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From the Editorial Desk

We are pleased to present the inaugural issue of the Atlas Law Journal. The Atlas Law Journal was founded to encourage students to hone their research and writing skills, and to provide for the possibility to gain detailed feedback from other dedicated students.

Building from the ground up takes time, of which there is never enough of. Our work kept us on our feet and taught us many unanticipated lessons. In this respect, we are much alike our prospective authors in our determination to contribute to the legal discourse. We remain committed to this ideal and believe that this first issue is a testament to our resolve.

We would like to thank each and every author who submitted their work for taking an interest in our Journal. Their patience and diligence made for a rewarding editorial experience marked by the singular aim of producing quality work.

In addition, we are grateful to Dr. Agustin Parise and Dr. Craig Eggett for their invaluable advice and guidance. Lastly, we extend our gratitude to the Faculty of Law at Maastricht University for their institutional support with our call for submissions and publication.

This issue only marks the first step and we look forward to fostering enthusiasm for academic writing in the student body within Maastricht, and beyond.

Maastricht, 14 June 2022,
The Atlas Law Journal Editorial Team

Strengthening International Environmental Law: The Nexus of Indigenous Rights and the Rights of Nature

Karl Baldacchino

1. INTRODUCTION

In the last two decades, there has been a proliferation of legal developments, debates, and case law that is arguably causing a paradigm shift within the regime of international environmental law. As a result of the Inuit petition of 2005 to the Inter-American Commission on Human Rights (IACHR) and the later United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) in 2007, indigenous peoples have gained a seat in negotiations to highlight their significant vulnerability to environmental harms and more so climate change, further strengthening the connection between human rights and the environment. Likewise, ever since Christopher Stone questioned if natural entities can be bearer of rights in his 1972 article,[1] legal scholars across the globe have tackled the concept of the rights of nature (RoN),[2] especially following the constitutional recognition of RoN in Ecuador and Bolivia in the late 2010s, its popularization in New Zealand through legislative acts, and the judicial activism that has built up a repertoire of domestic case law in Bangladesh, Colombia, Ecuador, India, and the United States.[3]

The aim of this article is to connect the indigenous and RoN

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[1] Christopher D. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 South California Law Review 450.

[2] Ariel Rawson and Becky Mansfield, 'Producing Juridical Knowledge: 'Rights of Nature' or the Naturalization of Rights?' (2018) 1(1-2) Environmental Planning E: Nature and Space 99; Pablo Salon, 'The Rights of Mother Earth' in Vishwas Satgar (ed) *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (Wits University Press); Craig M. Kauffman, 'Why Rights of Nature Laws are Implemented in Some Cases and Not Others: The Controlled Comparison of Bolivia and Ecuador' (International Studies Association Annual Conference, Toronto, 29 March 2019); Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7(13) Resources <https://doi.org/10.3390/resources7010013> accessed 25 May 2022.

[3] *Mohd. Salim v. State of Uttarakhand et al.* [2016] LNIND 2016 UTTAR 990; *Lalit Miglani vs. State of Uttarakhand* [2016] LNIND 2016 UTTAR 885; *Human Rights & Peace for Bangladesh & Others vs. Secretary of the Ministry of Shipping & Others* [2019] High Court Division Judgement in Writ Petition No. 13989 of 2016; *Future Generations vs. Ministry of Environment & Others* [2018] Supreme Court of Colombia Judgement STC 4360-2018; *Colorado River Ecosystem vs. State of Colorado* [2017] Order by the District Court for the District of Colorado of 4 December 2017; *R.F. Wheeler & E.G. Huddle vs. Attorney General of the State of Loja* [2011] Loja Provincial Court of Justice Judgement No. 1121-2011-0010 (2011, March 30).

movements together rather than keep them separate from each other, an argument that has gained support seeing as indigenous communities are considered to treat nature differently, and arguably better, than the majority of individuals. This aim is important primarily because RoN has gradually ventured towards, what this author considers, the extreme view that protecting nature ought to remain separate from human beings. However, as will be noted later in the article, the original ethos and persistence of supporters of RoN has been to reunite human beings with nature, remedying the separation that occurred following the colonial ambitions of Western empires. A second aim of this article is to depart from the suggestion that RoN can replace the wider structure of international environmental law. Supporters of RoN make such a claim based on the surmounting evidence that the law continually fails to protect nature from the economic, industrial, and exploitative activities of natural resources which reduce biodiversity. Rather than replacement, this author argues that RoN is better suited as a legal tool to further patch up the gaps of international environmental law, with the *Atrato* case in Colombia serving as a case study of how RoN resulted in raising environmental awareness, strengthened the inclusion of indigenous communities in development activities, and protects nature. Such an approach contributes towards strengthening the rule of law in environmental matters. Section Two introduces a socio-legal approach found in complexity theory to conclude how international environmental law can be strengthened by connecting indigenous rights and RoN. Section Three then focuses on the activism of indigenous peoples to protect their rights tied to their traditional territories and resources, whilst Section Four observes the RoN movement is discovering innovative ways to protect nature through a rights-based approach. Both movements show how rights can roll back the central belief that nature is an object to be exploited for the benefit of human civilization. Section Five looks into the Colombian Constitutional Court's reasoning in the *Atrato* case, consisting of a combined indigenous and RoN approach to resolve an environmental matter concerning illegal mining activities. Following this, Section 6 discusses how the Court's judgement resulted in not simply granting rights to nature but also how indigenous knowledge on living in harmony with nature further ensures that international environmental law is transposed into domestic laws and legislation through more access to information, participation, and remedies in environmental matters. Section Seven concludes by summarising the findings of the article.

2. Complexity Theory: The Ties that Bind

Complexity theory is a methodology commonly used in the field of natural sciences to explain the systematic connections of molecular or DNA structures, essentially "how patterned order could emerge without a guiding hand or central controller" in so-called 'complex' systems.[4] In his book, *The Idea of International Human Rights Law*, Wheatley explains that international and domestic legal systems are sometimes referred to as complicated which various stakeholders in the legal field try to make sense of. He argues that international law is similar to the natural sciences wherein both the legal and scientific communities use deductive reasoning and rely on facts which they aim to disprove and failing to do so makes particular legal rules more plausible, thus, developing a so-called 'learned grammar' with which the legal community uses to show their agreement.[5]

In contrast to autopoiesis theories that view closed legal systems developing from previous parliamentary legislation or court decisions which impact the present and future without considering institutions and practitioners, complexity theory relies on the communications between 'component agents' and external events, comparing this to ant colonies engaging in collective decision-making to quickly establish new nests rather than depending on the cognitive abilities of a single ant.[6] Therefore, Wheatly concludes that the international legal system emerged and evolved strongly from actors across all levels, wherein the United Nations then influenced the behaviour of the same agents that created it, known as 'downward causation' to form a:

> "*self-organizing system that results from the communication acts of states and non-states actors in the form (...) of diplomatic communications, the judgements of courts and tribunals, the texts of law-making treaties and General Assembly resolutions, and the writing of publicists*".[7]

The international legal system also displays other qualities identified by complexity theory: problem-solving or path dependence such as the Truman

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[4] Steven Wheatley, *The Idea of International Human Rights Law* (first published Oxford Scholarship Online 2019), pp. 4-5.
[5] ibid pp. 8-10.
[6] ibid pp. 39-41, 44-47.
[7] ibid pp. 47-50, 53-54; See also Erin Daly and James R. May, 'Learning from Constitutional Environmental Rights' in John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018), p. 57.

Proclamation of 1945 to claim rights of maritime areas near to continental shores consisting of petroleum deposits, which may have influenced the later adoption of the 1958 Convention on the Continental Shelf; the nature of power events like the *Lotus* case or the Holocaust, the wars of the Former Yugoslavia, and the genocide in Rwanda for international criminal law, or even minor events like the launch of Sputnik-1 in 1957 which developed international space law; the notion of change in international law since the time of Hugo Grotius in stark contrast to the Charter of the United Nations; and the concept of attractors such as ideas that connect the law with different world views and beliefs on sovereignty, the right to protect, human rights, and the environment.[8]

Using complexity theory as an approach allows us to both visualise the evolution of international environmental law and assess how indigenous peoples and RoN already had and could continue to have an impact on international environmental law. In essence, the goal of international environmental law is to balance environmental interests against economic interests. International agreements established frameworks in which states retained a large discretion of transposing international law into domestic legislation, but these agreements remained void of viable mechanisms of implementation, review, and enforcement for domestic authorities, nor did they create an international overarching organization that can tackle environmental matters.[9]

On the other hand, the history of colonialism has influenced so-called 'prehistoric' international environmental law with the instrumentalist, Cartesian concepts that reproduced a binary division between protecting nature and a culture that views nature as an object that humanity is master over.[10] This is evident from the limited, precise prohibitions in international environmental law since the 1960s and being fragmented from other regimes like international human rights or trade law, wherein the regime contains over 1150 multilateral environmental agreements but without any

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[8] Wheatley (n 4), pp. 55-63; D. Kapua'ala Sproat, 'An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation' (2016) 35 Stanford Environmental Law Journal 157, pp. 167, 171.

[9] Sasha D. Bachmann and Ikechukwu P. Ugwu, 'Hardin's "Tragedy of the Commons": Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?' (2021) 6 Oil and Gas, Natural Resources, and Energy Journal 547, pp. 550, 561-562; Emily Jones, 'Posthuman international law and the rights of nature' (2021) 12 Journal of Human Rights and the Environment 76, pp. 79-80.

[10] Julien Bétaille, 'Rights of Nature: Why it Might Not Save the Entire World' (2019) 16 Journal for European Environmental and Planning Law pp. 35-36, 40; Jones (n 9), pp. 76-77, 98-100.

connection to human rights or mechanisms for positive impacts. [11] This further discounts economic activities being rooted in colonialism which significantly impact indigenous peoples first amongst others. Only in Article 3 (1) (a) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Article 4 (1) of the International Convention for the Prevention of Pollution from Ships (MARPOL), and Article 4 (3) of the Basel Convention do we find concrete requirements for domestic restraints.[12] Likewise, Article 14 of the Convention on Biological Diversity (CBD) includes a list of measures that states must implement in policymaking activities to ensure that the environment is protected during development activities.[13] Gonzalez emphasises the contradictions that underlie international law which has historically aimed to promote peace through commercial activities as these same activities harm both human rights and the planet.[14] However, it remains true that international law did develop strong principles such as Principle 1 of the 1972 Stockholm Declaration which proclaimed that human beings and the environment are connected with human beings moulding their environment to fulfil human rights, or Principle 15 of the 1992 Rio Declaration that instituted the precautionary principle, and the CBD goal of tackling 'at source' causes for biodiversity loss.[15]

Taking these fragmentations into account, complexity theory can appreciate the 2005 attempt by the Inuit Circumpolar Conference to file a petition before the IACHR on behalf of all Inuit communities in the United

[11] Bachmann and Ugwu (n 9) pp. 551-552; Daly and May (n 7) p. 47.
[12] Maud Sarlieve, 'Ecocide: Past, Present and Future Challenges' in Filho, W. L. *et al.* (eds) *Life on Land* (Springer Nature 2021), p. 240; See also Darryl Robinson, 'Your Guide to Ecocide: Part 1' (2021) <http://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-1/> accessed 08 April 2022; Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES) Art. 3 (1) (a); International Convention for the Prevention of Pollution from Ships (adopted 17 February 1973, entered into force 2 October 1983) 1340 UNTS 61 (MARPOL) Art. 4 (1); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force on 5 May 1992) 1673 UNTS 126 (Basel Convention) Art. 4 (3)
[13] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) Art. 14.
[14] Carmen C. Gonzalez, 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32 Seattle University School of Law 407, pp. 419, 430-431.
[15] Nicola Pain and Rachel Pepper, 'Can Personhood Protect the Environment? Affording Legal Rights to Nature' (2021) 45 Fordham International Law Journal 315, p. 360; Federico Lenzerini and Erika Piergentili, 'A double-edged sword: Climate Change, biodiversity and human rights' in Ottavio Quirico and Mouloud Boumghar (eds.) *Climate Change and Human Rights: An international and comparative law perspective* (Routledge 2016), pp. 160-161.

States and Canada, detailing for the first time how climate change violated the human rights to food, education, health, and whose 'property and culture are melting away now' because of the U.S. as the largest emitter of greenhouse gases.[16] Despite the IACHR's rejection of the petition due to a lack of scientific proof to attribute climate impacts to U.S. actions, the petition triggered a flurry of activity on the international level in the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR). [17] Another instance came with the *Male Declaration on the Human Dimension of Global Climate Change*, calling for human rights to form a part of the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC COP).[18]

The 2015 Paris Agreement is crucial in this respect because for the first time human rights were strongly acknowledged by states in an international climate agreement under Paragraph 11 of the Preamble.[19] It was considered an incorporative preambular paragraph to guide domestic enforcement under the soft obligation of the word "should" as part of states' nationally determined contributions (NDCs) towards emissions reduction to "truly reflect their highest possible ambition, within the realm of their possibilities".[20] Paragraph 12 further recognised the importance of sinks and reservoirs of greenhouse gas (GHG) emissions such as trees and the oceans which are important ecosystems for indigenous communities, whilst paragraph 13 moved beyond the controversy surrounding the inclusion of the terms 'Mother Earth' and 'climate justice' that seemed to appease certain interest groups but instead provided stronger protections for nature without introducing new rights.[21] These international efforts to protect human rights from climate impacts culminated into the moment when during 48th Regular Session of the United Nations Human Rights Council the right to a clean,

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[16] Christopher Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (first published 1972, 3rd Edition, OUP 2010), pp. 51-53; Lenzerini & Piergentili (n 15) pp. 163-164.

