

the existence and survival of the State.[1358] This section departs from this understanding to analyse whether drug-trafficking organisations (DTOs) may be viewed as states within the Tillian understanding of statehood. Considering the militarisation of Mexican DTOs and the context of the drug war, this subsection argues that the CDS's operations have assumed a two-track character, where the Mexican State is in confrontation with a criminal organisation acting as a State.

With the increase in homicides during the War on Drugs,[1359] violence became a defining characteristic.[1360] This increased insecurity came at the cost of the Mexican State failing to ensure public security.[1361] This violent context was dependent on the democratic shift which introduced more competition into political, economic, and criminal spheres of Mexican society. The decision in 2006 to militarise the confrontation with DTOs only contributed to the cycle of violence that already existed,[1362] with criminal-state relations further fuelling it.[1363]

The process of violence increasingly recognised as a defining feature of the Mexican drug trade,[1364] emphasised by the integration of militarised factions in the DTOs. This began with the creation of *Los Zetas*, formerly the Gulf Cartel's armed faction made of national armed forces deserters,[1365] who fought the Sinaloa Cartel for territorial control.[1366] Territorial control remains one of the largest reasons for narco-related

[1358] Andres Galeana Abarca, "Ungoverned Spaces in Mexico: Autodefensas, Failed States, and the War on Drugs in Michoacán" (master's thesis, Naval Postgraduate School, 2014), 4, https://apps.dtic.mil/sti/citations/ADA621001.

[1359] Shirk and Wallman, "Understanding Mexico's Drug Violence," 1349.

[1360] Viridiana Rios, "Why Did Mexico Become So Violent? A Self-Reinforcing Violent Equilibrium Caused by Competition and Enforcement," *Trends in Organised Crime 16* (2013): 139, https://doi.org/10.1007/s12117-012-9175-z. While various sources report different numbers of DTO- or OC-related homicides, in the period of December 2006-June 2010, 41, 648 homicides were officially categories as such (Rios 2015, 139). This number is almost five times higher than OC-linked homicides in the 2001-2006 period (Ibid.).

[1361] Ricardo Máquez Blas, "La Derrota de del Estado Mexicano," *Wilson Center*, July 22, 2022, https://www.wilsoncenter.org/article/la-derrota-del-estado-mexicano.

[1362] Pansters, "Drug-trafficking," 324.

[1363] John P. Sullivan "From Drug Wars to Criminal Insurgency: Mexican Cartels, Criminal Enclaves and Criminal Insurgency in Mexico and Central America. Implications for Global Security," Working paper No 9, (Fondation Maison des Sciences de l'Homme, 2012), 5.

[1364] U.S National Institute of Justice, *Mexico and the United States: Neighbours Confront Drug-trafficking* (N.d.), https://www.ojp.gov/pdffiles1/nij/218561.pdf.

[1365] Insight Crime, "Mexico: Zetas."

[1366] Evan Ellis, "Organised Crime in Mexico and the Evolving Government Response," *Global Americans*, August 18, 2022, https://theglobalamericans.org/2022/08/organized-crime-in-mexico-and-the-evolving-government-response/.

violence.[1367] The CDS's former enforcement group, *Cártel Jalisco Nueva Generación* (CJNG),[1368] is especially known for their extreme use of violence,[1369] a defining feature of their operations.[1370]

The CDS and CJNG continue to compete over geographical control, introducing even more instability into the region.[1371] Estimates suggest that the drug trade employs at least 5,000 armed actors showing the level of militarisation.[1372] The growing trend of having a "military faction" within the broader structure suggests that confrontation between DTOs grew increasingly frequent in the context of the drug war and increased government crackdowns. The stream of violence creates a "self-reinforcing violent equilibrium" that perpetuates violent confrontations.[1373]

3. Establishing a Power Base

Thus far, the analysis has presented the weak state context as opportunity and

[1367] Beittel, *Mexico: Organised Crime and Drug-trafficking Organisations.*

[1368] Ibid., 32.

[1369] Vanda Felbab-Brown, "Cártel Jalisco Nueva Generación (CJNG) VS Sinaloa Cartel (CDS) Deploy Substantially Different Approaches to Governing," *Mexico News Daily*, June 11, 2022, https://mexicodailypost.com/2022/06/11/cartel-jalisco-nueva-generacion-cjng-vs-sinaloa-cartel-cds-deploy-substantially-different-approaches-to-governing/; Insight Crime, "Mexico: Jalisco Cartel New Generation (CJNG)," InSight Crime, Last Updated July 8, 2022, https://insightcrime.org/mexico-organized-crime-news/jalisco-cartel-new-generation/.

[1370] Beittel, *Mexico: Organised Crime and Drug-trafficking Organisations*, 32, 34; Nathan P. Jones, "The Strategic Implications of the Cártel de Jalisco Nueva Generación," *Journal of Strategic Security 11,* no. 1 (2018): 19-42, https://www.jstor.org/stable/10.2307/26466904. Jones (2018) discusses the CJNG following their split from the Sinaloa Cartel since 2016/2017 and their growing status as the most powerful OCG in Mexico. Despite distancing from the CDS, the CJNG continues to be known for their violent streak which has allowed them to reach the level of prominence that they have obtained.

[1371] Ellis, "Organised Crime in Mexico and the Evolving Government Response."; Beittel, *Mexico: Organised Crime and Drug-trafficking Organisations*, 34-5; Oscar López, "Land of No Return: The Mexican City Torn Apart by Cartel Kidnappings," *The Guardian*, May 13, 2023, https://www.theguardian.com/world/2023/may/13/mexico-city-fresnillo-cartel-kidnappings-violence; and María Verza, "A Mexican State Suffers Bloody Fallout of Cartel Rivalry," *Associated Press*, July 26, 2021, https://apnews.com/article/caribbean-129abf2e577a78fd12cfd6cd284a5aff. Confrontation between CJNG and the Sinaloa Cartel have heightened to a point in the Zacatecas state where around 70 people have gone missing between January and March of this year (Lopez 2023). In addition to kidnappings, the inter-cartel conflict has included shootings and killings on an almost daily basis (Ibid.). Zacatecas is one such example of inter-cartel conflict, as its location, bordering on 8 other states, proves to make it valuable territory to control (Ibid.; Verza 2021).

[1372] Viridiana Rios, "Why Did Mexico Become So Violent? A Self-Reinforcing Violent Equilibrium Caused by Competition and Enforcement," *Trends in Organised Crime* 16 (2013): 139, https://doi.org/10.1007/s12117-012-9175-z.

[1373] Rios, "Why Did Mexico Become So Violent?".

violence as the process of appropriating these structures. This subsection addresses how the CDS continues to guarantee its influence over these structures. It recognises territory control as the primary feature determining the organisation's political character. This subsection will argue that territorial control is the final step in the criminal appropriation of local political structures in establishing a criminal political entity or, in other words, criminal governance. This is built on the analysis that violence is used to destabilise local political and governance structures to establish de facto control over a territory to support criminal activity.[1374]

The spaces that have evolved into DTO strongholds mark localities where state power is challenged. As understood by Tilly's proposition, the focus on establishing and maintaining territorial control is crucial to the survival of the CDS as a criminal group and acknowledging its political nature. While corruption remains at the forefront of this analysis, the consequential loss of space as a sign of limited statehood is staple to understanding the impact of corruption on statehood and stable sovereignty. The creation of "dark spaces" identifies the criminal-governance nexus,[1375] as criminal governance, often in cooperation with state actors,[1376] dominates the locality.

Central authorities have limited control over the level of violence capacity in these "lost" territories.[1377] Neighbouring Central America countries have also "lost" territory to the

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[1374] Trejo and Ley, "High-Profile Criminal Violence," 204.

[1375] Pansters, "Drug-trafficking," 316.

[1376] Ibid; William Dean, Laura Derouin, Mikhalia Fogel, Elsa Kania, Tyler Keefe, James McCune, Valentina Perez et al, *The War on Mexican Cartels: Options for US and Mexican Policy-Makers*, Cambridge, MA: Harvard University: Institute of Politics, 2012, https://iop.harvard.edu/sites/default/files_new/research-policy-papers/TheWarOnMexicanCartels_0.pdf. These spaces are recognised as so-called "hotspots" of narco-activity, whether defined by violence or simply the presence of DTOs. These "hotspots" include the states of Baja California, Chihuahua, Sinaloa, and Michoacán, among others (Dean 2012, 10-11). On a city-level, Ciudad Juárez, a border city in Chihuahua, and Culiacán, the capital of Sinaloa, are (Ibid.)

[1377] J. N. Slavoski, "Mexico's Sovereignty Has Been Eroded from Within," *Wall Street Journal*, March 17, 2023, https://www.wsj.com/articles/mexico-drug-cartels-government-sovereignty-corruption-36789613; Carina Bergal, "The Mexican Drug War: The Case for Non-International Armed Conflict Classification," *Fordham International Law Journal* 34, no. 4 (2011): 1080, https://heinonline.org/HOL/P?h=hein.journals/frdint34&i=1052; Mary A. O'Grady, "Mexico Loses Its Sovereignty to Cartels," *Wall Street Journal*, November 10, 2019, https://www.wsj.com/articles/mexico-loses-its-sovereignty-to-cartels-11573411956; and George Grayson, "Mexican Cartels' Bloody Campaign for Sovereignty," By Scott Simon, *Weekend Edition Saturday*, October 16, 2010, https://www.npr.org/2010/10/16/130610297/mexican-cartels-bloody-campaign-for-sovereignty.
While academic literature seems to suggest a "loss" of territory to criminal governance, there is a strong notion in Mexican politics that the government will continue to maintain its sovereignty despite the

CDS and other Mexican DTOs as operations expand through this transit region.[1378] While Mexican DTOs have had connections in Central America since the 1980s, the growth in wealth and power from their growing share in the cocaine market further integrated Mexican DTOs in the corridor region.[1379] This is the premise of the "narco-insurgency" theory, describing the inability of the government to govern sovereign territory captured by criminal actors.[1380] Assuming a "decomposition of the State,"[1381] narco-insurgency assumes that there is a convergence of narcotic activity and politics to maintain market and territorial control.[1382] The Sinaloa Cartel's presence establishes a parallel structure, destabilising and replacing the State and its functions.[1383]

The CDS's power bases are established parallel to those of the Mexican State's,

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continued confrontation and the expansion of DTOs (Slavoski 2023). This can be seen by President Calderón's insistence that "the government 'has not lost any part… of the Mexican territory to drug cartels (Bergal 2011, 1080)." O'Grady (2019) explores Mexico's loss of sovereignty to DTOs' criminal governance and the negotiation strategy in the early days of the López Obrador's (AMLO) administration. Grayson's 2010 interview with NPR, building on his publication *Mexico: Narco-Violence and a Failed State?*, sheds brief insight on the impact of narco-violence on law enforcement in Mexico and the resulting competition for sovereignty between the State and DTOs.

[1378] Julia M. Bunck & Michael R. Fowler, *Bribes, Bullets, and Intimidation: Drug-trafficking and the law in Central America*, Penn State University Press, 2012, 34; Max G. Manwaring, "A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Organisations in Central America, El Salvador, Mexico, Jamaica, and Brazil," 2007, 23-24, https://apps.dtic.mil/sti/pdfs/ADA475687.pdf.; Parker Asmann & Alex Papadovassilakis, "Will us-Central America Relations Flater with Latest Corruption List?" *InSight Crime*, May 18, 2021, https://insightcrime.org/news/us-central-america-corruption-list/; and Douglas Farah and Carl Meacham, *Alternative Governance in the Northern Triangle and Implications for US Foreign Policy*, Lanham, MD: Centre for Strategic & International Studies, 2015, 12.

According to 2001 US Drug Enforcement Agency (DEA) estimates, 300-400 tons of cocaine passed through Central America to Mexico before reaching the US market (Bunck & Fowler 2012, 34). This has been the result of gangs, i.e., MS-13, negotiating these trafficking corridors to connect OC between Mexico and Central America (Manwaring 2007, 23-24). This "lost" territory in Central America is also marked by the corruption list published by the United States for the region which highlights suspects of committing or facilitating corruption and drug-trafficking (Asmann and Papadovassilakis 2021). This only highlights the governance crisis experienced in the region accompanied fragile licit economy (Farah and Meacham 2015, 12).

[1379] Julia M. Bunck and Michael R. Fowler, *Bribes, Bullets, and Intimidation: Drug-trafficking and the Law in Central America* (Penn State University Press, 2012) 48-9.

[1380] Robert J. Bunker, "Strategic Threat: Narcos and Narcotics Overview," *Small Wars & Insurgencies* 21, no. 1 (March 2010): 10, https://doi.org/10.1080/09592311003589229.

[1381] Hal Brands, *Mexico's Narco-Insurgency and US Counterdrug Policy* (Strategic Studies Institute, US Army War College, 2009), 12, http://www.jstor.org/stable/resrep11508.

[1382] Patrick Corcoran, "Knights Templar Test Narco-Insurgency Theory," *InSight Crime*, October 13, 2013, https://insightcrime.org/news/analysis/are-the-knights-templar-the-vanguard-of-a-narco-insrugency-in-mexico/.

[1383] Douglas Farah and Carl Meacham, *Alternative Governance in the Northern Triangle and Implications for US Foreign Policy* (Lanham, MD: Centre for Strategic & International Studies, 2015), 11.

replacing the State in rural and border regions. This essentially entangles the political and economic power of the organisation,[1384] resulting in a "fragmented sovereignty" that undermines the State framework. [1385] With a destabilising effect that has taken a multidimensional character, the CDS is able to directly weaken the immediate local and national power structures. This may include enforcing alternative criminal justice systems and the provision of welfare services in the territories that they control.[1386] This permeation of social and economic activities allows a consolidation of power, strengthening the CDS's political character by establishing a sense of "territorial lordship." [1387] This is especially true in the neoliberal context since the 1990s as the market has greater influence on the provision of social and welfare services.[1388] In this context, the CDS acts as an alternative governing authority following a militarised confrontation with the State.[1389] This is further enhanced by the crime-governance nexus established in the democratic era, presenting a threat to the efficacy of the state's security apparatus.[1390]

Territorial control exists for as long as it is sustainable to maintain. For this to happen,

[1384] Farah and Meacham, *Alternative Governance.*

[1385] Diane E. Davis, "Irregular Armed Forces, Shifting Patterns of Commitment, and Fragmented Sovereignty in the Developing World," *Theory and Society* 39, no. 3/4 (2010): 400, http://www.jstor.org/stable/40587542.

[1386] Morton, "The War on Drugs," 1641; Farah & Meacham, *Alternative Governance*, 10-11; Guadalupe Correa-Cabrera, Michelle Keck, and José Nava, "Losing the Monopoly of Violence: The State, a Drug War and the Paramilitarisation of Organised Crime in Mexico (2007-10)," *State Crime Journal* 4, no. 1 (2015): 84, https://doi.org/10.13169/statecrime.4.1.0077; Camilo Tamayo Gomez, "Organised Crime Governance in Times of Pandemic: The Impact of COVID-19 on Gangs and Drug Cartels in Colombia and Mexico," *Bulletin of Latin American Research 39*, no. S1 (2022): 12-15; and Andres Galeana Abarca, "Ungoverned Spaces in Mexico: Autodefensas, Failed States, and the War on Drugs in Michoacán," Master's thesis, Naval Postgraduate School, 2014, 15, https://apps.dtic.mil/sti/citations/ADA621001. The militarisation of Mexican DTOs also acted as a military of sorts to settle (criminal) disputes between the organisations (Correa-Cabrera, Keck, Nava 2015, 84). A prominent example of criminal governance rising where the state failed is COVID-19 pandemic; see Tamayo Gomez (2020) for more on this. La Familia and Los Caballeros, both largely based in Michoacán but also in the greater *Tierra Caliente* region, present themselves as religious organisations that help and protect the community to gain social support (Galeana Abarca 2014, 15). Farah and Meacham (2015) also touch on the growing role of non-state actors in Central America as providers of public goods and services in the second chapter of their publication, *Alternative Governance in the Northern Triangle and Implications for US Foreign Policy: Finding Logic Within Chaos*.

[1387] Santino (1994) quoted in Santoro, *Mafia Politics*, 212; and Hirschfeld, *Gangster States*.

[1388] The criminal provision of social services is only because of the lack of state-provided public goods, resulting in everything being privatised (Farah and Meacham 2015, 11).

[1389] Farah and Meacham, *Alternative Governance*, 15.

[1390] Morton, "The War on Drugs," 1640.

the actor in control requires a monopoly of violence within the territory.[1391] While in explicit conflict with the State, this, arguably, is not as intense as believed, considering the "alliance" between the CDS and the Calderón administration.[1392] The true conflict lays between the DTOs over territorial and market control.[1393] The criminal-political nexus is important here as control over state resources become available to allied non-state actors. While an effective counter-drug operation would require combating all DTOs,[1394] the Mexican state would be spread too thinly and, therefore, ineffectively confront the largest six cartels nor their factions.[1395] With a CDS "alliance," the Mexican state led a weakened confrontation against the other DTOs as the Sinaloa Cartel strengthened its capacity by increasing market and territory control, expanding its power base.[1396] 2012 estimates show the CDS, identified as the primary narcotrafficker to the US, gained control of 40-60% of Mexico's drug.[1397]

The Sinaloa Cartel succeeded at establishing itself as a dominant DTO amongst the many organisations in Mexico that shared an established history of (drug-)trafficking. During its dominance of the Mexican drug trade, the CDS's leader, Joaquín "El Chapo" Guzmán, became the leading figure the Mexican drug industry.[1398] Despite the

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[1391] Taylor and Botea, “Tilly Tally.”; Farah and Meacham, *Alternative Governance*, 19.

[1392] Morton, “The War on Drugs,” 1643.

[1393] Nathan P. Jones, Irina Chindea, Daniel Weisz-Argomedo, and John P. Sullivan, *Mexico’s 2021 Dark Network Alliance Structure: An Exploratory Social Network Analysis of Lantia Consultores’ Illicit Network Alliance and Subgroup Data*, Houstan, TX: Rice University’s Baker Institute for Public Policy, 2022, 12, https://doi.org/10.25613/KMGB-NC83. According to a former CDS affiliate leader, El Tomate, the Sinaloa Cartel actively kept factions operating in Tijuana in competition with each other following the Beltrán-Leyva Organisation’s (BLO) split around 2012 to prevent any intra-organisation conflict (Jones et al 2022, 12).

[1394] Alberto Lozano-Vázquez and Jorge Rebolledo Flores, ”In Search of the Mérida Initiative: From Antecedents to Practical Results,” in *Drug-trafficking, Organised Crime, and Violence in the Americas Today*, ed. Bruce M. Bagely and Jonathan D. Rosen (Gainesvill, FL: Univeristy Press of Florida, 2015), 246, https://doi.org/10.5744/florida/9780813060682.003.0012; and Malcom Beith, “A Broken Mexico: Allegations of Collusion between the Sinaloa Cartel and Mexican Political Parties,” *Small Wars & Insurgencies 22*, no. 5 (2011): 790, https://doi.org/10.1080/09592318.2011.620813. During his time as the top security officer, García Luna has been adamant that this has been the case, where the "government has attached without discrimination all criminal groups in Mexico” (Beith 2011, 790).

[1395] Morris, “Corruption,” 39.

[1396] Stone, “Mexico Not in League”; and Beith, “A Broken Mexico,” 789. Stone (2011) notes that the CDS’ rising fortunes fed suspicions that Mexican law enforcement was biased and essentially working to eliminate rivals. This bias has been supported by criticism that García Luna synthesised the state's battle against drug traffickers to facilitate the Sinaloa Cartel's consolidation of power (Beith 2011, 789).

[1397] Beittel, *Mexico: Organised Crime and Drug-trafficking Organisations*, 25

[1398] Alexander Montoya Prada, "Carteles del Narcotráfico y Grupos de Sicarios," URVIO *Revista Latinoamericana de Estudios de Seguridad*, no. 8 (2009): 119, http://www.redalyc.org/articulo.oa?iod+552656557010.

challenges that the drug war presented, the CDS was still able to maintain and grow their operations. Their success despite the trying context was the result of their effective appropriation of political structures at the local and national level. This process of criminal appropriation, while characteristically historical, intensified during the drug war, particularly during the 2006-2016 period. The exploration proposes that there are two approaches that the CDS had taken, the first was establishing and intensifying a criminal-political network and the second being a dual-track war, where the state and other DTOs were challenged for territorial control and the monopoly of violence. This required a weak state context, where the state apparatus and rule of law could easily be taken advantage of by criminal groups. This weak state context highlighted the historical importance of social networks in the absence of the Sinaloa Cartel's ability to depend on a formal (state) framework while challenging the state's legitimacy and security apparatus.

V. Final Considerations: *¿Plata o Plomo?*

"The largest groups of narcotics traffickers are in Mexico. They are the most dangerous, the strongest, and they have incredible trafficking networks."[1399]

December 2006 marked a new chapter in Mexico's history. President Felipe Calderón's militarised confrontation with powerful drug-trafficking organisations had a significant impact on the country's landscape, as the drug war, much like the criminal organisations, permeated into public society. As the War approaches its 20-year mark, discussions continue to surround why the drug war fails at its core purpose: eliminating Mexico's illicit drug trade.

The analysis presented highlights how the CDS has appropriated, and continues to appropriate, local governance structures. The paper identifies two overarching explanations: (1) the embeddedness of the illicit drug trade in Mexican society and (2) the political character of the CDS. The historical embeddedness of the illicit drug trade in Mexican society has shaped the current context of the weak state and maintains the historical criminal-political nexus well into the 21st century. The Pacific Cartel's political character is defined by the organisation's use of (excessive) violence for territorial

[1399] Bunck and Fowler, *Bribes, Bullets, and Intimidation*, 58.

control. This political character is present in the war against the State and in confrontation with other criminal organisations. This exploration can be boiled down to the infamous line associated with contemporary narco-culture and the illicit drug trade, *¿plata o plomo?* (money or bullet?), where the Pacific Cartel is both an economic and political actor.

These reasons lie under claims that Mexico is a mafia state or narco-state, according to the understanding presented by Naím (2012), where there is an intersection between the criminal and political spheres. The enhanced weak state status fuels the assumption of approaching a degree of failure, if it has not already reached a state of failure, associating the country with more conventionally viewed "failed states".[1400] Despite this, a deeper and more intricate understanding of the complexities given the evolution of Mexico's OC is needed. This underlines the importance for a strong rule of law and democratic culture. The prominence of OC maintains the drug trade at all levels, complicating this. As globalisation continues to play a vital role in the strengthening of this shadow economy, which has grown to become a community, international cooperation is increasingly important.

The relationship between criminal and political actors has remained constant throughout the last century of OC in Mexico despite increasing militarisation and democratisation efforts. In this sense, the Gambetta and Wang models for the Sicilian and Chinese mafia organisations are relevant to understanding drug-trafficking organisations for their political nature. As pointed out in scholarship,[1401] Mexican drug syndicates are especially unique in that they hold an ideology, rendering them political in nature and rather a mafia organisation than simply a drug syndicate. This requires further research into the concept of Mexican drug-trafficking organisations operating as a dual-track criminal organisation.

[1400] See "Is Mexico a Failing State?" (2009) for an exploration of the influence of drug-trafficking organisations on Mexican political stability and the validity in labelling Mexico as a failed or failing state. See Gallaher (2015) for a discussion on the debate of Mexico as a failed state considering the Mérida Intiative. See Davies (2010) for an exploration of non-state armed groups and their impact on sovereignty and the strong state.

[1401] Valentin Pereda, "Why Global North Criminology Fails to Explain Organised Crime in Mexico," *Theoretical Criminology 26,* no. 4 (November 2022): 620-640, https://doi.org/10.1177/13624806221104562.

Bibliography

"Is Mexico a Failing State? The Influence of Drug-trafficking Organisations on Mexican Political Stability." Master's thesis, National Defense Intelligence College, 2009. https://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room/FileId/161577/.

Abadinsky, Howard. *Organised Crime*. 10th ed. Belmont, CA: Wadsworth, 2013.

Acemoglu, Daron, Giuseppe De Feo, and Giacomo Davide De Luca. "Weak States: Causes and Consequences of the Sicilian Mafia." *The Review of Economic Studies* 87, no. 2 (March 2020): 537-581. https://doi.org/10.1093/restud/rdz009.

Agencia Reforma. "Ven en EU a México Como 'Narcoestado'." *El Siglo de Torreón*, September 16, 2017. https://www.elsiglodetorreon.com.mx/noticia/2017/ven-en-eu-a-mexico-como-narcoestado.html?from=old.

Alesina, Alberto, Salvatore Piccolo, and Paolo Punotti. 2018. "Organised Crime, Violence, and Politics." *The Review of Economic Studies* 86, no. 2 (March 2019): 457-499. https://doi.org/10.1093/restud/rdy036.

Alonso, Luis F. "5 Former Mexico Governors Accused of Corruption in 2016." *InSight Crime,* November 14, 2016. https://insightcrime.org/news/brief/five-former-mexico-governors-accused-of-corruption-in-2016/.

Anderson, Jack, and Jan Moller. "Mexico's Golden Triangle of Drugs." *The Washington Post*, September 9, 1996. https://www.washingtonpost.com/archive/local/1996/09/09/mexicos-golden-triangle-of-drugs/477a8aa1-0fed-4b59-8cd4-df4203db3ef9/.

Andreas, Peter, and Angelica Duran Martinez. "The International Politics of Drugs and Illicit Trade in the Americas." In *Routledge Handbook of Latin America in the World*, 1st ed., edited by Jorge Dominguez and Ana Covarrubias, 376-390. New York: Routledge, 2014. https://doi.org/10.4324/9781315753683.

Appleby, Peter. "Mexico Reliant on Army to Fight Crime Despite Human Rights Abuses." *InSight Crime*, October 6, 2022. https://insightcrime.org/news/amlo-armed-forces-human-rights-abuses-mexico/.

Arnold, Edwin. *The Marquis of Dalhousie's Administration of British India*. 1 vol. London, England: Saunders, Otley and Co., 1862.

Asmann, Parker. "'El Chapo' Defense Puts Spotlight on Alleged Mexico Corruption." *InSight Crime*, November 15, 2018. https://insightcrime.org/news/brief/chapo-defense-puts-spotlight-on-alleged-mexico-corruption/.

Asmann, Parker. "Guatemala Presidential Candidate Solicited Sinaloa Cartel for

Campaign Cash: US." *InSight Crime*, April 18, 2019. https://insightcrime.org/news/analysis/guatemala-presidential-candidate-sinaloa-cartel-campaign-cash/.

Asmann, Parker, and Alex Papadovassilakis. "Will US-Central America Relations Falter with Latest Corruption List?" *InSight Crime*, May 18, 2021. https://insightcrime.org/news/us-central-america-corruption-list/.

Bandiera, Oriana. "Land Reform, the Market for Protection, and the Origins of the Sicilian Mafia: Theory and Evidence." *The Journal of Law, Economics, and Organisation* 19, no. 1 (April 2003): 218-244. https://doi.org/10.1093/jleo/19.1.218.

Bagely, Bruce M. "Introduction: Drug-trafficking and Organised Crime in Latin America and the Caribbean in the Twenty-First Century: Challenges to Democracy." In *Drug-trafficking, Organised Crime, and Violence in the Americas Today*, edited by Bruce M. Bagely and Jonathan D. Rosen, 1-24. University Press of Florida, 2015.

Bagely, Bruce M., and Jonathan D. Rosen. "Preface: On the Study of Drug-trafficking and Organised Crime Networks in Latin America and the Caribbean in the Twenty –First Century." In *Drug-trafficking, Organised Crime, and Violence in the Americas Today*, edited by Bruce M. Bagely and Jonathan D. Rosen, xiii-xvii. University Press of Florida, 2015.

Bargent, James. "'Corruptionary' Provides a Guide to Mexico's Vocabulary of Corruption." *InSight Crime*, February 2, 2017. https://insightcrime.org/news/analysis/corruptionary-provides-guide-mexico-vocabulary-of-corruption/.

Barnes, Nicholas. "Criminal Politics: An Integrated Approach to the Study of Organised Crime, Politics, and Violence." *Perspectives on Politic*s 15, no. 4 (November 2017): 967–87. https://doi.org/10.1017/S1537592717002110.

Beith, Malcom. "A Broken Mexico: Allegations of Collusion between the Sinaloa Cartel and Mexican Political Parties." *Small Wars & Insurgencies 22*, no. 5 (2011): 787-806. https://doi.org/10.1080/09592318.2011.620813.

Beittel, June S. *Mexico: Organised Crime and Drug-trafficking Organisations*. CRS Report No. R41576. Washington, DC: Congressional Research Service, 2022. https://sgp.fas.org/crs/row/R41576.pdf.

Bergal, Carina. "The Mexican Drug War: The Case for Non-International Armed

Conflict Classification." *Fordham International Law Journal* 34, no. 4 (April 2011): 1042-1088. https://heinonline.org/HOL/P?h=hein.journals/frdint34&i=1052.

Bouchard, Martin, and Chris Wilkins. *Illegal Markets and the Economics of Organised Crime*. London: Routledge, 2010.

Brands, Hal. *Mexico's Narco-Insurgency and US Counterdrug Policy*. Strategic Studies Institute, US Army War College, 2009. http://www.jstor.org/stable/resrep11508.

Briscoe, Ivan, and Pamela Kalkman. *Illicit Networks: Rethinking the Systemic Risk in Latin America. PRISM* 5, no. 4 (2016): 151-171. https://cco.ndu.edu/Portals/96/Documents/prism/prism_5-4/Illicit%20Networks.pdf.

Bunck, Julia M., and Michael R. Fowler. *Bribes, Bullets, and Intimidation: Drug-trafficking and the Law in Central America*. Penn State University Press, 2012.

Bunker, Robert J. "Strategic Threat: Narcos and Narcotics Overview." *Small Wars & Insurgencies* 21, no. 1 (March 2010): 8-29. https://doi.org/10.1080/09592311003589229.

Carrapiço, Helena. "Reflections on Transnational Organised Crime as a Security Concept." In *The Routledge Handbook of Transnational Organised Crime*, edited by Felia Allum and Stan Gilmour, 21-34. Milton: Taylor & Francis Group, 2021. https://doi.org/10.4324/9781003044703.

Caulkins, Jonathan P., and Peter Reuter. "How Drug Enforcement Affects Drug Prices." *Crime and Justice* 39, no. 1 (2010): 213–71. https://doi.org/10.1086/652386.

Cedillo, Adela. "Operation Condor, the War on Drugs, and Counterinsurgency in the Golden Triangle (1977-1983)." Working Paper 443, Kellogg Institute for International Studies, May 2012. https://kellogg.nd.edu/sites/default/files/working_papers/Cedillo%20WP%20FINAL.pdf.

Centeno, Ramón I. "How to Understand the Militarisation of Mexico Under AMLO's Presidency." London School of Economics Blog. December 22, 2022. https://blogs.lse.ac.uk/latamcaribbean/2022/12/22/how-to-understand-the-militarisation-of-mexico-under-amlos-presidency/.

Chamberlin, Henry B. "Crime as a Business in Chicago." Chicago Crime Commission, Bulletin No. 6 (1919, October 1): 1-6.

Chu, Yiu K. *The Triads as Business*. London: Routledge, 2000.

Clavel, Tristan. “In Mexico, Local Authorities Walk a Fine Line with Criminal Groups.” *InSight Crime*, October 11, 2017. https://insightcrime.org/news/brief/former-mexico-governor-accused-non-aggression-pact-crime-groups/.

CNN. "Mexico Drug War Fast Facts." *CNN,* Last Updated March 20, 2022. https://edition.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/index.html.

Corcoran, Patrick. “Knights Templar Test Narco-Insurgency Theory.” *InSight Crime*, October 13, 2013. https://insightcrime.org/news/analysis/are-the-knights-templar-the-vanguard-of-a-narco-insrugency-in-mexico/.

Correa-Cabrera, Guadalupe, Michelle Keck, and José Nava. “Losing the Monopoly of Violence: The State, a Drug War and the Paramilitarisation of Organised Crime in Mexico (2007–10).” *State Crime Journal* 4, no. 1 (2015): 77–95. https://doi.org/10.13169/statecrime.4.1.0077.

Corte Penal Latinoamericana y del Caribe (COPAL). “Latin American Criminal Court Against Transnational Organised Crime.” 2016. https://www.europarl.europa.eu/meetdocs/2014_2019/documents/dlat/dv/07_copla_abstractnov2016/07_copla_abstractnov2016en.pdf.

Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight Against Organised Crime. *Office Journal of the European Union* 42 (2008): 1-4. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0841&from=EN.

Craig, Richard B. “La Campana Permanente: Mexico’s Antidrug Campaign.” *Journal of Interamerican Studies and World Affairs* 20, no. 2 (1978): 107–31. https://doi.org/10.2307/165432.

Craig, Richard. “Operation Condor: Mexico’s Antidrug Campaign Enters a New Era.” *Journal of Interamerican Studies and World Affairs* 22, no. 3 (1980): 345–63. https://doi.org/10.2307/165493.

Daniele, Gianmarco, and Benny Geys. “Organised Crime, Institutions and Political Quality: Empirical Evidence from Italian Municipalities.” *The Economic Journal* 125, no. 586 (August 2015): F233–F255. https://doi.org/10.1111/ecoj.12237.

Dean, William, Laura Derouin, Mikhaila Fogel, Elsa Kania, Tyler Keefe, James McCune, Valentina Perez et al. *The War on Mexican Cartels: Options for US and Mexican Policy-Makers*. Cambridge, MA: Harvard University: Institute of Politics, 2012. https://iop.harvard.edu/sites/default/files_new/research-policy-

papers/TheWarOnMexicanCartels_0.pdf.

Deare, Craig A. *Militarisation a la AMLO: How Bad Can It Get?* Wilson Centre. September 2021. https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Militarization_a_la_AMLO_Deare%20.pdf.

De Feo, Giuseppe, and Giacomo D. De Luca. "Mafia in the Ballot Box." *American Economic Journal: Economic Policy* 9, no. 3 (August 2017): 134–167. https://doi.org/10.1257/pol.20150551.

De Haldevang, Max. "AMLO Seeks to Further Expand the Role of the Military in Mexico." *Bloomberg*, August 9, 2022. https://www.bloomberg.com/news/articles/2022-08-09/amlo-seeks-to-further-expand-role-of-the-military-in-mexico#xj4y7vzkg.

Del Monte, Alfredo, and Luca Pennacchio. "Agricultural Productivity, Banditry and Criminal Organisations in Post-Unification Italy." *Rivista Italiana degli Economisti* 17, no.3 (2012), 347–378. https://doi.org/10.1427/38529.

De Mesquita Neto, Pablo. "Crime, Violence and Democracy in Latin America." Paper presented at the Integration in the Americas Conference, April 2002. https://web.archive.org/web/20071103102210/http://laii.unm.edu/conference/mesquita.php.

Den Held, Douwe, Alessandro Ford, and Chris Dalby. "From Empires to World Wars – A History of the Global Cocaine Trade." *InSight Crime*, September 1, 2022. https://insightcrime.org/news/empires-world-wars-history-global-cocaine-trade/.

Di Cataldo, Marco, and Nicola Mastrorocco. "Organised Crime, Captured Politicians, and the Allocation of Public Resources." *Journal of Law, Economics, and Organisation* 38, no. 3 (October 2021): 774-839. https://doi.org/10.1093/jleo/ewab015.

Diccionario del español de México. "Cacique." Colegio de México. N.d. https://dem.colmex.mx/ver/cacique.

Drapalova, Eliska. 2019. "Corruption and the crisis of democracy." Transparency International. Published March 6, 2019. https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-and-Crisis-of-Democracy_2019.pdf.

Edberg, Mark C. "Drug Traffickers as Social Bandits: Culture and Drug-trafficking in Northern Mexico and The Border Region." *Journal of Contemporary Criminal*

Justice 17, no. 3 (August 2001): 259-277. https://doi.org/10.1177/1043986201017003005.

Ellis, Evan "Organised Crime in Mexico and the Evolving Government Response." *Global Americans*, August 18, 2022. https://theglobalamericans.org/2022/08/organized-crime-in-mexico-and-the-evolving-government-response/.

Endres, Alexandra. "Mexiko ist eine Mafiakratie." *Zeit*, March 17, 2011. https://www.zeit.de/wirtschaft/2011-03/drogenstaat-mexiko-korruption?utm_referrer=https%3A%2F%2Fen.wikipedia.org%2F.

Euronews. "Capturado Joaquín 'el Chapo' Guzmán en un Motel en el Noroeste de México." *Euronews,* January 9, 2016. https://es.euronews.com/2016/01/09/capturado-joaquin-el-chapo-guzman-en-un-motel-en-el-noroeste-de-mexico.

Europol. "Defining Serious and Organised Crime." N.d. https://www.europol.europa.eu/socta/2017/defining-serious-and-organised-crime.html#:~:text=Since%20the%20year%202000%2C%20the,crimes%20for%20financial%20or%20material.

Europol, and the US Drug Enforcement Agency (DEA). *Complexities and Conveniences in the International Drug Trade: The Involvement of Mexican Criminal Actors in the EU Drug Market*. December 2022 https://www.europol.europa.eu/cms/sites/default/files/documents/Europol_DEA_Joint_Report.pdf.

Farah, Douglas, and Carl Meacham. *Alternative Governance in the Northern Triangle and Implications for US Foreign Policy*. Lanham, MD: Center for Strategic & International Studies, 2015.

Farfán-Méndez, Cecilia, Kathleen Bruhn, and Tesalia Rizzo. "AMLO's Expansion of the Military Undermines Mexico's Civilian Tradition." *Americas Quarterly*, October 20, 2022. https://www.americasquarterly.org/article/amlos-expansion-of-the-military-undermines-mexicos-civilian-tradition/.

Felbab-Brown, Vanda. "Cartel Jalisco Nueva Generacion (CJNG) VS Sinaloa Cartel (CDS) Deploy Substantially Different Approaches to Governing." *Mexico News Daily*, June 11, 2022. https://mexicodailypost.com/2022/06/11/cartel-jalisco-nueva-generacion-cjng-vs-sinaloa-cartel-cds-deploy-substantially-different-approaches-to-governing/.

Feuer, Alan. “El Chapo Trial Shows that Mexico’s Corruption is Even Worse Than You Think.” *The New York Times*, December 28, 2018. https://www.nytimes.com/2018/12/28/nyregion/el-chapo-trial-mexico-corruption.html.

Fijnaut, Cyrille J.C.F., Frank Bovenkerk, Gerben Bruinsma, and Henk van de Brunt. *Organised Crime in the Netherlands*. The Hague, the Netherlands: Kluwer Law International, 1998.

Finckenauer, James O. “Problems of Definition: What is Organised Crime?” *Trends in Organised Crime* 8, no. 3 (2005): 63-83. https://doi.org/10.1007/s12117-005-1038-4.

Fisher, Steve. “AMLO Promised to Take Mexico’s Army Off the Streets – But He Made It More Powerful.” *The Guardian*, September 27, 2022. https://www.theguardian.com/world/2022/sep/27/amlo-mexico-army-national-guard.

Gachúz, Juan Carlos. “Globalisation and Organised Crime: Challenges for International Cooperation.” *Baker Institute*, July 6, 2016. https://www.bakerinstitute.org/research/globalization-organized-crime.

Gagne, David. “Report Indicates Widespread Police Corruption in Tijuana.” *InSight Crime*, February 16, 2016. https://insightcrime.org/news/brief/report-indicates-widespread-police-corruption-tijuana-mexico/.

Gambetta, Diego. “The Sicilian Mafia: The Business of Private Protection.” Cambridge, MA: Harvard University Press, 1993.

Galeana Abarca, Andres. "Ungoverned Spaces in Mexico: Autodefensas, Failed States, and the War on Drugs in Michoacán." Master's thesis, Naval Postgraduate School, 2014. https://apps.dtic.mil/sti/citations/ADA621001.

Gallaher, Carolyn. “Mexico, the Failed State Debate, and the Mérida Fix.” *The Geographical Journal* 182, no. 4 (2016): 331-341. https://www.jstor.org/stable/44132379.

García, Ricardo R. “Drug-trafficking and Its Impact on Colombia: An Economic Overview.” *Canadian Journal of Latin American and Caribbean Studies* 28, no. 55-56 (2003): 277–304. https://doi.org/10.1080/08263663.2003.10816844.

Garzón, Juan C. *Mafia & Co.: The Criminal Networks in Mexico, Brazil, and Colombia*. Translated by Kathy Ogle. Washington DC: Woodrow Wilson International Centre for Scholars, 2008. https://www.wilsoncenter.org/publication/mafia-co.

Godson, Roy. "Transnational Crime, Corruption, and Security." In *Grave New World: Security Challenges in the 21st Century*, edited by Michael E. Brown, 259-278. Washington, DC: Georgetown University Press, 2003.

Granovetter, Mark. "Economic Action and Social Structure: The Problem of Embeddedness." *American Journal of Sociology* 91, no. 3 (1985): 481–510. http://www.jstor.org/stable/2780199.

Grayson, George. "Mexican Cartels' Bloody Campaign for Sovereignty." By Scott Simon, *Weekend Edition Saturday*, NPR. October 16, 2010. https://www.npr.org/templates/story/story.php?storyId=130610297.

Grillo, Ioan. "A Century of Defying US Drug Policy." *The Brown Journal of World Affairs* 20, no. 1 (2013): 253-265. https://www.jstor.org/stable/24590887.

Halpert, M., & Debusmann Jr., Bernd. "Mexico's ex-security minister Genaro García Luna convicted of drug-trafficking." *BBC*, February 22, 2023. https://www.bbc.com/news/world-us-canada-64726724.

Herrera, Joel S., and Cesar B. Martinez-Alvarez. "Diversifying violence: Mining, export-agriculture, and criminal governance in Mexico." *World Development 151*, (2022): 1-14. https://doi.org/10.1016/j.worlddev.2021.105769.

Hill, Peter B. E. 'The Modern *Yakuza*: Structure and Organisation', *The Japanese Mafia: Yakuza, Law, and the State*, 65-91. Oxford University Press, 2004. https://doi.org/10.1093/0199257523.003.0004.

Hirschfeld, Katherine. *Gangster States: Organised Crime, Kleptocracy, and Political Collapse*. Palgrave Macmillan, 2015.

Humphery, Caroline. *The Unmaking of Soviet Life*. Cornell University Press, 2002

Ibrahim, Bello, & Mukhtar, Jamilu I. "An Analysis of the Causes and Consequences of Kidnapping in Nigeria." *African Research Review* 11 no. 4 (December 2017). 134-143. http://dx.doi.org/10.4314/afrrev.v11i4.11

InSight Crime. "Mexico: Jalisco Cartel New Generation (CJNG)." *InSight Crime,* Last Updated July 8, 2022. https://insightcrime.org/mexico-organized-crime-news/jalisco-cartel-new-generation/.

InSight Crime. "Mexico: Sinaloa Cartel." *InSight Crime*, Last Updated May 4, 2021. https://insightcrime.org/mexico-organized-crime-news/sinaloa-cartel-profile/.

InSight Crime. "Mexico: Zetas." *InSight Crime*, Last Updated August 6, 2022. https://insightcrime.org/mexico-organized-crime-news/zetas-profile/.

InSight Crime. "Outgoing Mexico Governor to Lose Immunity from Long-Pending Arrest

Warrant." *InSight Crime*, September 30, 2022. https://insighcrime.org/news/outgoing-mexico-governor-lose-immunity-from-long-pending-arrest-warrant/.

InSight Crime. "Weekly InSight: Facebook Live on Coca Boom, Corruption and Cartels." *InSight Crime*, March 17, 2017. https://insightcrime.org/news/analysis/weekly-insight-videocast-coca-boom-corruption-cartels/.

Interpol. "Drug-trafficking." n.d. https://www.interpol.int/en/Crimes/Drug-trafficking.

Jones, Nathan P. "The Strategic Implications of the Cártel de Jalisco Nueva Generación." *Journal of Strategic Security 11,* no. 1 (2018): 19-42. https://www.jstor.org/stable/10.2307/26466904.

Jones, Nathan P., and Gary J. Hale. *Organised Crime and the Coronavirus in Mexico*. Rice University's Baker Institute for Public Policy, 2020. https://www.bakerinstitute.org/sites/default/files/2020-07/import/bi-brief-070820-usmx-organizedcrime.pdf.

Jones, Nathan P., Irina Chindea, Daniel Weisz-Argomedo, and John P. Sullivan. *Mexico's 2021 Dark Network Alliance Structure: An Exploratory Social Network Analysis of Lantia Consultores'Illicit Network Alliance and Subgroup Data*. Houston, TX: Rice University's Baker Institute for Public Policy, 2022. https://doi.org/10.25613/KMGB-NC83.

Joseph, Gilbert M. "On the Trail of Latin American Bandits: A Reexamination of Peasant Resistance." *Latin American Research Review* 25, no. 3 (1990): 7–53. http://www.jstor.org/stable/2503816.

Jüde, Johannes. "Making or un-making states: when does war have formative effects?" *European Journal of International Relations 28*, no. 1 (2022): 209–234. https://doi.org/10.1177/13540661211053628.

Kennedy, Michael, Peter Reuter, and Kevin Jack Riley. "A Simple Economic Model of Cocaine Production." *Mathematical and Computer Modelling* 17, no. 2 (1993): 19-36. https://www.rand.org/pubs/monograph_reports/MR201.html.

Kleemans, Edward R. "Theoretical Perspectives on Organised Crime." In *The Oxford Handbook of Organised Crime*, edited by Letizia Paoli, 33-52. Oxford University Press, 2014. https://doi.org/10.1093/oxfordhb/9780199730445.013.005.

Kynoch, Gary. "Crime, Conflict and Politics in Transition-era South Africa." *African Affairs* 104, no. 416 (July 2005). 493-514. https://. doi.org/10.1093/afraf/adi009.

Lasswell, Harold D. *Politics: Who Gets What, When, How*. Pickle Partners Publishing, 2018.

Laurell, Asa C. “Three Decades of Neoliberalism in Mexico: The Destruction of Society.” *International Journal of Health Services* 45, no. 2 (2015): 246–64. http://www.jstor.org/stable/45140494.

Leftwich, Adrian. "Thinking Politically: On the politics of Politics." In *What is Politics? The Activity and its Study*, edited by Adrian Leftwich, 1-22. John Wiley & Sons, 2015.

Lessing, Benjamin. “Conceptualising Criminal Governance.” *Perspectives on Politics 19*, no.3 (2021): 854-73. https://doi.org/10.1017/S1537592720001243.

Levine, Robert M. “The Mexican Revolution: A Retrospective View.” *Current History 66*, no. 393 (May 1974): 195-199, 231. https://www.jstor.org/stable/45313067.

Lewis, George C. *Local Disturbances in Ireland*. London, England: B. Fellowes, 1836.

Lopez, Oscar. “Lan of No Return: The Mexican City Torn Apart by Cartel Kidnappings.” *The Guardian*. May 13, 2023. https://www.theguardian.com/world/2023/may/13/mexico-city-fresnillo-cartel-kidnappings-violence.

Lozano-Vázquez, Alberto, and Jorge Rebolledo Flores. “In Search of the Mérida Intiative: From Antecedents to Practical Results.” In *Drug-trafficking, Organised Crime, and Violence in the Americas Today*, edited by Bruce M. Bagely and Jonathan D. Rosen, 239-256. Gainesvill, FL: Univeristy Press of Florida, 2015. https://doi.org/10.5744/florida/9780813060682.003.0012.

Magliocca, Nicholas R., Kendra McSweeney, Steven E. Sesnie, Elizabeth Tellman, Jennifer A. Devine, Erik A. Nielsen, Zoe Pearson, and David J. Warthall. “Modelling Cocaine Traffickers and Counterdrug Interdiction Forces as a Complex Adaptive System.” Proceedings of the National Academy of Sciences (PNAS), 119(16): 7784-7792. https://doi.org/10.1073/pnas.1812459116.

Maldonado Aranda, Salvador. “Stories of Drug-trafficking in Rural Mexico: Territories, Drugs and Cartels in Michoacán.” *European Review of Latin American and Caribbean Studies | Revista Europea de Estudios Latinoamericanos y del Caribe* 94 (April 2013): 43-66. https://www.jstor.org/stable/23408421.

Manwaring, Max G. “A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Organisations in Central America, El Salvador,

Mexico, Jamaica, and Brazil." 2007. https://apps.dtic.mil/sti/pdfs/ADA475687.pdf.

Máquez Blas, Ricardo. "La Derrota de del Estado Mexicano." Wilson Center. July 22, 2022. https://www.wilsoncenter.org/article/la-derrota-del-estado-mexicano.

McCartney, Robert J. "The Gold in Mexico's Hills: Drugs." *The Washington Post*, May 12, 1985. https://www.washingtonpost.com/archive/politics/1985/05/12/the-gold-in-mexicos-hills-drugs/d9e5b171-bdb3-4a8f-8cbc-806f18a4c94c/.

McIssac, Laura. '"Righteous Fraternities" and Honourable Men: Sworn brotherhoods in Wartime Chongqing.' *American Historical Review* 105, no.5 (December 2000): 1641-1655. https://doi.org/10.2307/2652035.

Mejia, Camilo. "Mexico Govt Survey Spotlights Ongoing Police Corruption." *InSight Crime*, June 17, 2014. https://insightcrime.org/news/brief/mexico-govt-survey-spotlights-ongoing-police-corruption/.

Mejía, Daniel, and Joanne Csete. *The Economics of the Drug War: Unaccounted Costs, Lost Lives, Missed Opportunities*. New York, NY: Open Society Foundation, 2016. https://www.unodc.org/documents/ungass2016/Contributions/Civil/OpenSociety/The_Economics_of_the_Drug_War_-_Unaccounted_Costs_Lost_Lives_Missed_Opportunities.pdf.

Millet, Kate. "Theory of Sexual Politics." In *Radical Feminism: A Documentary Reader*, edited by Barbara A. Crow, 122-153. NYU Press, 2000.

Montoya Prada, Alexander. "Carteles del Narcotráfico y Grupos de Sicarios." URVIO *Revista Latinoamericana de Estudios de Seguridad*, no. 8 (September 2009): 118-135. http://www.redalyc.org/articulo.oa?iod+552656557010.

Moreno-Sanchez, Rocio, David S Kraybill, and Stanley R Thompson. "An Econometric Analysis of Coca Eradication Policy in Colombia." *World Development* 31, no. 2 (2003): 375–83. https://doi.org/10.1016/S0305-750X(02)00192-4.

Morris, Stephen D. "Corruption, Drug-trafficking, and Violence in Mexico." *The Brown Journal of World Affairs* 18, no. 2 (2012): 29–43. http://www.jstor.org/stable/24590861.

Morton, Adam D. "The War on Drugs in Mexico: a failed state?" *Third World Quarterly* 33, no. 9 (October 2012): 1631-1645. https://doi.org/10.1080/01436597.2012.720837.

Naím, Moises. "Mafia States: Organised Crime Takes Office." Foreign Affairs 91, no. 3

(2012): 100–111.

Ochoa Elizondo, Marisol. "Del Crimen Organisado al Crimen Desordenado: Una Apuesta por la Observación Conceptual y Contextual." *Desacatos* 54 (2017): 92-105. https://www.scielo.org.mx/pdf/desacatos/n54/2448-5144-desacatos-54-00092.pdf.

O'Connor, Dermot. "The Political Economy of Colombia's Cocaine Industry." *Papel Politico* 14, no. 1 (March 2009): 81-106. http://www.scielo.org.co/pdf/papel/v14n1/v14n1a05.pdf.

O'Grady, Mary A. "Mexico Loses Its Sovereignty to Cartels." *Wall Street Journal*, November 10, 2019. https://www.wsj.com/articles/mexico-loses-its-sovereignty-to-cartels-11573411956.

Organisation of American States (OAS), and Inter-American Commission on Human Rights (IACHR). *Violence, Children and Organised Crime*. November 2015. http://www.oas.org/en/iachr/reports/pdfs/violencechildren2016.pdf.

Pansters, Wil G. "Drug-trafficking, the Informal Order, and Caciques. Reflections on the Crime-Governance Nexus in Mexico." *Global Crime 19*, no. 3-4 (2018): 315-338. https://doi.org/10.1080/17440572.2018.1471993.

Pansters, Wil G., and Benjamin T. Smith. "La Mafia Muere." *European Review of Latin American and Caribbean Studies | Revista Europea de Estudios Latinoamericanos y del Caribe* 19, no. 112 (July-December 2021): 91-116. https://www.jstor.org/stabe/10.2307/48658261.

Pearce, Frank. *Crimes of the Powerful: Marxism, Crime and Deviance*. London, England: Pluto Press, 1976.

Pereda, Valentin. "Why Global North Criminology Fails to Explain Organised Crime in Mexico." *Theoretical Criminology 26,* no. 4 (November 2022): 620-640. https://doi.org/10.1177/13624806221104562.

Pring, Coralie. 2017. *People and Corruption: Latin America and the Caribbean: Global Corruption Barometer*. ISBN: 978-3-96076-062-7. Transparency International. https://images.transparencycdn.org/images/2017_GCB_AME_EN.pdf.

Recio, Gabriela. "Drugs and Alcohol: US Prohibition and the Origins of the Drug Trade in Mexico, 1910-1930." *Journal of Latin American Studies* 34, no. 1 (2002): 21–42. http://www.jstor.org/stable/3875386.

Reid, Ed. *Mafia*. New York, NY: Random House, 1952. Quoted in K. von Lampe. *Organised Crime: Analysing Illegal Activities, Criminal Structures, and Extra-*

Legal Governance. Los Angeles: SAGE, 2016.

Reuter, Peter. *Disorganised Crime: The Economics of the Visible Hand*. Cambridge, MA: MIT Press, 1983.

Ries, Nancy. "Thugocracy: Bandit Regimes and State Capture." *Safundi* 21, no. 4 (October 2020): 473-485. https://doi.org/10.1080/17533171.2020.1832804.

Rios, Viridiana. "Why Did Mexico Become So Violent? A Self-Reinforcing Violent Equilibrium Caused by Competition and Enforcement." *Trends in Organised Crime 16* (2013): 138-155. https://doi.org/10.1007/s12117-012-9175-z.

Rojas-Sotelo, Miguel L. "Narcoaesthetics in Colombia, Mexico, and the United States." *Latin American Perspectives 41*, no. 2 (March 2014): 215-231. https://doi.org/10.1177/0094582X13518757.

Samuels, Richard J. "Kidnapping Politics in East Asia." *Journal of East Asian Studies* 10, no. 3 (2010): 363–96. https://doi.org/10.1017/S1598240800003660.

Sands, Leo. "Gilberto Rodríguez Orejuela: Colombian 'Chess Player' Drug Lord Dies in Prison." *BBC*, June 2, 2022. https://www.bbc.com/news/world-us-canada-61669876.

Santino, Umberto. *La Mafia Come Soggetto Politico*. Palermo: Centro Siciliano di Documentazione Peppino Impastato, 1994. Quoted in M. Santoro. *Mafia Politics*. Cambridge, UK; Medford, MA: Polity, 2022.

Santoro, Marco. *Mafia Politics*. Cambridge, UK; Medford, MA: Polity, 2022.

Schuberth, Mortiz. "A Transformation from Political to Criminal Violence? Politics, Organised Crime and the Shifting Functions of Haiti's Urban Armed Groups." *Conflict, Security, Development* 15, no.2 (May 2015), 169-196. https://doi.org/10.1080/14678802.2015.1030950.

Shirk, David, and Joel Wallman. "Understanding Mexico's Drug Violence." *The Journal of Conflict Resolution* 59, no. 8 (2015): 1348–76. http://www.jstor.org/stable/24546346.

Sims, Edwin W. "Fighting Crime in Chicago: The Crime Commission." *Journal of the American Institute of Criminal Law and Criminology* 11, no. 1 (1982): 21-28.

Slavoski, J. N. "Mexico's Sovereignty Has Been Eroded from Within." Wall Street Journal. March 17, 2023. https://www.wsj.com/articles/mexico-drug-cartels-government-sovereignty-corruption-36789613.

Smith, Benjamin T. "The Rise and Fall of Narcopopulism: Drugs, Politics, and Society in Sinaloa, 1930-1980." *Journal for the Study of Radicalism* 7, no. 2 (2013): 125-

165. https://doi.org/10.14321/jstudradi.7.2.0125

Soares, Rodrigo R., and Joana Naritomi. "Understanding High Crime Rates in Latin America: The Role of Social and Policy Factors." In *The Economics of Crime: Lessons for and from Latin America*, edited by Rafael Di Tella, Sebastian Edwards, and Ernesto Schargrodsky, 19-55. Chicago, IL: Chicago University Press, 2010. http://www.nber.org/chapters/c11831.

Solís Sánchez, Ismael. "El Caciquismo en México: La Otra Cara de la Democracia Mexicana. El Caso del Caciquismo Urbano en el Estado de México." *Estudios Político (México)*, no. 37 (January-April 2016): 167-192. https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0185-16162016000100007.

Stevens, Elijah. "Leaked Intelligence Points to Top Level Corruption in El Chapo Escape." *InSight Crime*, November 24, 2015. https://insightcrime.org/news/brief/leaked-intelligence-points-to-top-level-corruption-in-el-chapo-escape/.

Stone, Hannah. "Mexico Not in League with Sinaloa Cartel, Insists Government." InSight Crime, July 6, 2011. https://insightcrime.org/news/analysis/mexico-not-in-league-with-sinaloa-cartel-insists-government/.

Stratfor. "Areas of Cartel Influences in Mexico." April 11, 2011. https://worldview.stratfor.com/article/mexicos-drug-cartels-fight-territory.

Sullivan, John P. "Criminal Insurgency: Narcocultura, Social Banditry, and Information Operations." *Small Wars Journal*, December 3, 2012. https://smallwarsjournal.com/jrnl/art/criminal-insurgency-narcocultura-social-banditry-and-information-operations.

Sullivan, John P. "From Drug Wars to Criminal Insurgency: Mexican Cartels, Criminal Enclaves and Criminal Insurgency in Mexico and Central America. Implications for Global Security." Working Paper, Fondation Maison des Sciences de l'Homme, 2012.

Tamayo Gomez, Camilo. "Organised Crime Governance in Times of Pandemic: The Impact of COVID-19 on Gangs and Drug Cartels in Colombia and Mexico." *Bulletin of Latin American Research 39*, no. S1 (2022): 12-15.

Taylor, Brian D., and Roxana Botea. "Tilly Tally: War-Making and State-Making in the Contemporary Third World." *International Studies Review* 10, no. 1 (2008): 27–56. http://www.jstor.org/stable/25481929.

Teiner, David. "Cartel-Related Violence in Mexico as Narco-Terrorism or Criminal Insurgency." *Perspectives on Terrorism* 14, no. 4 (August 2020): 83-98. https://www.jstor.org/stable/26b927665.