[17] Jacqueline Peel and Hari M. Osofski, 'A Rights Turn in Climate Litigation?' (2017) 7(1) Transnational Environmental Law 37, p. 44.

[18] ibid.

[19] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) Preamble: *'that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'*.

[20] Maria Pia Carazo, 'Contextual Provisions (Preamble and Article 1)' in Daniel Klein *et al.* (eds.) *The Paris Agreement on Climate Change: Analysis & Commentary* (OUP 2016), pp. 114-116; See also Sproat (n 8) p. 166.

[21] ibid pp. 117-118.

healthy, and sustainable environment clean was officially recognised, reflecting visible state practice that implicitly and explicitly recognized this right, especially the 156 out of 193 (80%) UN member states who did so in their constitutions.[22]

Daly and May highlight that these efforts to connect human rights to environmental matters created downward pressure in support of rights-based approaches that incorporated environmental principles in domestic contexts, as well as contributed to upward pressure to develop maritime conventions, gender equality, child labour laws.[23] In a similar manner then, international environmental law may be strengthened by considering RoN as a logical consequence of indigenous beliefs and cultural practices which can potentially challenge those economic activities that harm the environment. It is not that RoN guarantees protection for natural entities per se, but that there is a higher likelihood that they further ensure the inclusion, consent, and access to remedies for actors besides states and corporations.

3. Developing Indigenous Rights

Indigenous peoples are at the centre of the environmental justice movement as a consequence of historic colonialist ambitions which split the world into a North-South divide, wherein the largely North, West states of Spain and Portugal carried out a 'civilising mission' against indigenous peoples who they saw as an uncivilised population that opposed the domination of nature as a commodity in the development of industrial processes.[24] The historic exploitation of nature and indigenous labour alongside the millions of slaves to extract natural resources became normalised as quasi-customary international law that approved colonial activities based on Enlightenment reasoning to assimilate indigenous peoples to the European mindset. This gave rise to the modern international economic law that widened the disparity between the North and the indigenous peoples. While the former attained valuable natural resources, the latter were left with the resulting social and environmental burdens, an exchange that remains visible to this day.[25]

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[22] UNHRC (Resolution adopted by the Human Rights Council on 8 October 2021) 'The human right to a clean, healthy, and sustainable environment' (8 of October 2021) A/HRC/RES/48/13; OHCHR 'Report of the Special Rapporteur for the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment on the Right to a Healthy Environment: Good Practices' A/HRC/43/53 (2020) [User-Friendly Version], p.12.

[23] Daly and May (n 7) p. 50.

[24] Gonzalez (n 14) pp. 407-408, 411-412.

[25] ibid pp. 410, 412.

Gonzalez notes that modern investment law evolved from bilateral investment treaties that adopted colonialism's 'instrumentalist view' of exploiting nature, creating an international design with the 1947 General Agreement on Tariffs and Trade (GATT) to stabilise the status quo of foreign investors' access to natural resources and without obligations to protect neither the environment nor the rights of those dependent upon those resources.[26] What placed indigenous peoples at a further disadvantage was the debt crisis of the 1980s that resulted in the so-called 'Washington Consensus' of developing states establishing a neoliberal model of economics based on liberalising, privatising, and removing social and regulatory barriers to trade in exchange for financial stimulus from international organizations like the International Monetary Fund (IMF) to repay foreign debt.[27] With such an international economic order, we can consider the start of the 'Anthropocene-Capitalocene' era we currently live in from the post-1950s, sometimes referred to as the 'Great Acceleration' when economic activity increased via globalized supply chains and served as a major cause for today's ecological crisis.[28] This creates a dichotomy that what started as developing countries needing to meet their economic debts has become developed states responsible for the larger ecological debt to developing states' ecosystems, natural resources, and their people as the main focal point of developing a system that repairs this crisis without departing from the 'fallacy of unlimited economic growth'.[29]

The notion of an indigenous people also emerged from colonialism and was shaped by the colonizers themselves to be seen as "unfit to found or administer a lawful state" within the classical Westphalian system of international law, being subjugated under the colonial gaze for labour purposes.[30] Later, it was consolidated as a mindset during the Berlin Africa

[26] ibid pp. 413-414, 418.
[27] ibid pp. 414-415.
[28] ibid pp. 417-418, 429-430 (the author visualises this fallacy via the Environmental Kuznets Curve hypothesis of an inverted-U connection between per capita income and environmental harm, once believed that as income increases so does environmental quality which numerous scientific studies challenged as a false representation of reality).
[29] Buchmann and Ugwu (n 9) p. 549 (in their article, the authors refer to Garret Hardin's *Tragedy of the Commons* which emphasises that the future of humanity is destined for suffering unless efforts are taken to rectify the what Hardin calls the 'remorseless working of things' in the sense that continuous exploitation of natural resources without leaving time for restoration of those same resources. Likewise, they compare Hardin's view with Thomas Malthus' exponential principles of population, wherein production grows arithmetically by 2, 4, 6, 8, whilst populations grow geometrically by 2, 4, 8, 16, etc. putting into perspective the imbalance of demand and supply); See also Jones (n 9) pp. 86-87, 100.
[30] Maria V. C. Ormaza, 'Re-thinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation' (2012) 4 GoJIL 263, pp. 267-268.

Conference between 1884-1885 through the 'trusteeship doctrine' of developed states being the so-called guardians of indigenous peoples.[31] The international community first attempted to mend the past issue of forced and unpaid labour of indigenous peoples in 1957 with the International Labour Organization's (ILO) Convention No.107 that identified them as 'populations' and acknowledged their distinct social, economic, and cultural practices as well as their link to colonialism.[32] However, this did not go beyond an integrationist approach that instilled a sense of equality, instead resulting in the rejection of the Convention by the pan-indigenous movement, who strengthened their efforts to attain firmer protection of their cultural identity, autonomy, and territories.[33]

Their efforts paid off three decades later in 1989 with ILO Convention No.169, which restated the No.107 definition but incorporated the somewhat controversial subjective criteria of self-identifying as indigenous which departed from the conservative practice of states recognising who is and is not indigenous.[34] Convention No.169 also furthered the cultural and autonomous distinctiveness of indigenous and tribal peoples from other communities, with a stronger recognition of their rights over traditional territories, excluding mineral resources for which we find the first instance of a state's obligation to consult indigenous peoples on measures that may directly or indirectly impact their rights. Even though Convention No.169 strengthened these rights being sought by indigenous peoples, as of writing this article only 24 states have ratified it with the latest being Germany in mid-2021 and, thus, cannot be considered a part of customary international law.[35]

On the other hand, what can be considered a form of customary international law is the 2007 UNDRIP. The UN Working Group on Indigenous Populations at first faced the problem of arriving at a common

[31] ibid pp. 268-269.
[32] ibid pp. 269-270.
[33] ibid pp. 270-271 (another attempt was made with the 1971 study by Jose Martinez Cobo as the Special Rapporteur for the UN Sub-Commission on Prevention of Discrimination of Minorities, wherein he defined indigenous people through 'historical continuance' based on ancestry since colonial times, the occupation of traditional territories, and the continued presence of their ancestral institutions that are cultural distinct from surrounding societies, but again did not move beyond what was accepted in ILO Convention No.107); See also Bachmann and Ugwu (n 9) pp. 555-556, 562; International Labour Organization Convention 107 on Indigenous and Tribal Populations (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247 (C107).
[34] Ormaza (n 30), pp. 271-272; Bachmann and Ugwu (n 9) pp. 562-563; International Labour Organization Convention 169 on Indigenous and Tribal Populations (adopted 27 June 1989, entered into Force 5 September 1991) 1650 UNTS (C169).
[35] Ormaza (n 30), p. 273; Bachmann and Ugwu (n 9) p. 563.

definition for the declaration that did not exclude other groups from protection, since the UNDRIP can be considered stronger than the UN Declaration on Minorities; however, 143 states still agreed that indigenous peoples both share the same rights found in the Universal Declaration on Human Rights (UDHR) and also retain collective rights to self-determination, flexible cultural and historical backgrounds, and the right to free, prior, and informed consent (FPIC) before implementing development projects.[36] For the purpose of this article, it is important to note how Article 29 UNDRIP is critical in granting indigenous peoples the right to "the conservation and protection of the environment and the productive capacity of their lands or territories and resources", and call on states to "implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination".[37] Not only does it acknowledge the need to protect the traditional territories of indigenous peoples, but highlights that the state must engage in both FPIC and generate mechanisms that include indigenous peoples.

It makes sense, therefore, that natives are at the forefront of the struggle to protect nature, following the logic that as a people who have lived on and own traditional territories and resources then they have the greatest interest in ensuring protection is guaranteed, requiring states and corporations to leave intact a pollution-free environment conducive to enjoying their cultural and spiritual practices, means of subsistence, and ownership of those resources in proximity of their territory.[38] There are three major drawbacks to the latter approach in that, firstly, Asian states view indigenous rights as sensitive political issues around recognizing the self-determination and autonomy of natives and, thus, inapplicable.[39] Secondly, African states fear that such rights may risk increasing ethnic conflict. [40] Lastly, human rights organizations argue against the exclusion of other groups that may not reach the threshold of self-identification as seen with

36 Ormaza (n 30), pp. 273-275; Bachmann and Ugwu (n 9) pp. 564-566; United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) (UNDRIP) Preamble para. 23, Arts. 3, 4, 10, 11, 13, 19, 28, 29, 32; Pain and Pepper (n 15) pp. 318-319 (environmental personhood are explicitly found in various First Nations customary laws, such as for Māori's); See also Agnieszka Szpak, 'Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Right and Climate Change – Business as Usual or a Breakthrough?' (2020) 162 Climate Change 1575, p. 1585.

37 UNDRIP (n 36) Art. 29; See also Sproat (n 8) pp.161, 181-182 (the author suggests that cultural integrity, land and other natural resources, social welfare and development, and self-government are four values be incorporated into a restorative justice framework for indigenous peoples to attain redress for the colonial past and climate impacts).

38 ibid.

39 Ormaza (n 30), p. 276-277.

40 ibid pp. 277-278.

non-indigenous *campesinos* (peasants) and afro-descendent groups in Latin America who have also historically resided on traditional territories and relied on particular resources on these territories.[41] A dual issue is also the fact that mitigation and adaptation measures can either harm indigenous rights or that these rights may upend mitigation efforts, such as seen in Norway with the recent Supreme Court judgement in *Fosen* which found in favour of the Sami indigenous community who challenged the establishment of the Storheia and Roen wind farm park that violated their cultural practices.[42]

There is not enough room in this article to debate these plausible drawbacks, but this author argues that indigenous rights can contribute towards the goal of protecting the environment, primarily because biodiversity loss and climate change, as tipping points for social and planetary boundaries, will impact all of humanity regardless of the differences that continue to divide us.[43] Therefore, the entrance of indigenous rights and beliefs in debates surrounding environmental protection at the international and domestic level further highlights the realities that environmental issues are also issues of environmental justice which require obligations by all stakeholders for the benefit of everyone.

4. The Rights of Nature Movement

Academics agree that the concept of RoN started with Christopher Stone's 1972 article entitled *Should Trees Have Standing?* in which he explained that he saw slaves, women, children, and indigenous communities as the predecessors for nature to claim rights and who were similarly seen as property serving an economic role in profit-making activities, acknowledging that:

> "*there will be resistance to giving the thing 'rights' until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it 'rights'—which is almost*

[41] ibid pp. 278-280.
[42] Sproat (n 8) p. 164-165; Carola Lingass, 'Wind Farms in Indigenous Areas: The Fosen (Norway) and the Lake Turkana Wind Project (Kenya) Cases (2021) Opinio Juris <http://opiniojuris.org/2021/12/15/wind-farms-in-indigenous-areas-the-fosen-norway-and-the-lake-turkana-wind-project-kenya-cases/> accessed on 8 April 2022.
[43] Philip Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) 33 Journal of Environmental Law 531, p.531; See also Kate Raworth, 'What on Earth is the Doughnut?' (2017) Kate Raworth: Exploring Doughnut Economics <https://www.kateraworth.com/doughnut/> accessed on 8 April 2022.

> *inevitably going to sound inconceivable to a large group of people*."[44]

Furthermore, Stone argued that granting rights to non-human entities was not an uncommon practice as could be seen with states, corporations, children, and ships who have their own appointed legal representatives to uphold their rights and interests in a court of law, concluding that just because nature cannot speak does not mean that it cannot have standing and access to justice like the common citizen whose rights may be harmed.[45] Around the time as the *Sierra Club vs. Morton* case, whereby Walt Disney wanted to build a ski resort in the Mineral King Valley, Stone was aware of the case and wrote his article with the intention that it would be reviewed by the Supreme Court Justice William O. Douglas who sat on the judges panel, thus, influencing his fond experiences of hiking in nature and resulting in a controversially dissenting opinion which favoured recognizing the rights of the popular hiking trail because "those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen."[46]

Following this, the discussion surrounding RoN grew silent and only restarted in the late 2000s when both Ecuador and Bolivia enshrined RoN in their respective 2008 and 2009 constitutions. This is notable because both constitutions depart from an anthropocentric view of the environment and instead incorporated indigenous peoples' beliefs to go beyond the idea that only human beings ought to be bearers of rights. This can be seen in the 2010 *Universal Declaration for the Rights of Mother Earth* (UDRME) to protect 'Pachamama' (Mother Earth) drafted by Cormac Cullinan with the rights to be restored, to have clean air, water, life, and be free from harm and pollution as an individual and governmental duty.[47] The choice to include

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[44] Stone (n1) pp. xi, 1, 3, 24-25; See also Pain and Pepper (n 15) p.319.
[45] Stone (n1), pp. 451-453.
[46] David R. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press 2017), pp. 102-103, 104-106 and 108; See also Pain and Pepper (n 15) pp. 327-328.
[47] Boyd (n 47) pp. 165-174, 192-196, 207-211; See also Polly Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (Shepheard-Walwyn Ltd. 2010) pp. 153-156; Gonzalez (n 14) p. 424; Craig M. Kaufmann and Pamela L. Martin, 'Constructing Rights of Nature Norms in US, Ecuador, and New Zealand' (2018) 18 Global Environmental Politics 43, pp. 55-57; See also Caroline McDonough, 'Will the River Ever Get a Chance to Speak? Standing Up for the Legal Rights of Nature' (2020) 31(1) Villanova Environmental Law Journal 145, pp. 152-154, Rawson and Mansfield (n 2) pp. 100-102, 107, Grant Wilson, 'Envisioning Nature's Rights to a Stable Climate System' (2020) 10 Sea Grant Law and Policy Journal 60, pp. 64-65, Paola V. Calzadilla, 'Case Note: A Paradigm

environmental rights into their constitutions means that nature forms a part of 'the deepest, most cherished values of a society', triggering an obligation for these states' policy making and judicial bodies to develop enforcement mechanism that can guarantee that environmental rights can be read alongside other rights or interests in a way that international law has so far been unsuccessful.[48] This can be visible from the impact of case law in Ecuador when both public authorities and citizens utilized RoN and the indigenous concept of '*sumak kawsay*' (harmonious coexistence) to protect the Vilcabamba river from pollution, to stop the development of palm plantations in Secoya, to monitor the water and waste management in a pig farm, and prevent activities from the Mirador Condor mine harming biodiversity, resulting in the development of secondary legislation that made RoN operational in function. [49]

The next major development came in New Zealand, when after centuries of negations the government recognized rights for two separate entities through legislation in 2014 and 2017. The rights of the Te Urewera National Park and the Whanganui River are important because the Māori communities depend on them for their livelihood, cultural heritage, health, food and water and fundamentally see these entities as their living, spiritual ancestors, inherently incapable of being owned. [50] Instead they utilised the concept of appointed guardians to draw up and implement plans that spoke on behalf of, protected, and promoted the rights of these natural entities. Once again, we see the inclusion of indigenous peoples and their beliefs to return to the idea that as human beings we form a part of nature, leaning further towards an Earth Law, fusing Stone's zeal to extend RoN with Cormac Cullinan's attempt at creating a 'Wild Law' that re-forges humanity with nature in opposition to viewing nature as property in the same way that the notion of slaves became gradually unacceptable, and Thomas Berry's holistic Earth Jurisprudence which extensively connects these arguments to say that nature has the right to be, to habitat, and to fulfil, being shared with

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Shift in Courts' View on Nature: The Atrato River and Amazon Basin Cases in Colombia' (2019) 15 Law, Environment, and Development Journal 1 (note), pp. 397-405.

[48] Daly and May (n 7) pp. 45-46; See also David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) pp. 4-12, 106-111, 25-255.

[49] Ludwig Kramer, 'Rights of Nature and Their Implementation' (2020) 17 Journal for European Environmental and Planning Law 47, pp. 50-53; Pain and Pepper (n 15) pp. 335-336; See also Boyd (n 47) pp. 132-143, 145-146, 148-154; See also McDonough (n 47) pp. 154-156; See also Kauffman & Martin (n 47) pp. 49-50, 52, 58.

[50] Kramer (n 49) pp. 48-49, 64 (this can be regarded to a certain extent not so much with the goal of environmental protection in mind rather than conflict resolution); Boyd (n 47), pp. 132-143, 145-146, 148-154; See also McDonough (n 47), pp. 154-156; Kauffman and Martin (n 47) pp. 49-50, 52, 58; Pain and Pepper (n 15) pp. 329-331.

human beings as part of nature's universe for the "freedom for all members of the Earth Community".[51]

In a similar approach to New Zealand, U.S. citizens utilized ordinances and community bills of rights to protect nature through *guardian ad litem* against extractive activities, becoming small legal laboratories challenging the boundaries of law such as with the 2006 Tamaqua Borough Ordinance in Pennsylvania that recognized the Tamaqua ecosystem.[52] Another attempt was in 2019 when the local community of Toledo, Ohio drew up a bill of rights for Lake Erie. Both attempts were guided by the Community Environmental Legal Defence Fund (CELDF) to stop environmental harm from local and federal economic activities.[53] These efforts favour nature's rights but retain anthropocentric duties to respect, protect, and fulfil these rights just as if they were human rights. This may even take the form of legal personality when human beings represent the interests of children, states, and corporations in courtrooms, but as guardians or trustees.

The above efforts influenced judicial activism that further broadened RoN across the world in Argentina, Australia, Belize, Brazil, Colombia, Costa Rica, Germany, India, Nepal, U.S., and other countries by finding new pathways to protect chimpanzees, Asiatic lions and buffalos, rivers, species of fish. This activism also created of new remedies such as the 'writ of kalikasan' by the Supreme Court of the Philippines, ordering the removal of the traditional requirement that an injury or injuries to human interests must exist in order to protect nature.[54] On the other hand, legal cases may not be seen as part of best practice for the following reasons. Firstly, there is often a scale of injury that serves as a threshold to conclude that nature's rights have been harmed. Secondly, that though countries support RoN in their respective forms, there remains a deferral to economic interests, especially in developing states who have limited access to funds and the persistency of poverty. Lastly, and in connection to the latter, state recognition does not preclude the enforcement of RoN through secondary legislation; and in the case of Bolivia, Ecuador, and Uganda there is constitutional recognition

[51] Pain and Pepper (n 15) p. 319; Boyd (n 47) p. xxxv and 231; Rawson and Mansfield (n 2) pp. 100, 111-114; Jones (n 9) p. 85.
[52] Pain and Pepper (n 15) p. 346; Boyd (n 47) pp. 110-114; Kramer (n 49) pp. 58-59.
[53] Pain and Pepper (n 15) p.346-347; Kramer (n 49) pp. 59-60.
[54] Boyd (n 47) pp. 222-227; Daly and May (n 7) p. 56; Kramer (n 49) pp. 60-63; Pain and Pepper (n 15) p. 319-321, 339-340; Wesche (n 43) p. 532-533.

alongside coated language that may prioritise interests of extractive industries.[55]

Bétaille argues that the development of international environmental law did initially frame the protection of nature for the benefit of humanity. However, he also stands corrected in saying that the law gradually shifted to adopt norms which favour the environment, and that RoN is no different than international environmental law because it continues to face similar issues of implementation, enforcement, and an overall effective protection of nature.[56] Furthermore, Pain & Pepper explain that the current achievements of RoN stands has taken a narrower approach with separate entities of nature gaining rights rather than seeing a general personhood being granted, and even then with a narrow representation by a few than the whole population.[57] Despite Europe lagging behind the trend of RoN, Bétaille and Kramer both give plausible arguments why RoN as a concept is unable to expand environmental protection in Europe. The European Union has already adopted directives that protect animals and rivers, as well as incorporating the necessary mechanisms permitting NGOs to access courts, gain standing, and attain remedies in environmental matters.[58] Furthermore, EU member states have also acted domestically such as French tort law addressing pure ecological harms and Germany adding animals rights into its constitutions.[59] Introducing RoN alongside these initiatives would face opposition because environmental protection is not generally considered an individual interest and will likely clash with economic, infrastructural, and development interests and the principle of a separation of powers should courts attempt to expand RoN via court orders. Other justifications are that the right to environment already achieves what RoN is aiming towards, with significant case law at the European Court of Human Rights considering and confirming the existence of such a right, debunking the idea that property rights are

[55] Pain and Pepper (n 15) p. 325-327; Kramer (n 49) p.50-51, 63, 67-68; Bétaille (n 10) p. 62-63 (secondary norms consist of coherent legislation, strict sanction mechanisms, tackling corruption, establishing an impartial authority, addressing administration inertia, legal measures can target regulators, ensuring access to justice, and that judicial orders are seen through).

[56] Bétaille (n 10) p. 60.

[57] Pain and Pepper (n 15) p. 334.

[58] Bétaille (n 10) pp. 46, 49-50, 61 (e.g. the EU's Natura 2000 network, 1992 Habitat Directive, Directive 2004/35, and especially the 1998 Aarhus Convention); Kramer (n 49) p. 64-65, 69-71 (e.g. the Regensburg Agreement of 1990, the Sofia Convention of 1994, and EU Directives 2000/60, 91/271, and 2010/75); See also Bachmann and Ugwu (n 9) p. 569-570 (the Aarhus Convention can be considered as the most ambitious venture in the area of environmental democracy).

[59] Bétaille (n 10) pp. 47-48; Kramer (n 49) p. 69 (Austria's Landesumweltanwalt, Hungary's Ombudsman for Future Generations); Boyd (n 47) p.223.

absolute and above environmental rights, and that even though international environmental law continues to retain anthropocentric features, these do not depart from the intrinsic values of nature that require conservation efforts and species protection.[60] Lastly, although the science attributing climate impacts to particular activities of corporations and even states is now extensive and sharply accurate, science remains contestable because even environmental impact assessments (EIAs) fall short of the mark of covering all corners, what is best for nature remaining unclear.[61]

These arguments help to humble the RoN movement because they remind us that reaching the ideal scenario whereby the law protects nature in and of itself, the reality is that *aporia* remains linked to RoN, meaning the law is a manmade tool that shows nature remaining dependent on human beings agreeing to expand rights to it, enforcing its rights, and intervening to restore those rights when they are harmed.[62] Although this author disagrees with the argument by Bachmann & Ugwu that RoN is more empathetic than the right to environment, argued to be more altruistic in scope,[63] the *Atrato* case in Colombia from 2016 may help shift the current debate towards understanding the use of RoN beyond the approach of protecting nature in and of itself, and instead towards the cooperation of all stakeholders in environmental matters.

5. The Atrato River as a Bearer of Rights

Wesche states that Colombia is currently at the forefront of protecting nature through constitutional pathways and its recent experiences have shaped the global discussion on RoN.[64] After a *tutela* action was filed by the NGO Terra Digna in 2015, on behalf of afro-descendant and indigenous communities, challenging illegal mining activities which polluted the biodiversity rich Atrato river (*el Choco*) and its tributaries, the Constitutional Court of Colombia recognised the following year that the Atrato held the rights to protection, conservation, maintenance, and restoration.[65] The Court declared that the state has a responsibility to consult with the communities of the

[60] Bétaille (n 10) pp. 43, 45, 55.
[61] Jones (n 9) pp. 94-95; See also Sproat (n 8) p. 219.
[62] Jones (n 9) p.97; Bétaille (n 10), p. 55.
[63] Bachmann and Ugwu (n 9) p. 553-554.
[64] Wesche (n 43) p. 533.
[65] ibid pp. 534-537 (Choco is historically known for its gold mines which afro-descendant peoples were transported to Colombia by the Spanish to work and who continue to use traditional methods and handmade equipment to extract gold in a sustainable manner without applying chemicals like mercury or cyanide used in conventional production methods carried out by small- and medium-sized businesses); Calzadilla (n 47) pp. 52.