Thoumi, Francisco E. “Colombian Organised Crime: From Drug-trafficking to Parastatal Bands and Widespread Corruption.” In *Traditional Organised Crime in the Modern World: Responses to Socioeconomic Change*, edited by Dina Siegel and Henk van de Bunt, 131-148. New York: Springer, 2012.

Thoumi, Francisco E. “Competitive Advantages in the Production and Trafficking of Coca-Cocaine and Opium-Heroin in Afghanistan and the Andean Countries.” In *Innocent Bystanders: Developing Countries and the War on Drugs*, edited by Philip Keefer and Norman Loayza, 195-252. Washington, DC: World Bank, 2010.

Trejo, Guillermo, and Sandra Ley. “High-Profile Criminal Violence: Why Drug Cartels Murder Government Officials and Party Candidates in Mexico.” *British Journal of Political Science 51,* (2021): 203-229.

Trejo, Guillermo, and Sandra Ley. *Votes, Drugs, and Violence: The Political Logic of Criminal Wars in Mexico*. Cambridge University Press, 2020. https://doi.org/10.1017/9781108894807.

Trejo, Guillermo, and Sandra Ley. “Why Did Drug Cartels Go to War in Mexico? Subnational Party Alternation, the Breakdown of Criminal Protection, and the Onset of Large-Scale Violence,” *Comparative Political Studies 51,* no.7 (2017): 900-937, https://doi.org/10.1177/0010414017720703.

United Nations Office on Drugs and Crime (UNODC). “Closer to Home - Drug Use in Latin America Countries in Focus.” June 26, 2008. https://www.unodc.org/unodc/en/frontpage/closer-to-home-drug-use-in-six-latin-american-countries-in-focus.html.

UNODC. “Module 1: Definitions of Organised Crime: Defining Organised Crime.” April 2018. https://www.unodc.org/e4j/zh/organized-crime/module-1/key-issues/defining-organized-crime.html#:~:text=Organized%20crime%20is%20a%20continuing,force%20to%20protect%20its%20operations.

UNODC. "Transnational Organised Crime." N.d. https://www.unodc.org/ropan/en/organized-crime.html#:~:text=a%20group%20of%20three%20or,financial%20or%20other

%20material%20benefit.

UNODC. *Transnational Organised Crime in Central America and the Caribbean: A Threat Assessment*. September 2012. https://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf.

UNODC. *United Nations Convention Against Transnational Organised Crime and the Protocols Thereto*. 2004. https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.

UNODC. *UNODC Strategic Vision for Latin America and the Caribbean 2022-2025.* N.d. https://www.unodc.org/res/strategy/STRATEGIC_VISION_LATIN_AMERICA_AND_THE_CARIBBEAN_2022_2025_ENE17_EDsigned.pdf.

US Attorney's Office Eastern District of New York. "Ex-Mexican Secretary of Public Security Genaro García Luna Convicted of Engaging in a Continuing Criminal Enterprise and Taking Millions in Cash Bribes from the Sinaloa Cartel." Department of Justice. February 21, 2023. https://www.justice.gov/usao-edny/pr/ex-mexican-secretary-public-security-genaro-garcia-luna-convicted-engaging-continuing.

US Department of State. "Joaquin Guzman-Loera (Captured)." N.d. https://www.state.gov/narcotics-rewards-program-target-information-brought-to-justice/joaquin-guzman-loera-captured/.

U.S National Institute of Justice. *Mexico and the United States: Neighbours Confront Drug-trafficking*. N.d. https://www.ojp.gov/pdffiles1/nij/218561.pdf.

Varese, Federico. *The Russian Mafia: Private Protection in a New Market Economy*. Oxford: Oxford University Press, 2001.

Vega, Andrea. "Sobronos y Narcotráfico, de Esto Acusan a García Luna." N+, February 9, 2023. https://www.nmas.com.mx/internacional/genaro-garcia-luna-acusado-narcotrafico-sobornos-juicio/internacional/sobornos-y-narcotrafico-de-esto-acusan-a-garcia-luna.

Verza, María. "A Mexican State Suffers Bloody Fallout of Cartel Rivalry." *Associated Press*, July 26, 2021. https://apnews.com/article/caribbean-129abf2e577a78fd12cfd6cd284a5aff.

Von Lampe, Klaus. *Organised Crime: Analysing Illegal Activities, Criminal Structures,*

and Extra-Legal Governance. Los Angeles: SAGE, 2016.

Voss, Gavin. "García Luna Convicted, But Corruption Concerns Endure in US-Mexico Partnership." *InSight Crime*, February 22, 2023. https://insightcrime.org/news/garcia-luna-convicted-corruption-concerns-endure-us-mexico-partnership/.

Wang, Peng, and Sharon Ingrid Kwok. "Hong Kong Triads: The Historical and Political Evolution of Urban Criminal Polity, 1842–2020." *Urban History* (March 2022): 1–23. https://doi.org/10.1017/S0963926821001024.

Wang, Peng. *The Chinese Mafia: Organised Crime, Corruption, and Extra-legal Protection*. Oxford University Press, 2017.

Wilson Centre. "The Felix Gallardo Organisation (Guadalajara OCG)." n.d. https://www.wilsoncenter.org/the-felix-gallardo-organization-guadalajara-ocg.

Woodiwiss, Michael. *Organised Crime and American Power: A History*. Toronto, Ontario, Canada: University of Toronto Press, 2001.

Zabludoff, Sidney J. "Colombian Narcotics Organisations as Business Enterprises." *Transnational Organised Crime* 3, no. 2 (1997): 20-49.

Research Article

The Role of Hate Speech in Inciting Genocide: A Case Study of *Radio Television Libre des Mille Collines* in Rwanda

Rawnak Miraj Ul Azam

Received: 24 February 2025 / Accepted: 10 June 2025

Abstract

This research investigates the critical role of Radio Télévision Libre des Mille Collines (RTLM) in inciting the 1994 Rwandan genocide. Examining the station's establishment, programming, and rhetoric within the historical and political context of pre-colonial, colonial, and post-independence Rwanda, this study argues that RTLM functioned as a powerful instrument of propaganda, directly contributing to the mass violence. The research analyses how RTLM systematically dehumanised the Tutsi population through derogatory language and stereotypes, portraying them as "cockroaches" and enemies of the state, thus lowering psychological barriers to violence. By combining popular music, talk shows, and news broadcasts, RTLM effectively disseminated hate speech to a broad audience, particularly the youth, who were later mobilised as perpetrators. This study further explores the correlation between specific RTLM broadcasts and outbreaks of violence, demonstrating the station's direct role in triggering and escalating the genocide. Through an examination of key International Criminal Tribunal for Rwanda (ICTR) judgments, including the Nahimana et al. and Ruggiu cases, this research analyses the legal implications of RTLM's actions, emphasising the responsibility of media actors in inciting genocide. Finally, the research discusses the implications for international law and policy on hate speech, genocide prevention, and media regulation, highlighting the crucial lessons learned from the Rwandan tragedy and suggesting future directions for preventing similar atrocities.

I. A Radio Station's Role in Genocide: Framing the RTLM Narrative

The 1994 Rwandan genocide stands as a reminder of the devastating consequences of unchecked hate speech and its potential to incite mass violence. Within a span of approximately 100 days, approximately 800,000 people, prominently the Tutsi, were systematically murdered.[1402] This horrific event was not a natural ramification of violence but rather the culmination of years of escalating ethnic tensions, political instability, and, crucially, the calculated dissemination of hate propaganda through various channels, notably the radio station Radio Télévision Libre des Mille Collines (RTLM).[1403] Rwanda's pre-colonial society was distinguished by a complex social hierarchy, with the Tutsi, Hutu, and Twa groups coexisting, albeit with varying degrees of social and economic power.[1404] However, the arrival of European colonial powers, first Germany and then Belgium, significantly altered these dynamics.[1405]

The colonial administrations, influenced by racial theories of the time, reinforced and rigidified ethnic distinctions, favouring the Tutsi minority and creating resentment among the Hutu majority.[1406] This colonial legacy of ethnic division laid the groundwork for future conflict.[1407] Following independence in 1962, Rwanda experienced a series of political upheavals and episodes of ethnic violence, further exacerbating tensions between Hutu and Tutsi.[1408] The Rwandan Civil War, beginning in 1990 with the invasion of the Rwandan Patriotic Front (RPF), a Tutsi-led rebel group, reigning from Uganda, further destabilised the country and created a fertile ground for extremist ideologies to flourish.[1409] In this context of heightened tension and fear, RTLM emerged

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[1402] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), 15.

[1403] Jean-Pierre Chrétien, *The Great Lakes of Africa: Two Thousand Years of History*, trans. Scott Straus (New York: Sone Books, 2006), 450.

[1404] Catherine Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda, 1860–1960* (New York: Columbia University Press, 1988), 25

[1405] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001), 100

[1406] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995), 30.

[1407] René Lemarchand, *Rwanda and Burundi: Post-Genocide and Post-Conflict* (Basingstoke, UK: Palgrave Macmillan, 2009), 45.

[1408] Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996–2006* (Cambridge: Cambridge University Press, 2009), 70.

[1409] Syeda Afroza Zerin and Rawnak Miraj Ul Azam, 'Synergizing ADR With the Existing Legal System to Ensure Access to Justice for Sustainable Infrastructure Development in Bangladesh' (2025) Conflict Resolution Quarterly https://doi.org/10.1002/crq.70006.

as a powerful tool for disseminating hate speech and inciting violence.[1410] The role of media, particularly radio, in the Rwandan genocide has been extensively studied, with Radio Télévision Libre des Mille Collines (RTLM) emerging as a central focus. Scholarship consistently points to RTLM's active role in inciting and facilitating mass violence. Alison Des Forges's comprehensive work, *Leave None to Tell the Story* (1999), meticulously documents the events of the genocide and details how RTLM's broadcasts contributed to the dehumanisation and targeting of Tutsis. This work is foundational for understanding the timeline of events and the systematic nature of the violence.[1411]

Several scholars have examined the specific content and rhetoric employed by RTLM. Allan Thompson's *Media and Genocide in Rwanda* (2007)[1412] provides an in-depth analysis of the station's programming, revealing how it blended entertainment with hate propaganda. Thompson highlights the use of dehumanising language, coded messages, and direct calls to violence, demonstrating how RTLM actively incited listeners to participate in the killings. Jean-Pierre Chrétien and Léonidas Mukimbiri's *Rwanda: Les médias du génocide* (2003) offers a further analysis of the media landscape during the genocide[1413] and focuses on the specific language and strategies employed by RTLM. These works emphasise the deliberate nature of RTLM's propaganda and its effectiveness in manipulating public opinion. Several researchers have explored the link between RTLM broadcasts and the escalation of violence.

Moreover, David Yanagisawa-Drott's quantitative study, "Propaganda and Conflict: Evidence from the Rwandan Genocide" (2014),[1414] uses econometric analysis to demonstrate a strong correlation between RTLM broadcasts and outbreaks of violence in different regions of Rwanda. This study provides empirical evidence supporting the claim that RTLM played a direct role in triggering and intensifying the genocide. Linda Melvern's *Conspiracy to Murder* (2004) further examines the political context surrounding RTLM's establishment and operation[1415], highlighting the close ties

[1410] Allan Thompson, *Media and Genocide in Rwanda* (London: Pluto Press, 2007), 55.
[1411] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch 1999)
[141214121412] Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press/Fountain Publishers/International Development Research Centre 2007)
[1413] Jean-Pierre Chrétien and Léonidas Mukimbiri, *Rwanda: Les médias du génocide* (Karthala 2003) 75.
[1414] David Yanagisawa-Drott, 'Propaganda and Conflict: Evidence from the Rwandan Genocide' (2014) 129 QJE 1947, 1955.
[1415] Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004)

between the station and extremist Hutu factions within the government. This work emphasises the role of political elites in orchestrating the propaganda campaign.

Furthermore, the psychological impact of RTLM's hate speech is also addressed in the literature. Ervin Staub's work on the roots of evil and genocide (1989, 1996) provides a theoretical framework for understanding how dehumanisation and propaganda can lead to mass violence.[1416] These theoretical insights are applied to the Rwandan context by scholars like Scott Straus in *The Order of Genocide* (2006)[1417], who uses perpetrator testimonies to demonstrate the influence of RTLM on their actions. While these sources focus on RTLM's significant role, it is essential to acknowledge that the genocide was a complex event with multiple contributing factors. While Mahmood Mamdani in his *When Victims Become Killers*, 2001[1418] and others emphasise the historical context of ethnic divisions and colonial legacies, the cited works on RTLM consistently demonstrate that the station played a crucial, direct role in inciting the violence, acting as a catalyst in the unfolding of the genocide. This body of literature firmly establishes RTLM as a key instrument in the perpetration of the Rwandan genocide.

This research argues that RTLM played a crucial role in inciting the genocide by systematically disseminating hate speech that dehumanised Tutsis and other targeted groups, creating an environment conducive to mass violence.[1419] The radio station's broadcasts were not merely expressions of prejudice; they were carefully crafted messages designed to incite fear, hatred, and ultimately, violence.[1420] By portraying Tutsis as "cockroaches," "snakes," and enemies of the state, RTLM effectively dehumanised them in the eyes of many Hutu listeners, making it easier to justify their extermination.[1421] This dehumanisation process was crucial in overcoming the moral barriers that would normally prevent people from engaging in acts of extreme

[1416] Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press 1989)

[1417] Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press 2006)

[1418] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press 2001) 55.

[1419] Stuart Allan, *Media, Risk and Science* (Buckingham, UK: Open University Press, 2001), 120.

[1420] Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (New York: Farrar, Straus and Giroux, 1998), 150.

[1421] Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca, NY: Cornell University Press, 2006), 180.

violence.[1422] This research seeks to address several key questions: *How did RTLM's broadcasts contribute to the dehumanisation of Tutsis? What specific language and rhetoric did RTLM employ to incite violence? What was the impact of RTLM's broadcasts on the actions of perpetrators? And finally, how did RTLM circumvent existing media regulations or exploit loopholes to disseminate its hateful message?*

This research adopts a multi-level methodology, drawing on a range of primary and secondary sources. It will involve a detailed analysis of RTLM transcripts, providing direct evidence of the language and rhetoric used by the station. These transcripts will be contextualised through an examination of historical documents, including government reports, eyewitness accounts, and scholarly analyses of Rwandan history and politics.[1423] Furthermore, the research will examine relevant legal instruments, such as the Genocide Convention and the Statute of the International Criminal Tribunal for Rwanda (ICTR)[1424], to understand the legal framework surrounding genocide and hate speech. Finally, it will draw on a wide range of scholarly literature on genocide, hate speech, media studies, and Rwandan history to provide a comprehensive analysis of RTLM's role in the genocide.[1425] RTLM played a crucial role in inciting the Rwandan genocide by systematically dehumanising Tutsis through hate speech. Its programming, combining music and inflammatory talk shows, has widely disseminated propaganda, mobilising youth to violence. Direct correlations exist between RTLM broadcasts and outbreaks of violence. ICTR judgments, notably the "Media Case," established legal precedent for holding media actors accountable for incitement to genocide. The tragedy highlights the critical need for media regulation and legal frameworks against hate speech to prevent future atrocities.

II. Echoes of the Past: Shaping the Rwandan Context for Genocide

Understanding the historical and political context of Rwanda is crucial to comprehend the 1994 genocide. The roots of the conflict lie deep within the country's pre-colonial past, were exacerbated by colonial intervention, and continued to fester in the post-independence era, culminating in the horrific events of 1994.

[1422] Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989), 200.

[1423] Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), 350.

[1424] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[1425] Mamdani, *Citisen and Subject*, 200.

Pre-colonial Rwandan society was a complex hierarchical system, primarily structured around cattle ownership and land control.[1426] While the terms Hutu, Tutsi, and Twa existed, they were not initially rigid ethnic categories in the modern sense.[1427] Rather, they represented socio-economic distinctions, with the Tutsi traditionally associated with cattle ownership and political power, the Hutu primarily engaged in agriculture, and the Twa forming a small minority of hunter-gatherers and artisans.[1428] Social mobility existed, allowing individuals to move between these categories based on wealth and status.[1429] Intermarriage and cultural exchange were also common, blurring the lines between these groups.[1430] However, a system of patronage, known as *ubuhake*, developed, creating patron-client relationships that often reinforced existing hierarchies, with Tutsi elites holding significant power over Hutu commoners.[1431] This system, while not inherently conflictual, laid the groundwork for future tensions by creating an uneven distribution of power and resources.[1432] It is important to note that while some scholars emphasise the fluidity of pre-colonial identities, others argue that underlying tensions and power imbalances existed even before the arrival of Europeans.[1433]

The arrival of colonial powers, first Germany in the late 19th century and then Belgium after World War I, fundamentally transformed Rwandan society.[1434] The colonial administrations, influenced by prevailing racial theories, sought to categorise and classify the population based on perceived racial differences.[1435] They adopted a Hamitic hypothesis, stating that the Tutsi were a superior race of Cushitic origin who had migrated from Ethiopia, bringing with them a more advanced culture and political

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[1426] Catharine Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda, 1860–1960* (New York: Columbia University Press, 1988), 30.

[1427] Jan Vansina, *Antecedents to Modern Rwanda: The Nyiginya Kingdom* (Madison: University of Wisconsin Press, 2004), 45.

[1428] David Newbury, *Kings and Clans: A Social History of the Lake Kivu Rift Valley* (Madison: University of Wisconsin Press, 1995), 60.

[1429] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001), 75.

[1430] Jean-Pierre Chrétien, *The Great Lakes of Africa: Two Thousand Years of History*, trans. Scott Straus (New York: Sone Books, 2003), 200.

[1431] René Lemarchand, *Rwanda and Burundi* (New York: Praeger Publishers, 1970), 80.

[1432] Catharine Newbury, "Rwanda 1880–1990: From Precolonial Hierarchies to Genocide," *Issue: A Journal of Opinion* 20, no. 2 (1992): 48.

[1433] Gérard Prunier, *The Rwanda Crisis, 1959–1994: History of a Genocide* (New York: Columbia University Press, 1997), 25.

[1434] Mahmood Mamdani, *Citisen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996), 150.

[1435] Nick Curtis, *Genocide in Rwanda: A Collective Memory* (London: Pluto Press, 2002), 35.

system.[1436] This theory justified the colonial preference for the Tutsi minority, who were seen as more "civilised" and therefore more suitable for administrative roles.[1437] The colonial powers reinforced these ethnic distinctions through the introduction of identity cards in the 1930s, officially labelling individuals as Hutu, Tutsi, or Twa.[1438] This formalised and rigidified ethnic identities, making them permanent and inescapable.[1439] The Belgian administration further entrenched ethnic divisions by favouring Tutsi elites in education, administration, and the economy, creating resentment among the Hutu majority.[1440] This preferential treatment created a sense of injustice and fuelled ethnic animosity, which would later be exploited by extremist politicians.[1441] The colonial period thus transformed fluid social distinctions into rigid ethnic categories, laying the foundation for future conflict.[1442]

Rwanda became independent from Belgium in 1962, marking the beginning of a period of political unrest and increasing ethnic violence.[1443] The transition to independence was marked by widespread Hutu uprisings against Tutsi dominance, leading to massacres and the displacement of thousands of Tutsis.[1444] The Hutu-dominated government that came to power after independence perpetuated the ethnic divisions created during the colonial era.[1445] The rhetoric of Hutu power and the demonisation of Tutsis as "internal enemies" became increasingly prevalent in political discourse.[1446] This rhetoric was often used to justify discriminatory policies and acts of violence against the Tutsi population.[1447] Several episodes of ethnic violence occurred in the

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[1436] Jan Vansina, *How Societies Are Born: Governance in West Central Africa before 1600* (Charlottesville: University of Virginia Press, 2005), 180.

[1437] Prunier, *The Rwanda Crisis* (1995), 30.

[1438] Timothy Longman, *Christianity and Genocide in Rwanda* (Cambridge: Cambridge University Press, 2010), 60.

[1439] Mamdani, *When Victims Become Killers*, 100.

[1440] Filip Reyntjens, "Rwanda: Three Days That Shook the World," *African Affairs* 94, no. 377 (1995): 543.

[1441] Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (New York: Farrar, Straus and Giroux, 1998), 90.

[1442] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), 40.

[1443] Linda R. Melvern, *Conspiracy to Murder: The Rwandan Genocide* (London: Verso, 2004), 55.

[1444] Prunier, *The Rwanda Crisis* (1997), 70.

[1445] René Lemarchand, *Rwanda and Burundi: Post-Genocide and Post-Conflict* (Basingstoke, UK: Palgrave Macmillan, 2009), 65.

[1446] Newbury, "The Cohesion of Oppression," 75. (Shortened form since it was previously cited as full note)

[1447] René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (Cambridge: Cambridge University Press, 1994), 120.

decades following independence, including massacres in 1963, 1973, and the early 1990s.[1448] These events further expanded ethnic divisions and created a climate of fear and mistrust.[1449] The rise of Hutu extremist groups, who advocated for the complete eradication of the Tutsi population, further exacerbated tensions.[1450] These groups, often with ties to the government, played a crucial role in preparing the ground for the 1994 genocide.[1451]

The Civil War, with the invasion of the Rwandan Patriotic Front (RPF), a Tutsi-led rebel group from Uganda, constituted a crucial turning point in Rwandan history.[1452] The war further destabilised the country and created a context of fear, uncertainty, and heightened ethnic tensions.[1453] The government, under President Juvénal Habyarimana, used the war as a pretext to consolidate power and further demonise the Tutsi population, portraying them as collaborators with the RPF.[1454] This rhetoric was amplified by extremist media outlets, such as RTLM, which played a key role in disseminating hate propaganda.[1455] The Arusha Accords, a peace agreement signed in 1993 aimed at ending the civil war and establishing a power-sharing government, were met with resistance from Hutu extremist factions who feared losing their grip on power.[1456] The assassination of President Habyarimana in 1994, widely attributed to Hutu extremists opposed to the Arusha Accords, served as the immediate trigger for the genocide.[1457] In the ensuing chaos, extremist elements within the government and military seized control, unleashing a campaign of systematic extermination against the Tutsi population.[1458] The civil war thus created the political along with social conditions that made the genocide possible, providing a context of violence, fear, and extremist mobilisation.[1459]

[1448] Prunier, *The Rwanda Crisis* (1997), 85–110.
[1449] Helen M. Hintjens, "Explaining the 1994 Genocide in Rwanda," *The Journal of Modern African Studies* 39, no. 2 (2001): 255.
[1450] Chrétien, *The Great Lakes of Africa* (2006), 420.
[1451] Melvern, *A People Betrayed*, 90–105.
[1452] Filip Reyntjens, "Rwanda: Background to a Genocide," *Africa* 64, no. 4 (1994): 499.
[1453] Barnett, *Eyewitness to a Genocide*, 70.
[1454] Prunier, *The Rwanda Crisis* (1995), 120–135.
[1455] Thompson, *Media and Genocide in Rwanda*, 60–75.
[1456] Colette Braeckman, *Rwanda: Histoire d'un génocide* (Paris: Fayard, 1994), 150.
[1457] Melvern, *Conspiracy to Murder*, 120–135.
[1458] Des Forges, *Leave None to Tell the Story* (1999), 150–175.
[1459] Ervin Staub, "Cultural-Societal Roots of Violence: The Examples of Genocidal Violence," *American Psychologist* 51, no. 2 (1996): 125.

III. The Birth of a Propaganda Machine: Rise of RTLM

Radio Télévision Libre des Mille Collines (RTLM) emerged as a powerful instrument of propaganda in the lead-up to and during the Rwandan genocide. Its establishment, programming, and the rhetoric it employed played role in inciting violence against the Tutsi population.

RTLM was founded in 1993, a period of increasing political tension and polarisation in Rwanda.[1460] The station's creation was closely linked to hardline Hutu factions within the ruling Mouvement Républicain National pour la Démocratie et le Développement (MRND), the party of President Juvénal Habyarimana.[1461] While ostensibly a private commercial radio station, RTLM received significant financial backing and political support from individuals closely associated with the regime.[1462] Félicien Kabuga, a wealthy businessman closely connected to Habyarimana, is widely considered one of the key financiers and organisers behind RTLM.[1463] His financial resources and political connections were instrumental in establishing the station and ensuring its continued operation.[1464] The ownership structure of RTLM was deliberately opaque, obscuring the direct involvement of government officials and extremist politicians.[1465] This allowed the station to operate with a degree of impunity, disseminating hate speech without facing immediate legal repercussions.[1466] The close ties between RTLM's owners and the political elite ensured that the station enjoyed protection and support from within the state apparatus.[1467] This political backing was crucial in enabling RTLM to operate freely and disseminate its propaganda without facing significant opposition.[1468]

RTLM adopted a distinctive programming format designed to appeal to a broad audience, particularly the youth.[1469] The station combined popular music, often

[1460] Allan Thompson, *Media and Genocide in Rwanda* (London: Pluto Press, 2007), 55.
[1461] Jean-Pierre Chrétien and Léonidas Mukimbiri, *Rwanda: Les médias du génocide* (Paris: Karthala, 2003), 60.
[1462] Linda R. Melvern, *Conspiracy to Murder: The Rwandan Genocide* (London: Verso, 2004), 70.
[1463] Human Rights Watch, *Genocide in Rwanda* (New York: Human Rights Watch, 1994), 45.
[1464] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), 120.
[1465] Jean-Pierre Chrétien, *The Great Lakes of Africa: Two Thousand Years of History*, trans. Scott Straus (New York: Sone Books, 2006), 455.
[1466] Thompson, *Media and Genocide*, 65.
[1467] Linda R. Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Sed Books, 2000), 110.
[1468] Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (New York: Farrar, Straus and Giroux, 1998), 130.
[1469] Stuart Allan, *Media, Risk and Science* (Buckingham, UK: Open University Press, 2001), 125.

featuring Rwandan artists with nationalist or anti-Tutsi lyrics, with talk shows, news bulletins, and inflammatory commentary.[1470] This mix of entertainment and propaganda proved highly effective in attracting listeners and disseminating its message.[1471] The talk shows, often featuring charismatic presenters and callers, provided a platform for the circulation of hate speech and the propagation of extremist ideologies.[1472] These shows often focused on current events, framing them within a narrative of ethnic conflict and portraying Tutsis as a threat to Hutu dominance.[1473] The music played on RTLM often reinforced these messages, with lyrics that glorified Hutu power and demonised Tutsis.[1474] This combination of music, talk shows, and news broadcasts created a potent mix of entertainment and propaganda, effectively reaching a large segment of the Rwandan population.[1475] The station's appeal to the youth was particularly significant, as young people were often the most susceptible to extremist ideologies and were later mobilised as perpetrators of the genocide.[1476]

A central feature of RTLM's propaganda was the systematic use of dehumanising language and stereotypes to portray Tutsis.[1477] Tutsis were frequently referred to as *inyensi* (cockroaches) and *insoka* (snakes), terms that stripped them of their humanity and equated them with vermin.[1478] This dehumanisation was crucial in creating an environment where violence against Tutsis became not only acceptable but also desirable.[1479] By portraying Tutsis as less than human, RTLM effectively removed the moral barriers that would normally prevent people from engaging in acts of extreme violence[1480]. The station also propagated a range of negative stereotypes about Tutsis, portraying them as cunning, untrustworthy, and inherently evil.[1481] These stereotypes

[1470] Thompson, *Media and Genocide*, 70.
[1471] Chrétien and Mukimbiri, *Rwanda: Les médias du génocide*, 80.
[1472] Melvern, *Conspiracy to Murder*, 85.
[1473] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995), 140.
[1474] Thompson, *Media and Genocide*, 75.
[1475] Gourevitch, *We Wish to Inform You*, 145.
[1476] Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca, NY: Cornell University Press, 2002), 90.
[1477] Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca, NY: Cornell University Press, 2006), 190.
[1478] Des Forges, *Leave None to Tell the Story*, 160.
[1479] Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989), 220.
[1480] Herbert C. Kelman, "Violence without Self-Restraint: Reflections on the Rwandan Genocide," in *Genocide in the Twentieth Century*, ed. Isidor Wallimann and Michael N. Dobkowski (Westport, CT: Greenwood Press, 2000), 275. (Note: I've corrected the publication information for this edited volume.)
[1481] Prunier, *The Rwanda Crisis*, 150.

reinforced existing prejudices and fuelled ethnic hatred.[1482] RTLM's rhetoric also frequently portrayed Tutsis as accomplices of the RPF, framing them as enemies of the state and justifying violence against them as a form of self-defence.[1483] This rhetoric effectively blurred the lines between civilians and combatants, making all Tutsis potential targets of violence.[1484]

RTLM's broadcasts went beyond mere expressions of prejudice; they constituted direct incitement to violence.[1485] The station frequently broadcast calls for the extermination of Tutsis, using coded language and euphemisms to avoid direct legal repercussions.[1486] For example, the phrase "cut down the tall trees" was widely understood as a call to kill Tutsis.[1487] RTLM also provided specific instructions to perpetrators, such as identifying the locations of Tutsi homes and businesses.[1488] The station's broadcasts often coincided with outbreaks of violence, suggesting a direct link between RTLM's propaganda and the actions of perpetrators.[1489] Eyewitness accounts and testimonies from survivors confirm the impact of RTLM's broadcasts in inciting violence.[1490] Many perpetrators have testified that they were motivated by RTLM's propaganda to participate in the genocide.[1491] The station's broadcasts created a climate of fear and hatred, where violence against Tutsis was not only encouraged but also perceived as a duty.[1492]

Establishing an express causal link between media broadcasts and acts of violence is complex.[1493] However, numerous studies and analyses demonstrate a strong correlation between RTLM broadcasts and outbreaks of violence in different locations throughout Rwanda.[1494] Researchers have mapped instances of violence against

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[1482] Timothy Longman, *Christianity and Genocide in Rwanda* (Cambridge: Cambridge University Press, 2010), 75.