Department of Choco who rely on the Atrato for water, food, subsistence, cultural practices, and health which were at risk from mining activities.[66] It also concluded that Colombia's constitution highlights nature as a fundamental objective and that this relationship is dynamic and in permanent evolution, adopting an ecocentric instead of an anthropocentric approach to conclude that the constitution protects nature not only from humanity's reliance on the environment "but also in relation to the other living organisms, with which we share the planet, conceived as existences worthy of protection in themselves".[67]

The Court also incorporated biocentrism as a moral theory to focus on including humanity as a part of nature that is harmed when nature is harmed, assisted by the development of jurisprudence from case C-632 in 2011 when the same Court recognised nature not as "the environment and surroundings of human beings, but as a subject of its own rights that must be protected and guaranteed" which requires strict mechanisms to prevent harm to nature and protect the right to a clean, healthy, and sustainable environment.[68] This implied a civic responsibility towards RoN based on the principle of sustainable development but more so on the polluter pays principle, that whoever harms the environment is constitutionally obligated to restore these rights in a distinct manner from human rights.[69] The mining activities contradict this duty, leading the Court to state that "the neglect in taking effective action to stop the activities of illegal mining has generated a severe humanitarian and environmental crisis in the Atrato River basin", thereby extending the previous biocentric approach that the basin bears rights since "environmental law from a traditional perspective has failed".[70] Therefore, the Court considered that both the government and society are obligated to care and preserve the "natural and cultural riches" of nature not

[66] Wesche (n 43) pp. 538-539; Ivan Vargas-Chaves *et al.*, 'Recognizing the Rights of Nature in Colombia: The Atrato River Case' (2020) 17(1) Revista Juridicas 13, p. 24.

[67] Wesche (n 43) p. 539; See also Maria del Pilar G. Pachon *et al.*, 'Climate Litigation in Colombia' in Francesco Sindico and Makane M. Mbengue (eds,) *Comparative Climate Litigation: Beyond the Usual Suspects* (Springer Nature 2021) pp. 55-56, 59.

[68] Vargas-Chaves *et al.* (n 66) pp. 15, 32-33 ; Wesche (n 43) p. 532 (the author placed the rights of nature within the biocentric approach wherein 'all forms of life have the right to exist, persist, maintain, and regenerate their vital cycles [and] human have the legal authority and responsibility to enforce these rights on behalf of nature.'); see also Jones (n 9) p. 92 (the Constitutional Court of Ecuador had adopted the same approach in 2015 against a corporate challenge to the removal of shrimp companies from ecological reserves as a violation of their right to property and to work, arguing that its position is akin to 'a biocentric vision that prioritizes nature in contrast to the classis anthropocentric conception in which the human being is the centre and measure of all things, and where nature was considered a mere provider of resources').

[69] Vargas-Chaves *et al.* (n 66) pp. 20, 30-31.

[70] ibid p. 26; Calzadilla (n 47) pp. 53-54.

just of the Atrato but also of forests, rivers, and biodiversity which form a part of the substantive elements of a healthy environment under article 8 of the constitution which guarantees the rights to life, health, culture as biocultural rights.[71]

Wesche explains that this landmark decision and the extensive development of RoN in *Atrato* was valuable because of the 'dialogical judicial activism' of the Court, by coupling RoN with procedural orders for the government to generate legislation that would protect the Atrato's rights and reduce the rate of illegal mining throughout Choco, along with monitoring mechanisms that would ensure the implementation of these rights and ordering the nomination of two legal guardians that enforce these rights in the courtroom; however, as noted above, these orders preclude the necessity that public authorities view these rights beyond a legal fiction.[72]

For the first two years following the ruling, there was little to no compliance with the ruling. Instead, the government tried to fulfil the court orders without understanding the mission embarked by the court, and only with the change of government in 2018 was significant progress made. [73] With the Ministry of the Environment chairing the Commission of Guardians alongside seven male and seven female representatives of the entire Atrato region, this served as a good practice of integral governance between government bodies and those immediately impacted by environmental harm, making the affected communities feel heard, considered, and directly involved in the development of what directly concerns them.[74] It is important to note that the Commission has not made use of their legal function to defend the rights of the Atrato, largely due to the representatives' limited training to initiate proceedings, a lack of funds and the security risks of doing so.[75] However, the current progress displays a 'socialization' of the court's orders over the legal personality of the Atrato as a promising pathway to

[71] Vargas-Chaves *et al*. (n 66) p. 25; Wesche (n 43) pp. 539-540 (biocultural rights 'refer to the rights of ethnic communities to autonomously administer and protect their territories – in accordance with their own laws and customs – as well as the natural resources that constitute their habitat, where their culture, traditions and way of life are developed based om their special relationship with the environment and biodiversity').

[72] Vargas-Chaves *et al*. (n 66) p. 26; Wesche (n 43) pp. 540-542; See also Pain and Pepper (n 15) p. 377; See also Calzadilla (n 47) p. 55.

[73] Wesche (n 43) p. 543 (the author adopts the qualitative approach of Rodriguez Garavito and Rodriguez Franco who differentiate between the direct-indirect and material-symbolic benefits of court decisions, whereby material and direct benefits are observable impacts to the parties in a lawsuit, whilst the indirect and symbolic are not visibly observable for the parties yet still retain plausible benefits nonetheless).

[74] ibid pp. 544-548; See also Sproat (n 8) p. 185 (the move towards authorities as 'receptacle[s] for reparations').

[75] Wesche (n 43) pp. 549-551.

narrow the gap between the government and the peripheral communities as far as capital creating policies are concerned. Additionally, it unites the goal of restoration with the difficult aim of transforming the local economy, to depart from the illegal mining activities that communities have depended on for decades.[76] In a sense, this outcome can be argued to have morphed EIAs with a cultural impact assessment.[77]

6. Indigenous Efforts & the RoN Movement Strengthening International Environmental Law

What the above sections show is that there have been significant developments since the turn of the millennium to both recognize indigenous rights tied to their traditional territories and resources along with expanding rights for nature. Though both movements developed in parallel to each other, both movements have begun to communicate and reach similar end goals. The *Atrato* case reaches a compromise in the debate between anthropocentric and ecocentric approaches to enforcing environmental law, acknowledging that humanity is at fault for the current crisis and returning back to human beings being a part of nature. A similar conclusion was also reached by the Colombian Supreme Court. In the *Future Generations* case of 2018, further strengthening the concept of eco-anthropocentricity by finding the Colombian Amazon to be a bearer of rights, exemplifying how these paradigm shifts are gradually gaining ground within the jurisprudence, case law, and judicial activism.[78]

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[76] ibid pp. 551-554.

[77] Lenzerini and Piergentili (n 15) pp. 170-171.

[78] *Future Generations vs. Ministry of the Environment & Others (Key Excerpts from Supreme Court Judgement)* (11001-22-03-000-2018-00319-01) (2018): The *Future Generations* case was a *tutela* action filed and won in 2018 by the NGO De Justicia and 25 Colombian youths, aged between 7 and 25 from areas at risk from climate impacts, challenging several federal and national government authorities for their omissions in handling the greenhouse gases resulting from the persistently high rate of deforestation in the Colombian Amazon which harmed the plaintiffs' rights to life, environment, food, water, and health for both current and future generations, using a combination of constitutional and international climate law to request policies that reduce deforestation to net-zero by 2020. Essentially this was a human rights case because the plaintiffs relied on a right to healthy environment, but the Supreme Court followed the thinking of *Atrato* and concluded of its own volition that the Amazon Rainforest bears the rights to protection, conservation, maintenance, and restoration by the hands of the State and its agencies which benefits humankind from the risks of 'irrational colonisation' of the forest, explaining that the past ecocentric approach points towards a more ecologically aware Colombia that is ready to safeguard the symbolism with ethical responsibility for the sake of 'children, grandchildren and all of posterity'; See also Kramer (n 49) p. 57.

This falls in line with Wilson's argument that indigenous peoples ought to be involved in strategic planning under the concept of fair and equitable sharing. This does not imply compensation that does not establish adequate benefits for indigenous peoples but relies on the preferred model of them gaining control over development, enjoying the distribution of employment, and determining how their traditional territories and resources are to be treated.[79] Instead of corporations continuing to use trust building measures, community development and impact-benefit agreements, and attaining social licenses to garner a sense of corporate responsibility which remain voluntary, the above approach in *Atrato* introduces holistic methods which can likely bear good fruits.[80] This reduces risks to both the environment and natives it establishes predictability, transparency, and a firm management of expectations whilst retaining the option to oppose extractive projects that prove ill to indigenous people and the environment together.[81]

This model is perhaps what international environmental law is meant to aim towards; bridging the reality that human civilization is advanced by the good graces and provisions of Mother Earth with the necessity of understanding that such provisions are finite, and time and care is required to rejuvenate or restore their deposits. Rather than aiming to replace international environmental law with RoN, the introduction of the latter can aid the former to look inward and reassess the way interests are balanced, so instead of interests becoming a legal competition for whose rights rein, a cooperative process would include all stakeholders in domestic settings in a way that truly balances economic interests, human rights, and functional ecosystems. Such a model can also trigger international shifts that may generate collaboration between developed and developing states, which Gonzalez argues is required to reorder the structure of the global economy to increasingly focus on environmental justice issues, socio-economic contexts, and sustainable methods of production.[82]

In line with complexity theory, these paradigm shifts have the strong potential to influence the international environmental law via path dependency, as mini power events, and especially as attractors. Whether it be efforts to generate policies in New Zealand and the U.S., statutory rights for nature in Ecuador and Bolivia, and case law in Colombia and India, all have influenced other countries like Australia, Bangladesh, Mexico and

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[79] Emma Wilson, 'What is Benefit Sharing? Respecting Indigenous Rights and Addressing Inequities in Arctic Resource Projects' (2019) 8 Resources, pp. 1-2.
[80] ibid pp. 4-5, 10-12.
[81] ibid pp. 5-6; Kramer (n 49) p. 75.
[82] Gonzalez (n 14) p. 432.

Uganda, creating shifts in jurisprudence and state practice at the highest levels in a similar way to strategic climate litigation efforts to recognize the right to a healthy environment under international law. Such an approach may also remove the risk that indigenous rights exclude protecting the rights of other communities who also rely on nature and its resources, with these rights reshaping the discussion around RoN to buttress the system's goals better. This avoids the zero-alternative thought experiment that Bétaille asks his readers to visualise, that the world would have been worse off without the current system of international environmental law.[83] Instead, this author proposes that RoN and indigenous rights can work by thinking within and outside of the system, seeking to implement its aims without risking the legitimization of the system's past failures.[84] Therefore, it pays for international environmental law to think big, about others, and about a process which coordinates restoration, rights, accessibility, and justice for all stakeholders involved in environmental matters and national development.[85]

7. CONCLUSION

This article has briefly outlined how indigenous rights and RoN movements developed in parallel but separate from one another, becoming increasingly connected over the last two decades due to the similar struggle they share of protecting the intrinsic value of nature. The history of both movements acknowledge that human beings separated themselves from nature so that they could control the access and flow of natural resources tied to their colonial ambitions, a separation that later became reproduced in the international legal, economic, trade, industrial, and policymaking systems that discount protecting nature in exchange for economic, public, or human interests. Likewise, it was proposed that RoN has allowed for indigenous communities to further expand the inclusion of their beliefs and cultural practices in both policymaking discussions with regard to development matters that are likely to impact the environment they rely on for the fulfilment of their rights, in turn wedding their right to free, prior, and informed consent with the precautionary principle.

This author has relied upon complexity theory to explain how individual actors, case law, and power events can create downward and upward pressure on the international legal system to progress and evolve, providing an instance of this when the right to a clean, healthy, and safe

[83] Bétaille (n 10) pp. 61-62.
[84] Jones (n 9) pp. 97, 100-101 ('In this sense, RoN may play a "transitional role" but need not be the end game.').
[85] Daly and May (n 7) pp. 55-57.

environment gained international recognition from the Human Rights Council in late 2021. It was noted that the Inuit petition to the IACHR in 2005 was a power event for the international community to later consider this right as civil society actors engaged in strategic climate litigation to pressure states to abide by their climate commitments via human rights claims, the recognition of this right in constitutions, and various courts discussing or even granting the existence of such as right. In a similar manner, RoN may mimic this pathway to in turn strengthen the protection of nature because of those instances when they achieved constitutional recognition as seen in Bolivia, Ecuador, and most recently in Uganda, were included in domestic legislation as in New Zealand and attempted in the U.S., and most importantly because of judicial activism as seen in Colombia, Bangladesh, Ecuador, and India.

To envision how RoN can indeed serve as a legal tool, the article analysed the *Atrato* case in Colombia, wherein the river was observed to be a crucial requirement for the fulfilment of the rights of those indigenous communities who brought forward the case. Seeing this vital link, the Constitutional Court recognized the Atrato river as a legal entity and bearer of rights; however, this did not create the outcome that these rights provided a guarantee that the river would be protected but that protection now relied upon the joint responsibility of the government and those indigenous representatives chosen to head the commission created under court order. Therefore, the Court's recognition of RoN in *Atrato* led to the opportunity for stakeholders to re-enter a process that would ensure their access to information, participation in decision making, and retain remedies in environmental matters of direct concern to them.

This outcome displayed an appropriate consideration of interests and balanced between a continued generation of socio-economic benefits but aimed to reduce harming the environment through the creation of domestic mechanisms for nature's restoration. It is considered beneficial because it contributes towards a model of good practice from a joint-governance perspective, one that exemplifies the kind of potential concluded by Wesche, in that the RoN movement should depart from the previous aim to replace the entire system of international environmental law in favour of RoN and instead invest its efforts towards RoN strengthening the rule of law in the regime of environmental law.

The Islamic State of Iraq and the Levant's Sexual Exploitation of Yazidi Women, Human Trafficking, and International Criminal Law

Fanny Decaluwé

1. INTRODUCTION

"I saw everything. I saw girls being raped. I witnessed their torture. I saw babies separated from their mothers. They killed our fathers, uncles, everyone. There is no horror I have not experienced. I lost my senses. There is nothing worse than rape."[1] These words were pronounced by a then twenty-one-year-old Yazidi woman who was captured by fighters from the Islamic State of Iraq and the Levant (hereinafter "ISIL") and who was eventually released following a payment. Her story is one of many, as it is believed that around six thousand Yazidi women were captured by ISIL in 2014.[2] Seen as "devil worshippers" by ISIL due to their religion,[3] Yazidi women were subjected to the greatest horrors, and yet, justice remains undone.

This paper, using the doctrinal research methodology, aims to discuss the relationship between the crimes committed against Yazidi women, the notion of human trafficking, and international criminal law. More specifically, this paper provides a general background of the situation; assesses whether the crimes concerned meet the requirements of the Trafficking Protocol's definition of human trafficking; and considers how the Protocol was implemented in Iraqi law and whether and how human trafficking is covered under the Rome Statute. Additionally, this paper evaluates how the crimes against the Yazidis may constitute crimes against humanity and what legal pathways are available to them. Eventually, the goal of this paper is to shed light on the different options available to Yazidi women to claim that they have been victims of human trafficking under both Iraqi Law and international criminal law.

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[1] BBC News, 'Yazidi women: Slaves of the Caliphate' (*YouTube*, 22 January 2015) <www.youtube.com/watch?v=bO1r0s2mw1k> accessed 13 June 2022.

[2] Christine Gibbons, 'CEDAW, the Islamic State, and Conflict-Related Sexual Violence' (2018) 51 Vand J Transnat'l L p. 1427.

[3] Marwah Adhoob and Bruce Zagaris, 'Genocide and Crimes against Humanity' (2021) 37 IELR p. 202.

2. General Background

2.1. ISIL

ISIL has a long history dating back to 1999.[4] Originally created under the name "Jama'at", the organisation went through many changes, including merging to become "al-Qaeda in Iraq", "the Islamic State of Iraq" and, finally, "the Islamic State of Iraq and the Levant".[5] The latter is the group as we know it today, which emerged in 2011 after the Syrian rebellion against Bashar al-Assad took place.[6] As the group became independent for the first time, it started a campaign of expansion.[7] Consequently, ISIL took control of the town of Sinjar in Iraqi Kurdistan, home to the Yazidis, in August 2014.[8]

2.2. The Yazidi Community

The Yazidis are a minority group of Kurdish origin who practice their own religion, Yazidism.[9] They have, since at least the sixteenth century, been persecuted by Muslim populations, who perceived them as "devil worshippers" due to Yazidisim's being formed from several local traditions.[10] In the 1970s, the Yazidis were forced to leave their villages and move to Sinjar as part of Saddam Hussein's "Arabization programs".[11] This explains why, when ISIL attacked them in 2014, most Yazidis lived around the town of Sinjar.

2.3. ISIL's Crimes Against the Yazidi Community

Following ISIL's takeover of Sinjar, Yazidi men were separated from Yazidi women.[12] While the former were systematically executed, the latter were

[4] David Sverdlov, 'Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence against Women' (2017) 50 Cornell Int'l LJ p. 335.
[5] ibid.
[6] Gibbons (n 2), p. 1426.
[7] Sverdlov (n 4), p. 336.
[8] Sarah Myers Raben, 'The ISIS Eradication of Christians and Yazidis: Human Trafficking, Genocide, and the Missing International Efforts to Stop It' (2018) 15 Braz J Int'l L p. 243.
[9] Sverdlov (n 4), p. 336.
[10] ibid, p. 337.
[11] Gibbons (n 2), p. 1426.
[12] ibid.

subjected to sexual exploitation and taken away from their children.[13] ISIL set up an organized sex trade with slave markets where ISIL soldiers could buy Yazidi women.[14] The latter were “transported from location to location”,[15] held in warehouses’ viewing rooms where they were photographed, given numbers and inspected, and sometimes even “made to sit in a chair facing buyers after anything that could be used to cover their bodies was taken away”.[16] Once a Yazidi woman was bought, her status as a slave was registered in a contract.[17] There were also “practical rules guiding slave transactions and treatment”,[18] including a prohibition on ISIL fighters’ transferring slaves to non-ISIL fighters and the requirement of “return to common ownership by ISIL” when the owner died.[19] This practice was not only authorized by ISIL, but also encouraged and celebrated as raping “kufaar” (infidels), which was thought to bring ISIL fighters closer to God.[20] Several victims reported that some ISIL fighters would even pray before and after sexually abusing them.[21]

Among ISIL’s victims, girls as young as six years old were sexually abused.[22] This terrifying treatment of Yazidi women did not only mentally and physically affect them when they were at the hands of ISIL, but also after they managed to escape (if they were successful in doing so) because of the continuous trauma and added difficulties of living in camps and not knowing the fate of their family members.[23] Up to ninety percent of the women freed reportedly suffered from severe lethargy, i.e., when someone “sleeps for days and appears unable to wake or sit up”.[24] According to Human Rights Watch, several women living in camps even committed suicide.[25] Yet, despite the recognized atrocities inflicted upon Yazidi women and girls, impunity persists. As a potential way to prosecute ISIL fighters, one may wonder

[13] Adhoob and Zagaris (n 3), p. 202.
[14] Gibbons (n 2), p. 1426.
[15] Samantha Hechler, 'Prosecuting Islamic State Members for Sexual and Gender-Based Crimes Committed against Yazidi Women and Girls' (2017) 25 Cardozo J Int'l & Comp L p. 601.
[16] ibid.
[17] ibid, p. 602.
[18] Gibbons (n 2), p. 1428.
[19] ibid.
[20] Hechler (n 15), pp. 601-602.
[21] Gibbons (n 2), p. 1427.
[22] Lisa Davis, 'Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict' (2016) 22 Sw J Int'l L p. 57.
[23] Gibbons (n 2), p. 1428.
[24] ibid.
[25] Hechler (n 15), p. 603.

whether the sexual exploitation of Yazidi women could qualify as human trafficking. Part three of this paper aims to answer this question.

3. The Yazidis' Sexual Exploitation by ISIL and "Human Trafficking"

3.1. Human Trafficking under the Trafficking Protocol

The leading definition of human trafficking can be found in article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter "the Trafficking Protocol").[26] This definition is made of three cumulative conditions, namely the act, means, and purpose. First, the "act" can be the recruitment, transportation, transfer, harboring, or receipt of persons. Second, the "means" include the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or of a position of vulnerability, or the giving or receiving of payments. Third, the "purpose" is that of exploitation which, "at minimum, shall include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs".[27]

3.2. Application of the Trafficking Protocol's Definition of "Human Trafficking" to the Acts of Sexual Exploitation Inflicted upon Yazidi Women and Girls

This definition shall now be applied to the case of the Yazidi victims of sexual exploitation. First, the "act" is fulfilled (transfer, harboring), as ISIL abducted them and moved them from facility to facility to be sold.[28] In some cases, women were even sent to Syria.[29] Interviewed by the BBC, a Yazidi survivor recalls the following event: "He picked me out of a hundred and fifty girls by drawing lots. He was so ugly like a beast with his long hair. He smelt so bad. I was so frightened I could not look at him".[30] When a Yazidi

[26] United Nations General Assembly Res 55/25 (15 November 2000) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime UN Doc A/RES/55/25.
[27] ibid, Art 3(a).
[28] Hechler (n 15), p. 601.
[29] The Atlantic, 'Yazidi Girls: Prisoners of ISIS' (*YouTube*, 7 December 2017) <www.youtube.com/watch?v=Te6HOtiBcf8> accessed 13 June 2022.
[30] BBC News, 'Yazidi survivor: "I was raped every day for six months"' (*YouTube*, 24 July 2017) <www.youtube.com/watch?v=XDniN3k5aQ8> accessed 13 June 2022.

woman was sold, she was under the custody of her owner, and when she had not been sold yet, she was under the custody of the "common ownership" of ISIL.[31] In any case, Yazidi women were under the custody of ISIL – be it under general or individual custody. Second, several of the "means" listed under the trafficking definition were used by ISIL. Arguably, however, the main method used was that of "threat or use of force". Indeed, many Yazidi survivors testify that they saw their male family members being killed in front of their eyes[32] and therefore knew that if they resisted, they were likely to be killed as well. When women and girls showed that they did not want to go with ISIL fighters, they were also beaten and dragged away by force.[33] Additionally, Yazidi women were undoubtedly extremely vulnerable in front of ISIL members who were armed while they were not.[34] They simply had no way to escape or defend themselves. Third, the "purpose" for which Yazidi women were taken is clearly sexual exploitation. Their use as sexual slaves was even formally regulated through laws governing "when and between whom sex is permitted". For example, having sexual relations with a pregnant slave was prohibited and fathers and sons could not share a slave.[35] As mentioned above, a "set process from capture to trade" was even put in place. There is therefore no doubt that ISIL's systematic sexual exploitation of Yazidi women constitutes human trafficking.

In addition to article 3(a) of the Trafficking Protocol, article 3(c) mentions that if a child under the age of eighteen is recruited, transported, transferred, harbored, or received for the "purpose" of exploitation, this shall always constitute "trafficking in persons", even if the aforementioned "means" are not met.[36] In the case at hand, many survivors report that children were also victims of the sex trade: "Whether someone was nine or twenty did not make a difference to them";[37] "I saw a man over forty take a ten-year-old girl";[38] "They raped girls who were nine, ten or even eight".[39] Those are all sentences pronounced by Yazidi women who witnessed, with their own eyes, that children were not spared by the horrors of ISIL. In this case, the sexual acts imposed on children automatically constitute human trafficking.

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[31] Gibbons (n 2), p. 1428.
[32] BBC News (n 30).
[33] NBC News, 'ISIS Terror: Yazidi Woman Escapes Sexual Slavery' (*YouTube*, 18 February 2015) <www.youtube.com/watch?v=VOFQgKQXX1E> accessed 13 June 2022.
[34] Hechler (n 15), p. 609.
[35] Sverdlov (n 4), p. 339.
[36] Protocol to Prevent, Suppress and Punish Trafficking in Persons (n 26), Art. 3(c).
[37] The Atlantic (n 29).
[38] BBC News (n 30).
[39] NBC News (n 33).

4. Iraq's Obligation under the Trafficking Protocol to Adopt Legislative Measures against Human Trafficking

Pursuant to article 5 of the Trafficking Protocol, State parties "shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol".[40] As a State party to the Trafficking Protocol, Iraq– one of the two countries, with Syria, where Yazidi women were used as sex slaves[41] – is therefore under the obligation to enact this type of law.[42]

In Iraq, Law No. 28 on Combating Trafficking in Persons (hereinafter "the Iraqi law") was passed on 23 April 2012.[43] Despite being modelled after the Trafficking Protocol, this law does not meet all the requirements of the Protocol. For example, the aforementioned article 3(c) was not implemented in the Iraqi law, meaning that the trafficking of children, like adults, must fulfil the "means" criterion in addition to the act and exploitation elements to constitute human trafficking.[44] In terms of punishment, the Iraqi law provides for different types of punishment, from imprisonment and a financial penalty[45] to capital punishment if "the act of human trafficking leads to the death of the victim".[46]

The Iraqi definition of human trafficking[47] differs slightly from that of the Trafficking Protocol[48] in that it omits "transfer" as an act. Nonetheless, the crimes committed against Yazidi women would most likely still qualify as human trafficking under Iraqi law based on another act, such as transporting or harboring. It shall be noted that other Iraqi sources, such as the Penal Code or Constitution,[49] might be relevant for prosecuting acts of human trafficking.[50] However, this goes beyond the scope of this paper.