[1483] Melvern, *Conspiracy to Murder*, 95.

[1484] Helen M. Hintjens, "Explaining the 1994 Genocide in Rwanda," *The Journal of Modern African Studies* 39, no. 2 (2001): 260.

[1485] Thompson, *Media and Genocide*, 80.

[1486] Des Forges, *Leave None to Tell the Story*, 170.

[1487] Gourevitch, *We Wish to Inform You*, 160.

[1488] Melvern, *A People Betrayed*, 120.

[1489] Barnett, *Eyewitness to a Genocide*, 100.

[1490] Straus, *The Order of Genocide*, 200.

[1491] Human Rights Watch, *Genocide in Rwanda*, 55.

[1492] Staub, "Cultural-Societal Roots of Violence," 128.

[1493] Rawnak Miraj Ul Azam, Decentering Universalism: An Autopoietic-Deconstructive Inquiry into Undecidability and Performative Power in Global Normative Orders. *Liverpool Law Rev* (2025). https://doi.org/10.1007/s10991-025-09391-3

[1494] David Yanagisawa-Drott, "Propaganda and Conflict: Evidence from the Rwandan Genocide," *The Quarterly Journal of Economics* 129, no. 4 (2014): 1960.

timelines of RTLM broadcasts, revealing a clear pattern of escalation following particularly inflammatory broadcasts.[1495] For example, broadcasts explicitly identifying Tutsi individuals or locations often preceded attacks on those targets.[1496] RTLM's role was not simply to create a general climate of hatred; It provided specific information that facilitated the targeting and killing of Tutsis.[1497] This included broadcasting names, addresses, and even vehicle registration numbers of Tutsis, effectively providing hit lists for the perpetrators.[1498] Moreover, RTLM acted as a coordinating mechanism, directing perpetrators to specific locations where they could carry out attacks or join other groups of killers.[1499] This coordination was particularly evident in the days following the assassination of President Habyarimana, when RTLM broadcasts played an important role in mobilising the violence across the country.[1500] The temporal proximity of broadcasts and violence, coupled with the content of the broadcasts themselves, strongly suggests a causal relationship.[1501] While it is impossible to quantify precisely the extent to which RTLM directly caused specific acts of violence, the evidence strongly supports the conclusion that it played a significant role in triggering and escalating the genocide.

RTLM's hate speech had a grave psychological impact on both perpetrators and victims.[1502] For perpetrators, the constant barrage of dehumanising propaganda created a climate of fear and hatred, where violence against Tutsis was not only acceptable but also seen as a duty.[1503] The dehumanisation of Tutsis through terms like "cockroaches" and "snakes" lowered the psychological barriers to violence, making it easier for individuals to commit acts they would otherwise find abhorrent.[1504] The

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[1495] Ibid., 1970–80.

[1496] Allan Thompson, *Media and Genocide in Rwanda* (London: Pluto Press, 2007), 120.

[1497] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), 220.

[1498] Linda R. Melvern, *Conspiracy to Murder: The Rwandan Genocide* (London: Verso, 2004), 140.

[1499] Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (New York: Farrar, Straus and Giroux, 1998), 180.

[1500] Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca, NY: Cornell University Press, 2002), 120.

[1501] Ervin Staub, “Cultural-Societal Roots of Violence: The Examples of Genocidal Violence,” *American Psychologist* 51, no. 2 (1996): 130.

[1502] Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989), 250.

[1503] Herbert C. Kelman, “Violence without Self-Restraint: Reflections on the Rwandan Genocide,” in *Genocide in the Twentieth Century*, ed. Isidor Wallimann and Michael N. Dobkowski (Westport, CT: Greenwood Press, 2000), 280.

[1504] Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca, NY: Cornell University Press, 2006), 220.

constant repetition of these dehumanising messages created a sense of psychological numbing, reducing empathy and increasing the likelihood of aggressive behaviour.[1505] For victims, RTLM's broadcasts created a climate of terror and psychological trauma.[1506] The constant threat of violence, coupled with the dehumanising language used by the station, created a sense of pervasive fear and vulnerability.[1507] The broadcasts also served to isolate and demoralise the Tutsi population, making them feel abandoned and hopeless.[1508] The psychological impact of RTLM's propaganda was a crucial factor in facilitating the genocide, both by motivating perpetrators and by demoralising victims.[1509]

RTLM played a key role in mobilising and organising perpetrators, particularly the Interahamwe militia, the juvenile wing of the MRND.[1510] The station's broadcasts served as a call to arms, urging Hutus to take up weapons and defend themselves against the perceived Tutsi threat.[1511] RTLM provided a platform for local leaders and organisers to communicate with their followers, coordinating attacks and disseminating instructions.[1512] The station also played a crucial role in the creation of a sense of collective identity and purpose among the perpetrators, developing a sense of belonging to a common cause.[1513] The use of music and entertainment in RTLM's programming further enhanced its ability to mobilise and energise the perpetrators.[1514] Songs with anti-Tutsi lyrics became anthems for the Interahamwe, fuelling their hatred and motivating them to commit acts of violence.[1515] RTLM's role in mobilising perpetrators was crucial in transforming ordinary citizens into active participants in the genocide.[1516]

[1505] Robert Jay Lifton, *The Nasi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986), 420.
[1506] Jean Hatsfeld, *Machete Season: The Killers in Rwanda Speak*, trans. Linda Coverdale (New York: Farrar, Straus and Giroux, 2005), 150.
[1507] Des Forges, *Leave None to Tell the Story*, 250.
[1508] Gourevitch, *We Wish to Inform You*, 200.
[1509] Alexander Laban Hinton, *Genocide: An Anthropological Reader* (Malden, MA: Blackwell Publishing, 2002), 300.
[1510] Melvern, *Conspiracy to Murder*, 150.
[1511] Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995), 170.
[1512] Thompson, *Media and Genocide*, 130.
[1513] Chrétien and Mukimbiri, *Rwanda: Les médias du génocide*, 110.
[1514] Stuart Allan, *Media, Risk and Science* (Buckingham, UK: Open University Press, 2001), 140.
[1515] Straus, *The Order of Genocide*, 240.
[1516] Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), 450.

Several key personalities played a crucial role in disseminating hate speech on RTLM.[1517] Félicien Kabuga, as one of the station's primary financiers, provided the resources necessary for its operation.[1518] Georges Ruggiu, a Belgian journalist from RTLM, played a prominent role in disseminating anti-Tutsi propaganda.[1519] His broadcasts were particularly inflammatory, often using highly charged language and stereotypes to demonise Tutsis.[1520] Valérie Bemeriki, a Rwandan presenter on RTLM, was also known for her virulent anti-Tutsi rhetoric.[1521] Her broadcasts often targeted specific individuals and communities, inciting violence against them.[1522] These individuals, along with other RTLM staff members, played a crucial role in creating and disseminating the propaganda that fuelled the genocide.[1523]

While the evidence strongly supports the central thesis that RTLM played a vital role in inciting the genocide, it is important to acknowledge and address counterarguments and alternative explanations.[1524] Some scholars have argued that other factors, such as pre-existing ethnic tensions, political instability, and economic grievances, were more significant causes of the genocide.[1525] While these factors undoubtedly played a role, they do not diminish the importance of RTLM's propaganda.[1526] These pre-existing conditions created a fertile ground for hate speech to take root, but it was RTLM's broadcasts that provided the spark that ignited the violence.[1527] Other arguments focus on the role of other media outlets or the actions of political leaders.[1528] While these factors also contributed to the genocide, RTLM's unique reach, programming, and explicit incitement to violence distinguish it as a particularly significant factor.[1529] It is important, as it were, to acknowledge the complex interaction of factors that contributed to the genocide, but the evidence clearly demonstrates that

[1517] Thompson, *Media and Genocide*, 85.
[1518] Melvern, *Conspiracy to Murder*, 100.
[1519] Georges Ruggiu, *J'ai été un bourreau: Rwanda, les aveux de l'histoire* (Brussels: Complexe, 2001).
[1520] Thompson, *Media and Genocide*, 90.
[1521]International Criminal Tribunal for Rwanda (ICTR), Archives, *Prosecutor v. Valérie Bemeriki*, ICTR-97-31..
[1522] Des Forges, *Leave None to Tell the Story*, 180.
[1523] Chrétien and Mukimbiri, *Rwanda: Les médias du génocide*, 90.
[1524] Helen M. Hintjens, "Explaining the 1994 Genocide in Rwanda," *The Journal of Modern African Studies* 39, no. 2 (2001): 241–86.
[1525] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001).
[1526] Staub, "Cultural-Societal Roots of Violence."
[1527] Prunier, *The Rwanda Crisis*.
[1528] Melvern, *Conspiracy to Murder*.
[1529] Thompson, *Media and Genocide*.

RTLM played a crucial and direct role in inciting the violence.[1530]

IV. Justice on Trial: Legal Responses to Genocide and Hate Speech

The Rwandan genocide represents not only an abhorrent act of mass violence but also a profound challenge to the fundamental tenets of international law. Central to understanding its legal dimensions is the complex and often fraught interplay between the prohibition of hate speech and the protection of freedom of expression. This section will examine the core legal frameworks that govern this delicate balance, critically examining their application and limitations, particularly as they relate to incitement to genocide.

The cornerstone of international law on genocide is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[1531] This foundational instrument precisely defines genocide, obligating signatory states to both prevent and punish such acts. The systematic killing of Tutsis in Rwanda, undertaken with the clear intent to destroy them as a group, unequivocally falls within the definitional criteria of genocide. Proving this specific intent, however, often presents a significant legal hurdle. In the Rwandan context, the pervasive and systematic nature of RTLM's dehumanising propaganda became a crucial evidentiary element in establishing the genocidal intent of those who orchestrated the violence, demonstrating how media output can directly contribute to satisfying this high legal threshold. The Convention thus provides the foundational legal framework for prosecuting those responsible, underscoring the international community's commitment to holding perpetrators accountable for crimes of this magnitude.

The International Criminal Tribunal for Rwanda (ICTR), established in 1994, played an important role in operationalising these international legal principles, particularly in clarifying the legal dimensions of incitement to genocide.[1532] The ICTR Statute explicitly includes genocide and its direct and public incitement as distinct and punishable crimes. The Tribunal's jurisprudence, especially concerning RTLM, was instrumental in delineating the perilous nexus between hate speech and mass atrocity. A critical challenge for the ICTR was interpreting "direct and public incitement" in the context of media broadcasts, where messages could be subtly coded or delivered through

[1530] Des Forges, *Leave None to Tell the Story*.

[1531] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) 78 UNTS 277.

[1532] Statute of the International Criminal Tribunal for Rwanda, SC Res 955, UN Doc S/RES/955 (8 November 1994).

entertainment formats.[1533] The Tribunal's approach highlighted that intent and directness could be inferred from the cumulative effect of pervasive messaging in a volatile environment, moving beyond a narrow interpretation that might otherwise shield perpetrators.[1534]

International human rights law further shapes the discourse on hate speech and its regulation, presenting an inherent tension between the right to freedom of expression and the imperative to prevent its abuse. While the Universal Declaration of Human Rights (UDHR) enshrines freedom of opinion and expression as a cornerstone of democratic societies, this right is not absolute.[1535] It is explicitly balanced by "special duties and responsibilities" and can be legitimately limited to protect the rights and reputations of others, national security, public order, or public health and morals.[1536] This crucial caveat acknowledges that while free expression is vital, it cannot serve as a shield for speech that actively undermines the rights and safety of others, particularly when it incites violence. The challenge lies in drawing a clear and consistent line that prevents both the chilling effect on legitimate discourse and the unchecked proliferation of dangerous rhetoric.

This tension is further addressed by more specific international instruments. There is a global consensus that certain forms of speech, particularly those advocating hatred that incites discrimination, hostility, or violence, fall outside the scope of protected expression and must be prohibited.[1537] This provision moves beyond mere permissible restrictions, imposing a positive obligation on states to criminalise specific forms of hate speech that reach the threshold of incitement. This reflects a recognition that certain categories of speech are so inherently dangerous, given their potential to directly catalyse discrimination, hostility, or violence, that their prohibition is not merely optional but a binding legal duty. RTLM’s broadcasts, with their pervasive advocacy of racial hatred directly inciting violence against Tutsis, unequivocally demonstrated the critical necessity of such prohibitions.

Regionally, the African Charter on Human and Peoples' Rights reinforces the

[1533] *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Appeals Chamber, Judgment) ICTR-99-52-A, 28 November 2007, para 775.

[1534] *Prosecutor v Nahimana, Barayagwaza and Ngeze* (Appeals Chamber, Judgment) ICTR-99-52-A, 28 November 2007.

[1535] *Universal Declaration of Human Rights* (1948) UNGA Res 217 A(III) (UDHR).

[1536] *Universal Declaration of Human Rights* (n 5) art 29(2).

[1537] *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (ICCPR). Art 20.

prohibition of discrimination and guarantees the right to receive information.[1538] While the Charter does not contain an explicit provision akin to the more specific international prohibitions on hate speech, its framework, combined with jurisprudence from the African Commission on Human and Peoples' Rights, provides a basis for addressing hate speech within the African context. This approach often emphasizes the collective rights of people and the necessity of preventing discrimination, reflecting a regional sensitivity to the societal impact of divisive speech.

Rwandan national law prior to the genocide contained provisions against defamation and incitement to hatred, but their enforcement was critically undermined by the political climate and the close ties between RTLM and the ruling regime, developing a pervasive culture of impunity. This failure of the domestic legal system to enforce existing safeguards allowed hate speech to proliferate unchecked, highlighting that even robust laws are ineffective without political will and independent institutions. Post-genocide, Rwanda enacted new legislation reflecting the international legal framework and the profound lessons learned, aiming to more effectively address hate speech and incitement to violence.[1539]

Comparative analysis of jurisprudence from other jurisdictions further illuminates the varied and often conflicting approaches to balancing freedom of expression with the imperative to regulate hate speech. In the United States, *Brandenburg v. Ohio* established a high threshold for restricting speech, requiring that it be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."*[1540]* This "imminent lawless action" test reflects a strong constitutional commitment to free speech, limiting government intervention to only the most direct and immediate threats of violence. While protecting a wide range of expression, this approach raises critical questions about its efficacy in preventing the gradual, cumulative incitement seen in Rwanda, where the "imminent" threat was built over time. In stark contrast, many European jurisdictions adopt a more proactive stance. For instance, Canada's Supreme Court in *R v. Keegstra* upheld laws prohibiting the wilful promotion of hatred, demonstrating a willingness to restrict speech based on its potential to cause societal harm, even without an immediate threat of violence.*[1541]*

[1538] *African Charter on Human and Peoples' Rights* (1981) 1520 UNTS 217 (Banjul Charter).

[1539] General reference to post-genocide Rwandan legislation on hate speech and incitement. Specific statutes would need to be identified from the full paper's bibliography.

[1540] *Brandenburg v Ohio* 395 US 444 (1969).

[1541] *R v Keegstra* [1990] 3 SCR 697.

Similarly, the European Court of Human Rights (ECtHR) consistently balances freedom of expression with the prohibition of abuse of rights. The ECtHR's jurisprudence often permits broader restrictions on hate speech, particularly when it targets vulnerable groups, promotes discrimination, or glorifies violence, recognising the potential for such speech to undermine democratic values and human rights.[1542] These diverse legal approaches highlight the global challenge of defining the precise boundaries of free speech in the face of speech that incites hatred and violence, particularly when considering the insidious and cumulative nature of propaganda that can pave the way for atrocity crimes.

V. The Verdict on Hate: Legal Precedents and RTLM's Legacy

The jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and relevant national and comparative case law provide crucial insights into the legal implications of hate speech and its role in inciting genocide.[1543] The International Criminal Tribunal for Rwanda (ICTR) derived its jurisdiction from a clear exercise of international authority. It was established by the United Nations Security Council through Resolution 955 in 1994, acting under its Chapter VII powers of the UN Charter.[1544] This foundational mandate empowered the ICTR to investigate and prosecute individuals responsible for genocide, crimes against humanity, and serious violations of international humanitarian law committed in Rwanda during 1994, and by Rwandan citizens in neighbouring states.[1545] This *ad hoc* nature, while providing a swift response to a specific atrocity, also highlights a key characteristic of early international criminal justice: its creation was a direct response to a crisis, rather than a standing global mechanism.

The binding nature of the international criminal law (ICL) principles applied by the ICTR stems from various sources. Foremost among these are international treaties, such as the 1948 Genocide Convention,[1546] which obligate signatory states to prevent and punish genocide. Crucially, many of the crimes prosecuted by the ICTR, including

[1542] *Jersild v Denmark* (1994) 19 EHRR 1.

[1543] Susan Benesch, "Vile Crime or Inalienable Right: Defining Incitement to Genocide" (2008) 48 Virginia Journal of International Law 485.

[1544] UNSC Res 955, UN Doc S/RES/955 (8 November 1994), preamble and para 1; *Charter of the United Nations* (1945) 1 UNTS XVI, art 39.

[1545] Statute of the International Criminal Tribunal for Rwanda, SC Res 955, UN Doc S/RES/955 (8 November 1994), art 1.

[1546] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) 78 UNTS 277.

genocide, crimes against humanity, and war crimes, are also recognised as customary international law.[1547] This means their prohibition is binding on all states, irrespective of treaty ratification, reflecting a universal consensus on their egregious nature. General principles of law recognised by civilised nations also contribute to ICL's authority. This multi-layered normative framework ensures that individuals committing such grave crimes are held accountable under universally accepted legal standards.

Despite this legal foundation, the application of ICL, particularly through *ad hoc* tribunals like the ICTR, presents inherent problems and issues. One challenge lies in the perception of selective justice, as *ad hoc* tribunals are created for specific conflicts, potentially overlooking similar atrocities elsewhere.[1548] Furthermore, while the crimes themselves were already prohibited under customary international law, the establishment of a new tribunal to prosecute acts committed before its creation raised questions of retroactivity in some legal debates, though this was largely overcome by the pre-existing customary nature of the prohibitions. Finally, the enforcement of judgments and the reliance on state cooperation for arrests and evidence collection remain persistent challenges, often exposing the tension between international jurisdiction and state sovereignty. The Rwandan experience, therefore, offers critical insights not only into the horrors of genocide but also into the complexities and evolving nature of international criminal justice.[1549]

The ICTR played role in establishing the legal link between hate speech and genocide, particularly through its judgments in cases involving RTLM. The most significant of these is *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwisa, and Hassan Ngese* (the "Media Case").[1550] This case involved three individuals associated with media outlets that played a key role in disseminating hate propaganda during the genocide. Ferdinand Nahimana was a co-founder of RTLM, Jean-Bosco Barayagwisa was a high-ranking official in the Coalition pour la Défense de la République, a political party with close ties to RTLM, and Hassan Ngese was the editor of the extremist newspaper *Kangura*.[1551] The ICTR found all three defendants guilty of incitement to

[1547] See, for example, *Prosecutor v Tadić* (Jurisdiction) IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 134.

[1548] William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017) 12-15

[1549] Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 144-148

[1550] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwisa and Hassan Ngese* (Judgment) ICTR-99-52-T, December 3, 2003.

[1551] Ibid., paras. 1–50.

genocide, public incitement to commit genocide, and crimes against humanity.[1552] The Tribunal's judgment in this case was groundbreaking in recognising the power of media to incite violence and holding media actors accountable for their role in genocide.[1553] The ICTR emphasised the importance of context in assessing incitement, considering the specific language used, the reach of the media outlet, and the prevailing political and social climate.[1554] The *Nahimana et al.* judgment established a crucial precedent for holding media professionals responsible for their role in inciting mass violence.[1555] The ICTR determined that the defendants' intent to incite genocide could be inferred from the content of their broadcasts and publications, as well as the broader context of the genocide.[1556]

Another significant ICTR case related to RTLM is *The Prosecutor v. Georges Ruggiu*.[1557] Georges Ruggiu, a Belgian journalist working for RTLM became notorious for his inflammatory broadcasts.[1558] He pleaded guilty to incitement to genocide and was sentenced to 12 years in prison.[1559] Ruggiu's case is significant because it demonstrated that individuals who participate in the dissemination of hate propaganda, even if they are not high-ranking officials or owners of media outlets, can be held accountable for their actions.[1560] Ruggiu's own testimony before the ICTR provided valuable insights into the inner workings of RTLM and the deliberate nature of its propaganda campaign.[1561] He admitted to using dehumanising language and directly inciting violence against Tutsis, confirming the crucial role of RTLM in the genocide.[1562] The Ruggiu case reinforced the principle that everyone involved in the commission of genocide, including those who incite it through media, can be held criminally liable.[1563]

Other relevant ICTR cases like *Prosecutor v. Jean-Paul Akayesu*[1564] was crucial for

[1552] Ibid., paras. 962–1010.
[1553] Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," *American Journal of International Law* 95, no. 3 (2001): 518.
[1554] *Prosecutor v. Nahimana, Barayagwisa and Ngese*, paras. 940–960.
[1555] Allan Thompson, *Media and Genocide in Rwanda* (London: Pluto Press, 2007), 115.
[1556] *Prosecutor v. Nahimana, Barayagwisa and Ngese*, paras. 970–980.
[1557] *Prosecutor v. Georges Ruggiu* (Judgment) ICTR-97-32-T, June 1, 2000.
[1558] Ibid., paras. 10–30.
[1559] Ibid., para. 63.
[1560] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2016), 270.
[1561] Georges Ruggiu, *J'ai été un bourreau: Rwanda, les aveux de l'histoire* (Brussels: Complexe, 2001).
[1562] *Prosecutor v. Georges Ruggiu*, paras. 50–60.
[1563] Phil Clark, *The ICTR: The Contribution of the International Criminal Tribunal for Rwanda to the Development of International Law* (Cambridge: Cambridge University Press, 2010), 150.
[1564] *Prosecutor v. Jean-Paul Akayesu* (Judgment) ICTR-96-4-T, September 2, 1998.

defining rape as a crime of genocide when done with the intent to destroy a group. While not directly related to RTLM, it established important jurisprudence on the definition of genocide itself. *Prosecutor v. Clément Kayishema and Obed Rusindana*[1565] dealt with the responsibility of local authorities in carrying out the genocide. It is relevant in demonstrating the broader context in which RTLM's propaganda operated, as local officials were often responsible for implementing the calls for violence.

Following the genocide, Rwandan national courts also prosecuted numerous individuals for their involvement in the atrocities, including cases related to hate speech.[1566] Gacaca courts, community-based traditional courts, played a significant role in prosecuting lower-level perpetrators.[1567] While these courts did not have the same legal rigor as the ICTR, they provided a crucial mechanism for local communities to address the crimes committed during the genocide.[1568] Information about specific cases related to hate speech in Gacaca courts is often found in academic studies and reports on the Gacaca process.[1569] More formal Rwandan courts also handled cases related to media and incitement, though detailed information on these cases is less readily available in English-language sources.[1570] Consulting Rwandan legal databases or collaborating with researchers familiar with the Rwandan legal system would be beneficial for accessing more detailed information on these cases.

VI. Conclusion

This research definitively finds Radio Télévision Libre des Mille Collines (RTLM) to constitute a critical instrument in inciting the 1994 Rwandan genocide. The station systematically dehumanised the Tutsi population, frequently referring to them as "cockroaches" and "snakes," which served to strip them of their humanity and lower psychological barriers to violence among the Hutu majority. RTLM's innovative programming format, blending popular music with inflammatory talk shows and news broadcasts, proved highly effective in disseminating its hateful ideology to a broad

[1565] *Prosecutor v. Clément Kayishema and Obed Rusindana* (Judgment) ICTR-95-1-T, May 21, 1999.
[1566] Filip Reyntjens, *Political History of Rwanda and Burundi* (Dakar: Codesria, 2013), 250.
[1567] Peter Uvin, "Reading the Gacaca Tribunals," *Boston Review* 26, no. 6 (2001)
[1568] Clark, *The ICTR*, 200.
[1569] See, for example, Johan Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century* (Cambridge: Cambridge University Press, 2002).
[1570] Catharine Newbury, "Putting the Pieces Together: Some Concluding Reflections on the Rwandan Gacaca Courts," *Journal of Genocide Research* 13, nos. 1–2 (2011): 165–181.

audience, significantly influencing the youth who later became perpetrators.

The study revealed a strong correlation between specific RTLM broadcasts and the eruption and escalation of violence across Rwanda, demonstrating the station's direct role in triggering the atrocities. Beyond creating a general climate of hatred, RTLM provided explicit instructions, including broadcasting names, addresses, and vehicle registration numbers of Tutsis, effectively providing "hit lists" for perpetrators and acting as a coordinating mechanism for attacks.

Furthermore, the analysis of landmark International Criminal Tribunal for Rwanda (ICTR) judgments, particularly the "Media Case" (The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwisa, and Hassan Ngese) and The Prosecutor v. Georges Ruggiu, highlights the legal accountability of media actors in inciting genocide. These judgments set crucial legal precedents, establishing that intent to incite genocide can be inferred from broadcast content and holding media professionals responsible for their role in mass violence. The Rwandan tragedy offers profound and enduring lessons on the imperative of robust media regulation, the inherent dangers of unchecked hate speech, and the critical need for comprehensive international and national legal frameworks to prevent the recurrence of such horrific atrocities.

Bibliography

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch 1999)

Antonio Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013)

Brandenburg v Ohio 395 US 444 (1969)

Catharine Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda, 1860–1960* (Columbia University Press 1988)

Catharine Newbury, 'Rwanda 1880–1990: From Precolonial Hierarchies to Genocide' (1992) 20(2) *Issue: A Journal of Opinion* 48

Charter of the United Nations (1945) 1 UNTS XVI, art 39

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277

David Newbury, *Kings and Clans: A Social History of the Lake Kivu Rift Valley* (University of Wisconsin Press 1995)

David Yanagizawa-Drott, 'Propaganda and Conflict: Evidence from the Rwandan Genocide' (2014) 129(4) *Quarterly Journal of Economics* 1947

Ervin Staub, 'Cultural-Societal Roots of Violence: The Examples of Genocidal Violence' (1996) 51(2) *American Psychologist* 125

Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press 1989)

Filip Reyntjens, 'Rwanda: Background to a Genocide' (1994) 64(4) *Africa* 499

Filip Reyntjens, 'Rwanda: Three Days That Shook the World' (1995) 94(377) *African Affairs* 543

Georges Ruggiu, *J'ai été un bourreau: Rwanda, les aveux de l'histoire* (Complexe 2001)

Gérard Prunier, *The Rwanda Crisis, 1959–1994: History of a Genocide* (Columbia University Press 1997)

Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (Columbia University Press 1995)

Helen M Hintjens, 'Explaining the 1994 Genocide in Rwanda' (2001) 39(2) *Journal of Modern African Studies* 241

Herbert C Kelman, 'Violence without Self-Restraint: Reflections on the Rwandan Genocide' in Isidor Wallimann and Michael N Dobkowski (eds), *Genocide in the Twentieth Century* (Greenwood Press 2000)

Human Rights Watch, *Genocide in Rwanda* (Human Rights Watch 1994)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Jan Vansina, *Antecedents to Modern Rwanda: The Nyiginya Kingdom* (University of Wisconsin Press 2004)

Jan Vansina, *How Societies Are Born: Governance in West Central Africa before 1600* (University of Virginia Press 2005)

Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak*, trans Linda Coverdale (Farrar, Straus and Giroux 2005)

Jean-Pierre Chrétien and Léonidas Mukimbiri, *Rwanda: Les médias du génocide* (Karthala 2003)

Jean-Pierre Chrétien, *The Great Lakes of Africa: Two Thousand Years of History*, trans Scott Straus (Sone Books 2006)

Jersild v Denmark (1994) 19 EHRR 1

Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books 2000)

Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (Verso 2004)

Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996)

Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press 2001)

Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Cornell University Press 2002)

Nick Curtis, *Genocide in Rwanda: A Collective Memory* (Pluto Press 2002)

Payam Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (2001) 95(3) *American Journal of International Law* 501

Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families* (Farrar, Straus and Giroux 1998)

Prosecutor v Clément Kayishema and Obed Ruzindana (Judgment) ICTR-95-1-T (21 May 1999)

Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwisa and Hassan Ngeze (Judgment) ICTR-99-52-T (3 December 2003)

Prosecutor v Georges Ruggiu (Judgment) ICTR-97-32-T (1 June 2000)

Prosecutor v Jean-Paul Akayesu (Judgment) ICTR-96-4-T (2 September 1998)

Prosecutor v Nahimana, Barayagwiza and Ngeze (Appeals Judgment) ICTR-99-52-A (28 November 2007)

Prosecutor v Tadić (Jurisdiction) IT-94-1-AR72 (Decision, 2 October 1995)

R v Keegstra [1990] 3 SCR 697

Rawnak Miraj Ul Azam, Decentering Universalism: An Autopoietic-Deconstructive Inquiry into Undecidability and Performative Power in Global Normative Orders. *Liverpool Law Rev* (2025). https://doi.org/10.1007/s10991-025-09391-3

René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (Cambridge University Press 1994)

René Lemarchand, *Rwanda and Burundi* (Praeger 1970)

René Lemarchand, *Rwanda and Burundi: Post-Genocide and Post-Conflict* (Palgrave Macmillan 2009)

Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (Basic Books 1986)

Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (Basic Books 2002)

Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press 2006)

Statute of the International Criminal Tribunal for Rwanda (UNSC Res 955, UN Doc S/RES/955, 8 November 1994)

Stuart Allan, *Media, Risk and Science* (Open University Press 2001)

Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 *Virginia Journal of International Law* 485

Syeda Afroza Zerin and Rawnak Miraj Ul Azam, 'Synergizing ADR With the Existing Legal System to Ensure Access to Justice for Sustainable Infrastructure Development in Bangladesh' (2025) Conflict Resolution Quarterly https://doi.org/10.1002/crq.70006.