[40] Protocol to Prevent, Suppress and Punish Trafficking in Persons (n 26), Art. 5.
[41] United Nations General Assembly Res 55/25 (15 November 2000) United Nations Convention against Transnational Organized Crime UN Doc A/RES/55/25, Art. 15(1)(a).
[42] Protocol to Prevent, Suppress and Punish Trafficking in Persons (n 26).
[43] Iraqi Law No. 28 on Combating Trafficking in Persons (2012).
[44] United Nations Office on Drugs and Crime, 'GLO.ACT supports counterparts in Iraq to review national legislation on Trafficking in Persons' <www.unodc.org/romena/en/Stories/2020/February/glo-act-supports-counterparts-in-iraq-to-review-national-legislation-on-trafficking-in-persons.html> accessed 14 June 2022.
[45] Iraqi Law No. 28 on Combating Trafficking in Persons (n 43), Art. 5.
[46] ibid, Art. 8.
[47] ibid, Art. 1.
[48] Protocol to Prevent, Suppress and Punish Trafficking in Persons (n 26), Art 3(a).
[49] Constitution of the Republic of Iraq (2005); See also Iraqi Penal Code (1969).
[50] International Organization for Migration, 'The protection of victims of trafficking in Iraq' (2019) <https://reliefweb.int/report/iraq/protection-victims-trafficking-iraq-review-applicable-legal-regime-and-assessment> accessed 14 June 2022, p. 22.

4.1. Obstacles to the Proper Enforcement of Iraq's Anti-Trafficking Laws

Given that the sexual exploitation of Yazidi women by ISIL took place in Iraq, among other places, those crimes fall under Iraq's national jurisdiction.[51]. However, there are various obstacles to the proper enforcement of the Iraqi law.[52] The combination of the extent of the crimes perpetrated by ISIL with the country's lack of resources causes national courts in Iraq to be overwhelmed.[53] The "highly politicized and polarized environment" in the country raises another barrier to prosecution.[54] Additionally, serious concerns have been raised about the fairness of judicial processes in Iraq.[55] The United Nations Assistance Mission in Iraq indeed pointed out that "a consistent failure to respect due process and fair trial standards" occurred in Iraqi criminal courts.[56]

As of 2018, no charges for sexual violence have been brought to Iraqi courts.[57] It therefore remains to be seen whether those courts will, at some point, with time and additional means, prosecute ISIL fighters for sexual exploitation amounting to human trafficking. A potential obstacle to this could be that Iraqi courts would rather choose to prosecute ISIL fighters for murder rather than human trafficking, as most of those fighters probably did not only rape Yazidis but also killed some, and murder is commonly seen as worse than rape. This, however, would prevent justice from being rendered to those many victims who were raped but not killed, and would fail to acknowledge the seriousness of sexual exploitation.

4.2. The (Dis)Advantages of Prosecuting ISIL under Iraqi Law

The main advantage of prosecuting ISIL fighters for the sexual exploitation of Yazidi women under Iraqi (human trafficking) law – as opposed to prosecuting them under international law for more serious international crimes, such as crimes against humanity or genocide – is that it might be easier to prove. However, as already mentioned, there are obstacles to this. Additionally, prosecution of ISIL for crimes against humanity or genocide

[51] Lourenzo Fernandez, 'Taking the Islamic State of Iraq and Syria (ISIS) to Court: Prosecuting ISIS's Crimes in Iraq and Syria' (2018) 12 NZ Pub Int Law Jl p. 77.
[52] Iraqi Law No. 28 on Combating Trafficking in Persons (n 43).
[53] Fernandez (n 51), p. 77.
[54] ibid.
[55] ibid.
[56] ibid.
[57] ibid.

under Iraqi law is, for the time being, not a possibility as those crimes have not been incorporated into Iraqi law.[58] Although it would be harder to prove, the United Nations suggested that the treatment inflicted upon Yazidi women may qualify as a crime against humanity, war crimes, or genocide.[59] Part four of this paper aims to discuss human trafficking in international criminal law and address whether and how those crimes could be prosecuted as crimes against humanity under international criminal law.

5. Human Trafficking in International Criminal Law

Article 7 of the Rome Statute of the International Criminal Court (hereinafter "the ICC") covers crimes against humanity. Articles 7(1)(c) and 7(1)(g) of the Rome Statute,[60] more specifically, refer to the crimes of "enslavement" and "sexual slavery" respectively. Since neither the ICC nor any other international criminal tribunal has ever heard a trafficking case, it is unclear whether those provisions on slavery encapsulate human trafficking.[61] In this regard, different interpretations have been proffered.

5.1. Why Should International Criminal Law Cover Human Trafficking?

Nadia Alhadi suggests three reasons why human trafficking should be addressed in international criminal law: it is "[a] pervasive and ever-growing crime",[62] it "[p]roduces grave consequences that contravene many nearly universally recognized human rights"[63] such as degrading treatment and security of person, and "[i]t contravenes economic and social rights enshrined in international legal instruments".[64]

While Alhadi acknowledges the benefits of the Trafficking Protocol and its implementation in national jurisdictions, she argues that many countries fall short of enforcing it – just like Iraq.[65] According to the UN Regional Information Centre for Western Europe, in 2018, "for every eight hundred people trafficked, only one person was convicted".[66] This clearly

[58] ibid, pp. 74, 77.
[59] ibid, p. 74.
[60] Rome Statute of the International Criminal Court (1998), Arts. 7(1)(c) and 7(1)(g).
[61] Nadia Alhadi, 'Increasing case traffic: expanding the International Criminal Court's focus on Human Trafficking cases' (2020), 41(3) Michigan Journal of International Law p. 542.
[62] ibid, p. 546.
[63] ibid.
[64] ibid, p. 547.
[65] ibid, p. 551.
[66] Autumn D. Tolar, 'Human trafficking analyzed as a crime against Humanity' (2020) 20(1) International and Comparative Law Review p. 131.

shows the disconnect between the enactment of laws and their actual enforcement.[67] Since the Protocol does not have its own prosecution office, it depends on States taking actions.[68] It is in this type of situation, that is when national-level enforcement is lacking, that Alhadi believes the international community should step in to complement domestic efforts.[69] It shall be noted, however, that the ICC's jurisdiction is only effective when the State cannot or does not want to prosecute the offenders.[70] Additionally, Alhadi claims that having human trafficking covered under the Rome Statute would not only provide domestic law enforcers with standards to follow, but also contribute to the unification of laws on human trafficking and facilitate the prosecution of state officials responsible for such crimes.[71]

5.2. Is Human Trafficking Covered by the Rome Statute?

The Rome Statute does not explicitly refer to human trafficking. However, articles 7(1)(c) and 7(1)(g) of the Rome Statute have been interpreted by the ICC and other tribunals as encompassing human trafficking.[72] While the former article covers enslavement, the latter covers trafficking of an exclusively sexual nature, such as rape, sexual slavery, or enforced prostitution. The Elements of Crimes, tasked with assisting the Court in interpreting article 7 of the Rome Statute,[73] suggests that sexual slavery includes sex trafficking, and that enslavement incorporates trafficking in persons.[74] It was also clarified that article 7(1)(c) exclusively covers forms of trafficking that do not have a sexual element to them. The justification for distinguishing sexual slavery from enslavement is that "the violation of a victim's sexuality adds a dimension of intimacy that cannot be glossed over".[75] This distinction is therefore aimed at emphasizing the seriousness of sexual slavery in case a person would not only be victim of human trafficking in the form of enslavement, but also sexual slavery.[76]

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[67] ibid.
[68] Alhadi (n 61), p. 553.
[69] ibid, pp. 549, 553.
[70] Tolar (n 66), p. 132.
[71] Alhadi (n 61), p. 553.
[72] ibid, pp. 554-555.
[73] Rome Statute of the International Criminal Court (n 60), Arts. 7 and 21(1)(a).
[74] Alhadi (n 61), p. 555.
[75] ibid, p. 556.
[76] Jamal Beigi, 'Criminalization of Human trafficking upon the basis of International Criminal Court Status and its related challenges' (2017) 54 International Studies Journal p. 37.

Pursuant to the Slavery Convention,[77] the crime of slavery requires a form of ownership over a person.[78] The Elements of Crime indicate that both types of slavery need "the act in question to involve any or all of the powers attaching to the right of ownership".[79] This aligns with the definition of enslavement in article 7(2)(c) of the Rome Statute which includes purchasing, selling, lending, or bartering a person. However, as suggested by Alhadi, this would significantly narrow the Trafficking Protocol definition, and fail to encapsulate many instances where exploitation, but not ownership, is present. If this high threshold definition is to be used to define slavery, there is little chance that human trafficking would be encompassed in it, as human trafficking focuses on exploitation rather than on ownership.[80] The International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY"), in its *Prosecutor v Kunarac* case,[81] argued that enslavement shall "encompass a much wider range of conduct than the traditional conception of chattel slavery"[82] and listed some characteristics of this crime, including (inter alia) control of movement, psychological control, measures taken to prevent or deter escape, force, duration, and cruel treatment and abuse. While these elements resemble ownership, formal ownership of the person, the ICTY reiterates, is not required. The prosecutor therefore solely needs to demonstrate that the trafficker continually controlled the victim through any of the conducts described by the Trial Chamber.[83] While human trafficking cases with an element of continuous exploitation would fall under the definition of enslavement, those cases where the trafficker does not have sustained power over the victim – such as merely transporting the victim – would not.

Moreover, the definition of enslavement itself refers to trafficking by mentioning the following: "enslavement includes the exercise of power in the course of trafficking in persons".[84] According to Clara Frances Moran, this clearly indicates the intention to include human trafficking as part of the definition of enslavement.[85]

While different interpretations of what enslavement entails have been made, the prevalent view seems to be that if there is continuous exploitation,

[77] Convention to Suppress the Slave Trade and Slavery (1926).
[78] Beigi (n 76), p. 37.
[79] Alhadi (n 61), p. 557.
[80] Tolar (n 66), p. 137.
[81] *Prosecutor v Dragoljub Kunarac* (Judgement) ICTY-96-23-T & 96-23/1-T (22 February 2001).
[82] Alhadi (n 61), p. 558.
[83] ibid, p. 559.
[84] Rome Statute of the International Criminal Court (n 60), Art. 7(2)(c).
[85] Tolar (n 66), p. 35.

human trafficking is encompassed in it. It shall now be assessed whether human trafficking meets article 7's chapeau elements.

5.3. Article 7 of the Rome Statute's Chapeau Elements

Even when a crime falls under enslavement or sexual slavery, it must still fulfil article 7's chapeau elements for the ICC to be able to adjudicate the case under the heading of crime against humanity. The required criteria are the following: "the act was committed by an individual associated with the state or other organization with state-link control as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[86]

First, the attack must have been directed against a civilian population.[87] Under article 7(2) of the Rome Statute,[88] this means that there must be "a course of conduct involving the multiple commission of acts referred to in article 7(1)",[89] i.e., essentially "any mistreatment of a civilian population".[90] Civilians are defined as non-participants in armed forces who are part of an identifiable group with shared religious, national, ethnic or linguistic characteristics.[91] This criterion therefore aims to address the collective nature of crimes against humanity as opposed to an attack being perpetrated against a random group of people.[92] In order for this requirement to be met, the motivation for attacking a civilian population must therefore originate from one of the common characteristics of the group.[93]

The issue with human trafficking fulfilling this first criterion is that in some cases – such as for organized criminal gangs – human trafficking is perpetrated for economic reasons rather than for the purpose of targeting a specific population.[94] Additionally, the attack must have been directed by a state or organization which had a de facto policy for the attack.[95] In other words, the attack should be perpetrated for the purpose of advancing an

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[86] Rome Statute of the International Criminal Court (n 60), Art. 7(1).
[87] Camille Antilla, 'Human trafficking as a crime against humanity – the potential to prosecute human trafficking at the International Criminal Court' (*University of Helsinki Library*, May 2019) <https://helda.helsinki.fi/bitstream/handle/10138/303348/Antila_Camilla_Pro_gradu_2019.pdf?sequence=2&isAllowed=y> accessed 4 June 2022.
[88] Rome Statute of the International Criminal Court (n 60), Art. 7(2).
[89] Alhadi (n 61), p.562; Rome Statute of the International Criminal Court (n 60), Art. 7(2)(a).
[90] Alhadi (n 61), p. 563.
[91] Beigi (n 76), p. 42.
[92] ibid; See also Tolar (n 66), p.143.
[93] Tolar (n 66), p. 143.
[94] Beigi (n 76), p. 42.
[95] Rome Statute of the International Criminal Court (n 60), Art. 7(2)(a).

organizational policy,[96] but this policy need not be expressly mentioned or formally adopted. Moreover, the fact that the attack can have been directed by an organization makes it possible for non-State actors exercising a de facto power over a specific region to fall under jurisdiction of the ICC and thereby to be prosecuted.[97] In the *Tadic* case,[98] the ICTY indeed established that crimes against humanity can be committed by terrorist organizations or individuals.[99]

Second, the mens rea requirement for crimes against humanity is that the perpetrator must have committed the act knowing that it was part of a broader, systematic attack against a specific type of population.[100] The perpetrator must not necessarily share the goal pursued by the widespread campaign but should at least be aware that his acts are part thereof and understand the general context in which they occur.[101]

Third, the attack which the act was part of must have been either widespread or systematic. The former element was interpreted as meaning that the attack must have been of a large scale, both in terms of the nature of the attack (time, geographical location)[102] and the number of victims. The latter criterion, in turn, requires that the act was organized and that it is improbable that it occurred randomly. A systematic attack is thus one that did not happen accidentally and that was repeated on a regular basis.[103] Elements such as a plan can provide evidence for determining the level of organization; however, such a plan or policy is not strictly required for the systematic element to be met.[104] Additionally, those requirements must be assessed as a whole rather than on an individual basis.[105]

Now that it has been determined that human trafficking can fall under the slavery provisions of crimes against humanity in some instances, and that article 7's chapeau elements have been described, it shall be determined whether the sexual exploitation of Yazidi women and girls could fall under one of those two slavery provisions, meet article 7's chapeau requirements, and thus potentially qualify as a crime against humanity.