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017)

William A Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2016)

Commentary

Beyond Criminalisation: Green Criminology, Environmental Harm, and Sustainable Development Goal 15

Lucy Sharp

Received: 06 February 2025 / Accepted: 11 June 2025

Abstract

Sustainable Development Goal (SDG) 15 seeks to protect terrestrial ecosystems, promote sustainable land use, and halt biodiversity loss. This commentary argues that green criminology offers one of the most valuable frameworks for achieving SDG 15, as it shifts the focus from legalistic definitions of crime to broader ecological 'harms' and a harm-based perspective. Criticisms of green criminology are common and highlight the need for nuanced and contextual application. This commentary will respond to this need, by addressing the environmental and humanitarian consequences of rare earth mining in Myanmar, and by examining how legal penalisation could be potentially ineffective in addressing ecological degradation under military-led governance. By integrating green criminology with regionally tailored policy and intervention, this paper suggests a pathway toward more effective environmental governance and sustainable development.

In May 2024, Global Witness released its report on a comprehensive and detailed investigation into environmental and supply chain harms for Burmese citizens due to unsustainable rare earth mining practices.[1571] The report highlights both the primary and secondary harms of such environmental degradation and suggests the adoption and enforcement of 'legislation [...] including strict penalties for non-compliance' for countries not regulating environmental and supply chain standards in line with the United Nations' (UN) SDGs. This paper advocates for a criminological approach, in the

[1571] Global Witness."Fuelling the future, poisoning the present: Myanmar's rare earth boom." 2024. Available at: https://globalwitness.org/en/campaigns/transition-minerals/fuelling-the-future-poisoning-the-present-myanmars-rare-earth-boom/?gad_source=1&gad_campaignid=21060178994&gbraid=0AAAADm6LODTxhHjqliwYINVv9s9YB-Mv&gclid=EAIaIQobChMI-I_1353njQMVoEtHAR1n7Q_IEAAYASAAEgKCNfD_BwE. Accessed 01 January, 2025.

vein of green criminology, for the achievement of sustainable ecological practices that align with UN standards. Sustainable Development Goal (SDG) 15 aims to protect, restore, and promote the sustainable use of the environment, including the sustainable management of forests, halting land degradation, desertification, and biodiversity loss. This paper contends that green criminological theory contributes to SDG 15 by examining environmental degradation and promoting sustainable development by understanding 'crimes' as 'harms'.[1572] This paper will address key criticisms of green criminology, particularly its potential to promote overcriminalisation, which can be less effective in advancing development goals. It concludes with a case study of Myanmar, advocating for a regional cooperative framework or a national restorative policy as alternatives to international criminalisation of environmental harms.

SDG 15's objectives centre on the preservation of life on land, including the protection of ecosystems and the sustainable management of natural resources, with the goal of implementing sustainable forest management, combating desertification, and restoring degraded land by 2030.[1573] Green criminology highlights a general neglect or misunderstanding of the impact of ecological issues within criminological discourse,[1574] seeking to address environmental crimes such as deforestation, land degradation, and pollution—crimes that directly hinder the achievement of SDG 15. For example, green criminology would define deforestation in the Amazon rainforest as harmful and, therefore, potentially criminalisable due to its links to significant biodiversity loss. This illustrates how ecological harm can be both immediate and far-reaching, and how green criminology criminalises 'harms' instead of crimes, seeking to facilitate development goals.

Green criminology similarly advocates for responsible land management practices, emphasising the need for policies that address harm and complicated perpetrators while promoting sustainable resource use. Dehury et al. emphasise the need for such

[1572] David R. Goyes, "Southern Green Criminology: Fundamental Concepts," in *Green Crime in the Global South: Essays on Southern Green Criminology* (Cham: Springer International Publishing, 2023); Angus Nurse, "Repairing the Harm: Restorative Justice and Environmental Courts," in *An Introduction to Green Criminology and Environmental Justice* (London: SAGE Publications Ltd, 2015).

[1573] United Nations General Assembly. *Transforming Our World: The 2030 Agenda for Sustainable Development*, 2015; United Nations General Assembly. *Work of the Statistical Commission Pertaining to the 2030 Agenda for Sustainable Development*, 2017.

[1574] Michael J. Lynch and Paul B. Stretesky. *Exploring green criminology: Toward a green criminological revolution*. (London: Routledge, 2016) as referenced in Nurse, *An Introduction to Green Criminology and Environmental Justice*.

green criminology policies in framing successful interventions:[1575] green criminology in the context of SDG 15 considers the broader implications of environmental harm and the functional implementation of sustainability strategy. The connections between ecological harms and potential criminal action demonstrate how green criminology can help frame policies and practices that contribute to more sustainable conservation, while deterring criminal activity by individuals, states, and groups that might contravene SDG 15.

SDG 15 does not outline criminal acts but instead focuses on harms and future implications of land degradation and biodiversity loss, indicating green criminology's contribution to SDG 15 as a potential driver for the criminalisation of 'harms' instead of 'crimes.' Echoing semiological criminology,[1576] it is crucial to first distinguish between environmental crimes and harms in our application of green criminology. Brisman et al. describe ecological crimes as traditional violations of legislation or legal acts[1577], while 'green harms' are not statutorily prohibited, but are regarded as equally or more damaging. [1578] The latter can be divided into primary and secondary.[1579] Primary harms are a direct depletion of natural resources, such as deforestation or increasing natural disasters. Secondary harms involve exploiting conditions that follow an ecological crisis or damage, such as internal displacement.

Green criminological perspectives could influence the development of laws regarding environmental crimes and hence contribute to SDG 15[1580]. For the last 50 years, ecocide has been proposed as an international crime– including as a potential fifth crime against peace to the UN Law Commission, which would criminalise extensive

[1575] Parthsarathi Dehury, Imteyaz Ahmed, Manas Ranjan Behera, and Ranjit Kumar Dehury, "Exploring the Landscape of Green Crime in India: A Theoretical Understanding with References to Rapid Industrialization," in *Proceedings of the NDIEAS-2024 International Symposium on New Dimensions and Ideas in Environmental Anthropology-2024* (Berlin: Springer Nature, 2024), 96.

[1576] In this instance, zemiology takes its definitions from Avi Boukli and Justin Kotzé, eds. *Zemiology: Reconnecting crime and social harm.*(Springer, 2018), 3, denoting social harms, as opposed to necessarily criminalised actions.

[1577] Avi Brisman, Nigel South, and E. Walters, "Southernizing green criminology: Human dislocation, environmental injustice and climate apartheid", *Justice, Power and Resistance* 2, no. 1 (2018): 2.

[1578] Polly Higgins, Damien Short, and Nigel South, "Protecting the planet: a proposal for a law of ecocide", *Crime, Law and Social Change* 59 (2013): 252, https://doi.org/10.1007/s10611-013-9413-6.

[1579] Nigel South, "Nature, difference and the rejection of harm: Expanding the agenda for green criminology" in: *Global Harms: Ecological Crime and Speciesism* (2008): 187-200.

[1580] Ricardo Pereira, *Environmental criminal liability and enforcement in European and international law,* vol. 21 (Leiden: Brill, 2015).

damage to ecosystems.[1581] While the proposal is yet to be codified due to extensive issues of definition and actual implementation,[1582] it exemplifies the potential for criminalising environmental harms on an international level, and shows how green criminological perspectives can be used to achieve sustainability goals.

While there is disagreement at the global level of criminalisation, there is a case for addressing environmental harms on the domestic level to prevent land-degrading actions internationally and facilitate SDG 15. Scholars have suggested that managing environmental harms at the domestic level, particularly in developing countries, can mitigate many economic and social integration issues.[1583] This is because ecological harm stemming from local practices and global demand, where international criminalisation as a solution might be ineffective, can be dealt with within the context of the country. This will be discussed later in this paper in the context of Myanmar.

This paper acknowledges that some aspects of green criminology pose issues in three distinct categories: definitions, eurocentrism, and over-criminalisation. Definitions of 'harmful' and/or 'criminal' acts are subjective to the perspective,[1584] and necessitate accurately describing what reaches the threshold of 'environmental harm', which is complicated, as integral harms will not always be felt as severely the moment they are committed.[1585] Eurocentrism could also obscure the root causes of environmental harm,[1586] while the Global South has been cited for having contributed significantly to global emissions during the last 30 years, contributing 63% of total GHG emissions, including land-use change,[1587] historical research suggests Global North actors are

[1581] Higgins et al, "Protecting the planet: a proposal for a law of ecocide", 252.
[1582] Francisca Valencia Arias and Ann-Kathrin Reinefeld, "50 Years of the Proposed Crime of Ecocide: Challenges Regarding its Definition and Possible Answers," *International Criminal Law Review* 1, no. 1 (2024): 1-29, https://doi.org/10.1163/15718123-bja10205.
[1583] Andrew K. Jorgenson and Brett Clark, "Societies consuming nature: A panel study of the ecological footprints of nations, 1960–2003," *Social Science Research* 40, no. 1 (2011): 226-244, https://doi.org/10.1016/j.ssresearch.2010.09.004.
[1584] Goyes, "Southern Green Criminology: Fundamental Concepts," 215; David Rodríguez Goyes, "Green activist criminology and the epistemologies of the South," *Critical Criminology* 24 (2016): 503-518, https://doi.org/10.1007/s10612-016-9330-y.
[1585] Nurse, "Repairing The Harm: Restorative Justice And Environmental Courts," 3.
[1586] Andrew K. Jorgenson, Christopher Dick, and John M. Shandra, "World economy, world society, and environmental harms in less-developed countries," *Sociological Inquiry* 81, no. 1 (2011): 53-87, https://doi.org/10.1111/j.1475-682X.2010.00354.x.
[1587] Aaron William Tester, "Deforestation in the Global South: Assessing uneven environmental improvements 1993–2013," *Sociological Perspectives* 63, no. 5 (2020): 764-785, https://doi.org/10.1177/0731121420908900; Harald Fuhr, "The rise of the Global South and the rise in

heavily responsible for global emissions.[1588] Finally, the emphasis on punitive responses that some strands of green criminology encourage risks over-criminalisation,[1589] overlooking underlying factors contributing to environmental damage, such as poverty and conflict, which might hold individual actors accountable for systemic issues often rooted in corporate, state or international behaviours, especially in the Global South.[1590] These issues could have an inverse effect on contributing to sustainable development by unfairly over-criminalising actors, not contributing to SDG 15.

Acknowledging the above criticisms, green criminologists have highlighted the potential benefits of restorative justice and alternative dispute mechanisms. Scholars emphasise that these alternatives provide more effective solutions:[1591] green criminological perspectives are already helping as a 'decolonial tool',[1592] mobilising the litigation space and the law in Global South jurisdictions to strengthen climate change policy responses and halt emissions-intensive projects,[1593] viewing environmental harms as crimes and addressing these ecological issues while sidestepping the problems of over criminalisation in the Global South. Hence, this perspective is still invaluable in its application to SDG 15.

This commentary will use Myanmar as a case study, highlighting rare earth mining and fire as a Global South example that considers the definitions of 'harms' as the two-pronged 'primary and secondary' classification,[1594] and as a focus on where criminalisation might not sufficiently address the complexities of rare earth mining or

carbon emissions", *Third World Quarterly* 42, no. 11 (2021): 2724-2746, https://doi.org/10.1080/01436597.2021.1954901.

[1588] Eos. "Global North Is Responsible for 92% of Excess Emissions". 2020. Available at: https://eos.org/articles/global-north-is-responsible-for-92-of-excess-emissions. Accessed 21 October, 2024.

[1589] Mark Halsey, "Against 'green' criminology", *British Journal of Criminology* 44, no. 6 (2004): 833-853, https://doi.org/10.1093/bjc/azh068.

[1590] Michael Kidd and Melissa Strydom, "Criminal enforcement of environmental law in South Africa," in *Research Handbook on Environmental Crimes and Criminal Enforcement*, 382-406. (Edward Elgar Publishing, 2024).

[1591] Nurse, "Repairing The Harm: Restorative Justice And Environmental Courts," 4.

[1592] David Rodríguez Goyes, "Green criminology as decolonial tool: A stereoscope of environmental harm", *The Palgrave handbook of criminology and the global south* (2018), 323-346.

[1593] Jolene Lin and Jacqueline Peel, "Actors in Global South Climate Change Litigation Mobilization Efforts," in *Litigating Climate Change in the Global South* (Oxford University Press, 2024).

[1594] South, "Nature, Difference and the Rejection of Harm: Expanding the Agenda for Green Criminology," 187-200.

human rights issues. Global Witness's 2024 investigation reports on environmental harm associated with the expansion of rare earth mining in Myanmar, highlighting its detrimental community and ecological effects, including severe land degradation, deforestation, and pollution, directly contradicting the goals set out in SDG 15. In Myanmar, rare earth mining can often displace citizens and directly fund military operations, contributing to further land degradation through scorched earth tactics.[1595] This demonstrates the need for a green criminological approach prioritising environmental justice instead of criminalisation, as in Myanmar, the impact of rare earth mining is also exacerbated by the State's involvement. This mirrors issues with environmental impact, such as armed conflict in Syria, exacerbated by state involvement.[1596] Ecological and humanitarian problems are often interconnected, underscoring the importance of restorative approaches and focus on secondary harms, where green criminology can better facilitate SDG 15, prioritising environmental restoration rather than imposing punitive measures.

Furthermore, international criminalisation of environmental harms might not be sufficient in the context of Myanmar's military-led governance as direct actors in the harms. Scholars describe the Western perspective as reductionist to the point that it risks misunderstanding the drivers, dynamics and potential solutions of conflict. In response, they call for a nuanced approach to develop successful responses,[1597] which can be exemplified by the Association of Southeast Asian Nations (ASEAN)'s dealings with Myanmar, providing a more nuanced model for addressing environmental and humanitarian issues. ASEAN has facilitated humanitarian interventions under the guise of disaster management. This enables it to address environmental and humanitarian impacts while avoiding alienating Myanmar by violating state sovereignty,[1598] illustrating the potential for regional cooperation in managing ecological harm. Such

[1595] Thiri Shwesin Aung, "Satellite analysis of the environmental impacts of armed-conflict in Rakhine, Myanmar," *Science of the Total Environment* 781 (2021):1-15, https://doi.org/10.1016/j.scitotenv.2021.146758; Myanmar Witness. "*Myanmar on Fire,"* 2023. Available at: https://www.myanmarwitness.org/reports/myanmar-on-fire, Accessed 21 October 2024.

[1596] Pax for Peace. "Axed & Burned: How Conflict-Caused Deforestation Impacts Environmental, Socio-Economic and Climate Resilience in Syria," 2023. Available at: https://paxforpeace.nl/publications/axed-burned. Accessed 21 October 2024.

[1597] David Brenner, "Misunderstanding Myanmar through the lens of democracy." *International Affairs* 100, no. 2 (2024): 751-769, https://doi.org/10.1093/ia/iiae015.

[1598] Mikio Oishi and Nina Ghani, "Developing a way to influence the conduct of the government in intrastate conflict: the case of Myanmar," in *Contemporary Conflicts in Southeast Asia: Towards a New ASEAN Way of Conflict Management* (2016), 89-110.

practices suggest that a collaborative strategy could enhance the effectiveness of responses to the challenges of rare earth mining, by prioritising restorative action that engages local communities. This perspective aligns with the SDG 15 goals and emphasises the importance of community involvement in environmental governance, ensuring that local voices are prioritised and that interventions are effective.

To conclude, this commentary argues that green criminology provides valuable insights into addressing environmental harms related to SDG 15, emphasising the need for a nuanced understanding of ecological harms and the importance of sustainable practices and environmental responsibility, which are crucial for achieving long-term success in addressing SDG 15. A theory of international cooperation and regional or national domestic restorative policy, effectively enhancing enforcement mechanisms to combat ecological degradation and biodiversity loss, is a more practical approach to achieving SDG 15 goals than international criminalisation of environmental harms. Combining green criminological insights with regional cooperation, as seen in Myanmar, could strengthen enforcement mechanisms, fostering a culture of sustainability and ecological responsibility.

Bibliography

Arias, Francisca Valencia, and Ann-Kathrin Reinefeld. "50 Years of the Proposed Crime of Ecocide: Challenges Regarding Its Definition and Possible Answers." *International Criminal Law Review* 1, no. 1 (2024): 1-29. https://doi.org/10.1163/15718123-bja10205.

Aung, Thiri Shwesin. "Satellite analysis of the environmental impacts of armed-conflict in Rakhine, Myanmar." *Science of the Total Environment* 781 (2021): 1-15. https://doi.org/10.1016/j.scitotenv.2021.146758.

Boukli, Avi, and Justin Kotzé, eds. *Zemiology: Reconnecting crime and social harm*. Springer, 2018.

Brenner, David. "Misunderstanding Myanmar through the lens of democracy." *International Affairs* 100, no. 2 (2024): 751-769. https://doi.org/10.1093/ia/iiae015.

Dehury, Parthsarathi, Imteyaz Ahmed, Manas Ranjan Behera, and Ranjit Kumar Dehury. "Exploring the Landscape of Green Crime in India: A Theoretical Understanding with References to Rapid Industrialization." In *Proceedings of the NDIEAS-2024 International Symposium on New Dimensions and Ideas in Environmental Anthropology-2024 (NDIEAS 2024)*, vol. 848, p. 314. Springer Nature, 2024.

Fuhr, Harald. "The rise of the Global South and the rise in carbon emissions." *Third World Quarterly* 42, no. 11 (2021): 2724-2746. https://doi.org/10.1080/01436597.2021.1954901.

"Global North Is Responsible for 92% of Excess Emissions." *Eos,* 2020. Available at: https://eos.org/articles/global-north-is-responsible-for-92-of-excess-emissions. Accessed October 21, 2024.

Global Witness. "Fuelling the future, poisoning the present: Myanmar's rare earth boom." 2024. Available at: https://globalwitness.org/en/campaigns/transition-minerals/fuelling-the-future-poisoning-the-present-myanmars-rare-earth-boom/?gad_source=1&gad_campaignid=21060178994&gbraid=0AAAADm6LODTxhHjqIiwYINVv9s9YB-Mv&gclid=EAIaIQobChMI-I_1353njQMVoEtHAR1n7Q_IEAAYASAAEgKCNfD_BwE. Accessed 01 January.

Goyes, David Rodríguez. "Southern green criminology: Fundamental concepts." In *Green crime in the global south: Essays on southern green criminology*, 1-30.

Cham: Springer International Publishing, 2023.

Goyes, David Rodríguez. "Green criminology as a decolonial tool: A stereoscope of environmental harm." In *The Palgrave handbook of criminology and the global south*, 323-346. 2018. https://doi.org/10.1007/s10612-016-9330-y.

Goyes, David Rodríguez. "Green activist criminology and the epistemologies of the South." *Critical Criminology* 24 (2016): 503-518.

Halsey, Mark. "Against 'green' criminology." *British Journal of Criminology* 44, no. 6 (2004): 833-853. https://doi.org/10.1093/bjc/azh068.

Higgins, Polly, Damien Short, and Nigel South. "Protecting the planet: a proposal for a law of ecocide." *Crime, Law and Social Change* 59 (2013): 251-266. https://doi.org/10.1007/s10611-013-9413-6.

Husain, Hishmi Jamil, Xiuqing Wang, Saied Pirasteh, Davood Mafi-Gholami, Bhavesh Chouhan, Mohammed Latif Khan, and Mehdi Gheisari. "Review and assessment of the potential restoration of ecosystem services through the implementation of the biodiversity management plans for SDG-15 localization." *Heliyon* 10, no. 8 (2024). https://doi.org/10.1016/j.heliyon.2024.e29877.

Jorgenson, Andrew K., and Brett Clark. "Societies consuming nature: A panel study of the ecological footprints of nations, 1960–2003." *Social Science Research* 40, no. 1 (2011): 226-244. https://doi.org/10.1016/j.ssresearch.2010.09.004.

Jorgenson, Andrew K., Christopher Dick, and John M. Shandra. "World economy, world society, and environmental harms in less-developed countries." *Sociological Inquiry* 81, no. 1 (2011): 53-87. https://doi.org/10.1111/j.1475-682X.2010.00354.x.

Kidd, Michael, and Melissa Strydom. "Criminal enforcement of environmental law in South Africa." In *Research Handbook on Environmental Crimes and Criminal Enforcement*, 382-406. Edward Elgar Publishing, 2024.

Lin, Jolene, and Jacqueline Peel. *Litigating Climate Change in the Global South*. Oxford University Press, 2024.

Lynch, Michael J., and Paul B. Stretesky. *Exploring green criminology: Toward a green criminological revolution*. Routledge, 2016.

Myanmar Witess. "Myanmar on Fire". 2023. Available at: https://www.myanmarwitness.org/reports/myanmar-on-fire. Accessed 21 October, 2024

Nurse, Angus. "Repairing The Harm: Restorative Justice And Environmental Courts."

In *An Introduction to Green Criminology and Environmental Justice,* 159-176. London: SAGE Publications Ltd, 2015.

Oishi, Mikio, and Nina Ghani. "Developing a way to influence the conduct of the government in intrastate conflict: the case of Myanmar." *Contemporary Conflicts in Southeast Asia: Towards a New ASEAN Way of Conflict Management*, 89-110. 2016.

Pax for Peace. “Axed & Burned: How Conflict-caused Deforestation Impacts Environmental, Socio-economic and Climate Resilience in Syria.” 2023. Available at: https://paxforpeace.nl/publications/axed-burned/. Accessed 21 October 2024.

Pereira, Ricardo. *Environmental criminal liability and enforcement in European and international law*. Boston: Brill. 2015.

Tester, Aaron William. "Deforestation in the Global South: Assessing uneven environmental improvements 1993–2013." *Sociological Perspectives* 63, no. 5 (2020): 764-785. https://doi.org/10.1177/0731121420908900.

United Nations General Assembly. *Transforming our world: the 2030 Agenda for Sustainable Development*. 2015.

United Nations General Assembly. *Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development*. 2017.

Commentary

How Terrorism Ends - Revisiting Cronin in Light of Contemporary Realities

Pierre Musa Halime Wessel[1599]

Received: 02 February 2025 / Accepted: 10 June 2025

Abstract

This comment revisits Audrey Cronin's *How Terrorism Ends* (2009), arguing for the need to reassess key aspects of her framework in light of significant developments since its publication. First, it highlights how the availability of new data and research (especially following the unprecedented rise and fall in global terrorist activity in the 2010s) offers a valuable opportunity to re-examine patterns of terrorist decline. Second, it explores how changes in the nature of terrorism, such as the rise of far-right extremism and lone-actor violence in Western countries, as well as the evolving role of digital technologies, point to the limitations of Cronin's framework in today's context. The findings warrant a broader and updated inquiry into how terrorism ends today.

This research was supported by the Economic and Social Research Council (ESRC) [Grant number ES/P000738/1]

[1599] Pierre Musa Halime Wessel is a PhD candidate in Criminology at the University of Cambridge. His research focuses on global perspectives of violence and violent extremism. In his doctoral work, he investigates reductions in terrorist violence through a mixed-methods approach.

I. Introduction

Cronin's *How Terrorism Ends*[1600] was first published in 2009 and received international praise as a well-researched account of terrorist decline and demise. It constitutes one of the most comprehensive typologies of its kind[1601] and quickly became a landmark study for counterterrorism scholars.

Critics described the book as insightful and "frustrating for all the right reasons,"[1602] noting its clear demonstration that terrorism defies simple solutions. Through a range of global case studies, Cronin offers a nuanced exploration of terrorist decline, highlighting the need to pursue incremental success over unattainable absolutes. Within this context, she references (e.g.) unrealistic expectations of quick success in negotiation processes[1603] or the reliance on brute force approaches as an unlikely cure-all for complex issues.[1604]

Throughout the book, Cronin achieves several contributions. Two of them (Cronin's triad of terrorism and her typology of terrorist decline) are discussed in this comment.

II. Key Contributions

A. The Terrorist Triad

A central stance in How Terrorism Ends is Cronin's challenge of the relationship between terrorist groups and their target governments as a dichotomy. She introduces the concept of the "triad of terrorism,"[1605] positing that a key third party in the struggle between terrorists and governments is the general populace or "audience."[1606]

Following the likes of Siqueira and Sandler,[1607] Cronin describes a competition

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[1600] Audrey Kurth Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns* (Princeton: Princeton University Press, 2009) https://doi.org/10.1515/9781400831142.

[1601] Audrey Kurth Cronin, *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns*, (Princeton University Press, 2011), https://press.princeton.edu/books/paperback/9780691152394/how-terrorism-ends.

[1602] Eric Shibuya, review of *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns*, by Audrey Kurth Cronin (Princeton, NJ: Princeton University Press, 2009), *Joint Force Quarterly*, no. 62 (3rd Quarter 2011): 134–135, https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-62/jfq-62_134_Shibuya.pdf.

[1603] Cronin, *How Terrorism Ends*, "Negotiations: Transition Toward a Legitimate Political Process," 35–72.

[1604] Cronin, *How Terrorism Ends*, "Repression: Crushing Terrorism with Force," 115–145.

[1605] Cronin, *How Terrorism Ends*, 7.

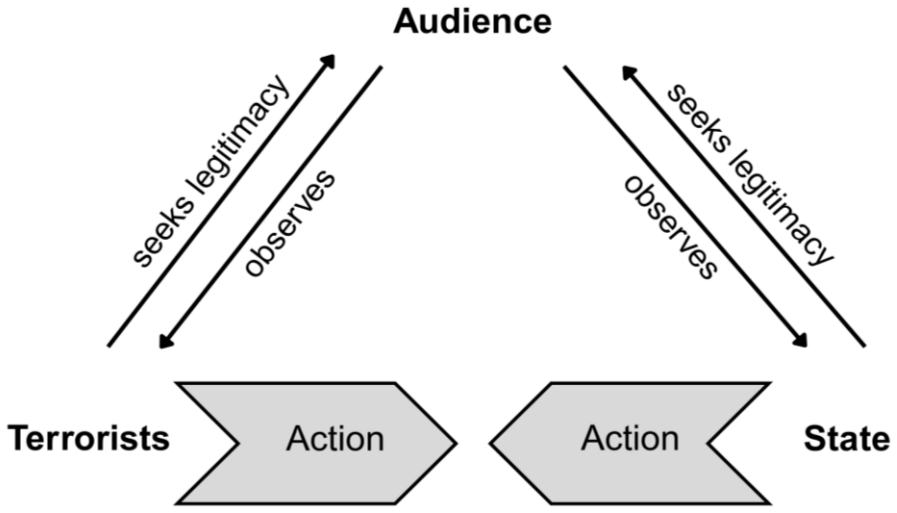
[1606] Ibid.

[1607] Kevin Siqueira and Todd Sandler, "Terrorists versus the Government: Strategic Interaction, Support, and Sponsorship," *Journal of Conflict Resolution* 50, no. 6 (2006): 878–98, https://doi.org/10.1177/0022002706293469.

between terrorist groups and governments for legitimacy among the audience, with governments aiming to uphold the status quo, and terrorist groups challenging it. The audience is presented as a key actor in determining the outcome of this struggle as both parties rely on it for popular support. Thus, the ultimate success or failure of terrorist campaigns is argued not to depend solely on the actions of states or terrorists, but, crucially, on how observers interpret and respond to them.

This triangular relationship is highlighted throughout the book at the example of the Hamas and the polarising effects of Israeli counterterrorism activities. Cronin describes how, provoked by attacks, the Israeli government has engaged in counter strikes against Palestinian targets that conflict with international law,[1608] eroding Israel's legitimacy among Palestinians, as well as parts of the international community. She posits that to provoke brute-force aggression in governments may well be part of a terrorist group's strategy to de-legitimise their opponent and earn legitimacy among those targeted. Finally, she concludes that Hamas' increasing popularity since the 1990s may have been the result of Israeli countermeasures, saying that they have "drawn recruits to terrorist organisations."[1609]

Figure 1: Proposed Visualisation of Cronin's Terrorist Triad



Cronin's example shows that the audience is a key actor, as both terrorist groups and target governments take actions to legitimise themselves or delegitimise each other in the audience's eyes. Today, 16 years after Cronin's observation, the conflict between Israel and Hamas can be observed in its extremes, with both sides now vying for a

[1608] Cronin, *How Terrorism Ends*, 30.
[1609] Cronin, *How Terrorism Ends*, 31.

global audience's legitimacy.

B. Typology of Terrorist Demise

With the terrorist triad in mind, Cronin theorises 6 ways terrorist campaigns may end. These include *Decapitation* (campaigns ending through the removal of group leadership, either by capture or assassination);[1610] *Negotiation* (campaigns ending through dialogue and compromise),[1611] *Success* (campaigns ending through the achievement of strategic or political goals),[1612] *Failure* (campaigns ending through loss of support, non-achievement of objectives, or internal collapse),[1613] *Repression* (campaigns ending through brute-force intervention),[1614] and *Reorientation* (campaigns ending through transitions to other causes or activities).[1615]

Key points from Cronin's analysis provide insights that challenge standard counterterrorism practices, particularly those rooted in the post-9/11 global 'war on terror'[1616]. For instance, governments have traditionally targeted terrorist leaders to end their campaigns (*Decapitation*), a tactic emblematic of the war on terror's reliance on brute force and motives of retaliation.[1617] Cronin acknowledges the pressures driving these actions, noting that governments aim to 'demonstrate resolve'[1618] and hope to weaken a group's ideological and organisational functions by removing its leader. However, she presents evidence that refutes expectations of a linear outcome from leadership decapitation. A resulting fractionalisation or the emergence of a new, more

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[1610] Cronin, *How Terrorism Ends*, "Decapitation: Catching or Killing the Leader," 14–34.

[1611] Cronin, *How Terrorism Ends*, "Negotiations: Transition Toward a Legitimate Political Process," 35–72.

[1612] Cronin, *How Terrorism Ends*, "Success: Achieving the Objective," 73–93.

[1613] Cronin, *How Terrorism Ends*, "Failure: Imploding, Provoking a Backlash, or Becoming Marginalized," 94–114.

[1614] Cronin, *How Terrorism Ends*, "Repression: Crushing Terrorism with Force," 115–145.

[1615] Cronin, *How Terrorism Ends*, "Reorientation: Transitioning to Another Modus Operandi," 146–166.

[1616] Erik W. Goepner, "Measuring the Effectiveness of America's War on Terror," *Parameters* 46, no. 1 (2016): 107, https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2828&context=parameters.

[1617] See Grace Elizabeth Powell, *Endless Kill List, Endless War: High Value Targeting and the War on Terror* (BA thesis, Wesleyan University, 2014), 7, 51, https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=a47c46873c192a4e140c34583442ff649e4f584a ; Robert Mandel, *Coercing Compliance: State-Initiated Brute Force in Today's World* (Stanford University Press, 2015), https://www.sup.org/books/politics/coercing-compliance; William Pfaff, *Fear, Anger and Failure: A Chronicle of the Bush Administration's War Against Terror from the Attacks in September 2001 to Defeat in Baghdad* (Algora Publishing, 2004), https://lawcat.berkeley.edu/record/166499; Stephen J. Cimbala, "Military Persuasion, Intelligence and the War on Terror," *Defense & Security Analysis* 22, no. 1 (2006): 61, https://doi.org/10.1080/14751790600577157.

[1618] Cronin, *How Terrorism Ends*, 16.

brutal leader can lead to unintended negative consequences of the intervention.[1619] By considering factors such as popular support or inner-group dynamics, she argues that leadership removal is a risky gamble, with its success being heavily dependent on the group's reliance on its leader for survival.[1620] Cronin further emphasizes that social factors like group cohesion among terrorists and audience dynamics often outweigh political objectives, advocating for dispassionate approaches to counterterrorism that reflect a deep understanding of the target's position in wider structural, social and political contexts. By recognising that terrorism is not purely driven by political and strategic goals, but further exists and develops in a social environment, Cronin's work aligns with a new school of counterterrorism scholars who favour holistic assessment over purely strategic mission-focused approaches.[1621]

In later years, her assessment found widespread support among counterterrorism scholars as emerging evidence further validated her findings. For instance, Jenna Jordan,[1622] expanded on Cronin's work by assessing over a thousand cases of leadership removal in 2019. Her findings widely reflect those of Cronin: evidence for the success of decapitation is mixed, and factors such group size, structure, and ideological commitment, determine the likelihood of success. Jordan's work does not outright disprove any of Cronin's findings, however, adds nuance in some places. For example, using contemporary data, Jordan finds that leadership targeting is often ineffective and may even strengthen groups by increasing radicalisation and violence.[1623] Jadoon et al. furthered this inquiry, finding that targeting lower-tier leaders can lead to loss of control over foot soldiers and more indiscriminate violence.[1624] This shows that while Cronin's work remains relevant, the observation of more recent developments and collection of new data allows scholars to refine and update Cronin's model.

III. Revisiting Cronin in Light of Recent Developments

[1619] Cronin, *How Terrorism Ends*, "Decapitation: Catching or Killing the Leader," 14–34.
[1620] Cronin, *How Terrorism Ends*, 31.
[1621] Max Abrahms, "How Terrorism Ends," *Middle East Quarterly* 17, no. 4 (Fall 2010): 85, https://cdn-mef.meforum.org/26/14/7ce8cf4f9ffa4cb1b3ee6eb561b6/2797.pdf.
[1622] Jenna Jordan, *Leadership Decapitation: Strategic Targeting of Terrorist Organizations* (Stanford University Press, 2019), https://www.sup.org/books/politics/leadership-decapitation.
[1623] Ibid.
[1624] Amira Jadoon, Andrew Mines, and Daniel Milton, "Targeting Quality or Quantity? The Divergent Effects of Targeting Upper versus Lower-Tier Leaders of Militant Organizations," *Journal of Conflict Resolution* 67, no. 5 (2023): 1007–1031, https://doi.org/10.1177/00220027221126080.

Sixteen years after the publication of *How Terrorism Ends*, it is a good moment to revisit Cronin's framework. First, the empirical landscape of terrorism studies has advanced significantly, with a new availability of data and research opening new possibilities. Second, the nature of terrorism has changed, calling for reinvestigation.

A. New Availability of Terrorism Data and Research

The data landscape around terrorism has changed significantly since 2009. Cronin's research for *How Terrorism Ends* was based on numerous collections of data. Statistical observations were predominantly based on data from the RAND-MIPT Knowledge Base,[1625] a now no longer maintained source of terrorist attack data. Researchers today have access to data collections such as the Global Terrorism Database (GTD).[1626] The GTD is the largest unclassified repository of terrorist attack data available to this date.[1627] Over 200,000 incidents are documented between 1970 to 2021, with each entry featuring up to 137 variables.[1628]

Some of these variables were included in previous datasets such as the RAND-MIPT Knowledgebase, however, are now recorded in much more detail. For instance, the GTD documents each incident's attack location by world region, country, state, city, latitude and longitude. By recording extensive variables, the GTD allows researchers to examine terrorist attacks in greater depth.

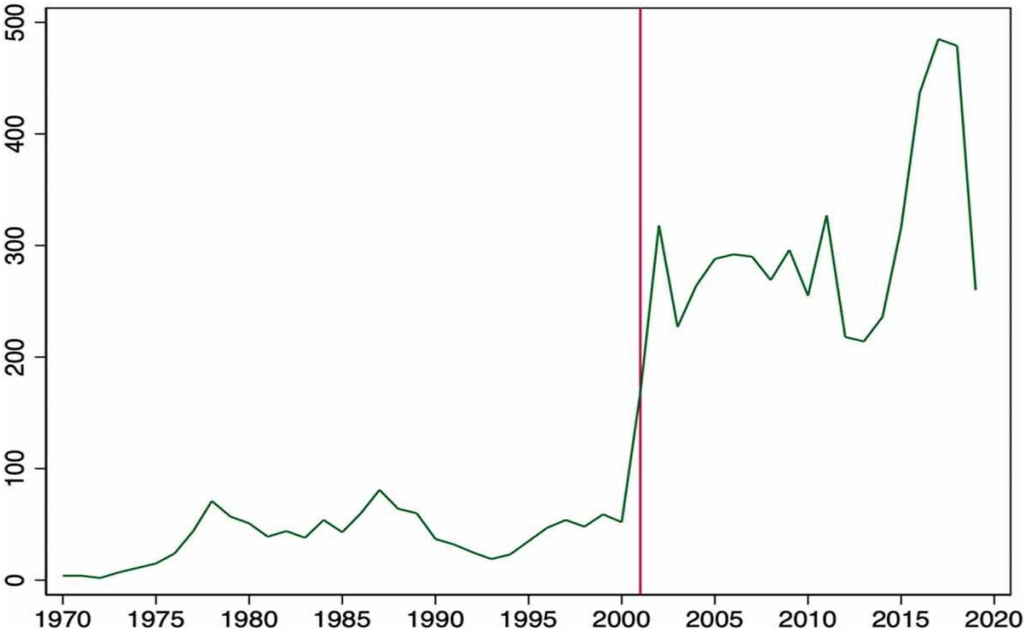
Figure 2: Articles Published on Terrorism Per Year 1970-2019

[1625] RAND Corporation, *Terrorism Incidents Knowledgebase*, accessed February 2, 2025, https://www.rand.org/nsrd/projects/terrorism-incidents/about.html.

[1626] START (National Consortium for the Study of Terrorism and Responses to Terrorism), *Global Terrorism Database* (GTD) (University of Maryland, 2025),https://www.start.umd.edu/data-tools/GTD.

[1627] Gary LaFree, Laura Dugan, and Erin Miller, *Putting Terrorism in Context: Lessons From the Global Terrorism Database* (Routledge, 2014), 18, https://doi.org/10.4324/9781315881720.

[1628] START (National Consortium for the Study of Terrorism and Responses to Terrorism), *Global Terrorism Database [data files]* (University of Maryland, 2021),https://www.start.umd.edu/gtd-download.



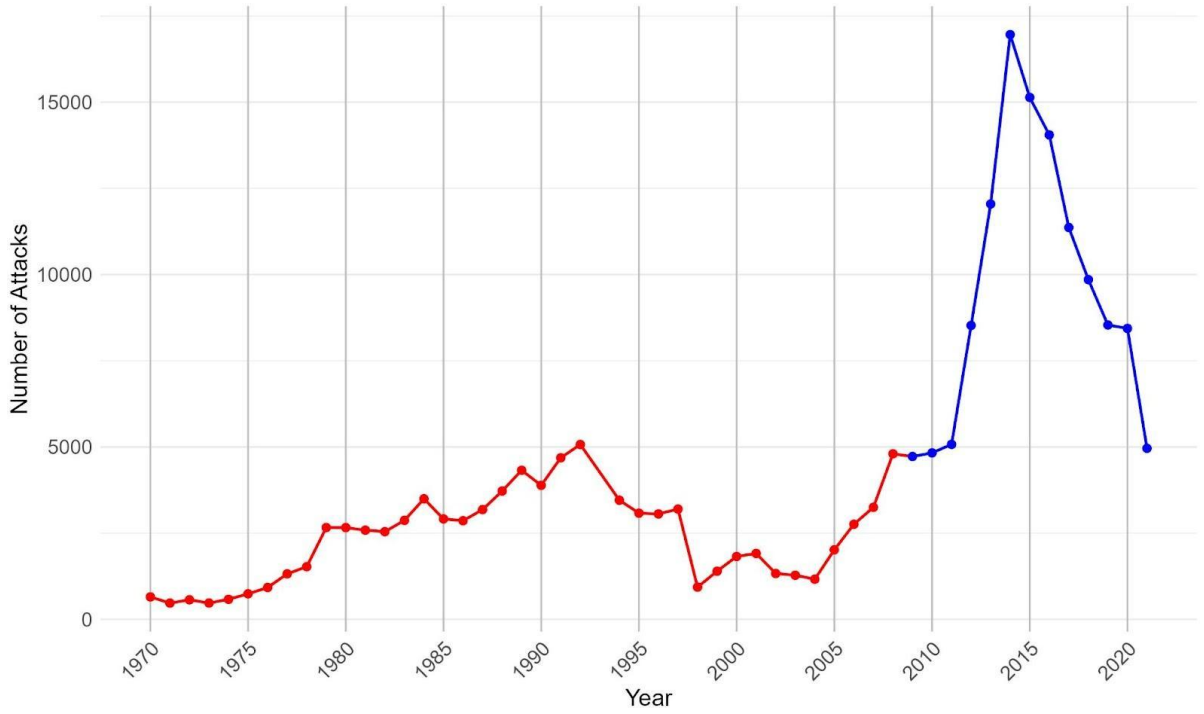
(Phillips, 2023)

Further, terrorism research has evolved significantly since 2009. Figure 2, created by Brian Phillips, tracks the use of "terrorist" or "terrorism" in academic titles over time using Web of Science data.[1629] Phillips used it to illustrate the surge in terrorism studies after the 9/11 attacks (marked by a vertical line). Notably, the highest annual number of publications occurred after Cronin's 2009 *How Terrorism Ends*. With a new body of literature and extensive data collections like the GTD available, researchers today are well positioned to reassess typologies of terrorist decline and demise in contemporary contexts.

Another factor warranting a reassessment of Cronin's typology is the dramatic shift in the trajectory of global terrorist attacks since her book's publication. Most notably, global terrorist acts surged to an all-time high in the 2010s, peaking in 2014. Figure 3, based on GTD data, illustrates this sharp rise and the recent decline. It is important to note that the data only extends to June 2021, thus, the final year on the graph represents just six months of records. This should be considered when interpreting the apparent decline in that period. Nevertheless, a sharp fall is evident after 2014.

Figure 3: Number of Terrorist Attacks 1970-2021

[1629] Brian J. Phillips, "How Did 9/11 Affect Terrorism Research? Examining Articles and Authors, 1970–2019," *Terrorism and Political Violence* 35, no. 2 (2023): 411, https://www.tandfonline.com/doi/full/10.1080/09546553.2021.1935889.

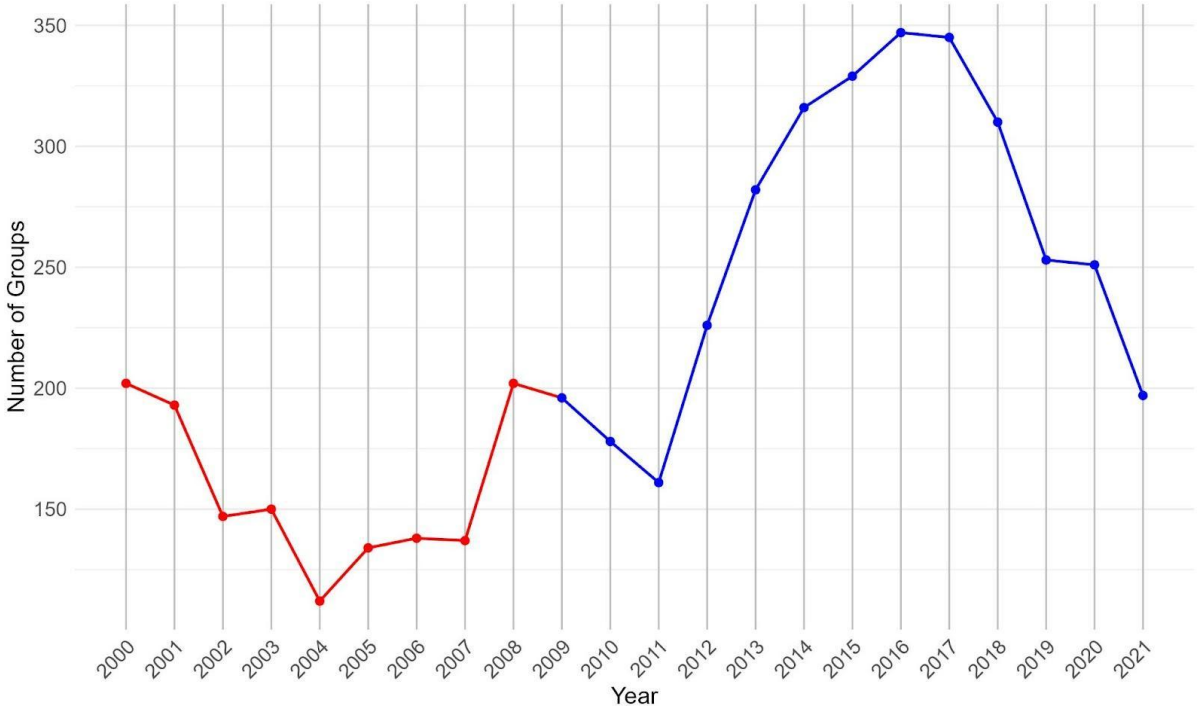


Based on GTD Data (START, 2025)

At the time of Cronin's publication, notable fluctuations in terrorist activity had already occurred, which she explores through detailed case studies. However, the sharp rise in attacks from 2010 to 2014, followed by a steep decline, marks historically unprecedented trends. These developments offer a unique opportunity to study terrorist decline. What caused the sudden drop in attacks? What can it reveal about how terrorism ends? And can this historic downturn help refine typologies of terrorist decline and demise?

Moreover, since Cronin's observations, many new groups have formed and delivered impactful assaults on democracies worldwide. Figure 4 shows an increase in unique active groups recorded, peaking in 2016, with a subsequent decline, broadly mirroring attack trends.

Figure 4: Number of Unique Active Terrorist Groups per Year 2000-2020



Based on GTD Data (START, 2025)

The marked decline in unique active groups per year suggests that many terrorist organisations have ended in recent years, reinforcing the unique opportunity to study terrorist decline today. What are the conditions under which groups decline or end today? Do these conditions differ compared to the early 2000s?

B. The Shifting Landscape of Terrorism

Since 2009, terrorism has taken on new forms that fall outside the scope of Cronin's original focus.

For instance, there has been a significant rise in far-right terrorism in western democracies in the past decade, with numbers in fascist attacks increasing significantly.[1630] Alongside prevailing Islamist ideologies, far-right extremism is now among the most prevalent ideologies in the global North[1631] and poses a severe threat to democratic systems.[1632]

Within How Terrorism Ends, few short mentions are made of right-wing terrorist

[1630] Jonathan Collins, "A New Wave of Terrorism? A Comparative Analysis of the Rise of Far-Right Terrorism," *Perspectives on Terrorism* 15, no. 6 (2021): 2, https://www.jstor.org/stable/27090913.

[1631] Syed Shehzad Ali, "Far-Right Extremism in Europe," *Journal of European Studies (JES)* 37, no. 1 (2021): 121, https://asce-uok.edu.pk/journal/index.php/JES/article/view/171.

[1632] Milan W. Svolik, Elena Avramovska, Johanna Lutz, and Filip Milačić, "In Europe, Democracy Erodes from the Right," *Journal of Democracy* 34, no. 1 (2023): 7, https://muse.jhu.edu/article/875795.

groups.[1633] The main focus of Cronin's explorations is on Islamist groups and diverse examples of separatist, left-wing, or Maoist groups. Except for the Irish Republican Army and the Northern Irish peace process, case studies illustrating her six types of terrorist demise largely focus on terrorist groups outside of Europe or North America. In the light of a steep rise in far-right terrorist attacks in those regions, new questions arise about how terrorism ends. For example: How does right-wing terrorism end? How would the repression or decapitation of a terrorist group look like in e.g. Europe?

Another key development is an unprecedented increase in lone-actor terrorist attacks. Over 90 percent of fatal terrorist attacks in the West in the past five years have been carried out by lone actors.[1634] The Global Terrorism Index 2025 reports that "these attacks are typically carried out by youths [...] who have no formal ties to terrorist organisations."[1635] Lone-actor terrorism is either inspired by existing groups or driven by self-constructed hybrid ideologies pieced together from diverse, sometimes opposing, belief systems to justify violence.[1636]

Cronin's work focuses exclusively on the trajectories of terrorist campaigns, with her observations and typology constructing how terrorism declines in groups specifically. At the time of Cronin's writing, terrorism in the West was more popularly known to be a threat emanating from groups, with impactful attacks in the West (such as the 2004 train bombings in Madrid,[1637] or the 2015 Paris concert assaults[1638]) being orchestrated by well-organised foreign extremist adversaries. Now, however, the main terrorist threat for western countries are lone actors, for whom Cronin's framework does not account. Thus, a contemporary answer to the question of how terrorism ends must go beyond explanations of how the campaigns of terrorist groups end.

Lastly, global digitalisation and rapid advancements in the technology sector have reshaped the way terrorism develops and operates. Within the context of Cronin's key

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[1633] See Cronin, *How Terrorism Ends*, 96, 98, 112.

[1634] Vision of Humanity, "Evolving Threat of Lone Wolf Terrorism in the West," *Vision of Humanity*, March 4, 2025, https://www.visionofhumanity.org/evolving-threat-of-lone-wolf-terrorism-in-the-west/ .

[1635] Institute for Economics & Peace, *Global Terrorism Index 2025: Measuring the Impact of Terrorism* (Sydney: Institute for Economics & Peace, 2025), 2, https://www.visionofhumanity.org/wp-content/uploads/2025/03/Global-Terrorism-Index-2025.pdf.

[1636] Ibid, 38.

[1637]William Rose, Rysia Murphy, and Max Abrahms, "Does Terrorism Ever Work? The 2004 Madrid Train Bombings," *International Security* 32, no. 1 (Summer 2007): 185, https://www.jstor.org/stable/30129805.

[1638] Mathieu Raux et al., "Analysis of the Medical Response to November 2015 Paris Terrorist Attacks: Resource Utilization According to the Cause of Injury," *Intensive Care Medicine* 45 (2019): 1232, https://doi.org/10.1007/s00134-019-05724-9.

contributions, it pays to consider the impact of social media on how terrorists and other extremist actors now engage audiences as a key part of the triad of terrorism.

Since the publication of *How Terrorism Ends*, the nature of social interactions has fundamentally changed. In large part, most people now interact with others virtually, whether it is in the workspace or in their free time. Online portals provide spaces for disinformation and propaganda for notable terrorist groups such as ISIL (Da'esh),[1639] fuelling extremist ideologies and extending the arm of terrorist recruiters into people's homes.[1640] Social media algorithms favour extreme content and tend to recommend material that reinforces users' existing beliefs, creating echo chambers and radicalisation spaces.[1641]

Beyond recruitment, there has been a notable shift in public discourse on terrorism and its combat. Opinions are increasingly polarized, and information shared in online spaces often intensify the debate. For example: After the 2024 Southport stabbings, disinformation about the incident shared in online forums sparked nation-wide violent protests by the far right and other individuals inspired by their outrage. [1642]

Further, international conflicts (including those between terrorist groups and their target governments) have also become more divisive, with state actors, non-state armed groups, and other political stakeholders using digital platforms to disseminate competing narratives. These developments highlight the continued relevance of Cronin's terrorist triad, where the audience remains a key player in the struggle for legitimacy. In an era where information spreads rapidly and reaches people who may not engage with traditional media, the audience's role has arguably become more influential than ever.

It seems, however, that in a globalised world, more parties than just terrorists and their target governments stand to gain from influencing the audience. The example of the Southport riots illustrates that external extremist adversaries seek to exploit unrelated

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[1639] James A. Piazza, "Fake News: The Effects of Social Media Disinformation on Domestic Terrorism," *Dynamics of Asymmetric Conflict* 15, no. 1 (2022): 57, https://doi.org/10.1080/17467586.2021.1895263.

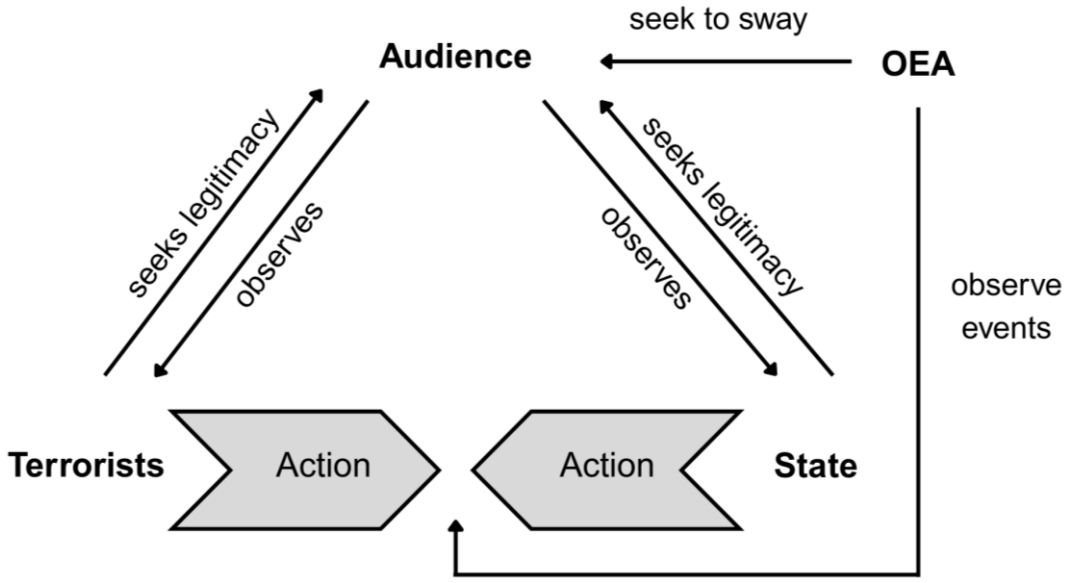
[1640] Imran Awan, "Cyber-Extremism: ISIS and the Power of Social Media," *Society* 54, no. 2 (2017): 139, https://doi.org/10.1007/s12115-017-0114-0; Gabriel Weimann, "The Emerging Role of Social Media in the Recruitment of Foreign Fighters," in *Foreign Fighters Under International Law and Beyond* (2016): 77, https://doi.org/10.1007/978-94-6265-099-2_6.

[1641] Ermelinda Rodilosso, "Filter Bubbles and the Unfeeling: How AI for Social Media Can Foster Extremism and Polarization," *Philosophy & Technology* 37, no. 2 (2024): 71, https://doi.org/10.1007/s13347-024-00758-4.

[1642] "Southport Stabbing: What Led to the Spread of Disinformation?," *Al Jazeera*, August 2, 2024, https://www.aljazeera.com/news/2024/8/2/southport-stabbing-what-led-to-the-spread-of-disinformation.

conflicts to further their own cause among a shared audience. Scholars could consider adding to the terrorist triad, accordingly, as illustrated in Figure 5.

Figure 5: Proposed Addition of "Other Extremist Adversaries" (OEA) to Cronin's Triad of Terrorism



IV. Conclusion

Cronin's *How Terrorism Ends* has proven relevant for over a decade and a half, with scholars continually building on her work. Two key contributions are her triad of terrorism and six types of terrorist decline and demise.

Today, there is a unique opportunity to revisit Cronin's work, based on the availability of new data and research. Since the publication of *How Terrorism Ends*, both the sharpest rise and the most significant decline in recorded terrorist attacks have taken place, creating new opportunities to examine how terrorism ends today.

Further, reflecting on changes in the nature of terrorism has produced the insight that Cronin's framework falls short of explaining some of the most recent developments. First, the rise of far-right terrorism in Western democracies highlights the need to revisit Cronin's framework in light of evolving threats. Understanding how terrorism ends today calls for extending her analysis to account for ideological and regional developments that have occurred since her book was published.

Second, the growing prevalence of lone-actor terrorism also points to a limitation of Cronin's framework, which was built around the decline of organised terrorist groups. Understanding how terrorism ends today requires expanding the scope to include

forms of violence that operate outside traditional group structures.

Last, technological advances allow terrorists and those who combat them to engage global audiences in new ways, reaffirming the importance of the audience in Cronin's terrorist triad. Recent developments, however, suggested that scholars could add to the concept.

Bibliography

Abrahms, Max. “How Terrorism Ends.” *Middle East Quarterly* 17, no. 4 (Fall 2010): 85–86. https://cdn-mef.meforum.org/26/14/7ce8cf4f9ffa4cb1b3ee6eb561b6/2797.pdf

Ali, Syed Shehzad. “Far-Right Extremism in Europe.” *Journal of European Studies (JES)* 37, no. 1 (2021): 119–139. https://asce-uok.edu.pk/journal/index.php/JES/article/view/171.

Al Jazeera. “Southport Stabbing: What Led to the Spread of Disinformation?”. *Al Jazeera.* August 2, 2024. https://www.aljazeera.com/news/2024/8/2/southport-stabbing-what-led-to-the-spread-of-disinformation.

Awan, Imran. "Cyber-Extremism: ISIS and the Power of Social Media." *Society* 54, no. 2 (2017): 138–149. https://doi.org/10.1007/s12115-017-0114-0.

Cimbala, Stephen J. "Military Persuasion, Intelligence and the War on Terror." *Defense & Security Analysis* 22, no. 1 (2006): 61–72. https://doi.org/10.1080/14751790600577157.

Collins, Jonathan. “A New Wave of Terrorism? A Comparative Analysis of the Rise of Far-Right Terrorism.” Perspectives on Terrorism 15, no. 6 (2021): 2–22. https://www.jstor.org/stable/27090913.

Cronin, Audrey Kurth. *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns*. Princeton, New Jersey: Princeton University Press, 2009. https://doi.org/10.1515/9781400831142.

Goepner, Erik W. *Measuring the Effectiveness of America’s War on Terror*. 2016. https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2828&context=parameters.

Institute for Economics & Peace. *Global Terrorism Index 2025: Measuring the Impact of Terrorism*. Sydney: Institute for Economics & Peace, 2025. https://www.visionofhumanity.org/resources/global-terrorism-index-2025/.

Jadoon, Amira, Andrew Mines, and Daniel Milton. “Targeting Quality or Quantity? The Divergent Effects of Targeting Upper versus Lower-Tier Leaders of Militant Organizations.” *Journal of Conflict Resolution* 67, no. 5 (2023): 1007–1031. https://doi.org/10.1177/00220027221126080.

Jordan, Jenna. *Leadership Decapitation: Strategic Targeting of Terrorist Organizations*. Stanford: Stanford University Press, 2019. https://www.sup.org/books/politics/leadership-decapitation.

LaFree, Gary, Laura Dugan, and Erin Miller. *Putting Terrorism in Context: Lessons From the Global Terrorism Database*. Routledge, 2014. https://doi.org/10.4324/9781315881720.

Mandel, Robert. *Coercing Compliance: State-Initiated Brute Force in Today's World.* Stanford, CA: Stanford University Press, 2015. https://www.sup.org/books/politics/coercing-compliance.

Pfaff, William. *Fear, Anger and Failure: A Chronicle of the Bush Administration's War Against Terror from the Attacks in September 2001 to Defeat in Baghdad.* New York: Algora Publishing, 2004. https://lawcat.berkeley.edu/record/166499.