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[96] Beigi (n 76), p. 43.
[97] Alhadi (n 61), p. 553.
[98] *Prosecutor v Dusko Tadic* (Judgment) ICTY-94-1-A (15 July 1999).
[99] Beigi (n 76), p .41.
[100] Alhadi (n 61), p. 564.
[101] ibid; See also Tolar (n 66), p. 144.
[102] Tolar (n 66), p. 141.
[103] Alhadi (n 61), p. 565.
[104] Tolar (n 66), p. 142.
[105] Alhadi (n 61), p. 567.

6. Yazidi Women's Sexual Exploitation by ISIL and Human Trafficking under International Criminal Law

6.1. Can the Crimes Committed by ISIL against Yazidi Women Be Considered Sexual Slavery and/or Enslavement?

As determined above, article 7(1)(g) of the Rome Statute covers sexual slavery while article 7(1)(c) covers enslavement. Additionally, enslavement only encompasses situations in which there is no sexual element. Therefore, since the crimes covered here concern sexual exploitation, it shall be assessed whether they constitute sexual slavery rather than enslavement. Slavery is mainly interpreted as not requiring ownership but rather necessitating continuous control over the victim. In the case at hand, Yazidi women were clearly under the continuous control of ISIL as they were not free and could not leave the area where their "owner" lived or the warehouse where they were held captive if they had not been sold yet. Moreover, it could be argued that even though ownership is not required, it is present in this case. It is indeed quite clear from ISIL's laws that ISIL ran an organized sex trade with contracts and ownership. Therefore, in any case, the crimes committed against Yazidi women amount to sexual slavery under article 7(1)(g) of the Rome Statute.

6.2. Do the Acts Committed against Yazidi Women Fulfil Article 7's Chapeau Requirements?

First, the attack was directed against the Yazidi civilian population. Indeed, Yazidi women are non-participants in armed forces who are members of the identifiable Yazidi community. This group has its own religion called the Yazidism, its own Kurdish ethnicity, and Kurdish language. It is clear from ISIL's own documents that ISIL attacked them because they practice a religion seen by the terrorist group as endorsing devil worshipping. Additionally, the attack was committed with the aim of establishing ISIL's policy to destroy any community that does not share their beliefs and to convert them to their extremist view of Islam.[106] In an interview with the BBC, a Yazidi woman testifies that she was forced to pray and read the Quran and that, "[E]ven worse, she had to learn the Quran by heart".[107] She even added that "[E]ither you die or you learn it by heart".[108] Therefore, ISIL's

[106] Craig Douglas Albert, 'No place to call home: the Iraqi Kurds under the Ba'ath, Saddam Hussein, and ISIS' (2017) 92(3) Chicago-Kent Law Reviez p. 835.
[107] The Atlantic (n 29).
[108] ibid.

attack on the Yazidi population was clearly motivated by their willingness to destroy the Yazidis' culture and beliefs.

Second, the requirement that the perpetrator must have known that they were acting as part of a systematic attack against the Yazidis cannot be addressed here. It shall indeed be assessed in more specific, individual cases.

Third, the attack against the Yazidis was arguably not only widespread, but also systematic. It is indeed believed that around six thousand Yazidi women were abducted by ISIL and that they were sexually exploited not only around the Sinjar area, but also in other places in Iraq and Syria. Additionally, this attack was very well organized by ISIL and repeated on a regular basis. For instance, a Yazidi victim told the BBC in an interview that every day for six months, her owner raped her.[109]

All in all, it can be concluded that not only would the crimes committed against the Yazidis constitute sexual slavery, but that they can also be adjudicated by the ICC under the heading of crimes against humanity. It now remains to be seen how this case could be brought in front of a court or tribunal and be prosecuted.

7. Prosecution under International Criminal Law

The Rome Statute includes an admissibility regime made of two elements: complementarity and gravity. Even though these are very important in determining whether crimes can be prosecuted, this consideration falls behind the scope of this paper. This part, instead, only aims to address the different options available to prosecute ISIL. Those include the ICC, an ad hoc international criminal tribunal, national courts, a hybrid tribunal, and foreign national courts.

7.1. The ICC

ISIL's actions may be prosecuted under the heading of crimes against humanity at the ICC.[110] However, there are several obstacles to this, the first one being that neither Iraq nor Syria have signed the Rome Statute.[111] Another way for the ICC to exercise jurisdiction in this case would be through a referral from the United Nations Security Council.[112] This is nonetheless quite unlikely given that in 2014, both Russia and China – two of the permanent members of the UN Security Council – vetoed a resolution

[109] BBC News (n 30).
[110] Gibbons (n 2), p. 1447.
[111] ibid, p. 1448.
[112] Hechler (n 15), p. 611.

to refer the situation in Syria to the ICC.[113] Another possibility would be for either Iraq or Syria to accept jurisdiction of the ICC under article 12(3) of the Rome Statute.[114] This, however, would enable the ICC to examine the entire conflict in those countries, including acts by the government, rendering this recourse very unlikely as well.[115]

7.2. Ad hoc International Criminal Tribunal

An international criminal tribunal could be created by the United Nations, as was done for the former Yugoslavia and Rwanda.[116] However, despite several investigation units having collected thousands of documents and pushed for the establishment of such a specialized tribunal in Iraq, this option remains improbable as it would require the Security Council to vote on this.[117]

7.3. National Courts

Courts in Syria and Iraq could prosecute the crimes themselves.[118] This, according to UN bodies, “remains the only viable path for culpability in Syria and Iraq”.[119] This option presents many advantages, such as the potential for greater impact among the local population, easier access to evidence, and to perpetrators.[120] Although such prosecutions have started, they do not cover sexual violence crimes. Additionally, there are concerns about due diligence standards not being satisfied in terms of investigation and punishment of those crimes.[121] In 2017, Human Rights Watch indeed emphasized potential issues related to these “rapid-fire trials” focusing on efficiency and neglecting fair trial concerns. [122] A potential solution for this would be for Iraq to coordinate with actors such as a criminal investigative group like the Commission for International Justice and Accountability and the UN Security Council investigative team.[123] This is more likely to occur given that such an investigative team would only be mandated for the

[113] Gibbons (n 2), p. 1448.
[114] Rome Statute of the International Criminal Court (n 60), Art. 12(3).
[115] Gibbons (n 2), p. 1448.
[116] ibid, p. 1449.
[117] ibid.
[118] Hechler (n 15), p. 609.
[119] Gibbons (n 2), p. 1449.
[120] Hechler (n 15), p. 610.
[121] Gibbons (n 2), p. 1450.
[122] ibid.
[123] ibid, p. 1454.

investigation of ISIL crimes and not for the Iraqi government's actions as part of the conflict.

7.4. Hybrid Tribunal

A hybrid tribunal combining domestic State law with international criminal standards could be created. However, such a tribunal can only operate within Syria or Iraq if the political situation changes, as it is currently unstable. Additionally, for this tribunal to be established, the Iraqi or Syrian governments would either need to consent to it, or a resolution by the UN Security Council would be required. Setting up such a tribunal therefore faces the same issues as for prosecution at the ICC.

7.5. Foreign National Courts

Another option would be to prosecute ISIL in the courts of countries other than Iraq and Syria. This would be possible under the principle of universal jurisdiction, whereby the laws of the country adjudicating the case would apply based on the idea that "certain crimes are so heinous that any nation can exercise its authority to stop it".[124] Such an option does not require the victim or the perpetrator to be linked to the State trying the case. This principle was, for instance, applied in Sweden to convict a Syrian rebel fighter[125] or more recently in Germany where an ISIL supporter was condemned for her involvement in the death of a Yazidi girl.[126] Such cases are however the exception rather than the rule, and no case on the sexual exploitation of Yazidis has been heard so far.

8. Conclusion

Considering the offence of human trafficking, two main legal pathways are available to Yazidi victims: prosecution under (Iraqi) national law and prosecution under international criminal law. With regard to the first option, this paper outlines that the sexual exploitation of Yazidis constitutes human trafficking under both the Trafficking Protocol and Iraq's anti-trafficking law. Despite there being advantages to prosecuting ISIL under Iraqi law, there are also obstacles to the proper enforcement of this law due to elements such as lack of resources, high number of cases, and issues in terms of fair

[124] Hechler (n 15), p. 619.
[125] ibid, p. 620.
[126] Marwah Adboob, 'Crime against humanity and the International Criminal Court: German Court convicts woman of crimes against humanity in death of Yazidi girl' (2021) 37(11) International Enforcement Law Report p. 411.

trial. As regards the second option, this paper demonstrates that in some situations, human trafficking can be covered by the Rome Statute under the notions of sexual slavery and enslavement. It further points out that the sexual exploitation of Yazidis constitutes a crime against humanity. Finally, the feasibility of the different legal pathways was assessed.

In February 2021, two thousand eight hundred and seventy-two Yazidis were reportedly still missing.[127] The whereabouts of their location remains unclear, although some reports suggest that they may still be under ISIL's control in Syria and Turkey or subjected to exploitation in other parts of the world. For those people, those who died at the hands of ISIL and those who survived, justice remains undone. When will impunity end?

[127] US Department of State, '2021 Trafficking in Persons Report: Iraq' <www.state.gov/reports/2021-trafficking-in-persons-report/iraq/> accessed 14 June 2022.

Ensuring Corporate Accountability: The UN Guiding Principles' Third Pillar in Germany and the U.S. *Anna Arden*

1. Introduction

In 2010, 42 of the world's 100 largest economic entities were corporations, with Wal-Mart having a revenue exceeding the GDPs of 171 countries.[1] This economic power, in addition to the global scale of their operations, creates the possibility for companies to fundamentally influence governments as well as individuals.[2] They perform sovereign tasks, such as maintaining public order or intervening in crisis areas.[3] Furthermore, they act as regulators in cross-border issues or face states in investment arbitration proceedings.[4] In that capacity, their actions have the potential to improve living conditions by creating jobs, initiating necessary research or providing products, which satisfy people's needs in their daily lives.[5] Regardless of their impact, transnational companies, as private actors, are not traditional subjects of international law, therefore, they are not directly bound by existing obligations deriving from international law.[6] This is particularly devastating when it comes to the vast amount of human rights abuses committed by companies.

One of the downsides of globalisation is the possibility to avoid stricter regulation with regard to workers' rights or environmental protection by relocating production sites to developing countries and emerging

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[1] Tracey Keys and Thomas Malnight, 'Corporate Clout Distributed: The Influences of the World´s Largest 100 Economic Entities' (2009) <https://globaltrends.com/product/special-report-corporate-clout-distributed-2012-the-influence-of-the-worlds-largest-100-economic-entities/> accessed 06 April 2022.

[2] Nina Schniederjahn, 'Access to Effective Remedies for Individuals against Corporate-Related Human Rights Violations' in Ralph Nikol, Thomas Bernhard and Nina Schniederjahn (eds), *Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht* (Nomos Verlagsgesellschaft 2013), p. 101.

[3] Christian Djeffal, 'Neue Akteure und das Völkerrecht: eine begriffsgeschichtliche Reflexion' in Ralph Nikol, Thomas Bernhard and Nina Schniederjahn (eds), *Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht* (Nomos Verlagsgesellschaft 2013), p. 12.

[4] ibid.

[5] Katarina Weilert, 'Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards' (2009) 69 Zeitschrift für ausländisches öffentliches Recht 883, p. 884.