Phillips, Brian J. "How Did 9/11 Affect Terrorism Research? Examining Articles and Authors, 1970–2019." *Terrorism and Political Violence* 35, no. 2 (2023): 409-432. https://www.tandfonline.com/doi/full/10.1080/09546553.2021.1935889.

Piazza, James A. "Fake News: The Effects of Social Media Disinformation on Domestic Terrorism." *Dynamics of Asymmetric Conflict* 15, no. 1 (2022): 55-77. https://doi.org/10.1080/17467586.2021.1895263.

Powell, Grace Elizabeth. *Endless Kill List, Endless War: High Value Targeting and the War on Terror.* 2014. https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=a47c46873c192a4e140c34583442ff649e4f584a.

Princeton University Press. *How Terrorism Ends: Understanding the Decline and Demise of Terrorist Campaigns*. August 28, 2011. https://press.princeton.edu/books/paperback/9780691152394/how-terrorism-ends?srsltid=AfmBOooFRiqyxeTWOAVmB6vbuz1LDCNI0JzlJ5esXa5kUkSkXEcKGWCr.

RAND Corporation, *Terrorism Incidents Knowledgebase*, accessed February 2, 2025, https://www.rand.org/nsrd/projects/terrorism-incidents.html.

Raux, Mathieu, Pierre Carli, Frédéric Lapostolle, Matthieu Langlois, Youri Yordanov, Anne-Laure Feral-Pierssens, Alexandre Woloch, et al. "Analysis of the Medical Response to November 2015 Paris Terrorist Attacks: Resource Utilization According to the Cause of Injury." *Intensive Care Medicine* 45 (2019): 1231–1240. https://doi.org/10.1007/s00134-019-05724-9.

Rodilosso, Ermelinda. "Filter Bubbles and the Unfeeling: How AI for Social Media Can Foster Extremism and Polarization." *Philosophy & Technology* 37, no. 2 (2024): 71. https://doi.org/10.1007/s13347-024-00758-4.

Rose, William, Rysia Murphy, and Max Abrahms. “Does Terrorism Ever Work? The 2004 Madrid Train Bombings.” *International Security* 32, no. 1 (Summer 2007): 185-192. https://www.jstor.org/stable/30129805.

Siqueira, Kevin, and Todd Sandler. "Terrorists versus the Government: Strategic Interaction, Support, and Sponsorship." *Journal of Conflict Resolution* 50, no. 6 (2006): 878–898. https://doi.org/10.1177/0022002706293469.

START (National Consortium for the Study of Terrorism and Responses to Terrorism). *Global Terrorism Database Codebook: Methodology, Inclusion Criteria, and Variables*. University of Maryland, 2021. https://www.start.umd.edu/gtd/downloads/Codebook.p.

START (National Consortium for the Study of Terrorism and Responses to Terrorism). *Global Terrorism Database 1970-2021* [data files]. University of Maryland, 2025. https://start.umd.edu/gtd.

Svolik, Milan W., Elena Avramovska, Johanna Lutz, and Filip Milačić. “In Europe, Democracy Erodes from the Right.” *Journal of Democracy* 34, no. 1 (2023): 5–20. https://muse.jhu.edu/article/875795.

Vision of Humanity. “Evolving Threat of Lone Wolf Terrorism in the West.” *Vision of Humanity*. March 4, 2025. https://www.visionofhumanity.org/terrorism-is-spreading-despite-a-fall-in-attacks/.

Weimann, Gabriel. "The Emerging Role of Social Media in the Recruitment of Foreign Fighters." In *Foreign Fighters Under International Law and Beyond*, 77–95. 2016. https://doi.org/10.1007/978-94-6265-099-2_6.

Paper Review

Paper Review of Maruna S. (2011) 'Re-entry as a rite of passage'

Rebekka Marcuk

Received: 16 February 2025 / Accepted: 10 June 2025

Abstract

This paper critically examines Shadd Maruna's (2011) 'Re-entry as a rite of passage', which explores how structured rituals can facilitate the reintegration of ex-prisoners by reducing stigma and promoting social acceptance. Maruna argues that the absence of such rites contributes to high recidivism rates, proposing public acts of remorse and community involvement as solutions. While his framework offers valuable insights, this review highlights key limitations, including the oversimplification of societal attitudes, the ambiguity of 'community', and the neglect of mental health challenges. It concludes that while reintegration rituals hold promise, they must be supported by systemic reforms and targeted social policies for lasting impact.

I. Introduction

Shadd Maruna's 'Re-entry as a rite of passage' is a compelling article from 2011, which addresses the contemporary issue of ex-prisoner reintegration. In his article, Maruna, Head of Department of Sociology, Social Policy, and Criminology at the University of Liverpool, presents a persuasive theoretical exercise that merges anthropological ideas on the significance of rituals in human life with criminological research to propose potential solutions in reintegration processes.[1643] Written in the context of persistently high reoffending rates (26.5% between April 2011 and March 2012 in the UK), the article addresses ongoing challenges faced by former prisoners struggling to find their way back into society.[1644]

In his work, he examines the concept of rituals to support the rehabilitation of former prisoners into society.[1645] Such rituals would consist of public ceremonies, deeply rooted in community participation, that symbolically acknowledge both the individual's hardships and their achievements. Subsequently, Maruna argues that the absence of structured rituals, or 'rites of passage' which play a crucial role in navigating significant life transitions, hinders successful reintegration.[1646] While rituals remain performed publicly during trial, they are neglected once incarceration ends.[1647] Consequently, this disregard leaves former convicts to navigate the transition from incarceration to society without societal support. The void of public rituals may aggravate stigmatisation and challenges faced by these individuals further, making recidivism more likely. Drawing on neo-Durkheimian theories, Maruna proposes that rituals possess the power to shape emotions and facilitate moral integration.[1648] In practice, rites of passage could include symbolic acts such as repentance and forgiveness, promoting both the individual's transition into a member of society and their acceptance by the public.

II. Role of Rituals in Reintegration: Emotional Bonds and Community Support

Maruna's argument on ritualistic practices as tools for giving meaning to action is both

[1643] Shadd Maruna, 'Reentry as a Rite of Passage', *Punishment & Society* 13, no. 1 (2011): 3–28; University of Liverpool, 'Professor Shadd Maruna | Our People | University of Liverpool', Liverpool.ac.uk, n.d.

[1644] Ministry of Justice, 'Proven Reoffending Statistics - April 2011 - March 2012', GOV.UK, 2014.

[1645] Sharuna's theory is primarily based on the Anglo-American world; Maruna, 'Reentry as a Rite of Passage', 4.

[1646] Ibid.

[1647] Rituals during trials, or 'degradation rituals' after Garfinkel, diminish individuals to criminals while revoking their membership in society; Harold Garfinkel, 'Conditions of Successful Degradation Ceremonies', *American Journal of Sociology* 61, no. 5 (1956): 420–24.

[1648] Maruna, 'Reentry as a Rite of Passage'.

compelling and remains highly relevant today, particularly given the continuous high reoffending rates.[1649]

Rituals as a passage to integration not only represent symbolic change but could also evoke emotional rewards in the minds of former inmates. Such emotional dimensions may be activated through the brain's reward system by ritualistic acts like community forgiveness, thereby releasing a sense of achievement**.** Neuroscientific research indicates that this process may reinforce positive behaviours and encourage desistance from reoffending by generating emotional meaning.[1650] Furthermore, when a community is involved in the process, witnessing the 'transformation' of the ex-convict into a member of society while enforcing positive emotions, the individual is provided with a stronger incentive to continue on the path of reintegration.

In line with this, Maruna continues to emphasise ritual as an instrument of transition due to the interplay between society and the individual. This remains significant, as evidence from 2024 highlights that family bonds constitute a central aspect of successful reintegration.[1651] In many cases, former prisoners credit family support as crucial during their transition to a 'normal' life.[1652] Rituals strengthen bonds between ex-prisoners and their communities by fostering connection through shared emotional experiences. Positive feelings associated with a meaningful ritual are therefore associated with the other party, especially salient as many former convicts have reported that alienation from family and community has caused further difficulties in rebuilding trust.[1653]

III. Challenges and Limitations in Maruna's Approach

However, the theory of rites raises some problems that Maruna disregards too quickly. This is particularly evident in his discussion of society's role in reintegration, which may lead readers to perceive his ideas as overly generalised. He emphasises the importance of public perception in a prisoner's reentry into society. While Maruna rightly recognises the hostile attitude of the media and wider society's negative

[1649] In the UK, those released from prison in 2022 had a 25.5% recidivism rate, an increase from the previous year; Ministry of Justice, 'Proven Reoffending Statistics: January to March 2022', GOV.UK (Ministry of Justice, 2024).

[1650] Suzanne Hidi, 'Revisiting the Role of Rewards in Motivation and Learning: Implications of Neuroscientific Research', *Educational Psychology Review* 28 (April 22, 2015): 61–93.

[1651] Ahmet Kılıç and Mustafa Kaan Tuysuz, 'Exploring the Challenges of Reintegrating Ex-Offenders into Society', *Interdisciplinary Studies in Society, Law, and Politics* 3, no. 3 (2024): 4–11.

[1652] Ibid.

[1653] Maruna, 'Reentry as a Rite of Passage'; Kılıç and Tuysuz, 'Exploring the Challenges of Reintegrating Ex-Offenders'.

perception of ex-prisoners, he oversimplifies the moral conduct of the public. Symbolic acts, even when repeated and thus normalised, are often insufficient to address grievances, particularly in cases of violent crimes like murder or rape. Maruna argues that emotional labour, such as the acts of remorse and forgiveness involving both parties, is a key prerequisite for the effectiveness of rites of passage.[1654] However, remorse, regardless of how sincere, is not always accepted by the victims of the offence. If the victim is unwilling to participate in the ritual, the community may take on the role in the reconciliation process. Nonetheless, certain crimes are deemed 'unforgivable', adding negative emotions to the ritual and illustrating a paradox of the text. Although the author acknowledges the hostile perception of former prisoners, he remains optimistic that the repetition of rituals, even if initially met with resistance, has the potential to gradually reshape emotions and reduce stigmatisation. However, Maruna also warns of the danger of 'empty, forced' rituals that can occur if the process is not embraced by all involved, ultimately perpetuating a counterproductive cycle.[1655]
Additionally, challenges emerge upon closer examination of Maruna's concept of 'community'. The text does not specify which community Maruna is referring to and leaves this as a possibly intended open end, as by 2011, when the article was published, globalised and multicultural societies were already well established. In the context of today's globalised world, it is no longer realistic to refer to a singular, unified society as envisioned in Durkheim's theories. Instead, moral principles can vary widely within a single country or city, where communities often become fragmented.[1656] While such diversity opens possibilities for more reintegration rituals, it also presents significant challenges, such as determining who is responsible for representing the other party in the transition. It remains unclear which specific communities Maruna refers to, and it is arguable whether a unified community exists in contemporary society at all. This ambiguity raises the question whether the concept of community should be reexamined on a smaller scale, focusing on entities such as religious organisations or other groups operating within distinct social circles.
Furthermore, one could argue that Maruna's ideas are slightly idealistic. He emphasises the stigmatisation of prisoners who continue to wear 'invisible stripes' even

[1654] Ibid.
[1655] Maruna, 'Reentry as a Rite of Passage', 22.
[1656] Kate Connolly, 'Atheist Berlin to Decide on Religion's Place in Its Schools', the Guardian (The Guardian, April 26, 2009).

after their release.[1657] Research shows that openly accessible criminal records render it impossible for former inmates to shed their identity as criminals, which subsequently prevents them from finding employment and housing.[1658] The 'electronic scarlet letter', not only marks individuals symbolically but also legally and socially, often indefinitely.[1659] Despite growing calls for reforms such as record sealing, background checks remain entrenched in employer and landlord screening practices.[1660]

Maruna accurately identifies the difficulties faced by individuals upon release and proposes eliminating elements like criminal records, allowing former prisoners to begin their new lives without being permanently marked or separated from society. However, certain technicalities, potentially involving the harbouring of negative emotions and obstructing the concept of rites of entry, may be considered necessary in the context of certain offences. For instance, community notification laws such as Clare's Law, sex offender registries**,** and employment prohibitions in child-oriented settings for formerly convicted child sexual offenders are not only legally mandated but are also widely endorsed by the public as safety measures.[1661] This division between ex-prisoners and the community, while necessary, highlights that reintegration rituals should not be generalised and might be more suited to those convicted of non-violent offences. Furthermore, communities may resist such rituals, particularly when justice is perceived to be inadequate, as in cases of early release due to overcrowding.[1662] This reality challenges Maruna's suggestion that ritualised reintegration can or should apply universally**,** particularly for individuals convicted of violent offences.

Another important consideration is the mental health of former inmates. The text stresses the importance of prisoners actively demonstrating redemption to gain acceptance.[1663] However, many prisoners face significant challenges, such as

[1657] Maruna, 'Reentry as a Rite of Passage', 12.

[1658] Ibid.

[1659] Daniel S. Murphy et al., 'The Electronic 'Scarlet Letter': Criminal Backgrounding and a Perpetual Spoiled Identity', Journal of Offender Rehabilitation 50, no. 3 (April 21, 2011): 101–18.

[1660] Ispa-Landa, Simone, and Charles E. Loeffler. 'Indefinite Punishment and the Criminal Record: Stigma Reports among Expungement Seekers in Illinois', Criminology 54, no. 3 (June 8, 2016): 387–412.

[1661] Home Office. 'Domestic Violence Disclosure Scheme Factsheet', GOV.UK, January 3, 2024.; Levenson, Jill S., Yolanda N. Brannon, Timothy Fortney, and Juanita Baker. 'Public Perceptions about Sex Offenders and Community Protection Policies', Analyses of Social Issues and Public Policy 7, no. 1 (2007): 137–61.

[1662] Anne-Marie McAlinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration*, ed. Ralph Cunnington and Djakhongir Saidov (Bloomsbury Publishing Plc, 2007).

[1663] Maruna, 'Reentry as a Rite of Passage'.

untreated mental health issues and substance abuse, which inherently complicate the process of 'proving' their worth.[1664] While the text acknowledges mental health struggles, it should focus more on the profound burden these issues place on prisoners. Imprisonment exacerbates the trauma and mental health problems of the individuals concerned.[1665] Such a situation underscores the necessity for improved support and enhanced collaboration between the justice system and mental health services. Since the time the article was written, suicide rates among former convicts under post-custody supervision has increased six-fold in 2018-19 in the United Kingdom.[1666] Further, without such efforts, ex-prisoners remain at high risk of reoffending.[1667] Rituals can play a role in overcoming some mental health barriers, but they are not a standalone solution. This aligns with the argument that degradation rituals in incarceration worsen mental health barriers. Addressing the harm caused by prison and improving support is key to successful reintegration, and active support and reintegration efforts must begin within the prison system itself to be truly effective.

IV. Conclusion

In conclusion, Maruna's work offers more opportunities to advance current reintegration processes. Given the high recidivism and suicide rates among ex-prisoners, it is evident that current reintegration strategies are not efficient enough.[1668] The addition of a ritual component, which has been shown to have positive psychological significance on people's minds, could facilitate the transition process of returning to society.[1669] However, it would have been beneficial to further investigate the publics' negative perception of offenders and strategies to address them. Another important consideration is the mental health of former inmates, as untreated mental health issues and substance abuse significantly complicate their reintegration, highlighting the need for improved support systems and collaboration between the

[1664] Kristal May S. Vivares, 'The Reintegration of Ex-Convicts in Society: A Case Study', *International Journal of Social Science and Human Research* 6 (October 23, 2023): 6173–80; Paul E. Bebbington et al., 'The Mental Health of Ex-Prisoners: Analysis of the 2014 English National Survey of Psychiatric Morbidity', *Social Psychiatry and Psychiatric Epidemiology* 56, no. 11 (March 22, 2021).
[1665] Vivares, 'The Reintegration of Ex-Convicts in Society'.
[1666] Grierson, Jamie, 'Freed prisoners killing themselves at a rate of one every two days', *The Guardian,* November 18, 2019.
[1667] Bebbington et al., 'The Mental Health of Ex-Prisoners'.
[1668] McCarthy, 'High Risk of Suicide Seen in Formerly Incarcerated People'; Ministry of Justice, 'Proven Reoffending Statistics: January to March 2022'.
[1669] Hidi, 'Revisiting the Role of Rewards in Motivation and Learning'.

justice system and mental health services.

Bibliography

Ahmet Kılıç, and Mustafa Kaan Tuysuz. 'Exploring the Challenges of Reintegrating Ex-Offenders into Society', *Interdisciplinary Studies in Society, Law, and Politics* 3, no. 3 (2024): 4–11. https://doi.org/10.61838/kman.isslp.3.3.2.

Bebbington, Paul E., Sally McManus, Jeremy W. Coid, Richard Garside, and Terry Brugha. 'The Mental Health of Ex-Prisoners: Analysis of the 2014 English National Survey of Psychiatric Morbidity', *Social Psychiatry and Psychiatric Epidemiology* 56, no. 11 (March 22, 2021). https://doi.org/10.1007/s00127-021-02066-0.

Connolly, Kate. 'Atheist Berlin to Decide on Religion's Place in Its Schools', the Guardian. The Guardian, April 26, 2009. https://www.theguardian.com/world/2009/apr/26/berlin-germany-religious-education-ethics.

Garfinkel, Harold. 'Conditions of Successful Degradation Ceremonies'. *American Journal of Sociology* 61, no. 5 (1956): 420–24. https://doi.org/10.1086/221800.

Grierson, Jamie. 'Freed Prisoners Killing Themselves at a Rate of One Every Two Days', *The Guardian*, November 18, 2019. https://www.theguardian.com/society/2019/nov/18/freed-prisoners-killing-themselves-at-a-rate-of-one-every-two-days.

Hidi, Suzanne. 'Revisiting the Role of Rewards in Motivation and Learning: Implications of Neuroscientific Research', *Educational Psychology Review* 28 (April 22, 2015): 61–93. https://doi.org/10.1007/s10648-015-9307-5.

Home Office. 'Domestic Violence Disclosure Scheme Factsheet', GOV.UK, January 3, 2024. https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet.

Ispa-Landa, Simone, and Charles E. Loeffler. 'Indefinite Punishment and the Criminal Record: Stigma Reports among Expungement-Seekers in Illinois', *Criminology* 54, no. 3 (June 8, 2016): 387–412.

https://doi.org/10.1111/1745-9125.12108.

Levenson, Jill S., Yolanda N. Brannon, Timothy Fortney, and Juanita Baker. 'Public Perceptions about Sex Offenders and Community Protection Policies', *Analyses of Social Issues and Public Policy* 7, no. 1 (2007): 137–61. https://doi.org/10.1111/j.1530-2415.2007.00119.x.

Maruna, Shadd. 'Reentry as a Rite of Passage', *Punishment & Society* 13, no. 1 (2011): 3–28. https://doi.org/10.1177/1462474510385641.

McAlinden, Anne-Marie. *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration*. Edited by Ralph Cunnington and Djakhongir Saidov. Bloomsbury Publishing Plc, 2007.

Ministry of Justice. 'Proven Reoffending Statistics: January to March 2022', GOV.UK. Ministry of Justice, 2024. https://www.gov.uk/government/statistics/proven-reoffending-statistics-january-to-march-2022/proven-reoffending-statistics-january-to-march-2022.

Ministry of Justice. 'Proven Reoffending Statistics - April 2011 - March 2012', GOV.UK, 2014. https://www.gov.uk/government/statistics/proven-reoffending-statistics-april-2011-march-2012.

Murphy, Daniel S., Brian Fuleihan, Stephen C. Richards, and Richard S. Jones. 'The Electronic 'Scarlet Letter': Criminal Backgrounding and a Perpetual Spoiled Identity', *Journal of Offender Rehabilitation* 50, no. 3 (April 21, 2011): 101–18. https://doi.org/10.1080/10509674.2011.560548.

University of Liverpool. 'Professor Shadd Maruna | Our People | University of Liverpool', Liverpool.ac.uk, n.d. https://www.liverpool.ac.uk/people/shadd-maruna.

Vivares, Kristal May S. 'The Reintegration of Ex-Convicts in Society: A Case Study',

International Journal of Social Science and Human Research 6 (October 23, 2023): 6173–80. https://doi.org/10.47191/ijsshr/v6-i10-52.

Commentary

Transnational Armed Conflicts: IAC or NIAC – The Lesser of Two Evils?

Shriya Maini and Raima Singh[1670]

Received: 03 March 2025 / Accepted: 10 June 2025

Abstract

Transnational Armed Conflicts may be described as 'non-traditional' conflicts, which involve hostilities between a non-State armed group and the armed forces of a State. The classification of such conflicts is a matter of deliberation and controversy, given its implications for the application of international humanitarian law. These conflicts do not fit under the conventionally recognised conflicts, namely conflicts between two states, a state, and a non-state party or two non-state parties within a territory. For the purposes of international humanitarian law, this article argues that transnational armed conflicts may be categorized as a classic Non – International Armed Conflict. This argument hinges on four grounds: (1) Interpretation of the Geneva Conventions; (2) Basis for separate legal regimes; (3) Consequential Reasons; and (4) Examination of counter arguments. In essence, this article aims to address and clarify the legal ambiguity surrounding the categorisation of transnational armed conflicts, along with emphasising upon broader concerns of sovereignty and accountability. Further, it presents a practical model to supplement the author's conceptual analysis, drawing upon the insights of renowned legal scholars.

[1670] Shriya Maini is an Advocate on Record, practising at Supreme Court of India, Delhi High Court and various district courts of Delhi. She is a graduate from Gujarat National Law University, India (2008 – 2013) and University of Oxford (BCL), (2014 – 2015).

Introduction

Transnational Armed Conflicts may be described as 'non-traditional' conflicts, which involve hostilities between a non-State armed group and the armed forces of a State.[1671] The classification of such conflicts is a matter of deliberation and controversy, given its implications for the application of international humanitarian law **["IHL"].** These conflicts do not fit under the conventionally recognised conflicts in IHL, namely conflicts between two states, a state, and a non-state party or two non-state parties within a territory.[1672] This article aims to address and clarify the legal ambiguity surrounding the categorisation of transnational armed conflicts, along with emphasising upon broader concerns of sovereignty and accountability. Further, it presents a practical model to supplement the author's conceptual analysis, drawing upon the insights of renowned legal scholars.

The characterisation of transnational armed conflicts as non-international armed conflicts ("NIACs") or international armed conflicts ("IACs") remains contested in international legal scholarship.[1673] For the purposes of international humanitarian law, I argue that transnational armed conflicts may be categorized as a classic NIAC. This argument hinges on four grounds: (**1**) Interpretation of the Geneva Conventions; (**2**) Basis for separate legal regimes; (**3**) Consequential Reasons; and (**4**) Examination of counter arguments.

The factual model that I examine is as follows: A belligerent state [B] uses force against a non-state actor [N] on the territory of a territorial state [T]. Armed forces of T are not involved in the conflict, and actions of N are not attributable to T.

[1671] Bartels, R. (2013). Transnational Armed Conflict: Does it Exist? In L. De Jong, S. Kolanowski, L. Bouza Garcia, A. Deckmyn, E. Hébert, & M.-S. Rinuy (Eds.), *Scope of Application of International Humanitarian Law = Le champ d'application du Droit International Humanitaire* (Vol. 43, pp. 114–128). College of Europe. https://pure.uva.nl/ws/files/61983693/Transnational_Armed_Conflict.pdf.

[1672] Chelimo, G. C. (2011, April 1). *Defining armed conflict in international humanitarian law*. Inquiries Journal. http://www.inquiriesjournal.com/articles/1697/defining-armed-conflict-in-international-humanitarian-law.

[1673] The author is grateful to Professor Dapo Akande and Judge Theodor Meron for their teaching on international armed conflicts and international criminal law during the author's postgraduate studies at the University of Oxford (2014-15). She is also grateful to her father, Advocate Rajive Maini whose critical reading of earlier drafts and constant guidance significantly shaped this article and her partner Advocate Vishesh Wadhwa who kept up with endless support during many late nights this article demanded.

CHARACTERISATION OF THE CONFLICT

Interpretation of the Geneva Conventions

An armed conflict between two or more… High Contracting Parties is an international armed conflict.[1674] At first blush, it may seem indisputable that the conflict between B and N, a non-inter-state conflict, falls outside this definition. However, it has been argued that the use of force by B on T's territory without its consent brings this conflict within Common Article 2 **["CA2"]**.[1675] Prof. Akande argues that the use of force by B *against* T without its consent violates Art. 2(4) and suffices to establish an IAC between B and T.[1676]

The author presents several arguments in support of a contrasting viewpoint.

First, Art. 2(4) and CA2 are textually and rationally different. While Art. 2(4) prohibits the "use of force… *against* any state", CA2 requires an armed conflict *between* states. The suggestion that Art. 2(4) does not prohibit the use of force *in* the territory of a state, though not directed against it, was rejected by the ICJ.[1677] However, that decision was based on the comprehensive nature of the prohibition in Art. 2(4) and the dangers that the "manifestation of a policy of force" may give rise to. These concerns are irrelevant for CA2. Admittedly, CA2 does not require the exchange of force between states.[1678] However, this does not mean that any use of force on the territory, though directed at a non-state actor, leads to an "armed conflict" *between* the states. Further, Prof. Akande alludes to the danger that this issue may turn on the state of mind or intention of the belligerent state. This is unwarranted in our view. A conflict "between" states - a treaty requirement, must be interpreted objectively, independent of the motive of the belligerent state.

Secondly, a contrary view would render Paragraph 2 of CA2 redundant, as occupation of a state's territory indisputably constitutes a use of force against that state (Armed

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[1674] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, August 12, 1949, Art. 2.

[1675] Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts," *SSRN Electronic Journal*, January 1, 2012, https://surl.li/jxbsjw.

[1676] Charter of the United Nations, June 26, 1945, Art. 2, para. 4.

[1677] United Kingdom of Great Britain and Northern Ireland v. Albania, (1949) ICJ Rep 244. https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf

[1678] Hans Peter Gasser, Christopher Greenwood. 2017. *Law on the Use of Force and Armed Conflict.* Edward Elgar Publishing.

Activities).

Thirdly, in *Nicaragua,* the International Court of Justice **["ICJ"]** held that the United States of America's **[" U.S."]** "arming and training of contras" constituted a use of force against Nicaragua.[1679] In this case, Nicaragua had filed an application alleging unlawful use of force and breach of sovereignty. The ICJ found these acts to be unlawful use of force, and a breach of the territorial integrity of the country. Even today, a significant portion of the U.S. aid has been directed towards Ukraine, particularly since the 2022 invasion. The U.S. also provides substantial military aid to Israel, which has been a major point of discussion in relation to the ongoing conflict in Gaza and to Taiwan too, particularly in response to perceived threats from China. There are also claims that the U.S. also funds military activities and initiatives in the Indo-Pacific region since a large portion of the U.S. federal budget is allocated to defense spending, covering military operations, weapons development, and personnel costs. Prof. Akande's view would lead to the result that even in the complete absence of fighting by the forces of the USA, there was an IAC between Nicaragua and the contras. That render undermines the requirement of 'overall control' – a threshold that mere "arming and training" might not satisfy.[1680]

Finally, the statute of the International Criminal Tribunal for Rwanda **["ICTR"]** extends its jurisdiction to enforce the law of non-international armed conflicts to neighboring countries.[1681] This also lends support to characterising transnational armed conflicts as NIACs.[1682]

Rationale

Despite repeated attempts by the ICRC, States have shown a marked reluctance to renounce the distinction between rules applicable to IACs and NIACs. One reason for this is the fear that greater protection to non-state actors in NIACs may threaten state

[1679] The Republic of Nicaragua v. The United States of America, (1984) ICJ Rep 392. https://www.icj-cij.org/sites/default/files/case-related/70/070-19841126-JUD-01-00-EN.pdf

[1680] The Prosecutor v. Duško Tadić, (1999) IT-94-1-A. https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf

[1681] Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, Art. 7.

[1682] Marco Sassòli, "Transnational Armed Groups and International Humanitarian Law," by Harvard University, *Harvard University Occasional Paper Series*, season-04 2006, https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf.

sovereignty.[1683] An equally important reason is the unwillingness of states to attach any legitimacy to the use of force by non-state actors.[1684] Thus, states have repeatedly suggested that members of organized armed groups engaged in NIACs do not deserve the same protection as solders of regular armed forces.[1685] Evidently, the territorial spread of a conflict is wholly immaterial to these concerns. Thus, affording greater protection to non-state groups on the sole ground that they fight from the territory of a different state runs contrary the intention of states. As has often been argued, "it cannot be the case that by stepping across the border a rebel would suddenly be entitled to claim…. immunity for attacks against state forces".[1686]

Conversely, it may be argued that it is incorrect to characterize a transnational armed conflict as an NIAC since that confers lesser protection to civilians in the territorial state. However, the development of customary international law has substantially bridged this gap. Thus, principles of proportionality, distinction, and the obligation to take feasible precautions are applicable to NIACs as well as IACs.[1687] Equally, customary law protection of civilian objectives is available regardless of the characterisation of the conflict.[1688]

Consequential Reasons

Characterising a transnational armed conflict as an IAC involves the imposition of a legal regime designed for inter-state conflicts with little reference to the fact that the parties actually engaged in hostilities are a state and a non-state entity. In our view, this leads to several unfounded consequences.

[1683] Christopher Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia," in Max *Planck Yearbook of United Nations Law*, 1997, https://www.mpil.de/files/pdf2/mpunyb_greenwood_2.pdf.

[1684] Roy Schöndorf, "Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations," *International Law Studies*, 2021, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2957&context=ils.

[1685] Noam Lubell. 2010. "Extraterritorial Use of Force Against Non-State Actors". In *Oxford Monographs in International Law*. OUP Oxford.

[1686] Nils Melzer, "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities," *International Law and Politics*, https://nyujilp.org/wp-content/uploads/2012/04/42.3-Melzer.pdf.

[1687] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), Rule 17.

[1688] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), Rule 7.

First, members of organised armed groups fail to be treated as civilians. AP I defines civilians as persons not falling under Art. 4A, GC III or Art. 43, AP I.[1689] Since most organised armed groups are unlikely to satisfy the conditions under Art. 4A of GC III[1690] ("having a fixed distinctive sign", "carrying arms openly", etc.) and do not fight under a 'command responsible to' either state-party to the conflict, they are civilians for the purposes of AP I.[1691] They may be targeted only *if* and *for so long as* they take a direct part in hostilities. Notably, as regards rules of targeting, this confers greater protection on members of the non-state group than what members of the territorial state's armed forces would have been entitled to.[1692]

Prof. Milanovic attempts to avoid this fallacy by classifying non-state actors as militia fighting 'on behalf of' the territorial state. However, this is wholly fictional. The territorial state may have expressly disassociated itself from the non-state group or may simply be incapable of preventing the use of its territory by the group. Further, even if one were to accept Prof. Milanovic's classification, non-state actors continue to be treated as "civilians" so long as they do not fulfill the requirements under Art. 4A, GC III.[1693] This leads to the further absurdity that non-state actors can confer on themselves greater protections by choosing to not comply with GCIII requirements.

Secondly, classifying a transnational armed conflict as an IAC also unreasonably expands the 'zone of combat'. For IACs, the zone of combat extends to the whole territory of the warring States while for NIACs it only extends to the territory under the control of a party.[1694] The consequence of this expansion lies in the fact that conventionally in NIACs, the application of IHL is territorially limited to areas of actual fighting between the parties. Human rights law governs all other areas.[1695] The effect

[1689] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 50.

[1690] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Art. 4A.

[1691] Shiri Krebs, "Designing International Fact-Finding: Facts, Alternative Facts, and National Identities," *Fordham International Law Journal*, 2018, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2692&context=ilj.

[1692] Marco Sassòli, "Legitimate Targets of Attacks under International Humanitarian Law," by Program on Humanitarian Policy and Conflict Research at Harvard University, 2003, https://hhi.harvard.edu/sites/hwpi.harvard.edu/files/humanitarianinitiative/files/session1_legitimate_targets_ihl.pdf?m=1615827575.

[1693] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Art. 4A.

[1694] The Prosecutor v. Duško Tadić, (1999) IT-94-1-A. https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf

[1695] Mary Ellen O'Connell, "Declaration of Prof. Mary Ellen O'Connel." *United States District Court for the District of Columbia*,

of the expansion of the zone of combat therefore is to replace human rights norms that would otherwise have applied with the less protective humanitarian law rules.

2010, https://ccrjustice.org/files/Declaration%20of%20Mary%20Ellen%20O'Connell%2010-08-2010.pdf.

Examination of Counterarguments

(a) Consent of the Territorial State

The consequences of the territorial State's consent for the purposes of interpretation of CA2 have been considered above. Here, we propose to outline a few other objections to that line of argumentation.

First, the 'consent-reasoning' runs in problems when the belligerent state acts in breach of a mandate conferred by the territorial state. That scenario leaves two options: (**i**) to bifurcate that part of the conflict that exceeds the mandate and (**ii**) to treat the whole conflict as internationalized. Upon further analysis, it can be deduced that neither option is satisfactory. While bifurcating the conflict may be possible in cases of geographical restrictions, it may prove unworkable where the mandate is more nuanced; for instance, where it imposes a maximum threshold for the use of force, or restrictions on the nature of weapons employed. It may seem that treating the whole conflict as internationalized is a convenient solution. However, even for geographically restricted mandates, it does not stand to reason why rights of non-state actors within the territory covered by the mandate should differ depending on the belligerent state's breach.

Secondly, neither view commands unequivocal judicial support. Prof. Akande relies on the *Armed Activities* case.[1696] However, while in the dispositive the Court found a violation of GCIV outside the area occupied by Uganda, the reasoning of the majority does not reflect on this issue at all. The majority confines itself to Uganda's violation of GCIV "with regard to obligations of an occupying Power".[1697] Moreover, the court in that case found that "Uganda was not… engaging in military operations against rebels… it was engaged in military assaults that resulted in the taking of the town of Beni... its airfield… taking of the town of Bunia… its airport… the town of Watsa and its airport". Thus, an objective determination under CA2 would have characterised the conflict as an IAC in any case. Prof. Akande also relies on Judge Shahabuddeen's separate opinion in *Tadic*. However, the issue that he was considering was whether or not force was being used by a state and not whether the use of force *against* a state suffices to constitute an IAC.

[1696] Democratic Republic of the Congo v. Uganda, (2005) ICJ Rep 168. https://www.icj-cij.org/case/116

[1697] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

(b) Interpretation of Common Article 3

It has been argued that CA3 **["Common Article 3"]** applies only to conflicts confined to the territory of one contracting party.[1698] In my opinion, the preferable view is that CA3 applies as long as hostilities takes place in the territory of *one of the* High Contracting Parties.[1699] The latter view is supported by the drafting history of CA3.[1700] Admittedly, an earlier draft of CA3 used the phrase "on the territory of one or more of the High Contracting Parties." However, in response to a query by the Mexican delegate, the ICRC representative clarified that the removal of this phrase was not intended to affect the territorial reach of CA3.[1701]

(c) Bifurcation Problem

It has been argued that characterising the conflict as an NIAC runs into problems when the territorial state fights on the side of the non-state group. Proponents of the NIAC-characterisation are then forced to bifurcate the conflict into two components – IAC between B and T and NIAC between B and N. While this is undoubtedly a complicated exercise, there are in my view, good reasons for bifurcation. First, it derives support from the reasoning in *Nicaragua*. There, the ICJ considered the conflict between Nicaragua and the contras as an NIAC while applying rules of IAC to the conflict between the USA and Nicaragua. Secondly, the difficulties of bifurcation often correspond to the practical complexities on the ground. Avoiding bifurcation in the interests of simplicity may therefore work injustice. For instance, it is not clear why members of non-state groups should be entitled to greater rights merely because they happen to be fighting on the same territory as a conflict between two states.[1702] In an IAC, IHL provides specific protections for combatants, including POW **["Prisoner of**

[1698] Marko Milanovic and European Society of International Law, "The End of Application of International Humanitarian Law," *International Review of the Red Cross*, vol. 96–96, 2014, https://doi.org/10.1017/S181638311500003X.

[1699] Noam Lubell et al., *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights,2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf.

[1700] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, August 12, 1949, Art. 2.

[1701] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008), http://www.ejil.org/pdfs/20/2/1808.pdf.

[1702] Christopher Greenwood, "International Law and the Conduct of Military Operations: Stocktaking at the Start of a New Millennium," *International Law Studies*, 2016, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1430&context=ils.

war"] status upon capture. These protections are not automatically extended to members of non-state armed groups, even if their conflict overlaps with an international one, though all victims irrespective of their nature must be entitled to a humane treatment and protection from unnecessary suffering. This creates a situation where members of non-state groups, while still subject to the laws of war, may not benefit from the same protections afforded to state combatants. Additional rights must not be provided as mere incidents of geographical location of a non-state group, rather the conduct of such actors during the said conflict. Further, as per the Additional Protocol II of the Geneva Convention, 1949, such groups must meet a specified criteria to be classified as a non-state group.[1703] Entitlement to greater rights must arise out of the universally accepted principle of foundational equality and be based upon the engagement of the group in the conflict.[1704]

II. Consequences of Characterisation

As Prof. Akande points out, it is one thing to say that the law of IAC applies; it is quite another to ascertain how that legal regime applies to members of organized armed groups. In many cases, non-compliance with the requirements under GC III **["Geneva Convention III"]** disentitles non-state fighters from protections that are available to members of regular armed forces. In order to substantiate the arguments raised, it is essential to examine the below mentioned four potential areas of concern :-

1. **Prisoner of War Status**: The (un)availability of POW status to non-state fighters vindicates Prof. Akande's point. It does not follow from the fact that the law of IAC applies that all non-state actors are entitled to POW status. They additionally have to comply with the requirements in Art. 4A, GCIII.[1705] Hence, even if the IAC characterisation is adopted, whether the availability of POW status to members of organised armed groups turns on whether they comply with the requirements in Art. 4A.

[1703] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977.
[1704] Sassòli, M., & Shany, Y. (2011). DEBATE: Should the obligations of states and armed groups under international humanitarian law really be equal? *International Review of the Red Cross*, *93*(882), 425–442. https://doi.org/10.1017/s1816383111000403
[1705] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Art. 4A.

2. **Combatant Immunity**: AP I confer "the right to participate directly in hostilities" only on members of armed forces of a party to the conflict.[1706] Therefore, regardless of the characterisation of a conflict as an IAC or NIAC, this protection is unlikely to be extended to members of non-state groups.

3. **Rules of Detention**: This issue hinges on the scope of application of AP II **[Additional Protocol II to the Geneva Conventions, 1977"].** Notably, AP II applies only to armed conflicts that take place in the territory of a High Contracting Party between its armed forces and organised armed groups. AP II is thus inapplicable to transnational conflicts. Detainees in an NIAC are therefore only entitled to the generic protection made available by CA3. Needless to say, the scope of this protection is severely restricted as compared to the provisions of AP I. Apart from protecting detainees from torture and other "cruel treatment", it prohibits the passing of sentences or executions without the sanction of a "regularly constituted court affording all the judicial guarantees."

4. **Targeting Rules:** Regardless of the areas of convergence noted above, crucial differences remain in the applicable rules of targeting. As has been demonstrated before, characterising a transnational conflict as an IAC leads to conferring a 'civilian' status on members of organised armed groups. They can be targeted only for so long as they take a 'direct part in hostilities. However, the NIAC-characterisation means that those who assume a 'continuous combat function' may be targeted for the whole duration of their membership in the group.[1707]

5. **International Criminal Law:** Differences of classification also remain in terms of prosecution for war crimes.[1708] For instance, the prohibitions on means and methods of warfare in article 8(2) and (b) applicable to IACs are significantly more exhaustive than the limited nature of offences prescribed during an NIAC,

[1706] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 43, para. 2.
[1707] Nils Melzer and International Committee of the Red Cross, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," 2009, https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf.
[1708] C. Byron, "Armed Conflicts: International or Non-International?" *Journal of Conflict and Security Law* 6, https://doi.org/10.1093/jcsl/6.1.63.

limited primarily to conduct such as cruelty, mutilation, taking of hostages, etc..[1709]

[1709] Rome Statute of the International Criminal Court, July 17, 1998, Art. 8, para. 2(c).

Conclusion

The classification of transnational armed conflicts remains of great significance to international academia and also affects the legal obligations of the states involved. A close examination of the aforementioned treatises and judgements, such conflicts can be best understood as NIACs to preserve legal consistency and adherence to international frameworks. Although classifying the said conflicts as IACs significantly undermines civilian and combatant safety, it is pertinent to note that neither classification can be negated or accepted in totality. Complex nature of transnational armed conflict calls for a nuanced approach. Classification of the said conflicts, as of now, aligns with IHL standards. Thus, legal frameworks governing the ambit of armed conflicts must remain in consonance with the contemporary political realities.

Bibliography

Akande, Dapo. "Classification of Armed Conflicts: Relevant Legal Concepts," *SSRN Electronic Journal*, January 1, 2012, https://surl.li/jxbsjw.

Bartels, R. Transnational Armed Conflict: Does it Exist? In L. De Jong, S. Kolanowski, L. Bouza Garcia, A. Deckmyn, E. Hébert, & M.-S. Rinuy (Eds.), *Scope of Application of International Humanitarian Law = Le champ d'application du Droit International Humanitaire* (Vol. 43, pp. 114–128). College of Europe. https://pure.uva.nl/ws/files/61983693/Transnational_Armed_Conflict.pdf.

Chelimo, G. C. *Defining armed conflict in international humanitarian law*. Inquiries Journal. http://www.inquiriesjournal.com/articles/1697/defining-armed-conflict-in-international-humanitarian-law.

Byron, C. "Armed Conflicts: International or Non-International?" *Journal of Conflict and Security Law* 6, https://doi.org/10.1093/jcsl/6.1.63.

Gasser, H.P. and Greenwood, C. 2017. *Law on the Use of Force and Armed Conflict*. Edward Elgar Publishing.

Greenwood, C. "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia," in *Max Planck Yearbook of United Nations Law*, 1997, https://www.mpil.de/files/pdf2/mpunyb_greenwood_2.pdf.

Greenwood, C. "International Law and the Conduct of Military Operations: Stocktaking at the Start of a New Millennium," *International Law Studies*, 2016, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1430&context=ils.

Krebs, S. "Designing International Fact-Finding: Facts, Alternative Facts, and National Identities," *Fordham International Law Journal*, 2018, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2692&context=ilj.

Lubell, N. 2010. "Extraterritorial Use of Force Against Non-State Actors". In *Oxford Monographs in International Law*. OUP Oxford.

Lubell, N. et al., *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (The Geneva Academy of International Humanitarian Law and Human Rights, 2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL.pdf.

Melzer, N. "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of

Direct Participation in Hostilities," *International Law and Politics*, https://nyujilp.org/wp-content/uploads/2012/04/42.3-Melzer.pdf.

Melzer, N. *Targeted Killing in International Law* (Oxford University Press, 2008), http://www.ejil.org/pdfs/20/2/1808.pdf.

Melzer, N. and International Committee of the Red Cross, "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," 2009, https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf.

Milanovic, M. and European Society of International Law, "The End of Application of International Humanitarian Law," *International Review of the Red Cross*, vol. 96–96, 2014, https://doi.org/10.1017/S181638311500003X.

O'Connell, M. "Declaration of Prof. Mary Ellen O'Connel." *United States District Court for the District of Columbia*, 2010, https://ccrjustice.org/files/Declaration%20of%20Mary%20Ellen%20O'Connell%2010-08-2010.pdf.

Sassòli, M. "Legitimate Targets of Attacks under International Humanitarian Law," by Program on Humanitarian Policy and Conflict Research at Harvard University, 2003, https://hhi.harvard.edu/sites/hwpi.harvard.edu/files/humanitarianinitiative/files/session1_legitimate_targets_ihl.pdf?m=1615827575.

Sassòli, M., & Shany, Y. (2011). DEBATE: Should the obligations of states and armed groups under international humanitarian law really be equal? *International Review of the Red Cross*, *93*(882), 425–442. https://doi.org/10.1017/s1816383111000403

Sassòli, Marco. "Transnational Armed Groups and International Humanitarian Law," by Harvard University, *Harvard University Occasional Paper Series*, season-04 2006, https://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf.

Schöndorf, R. "Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations," *International Law Studies*, 2021, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2957&context=ils.

Book Review

Zabyelina, Yuliya's '*Between Immunity and Impunity: External Accountability of Political Elites for Transnational Crime'*

Miles Ratcliffe & Caroline McKenna[1710]

Received: 07 March 2025 / Accepted: 10 June 2025

Abstract

In *Between Immunity and Impunity,* Dr. Yuliya Zabyelina, Associate Professor in the Department of Criminology and Criminal Justice at The University of Alabama, examines the challenges associated with holding accountable profit-driven transnational crimes that destabilise the global order. She provides a compelling account of the nature of these crimes and the impact that immunity has on victims' ability to seek justice. By relying on a wide array of literature, jurisprudence, and governmental and non-governmental reports, Dr. Zabyelina both makes the case for the need for accountability and introduces the reader to various external accountability mechanisms. This book lays the groundwork for future research, particularly in terms of policy considerations for immunity exceptions and the theorisation of how legal and political structures contribute to impunity for criminal elites.

This work critically analyses the bounds of diplomatic immunity as it relates to accountability for profit-driven transnational crimes perpetrated by public officials. Dr Zabyelina starts by providing a theoretical and practical overview of immunity for public officials, and then narrows in on transnational crimes that are financially motivated, relying on the theoretical concept of elite deviance to provide the backdrop for the following three chapters.[1711]

[1710] Miles Ratcliffe and Caroline McKenna both graduated from the Criminal Law and Criminal Justice LLM programme at the University of Edinburgh in 2024.

[1711] Yuliya Zabyelina, *Between Immunity and Impunity: External Accountability of Political Elites for Transnational Crime* (Cambridge University Press, 2023), 4.

Dr. Zabyelina then explores diplomatic immunity as it relates to three specific areas of transnational crime: trafficking of diplomatic household workers, corruption and money laundering, and drug trafficking. She spends the first part of each chapter introducing the nature and context of the crime, providing examples that demonstrate a clear need for accountability. She then takes the reader through domestic and international jurisprudence, comparing not only different results but different analyses courts have taken regarding immunity arguments, for example, exceptions to immunity for grave human rights abuses.[1712] The rest of each chapter is used to explore possible avenues for accountability, which include creative ideas inside and outside of court processes, as well as recommended actions for both sending and receiving states. Dr. Zabyelina takes an interdisciplinary approach to address these "economic crimes that occur at the nexus of power, privilege, and impunity".[1713]

The main thrust of this book is to explore the additional layer of difficulty that foreign official immunity provides to how national jurisdictions tackle crimes which ultimately destabilise the international order.[1714] In the opening chapter, Dr. Zabyelina artfully explains the lack of a principled framework for approaching immunity in the context of transnational or international crimes, noting that in the absence of real certainty, only those who seek to exploit the system benefit.[1715] As a result, she takes the position that exploring the inherent tension between state immunity and the need for accountability would be the appropriate intellectual leap to resolve such a pressing issue.[1716]

This issue of limitation and legitimacy has long been present in literature concerning transnational crime. Christensen, for example, posits that transnational frameworks seek to legitimate themselves by respecting the "monopoly on power" that nation-states hold.[1717] The key focus, therefore, is to rely on local legitimacy and expertise to punish crimes which are of international concern.[1718] Furthermore, Lord contends that

[1712] Zabyelina, *Between,* 102.
[1713] Zabyelina, *Between,* 248.
[1714] Zabyelina, *Between,* 15.
[1715] Zabyelina, *Between,* 83.
[1716] Zabyelina, *Between,* 85.
[1717] Mikkel Jarle Christensen and Neil Boister, "New Perspectives on the Structure of Transnational Criminal Justice," *Transnational Crime* 3 (2017), 6.
[1718] Christensen and Boister, *New Perspectives*, 8.

due to the fragmented implementation of these frameworks, there remains no agreed-upon basis upon which we can legitimately punish rule-breaking global elites.[1719] As a practical example of this, Dr. Zabyelina refers to how difficult it can be to get around immunity rules when kleptocrats have used their home state's legal powers to gain access to illicit wealth, giving them access to forms of state immunity.[1720] In other words, the issue appears to be the ability of states to enforce transnational justice when elites benefit from legal frameworks that prevent them from being held accountable. Dr. Zabyelina's achievement with this work lies in demonstrating the additional layer of immunity that contributes to this significant limitation.

Dr. Zabyelina discusses this issue and looks into how courts and policymakers have sought to address immunity in this context. Of particular interest was the focus in Chapter 2 on domestic workers who are victims of labour trafficking by those with foreign official immunity.[1721] As an issue, it perfectly demonstrates how immunity adds a layer of vulnerability to victims in addition to the social isolation they experience and the socioeconomic power of their employers.[1722] Meanwhile, deliberations over the "commercial exception" contained within the Vienna Convention on Diplomatic Relations have long reflected a balancing act between ensuring diplomats can fulfil their duties, while sanctioning certain types of criminal behaviour.[1723] In the United States, the approach of the courts has been to retain a strict construction out of deference to diplomatic difficulties potentially posed to the executive branch of government.[1724] For Bergmar, accepting this broader interpretation of immunity amounts to tacitly accepting the exploitation of foreign domestic workers.[1725] Meanwhile, the wider understanding of the commercial exception developing in the United Kingdom can be seen as a shift towards ensuring there might be some accountability for an issue like this going forward, which some have described as a

[1719] Nicholas Lord, "Establishing enforcement legitimacy in the pursuit of rule-breaking 'global elites': The case of transnational corporate bribery," *Theoretical Criminology* 20, no. 3 (2016), 390.
[1720] Zabyelina, *Between*, 176.
[1721] Zabyelina, *Between*, 91.
[1722] Zabyelina, *Between.*
[1723] Vienna Convention on Diplomatic Relations (signed 1961), Article 31(1)(c), *Basfar v Wong* [2022] UKSC 20, para 102.
[1724] Nina Maja Bergmar, "Demanding Accountability Where Accountability is Due: A Functional Necessity Approach to Diplomatic Immunity under the Vienna Convention," *Vanderbilt Journal of Transnational Law* 47 (2014), 519.
[1725] Bergmar, *Demanding*, 524.

"historic break" from a deference for immunity.[1726]

Dr. Zabyelina explores these points of interpretation, which demonstrate how this work synthesises the enforcement of transnational justice with tackling jurisdictional issues around immunity.[1727] Her contribution is to examine the issue of immunity and labour trafficking holistically, exploring the nuances of how courts and policymakers have sought to circumvent immunity and foster some form of accountability. These solutions vary from potentially holding both sending and receiving states liable for these abuses,[1728] to active preventative policy in the receiving state, such as registration and record keeping.[1729] Dr. Zabyelina recognises the limitations if the sending states do not waive immunity.[1730] However, she essentially calls out both sending and receiving states to treat these incidents as violations of criminal law and human rights protections, which can be addressed through domestic legislation and prosecution.[1731] Moreover, she offers alternative solutions, such as out-of-court civil settlements, as well as waiting until diplomatic terms are resolved and the residual immunity is lessened. Importantly, she also recommends preventative measures that would serve to diminish occurrences of such transnational crimes.[1732] This holistic approach puts all states on notice that diplomatic immunity does not inevitably have to lead to impunity.

The result is that the author, in each chapter, demonstrates how the issue of focus, whether labour trafficking in Chapter 2, money laundering in Chapter 3, or drug trafficking in Chapter 4, is complicated by the issue and nature of immunity. The contribution to the field is to provide a greater understanding of these issues and the benefits and limitations of any workable legal or policy solutions.

Dr. Zabyelina's analysis and arguments are developed mainly through the academic

[1726] Sophie Ryan, "Modern Slavery and the Commercial Activity Exception to Diplomatic Immunity from Civil Jurisdiction: The UK Supreme Court's Decision in Basfar v Wong," *Modern Law Review* 87, no. 1 (2024), 202, 204 & 216.
[1727] Zabyelina, *Between*, 117.
[1728] Zabyelina, *Between*, 126 & 130.
[1729] Zabyelina, *Between*, 137 & 138.
[1730] Zabyelina, *Between,* 140.
[1731] Zabyelina, *Between,* 137.
[1732] Zabyelina, *Between,* 132-134.

fields of international law and international criminal justice.[1733] In the first chapter, she relies upon a combination of secondary literature, jurisprudence, and reports to provide a background on diplomatic immunity, including its legal framework as well as its conceptual, doctrinal, and theoretical foundations.[1734] In chapters 2, 3, and 4, she largely relies on jurisprudence of domestic and international courts, governmental and non-governmental reports, and court filings to guide the reader through the types of situations that result in public officials committing transnational crimes, cases that have been litigated, and other avenues for accountability.

Dr. Zabyelina's exploration of these topics is characterised by a unique style of writing, ranging from a storytelling narrative to a textbook-style technicality. Chapter 1 is highly technical and legally dense, as Dr. Zabyelina guides the reader through the immunities of public officials under international law. This is contrasted with the first sections of the following three chapters, which provide an introduction to each set of crimes in an easy-to-read narrative. The remainder of those chapters falls somewhere in the middle in terms of technicality of writing. The benefit of this writing style is that it gives the reader variety, which is engaging. However, a drawback may be that someone with more expertise in this area wants more technical writing and less narrative, while someone with less knowledge in the area may take the opposite view.

The concluding chapter touches upon several areas that are all ripe for further research. This includes eliminating the profit motive of such crimes, the power imbalances of different countries in terms of political influence on public officials' immunity, and the possibility of a standalone Transnational Criminal Court.[1735] For example, when discussing the waiver of immunity, one cannot ignore the global political reality that some countries will have significantly more influence in persuading another country to waive immunity. The book offers various avenues for exceptions to immunity or as alternatives to court proceedings. However, further arguments regarding the likelihood of success of these potential accountability mechanisms need to be considered.

[1733] Zabyelina, *Between,* 19.
[1734] Zabyelina, *Between,* 24.
[1735] Zabyelina, *Between,* 252, 254, and 256.

This book lays the groundwork for several areas of future research, including further examination of the concept of elite deviance and its application to the doctrinal analysis presented by the author. Elite deviance, as a theoretical framework, details how the legal and political influence of elites leads to this form of criminality being pervasive throughout structures of power.[1736] Dr. Zabyelina's references to the concept in the introductory chapter were incredibly apt, and any future research on how policy can overcome this issue must be rooted in a framework which understands how legal and institutional structures facilitate this sort of behaviour.[1737] These observations are crucial for laying the groundwork for future research to understand how these power structures operate in the context of immunity and for developing effective policy solutions going forward.

Furthermore, the limitations of this scholarship, as acknowledged by the author, mainly involve the over-representation of some jurisdictions with primary sources.[1738] This was not by choice of the author, but rather, the publicly available court files, as well as the willingness and ability of states to investigate and prosecute such offences.[1739] This limitation is particularly recognised in transnational enforcement scholarship, with some contention that this is also the impact of the traditional dominance of major economic powers such as the United States and a resulting "clublike" network of governance.[1740] While future scholarship, which mainly relies on primary sources, may be bound by this limitation, those engaging in more theoretical scholarship may wish to consider in depth how this applies beyond the Global North.[1741]

Finally, while the argument against immunity for these profit-driven transnational crimes seems obvious, future research could build on this book by further critically analysing the theoretical and moral bases for providing exceptions to immunity when it comes to these types of crimes, as well as the policy argument when it comes to the external avenues of accountability. Dr. Zabyelina herself takes a more policy-focused

[1736] David R. Simon, *Elite Deviance* (Routledge, 2018), 28.
[1737] Edwin Sutherland, "White Collar Criminality," Yearbook 138 (1940): 150.
[1738] Sutherland, *White*, 20.
[1739] Sutherland, *White,* 20.
[1740] Bruce Zagaris, International White Collar Crime: Cases and Materials (Cambridge University Press, 2015): 14.
[1741] Danielle Watson et al, "Crime and Governance in the Global South" *Annual Review of Criminology* (2025): 301.

approach in a separate article, where she considers the ongoing debates about immunity as it relates to international and transnational crimes.[1742]

This book would be an appropriate read for those interested in the nuances of both international diplomatic law and transnational law enforcement. Dr. Zabyelina contributes to the literature in both of these fields by demonstrating the additional layer of complexity that foreign official immunity adds to the issue of enforcing transnational law against global elites. While the book is doctrinally focused, it lays the groundwork for any additional theoretical work which could be undertaken in this area. The author references explicitly elite deviance in the introductory chapter, which provides a theoretical explanation for why global elites tend to avoid accountability. This presents an exciting opportunity for future research into how this additional layer of practical difficulty fits into the theorisation of how legal and political structures contribute to impunity for criminal elites.

[1742] Yuliya Zabyelina, "Revisiting the Concept of Organized Crime Through the Disciplinary Lens of Economic Criminology," *Journal of Economic Criminology* 1 (2023).

BIBLIOGRAPHY

PRIMARY SOURCES

Basfar v Wong [2022] UKSC 20.

United Nations. “Vienna Convention on Diplomatic Relations.” Treaty Series, vol. 500, 1961.

SECONDARY SOURCES

Bergmar, Nina Maja. “Demanding Accountability Where Accountability is Due: A Functional Necessity Approach to Diplomatic Immunity under the Vienna Convention.” *Vanderbilt Journal of Transnational Law* 47 (2014): 501.

Christensen, Mikkel Jarle, and Neil Boister. "New perspectives on the structure of transnational criminal justice." *Brill Research Perspectives in Transnational Crime* 1, no. 2-3 (2017): 1-11.

Lord, Nicholas. “Establishing enforcement legitimacy in the pursuit of rule-breaking ‘global elites’: The case of transnational corporate bribery.” *Theoretical Criminology* 20, no. 3 (2016): 376-399.

Ryan, Sophie. “Modern Slavery and the Commercial Activity Exception to Diplomatic Immunity from Civil Jurisdiction: The UK Supreme Court’s Decision in Basfar v Wong.” *The Modern Law Review* 87, no. 1 (2024): 202-217.

Simon, David. *Elite deviance*. Routledge, 2018.

Sutherland, Edwin H. “White-collar criminality.” *YB* (1940): 138.

Watson, Danielle, Jarrett Blaustein, Nathan W. Pino, and Julie Berg. "Crime and Governance
in the Global South." *Annual Review of Criminology* 8 (2025).

Zabyelina, Y. *Between immunity and impunity: external accountability of political elites for
transnational crime*. Cambridge University Press, 2023.

Zabyelina, Yuliya. "Revisiting the concept of organized crime through the disciplinary lens of
economic criminology." *Journal of Economic Criminology* 1 (2023): 100017.

Zagaris, Bruce. *International white collar crime: cases and materials*. Cambridge University
Press, 2015.