[6] Matthias Herdegen, *Grundrisse des Rechts – Völkerrecht* (19th edition, C. H. Beck 2020), §13 para. 6.

economies.[7] As shown in a report conducted by the Business and Human Rights Resource Centre, most human rights abuses of the sample cases occurred in Asia and the Pacific with 28% of cases, Africa with 22% and Latin America with 18 % in contrast to only 3% of cases in Europe.[8] The findings further indicate violations of the entire range of human rights, including civil and political rights, labour rights as well as economic, social and cultural rights.[9] Moreover, in nearly 60% of the sampled cases the violations were caused directly by acts or omissions of the companies.[10]
With corporate conduct taking place in developing countries, where the national legal systems or the governments often do not have the capacity to investigate and prosecute complaints, victims are forced to turn to the legal systems of the parent company's home state.[11] These states could potentially regulate the extraterritorial conduct of business enterprises incorporated in their territory and thereby enable victims to receive compensation for their suffered harm.[12] However, in order to avoid creating a competitive disadvantage due to claims for damages, states generally refrain from addressing this issue individually.[13]

Nevertheless, there has been a growing movement on the international level discussing the issue of business and human rights, which resulted in different sets of guidelines, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, or the UN Guiding Principles on Business and Human Rights. While these initiatives codify already existing societal expectations rather than constituting new direct obligations on business enterprises, this development could lead to binding corporations to human rights standards in the future.[14] This movement has already been manifested in a draft for a legally binding instrument to regulate, in the realm of international human rights law, the activities of

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[7] Weilert (n 5), p. 885.
[8] United Nations Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse' (23 May 2008) A/HRC/8/5/Add.2, p. 10.
[9] ibid, p. 2.
[10] ibid, p. 4.
[11] Schniederjahn (n 2), p. 102.
[12] United Nations Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations ´Protect, Respect and Remedy` Framework' (21 March 2011) A/HRC/17/31, commentary to principle 2.
[13] Weilert (n 5), p. 897.
[14] Herdegen (n 6), §13 para. 3.

transnational corporations and other business enterprises, created by an open-ended intergovernmental working group employed through a mandate from the Human Rights Council.[15]

Since the development and adoption of such an instrument lies in the future, the aim of this paper shall be to assess the extent to which states ensure access to justice for victims of human rights abuses as indicated in the third pillar of the UN Guiding Principles on Business and Human Rights.[16] The focus will be on whether procedural laws in the U.S. and Germany allow for an adequate forum to litigate civil claims deriving from tortious acts abroad. The emphasis shall be on claims against parent companies, not their local subsidiaries, as parent companies may impact relevant policies of their subsidiaries and may offer increased chances for adequate compensation after victimization. After presenting the applicable provisions of the UN Guiding Principles on Business and Human Rights, as well as a brief overview on the chemical disaster in Bhopal, the analysis will proceed with highlighting the relevance and difficulties of the doctrine of *forum non conveniens* when trying to establish forum in the U.S. Additional mention will be made to the developments related to the Alien Tort Statute before comparing the procedural framework to the applicable laws in Germany.

2. UN Guiding Principles on Business and Human Rights

In the realm of the UN Human Rights Council, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, prepared a final report, which summarises his investigative work from 2005 to 2011, and entails the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, which was adopted by the Human Rights Council in March 2011. The framework entails three different components of effective human rights protection, namely the State's duty to protect individuals against human rights violations by third parties, the responsibility of corporations to respect human rights, and victims' access to remedy.[17] It is important to point out that the Guiding

[15] United Nations Human Rights Council, 'Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (2022) <www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc> accessed 06 April 2022.
[16] United Nations Human Rights Council (n 12).
[17] ibid, para. 6.

Principles do not create new obligations under international law.[18] Nevertheless, they demonstrate the existing consensus within the international community, and therefore constitute appropriate standards, which could be considered by courts when interpreting national legislation and deciding whether a corporation fulfilled its due diligence obligations.[19] The focus of this paper lies with the third pillar of the Guiding Principles considering access to remedy, taking into account that regardless of exhaustive protective regimes on a national and international level, sadly, human rights abuses are not completely inevitable. Therefore, in order to prevent the states' duty to protect from becoming meaningless or ineffective, access to adequate judicial steps is fundamental. Interesting to mention is that the foundational principle 25 highlights the states' obligation to ensure access to effective remedy only in cases "when such abuses occur within their territory and/or jurisdiction".[20] Consequently, with regard to states' sovereignty, no other state is obliged, nor should be obliged to establish its jurisdiction in cases of human rights abuses abroad. However, this provision disregards one of the essential problems of transnational companies and human rights abuses: states, in whose territory violations occur, often do not provide effective remedy to victims. This tension between sovereignty and effective human rights protection is a characterising issue in this context. Further, the concept presented in the Guiding Principles maintains the onus on the individual states to allow for domestic remedies, instead of emphasising the need for an international body adjudicating human rights abuses, as standards of fundamental importance to the international community.

Looking into state-based judicial mechanisms as described in principle 26, the Guiding Principles identify the existence of "legal, practical and other relevant barriers".[21] Nevertheless, only the following commentary further explains the existing difficulties. Some of the barriers named are the diffusion of responsibility within corporate structures, inaccessible forums in home states, the cost of litigation and legal representation, and lack of expertise in state officials, which are often a consequence of the existing imbalance in funds or access to information and expertise between the parties. Still, the description is rather vague, therefore, it is inapt to

[18] ibid, para. 14.

[19] Miriam Saage-Maaß and Maren Leifker, 'Haftungsrisiken deutscher Unternehmen und ihres Managements für Menschenrechtsverletzungen im Ausland' (2015) 42 Betriebs Berater 2499, p. 2504.

[20] United Nations Human Rights Council (n 12), principle 25.

[21] United Nations Human Rights Council (n 12), principle 26.

significantly improve victims' access to domestic remedies.[22] Moreover, even though the inaccessibility of adequate forum in the jurisdiction, where the human rights abuses occur, is recognised, principle 25 limits states' responsibility to their own territory.[23] Further, it does not mention the necessity to investigate whether companies incorporated under their laws violate human rights abroad.[24] Consequently, the Guiding Principles entail a rather contradictory approach regarding victims' access to justice.

3. THE CHEMICAL DISASTER IN BHOPAL

In order to analyse the possibility of an effective remedy, the United States and Germany are chosen as examples, since they are both popular home states for transnational operating enterprises, and at the same time their respective legal systems entail high standards of human rights protection. The comparison is based on a factual case, that has been denied forum in the United States and was referred back to the Courts of the Union of India. After the analysis of the U.S. rulings, the case shall be transferred and modified to a hypothetical German company.

On the night of the 2nd of December 1984, the toxic gas methyl isocyanate, used for the production of pesticides, such as Sevin and Temik, escaped from a chemical plant in Bhopal, India. The plant was owned and operated by Union Carbide India Limited ("UCIL"), a company incorporated under Indian law with 50.9 % of its stock belonging to the parent company Union Carbide Corporation ("UCC"), incorporated in New York. Another 20% of UCIL was owned by Indian government financial institutions.25 Carried by the wind, the gas affected the nearby densely populated areas, leaving 2,100 individuals dead and 200,000 people injured as well as livestock and crops damaged.[26] Up to date, more than 30 years later, the contaminated factory premises still have not been sufficiently rehabilitated, leaving people and the environment continuously affected by the toxic chemicals on site.[27]

[22] Schniederjahn (n 2), p. 112.
[23] Schniederjahn (n 2), p. 112.
[24] ibid.
[25] Jamie Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal' (1991) 29 Osgoode Hall Law Journal 1, p. 3.
[26] *In Re Union Carbide Corporation Gas Plant Disaster* [1986] 634 F. Supp. 842 (SDNY), p. 844.
[27] Deutschlandfunk, 'Eine Chemiekatastrophe ohne Ende' (3 December 2014) <www.deutschlandfunk.de/30-jahre-bophal-eine-chemiekatastrophe-ohne-ende-100.html> accessed 07 April 2022.

Methyl isocyanate was known to be a volatile and highly toxic chemical, which could cause severe and diverse effects on human beings, such as lung damage, tuberculosis, blindness, nervous and psychological disorders, gynaecological damage, as well as birth defects.[28] Therefore, extreme caution needed to be applied when handling this dangerous substance, something not only known by the subsidiary in India, but also to the American parent company, which led to suits being brought against UCC in U.S. courts. A similar scenario can be thought of when considering the multitude of German parent companies active in the chemical industry, which have inter alia subsidiaries located in India and incorporated under Indian law.

4. Access to Justice in the U.S.

Shortly after the catastrophe, more than 145 cases were brought against UCC in different courts all over the U.S, which were joined and assigned to the District Court of the Southern District of New York.[29] Separately to the individual victims, the Union of India filed a complaint against UCC before the same court based on the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, which legitimised its representation of the Indian plaintiffs.[30] Particularly interesting from a civil law perspective is hereby the doctrine *forum non conveniens*, which can only be found in common law traditions, and the Alien Tort Statute, which has dominated the US-focused discussion related to human rights abuses by transnational operating corporations.

4.1. Forum Non Conveniens

The defendant UCC raised a motion to dismiss the action on grounds of *forum non* conveniens.[31] This established doctrine originated in 1947 from the two United States Supreme Court decisions in Gulf Oil Corp. v Gilbert and Koster v Lumbermens Mutual Casualty Co.[32] The Court established in Gilbert, that a federal district court can dismiss an action “at least where its

[28] Cassels (n 25), p. 3.
[29] C. M. Abraham and Sushila Abraham, ‘The Bhopal case and the development of environmental law in India’ (1991) 40 International & Comparative Law Quarterly 334, p. 335.
[30] ibid.
[31] *In Re Union Carbide Corporation Gas Plant Disaster* [1986] 634 F. Supp. 842 (SDNY), p. 845.
[32] Mark Weston Janis, ‘The Doctrine of Forum Non Conveniens and the Bhopal Case’ (1987) 34 Netherlands International Law Review 192, p. 194.

jurisdiction is based on diversity of citizenship and the state courts have such power".[33] Such decision, however, should take into account private interests, such as access to sources of proof, access to witnesses and the possibility to view the premises as well as public interests, which include inter alia administrative burden in congested centres, the burden of jury duty, local interests and conflict of laws.[34] In Koster, the Court added that "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice".[35] To decide on the defendant´s motion, the District Court further relied on Piper Aircraft Co. v Reyno, a Supreme Court case from 1981, establishing that a motion to dismiss because of forum non conveniens cannot be defeated by pointing out the insufficiency of the substantive law applied in the alternative forum, and that the assumption for the plaintiff´s choice of forum is less strong when the plaintiff is foreign.[36]

4.1.1. Adequacy of the Indian Legal System

Since none of the used precedents raised the question of adequacy of the alternative forum, but it was one of the major arguments by the plaintiffs, the District Court started with assessing the suitability of the Indian judicial system to adjudicate such a complex case on mass torts. It needs to be mentioned, that at that point in time, the judicial system in India was characterised by constant delays within litigation, deficiencies in substantive law, an immense cost to lawsuits making them unreachable to the general public and a great amount of technicalities unfit to adjust to the growing needs of Indian society.[37] Regardless of contradicting testimony, the District Court concluded by considering the Indian courts "well up to the task of handling this case" and kept on refraining, according to Piper, from regarding possible unfavourable change in law for the plaintiffs.[38] This outcome can indeed be considered surprising, taking into account that the Union of India, at least in the first instance at the District Court, filed an individual claim against UCC in the U.S., therefore, implicitly stating that they do not consider their legal system capable to handle the task of adjudicating this case of mass torts.[39] Furthermore, the evaluation can be seen to demonstrate the reluctance of the U.S. courts to interfere into the

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[33] [1947] 330 US. 501, p. 501.
[34] ibid, pp. 501-502.
[35] [1947] 330 US 518, p. 519.
[36] [1981] 454 US 235, p. 236.
[37] C. M. Abraham and Sushila Abraham (n 29), p. 354.
[38] *In Re Union Carbide Corporation Gas Plant Disaster* [1986] 634 F. Supp. 842 (SDNY), p. 852.
[39] Janis (n 32), p. 200.

affairs of another sovereign state in order to provide adequate protection of human rights. In addition, giving the plaintiff´s choice of forum less weight because of them being foreign, as established in *Piper*, bears the risk of leaving them unprotected, especially if there is no proper adequacy review of the alternative legal system. Nevertheless, it should be kept in mind that the issue of human rights and business does not only deal with legal reviews of individual cases, but is also highly politicised, meaning that the judgements have far reaching consequences beyond the individual victims, which leads the District Court's caution to be comprehensible.

However, regarding the outcome of the lengthy judicial process in India, with approximately $330 million USD of the $470 million USD settlement payment agreed upon on the 14 February 1989 between the UCC and the Union of India, which is still to be disbursed to the Bhopal victims and litigation pending decades after the tragedy,[40] this assessment definitely has to be criticised.

4.1.2. Private Interests

Subsequently, the District Court pondered on the existing private interests, as required in *Gilbert*. With respect to the possible sources of proof, the UCC argued that all relevant documentation concerning possible liability was placed in India, taking into account that the Bhopal plant, regardless of the 50,9 % of stock being owned by UCC, was managed and operated entirely by Indian employees of UCIL.[41] In contrast, the plaintiffs argued that the UCC had a considerable impact on the design of the plant in Bhopal, since they provided the design package, which was only changed in minor instances by UCIL.[42] The defendant managed to minimise the importance of the design package and highlighted the involvement of several UCIL engineers.[43] Without deciding on the question of responsibility for the design and building of the plant, the District Court found that the most relevant evidence on matters concerning liability was located in India, considering as well the need to translate documents into English before being used in a trial in the U.S., whereas Indian courts would not need such a translation.[44] Therefore, already with this rather simple argument, UCC managed to establish a certain distance between themselves as the parent company and

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[40] Business and Human Rights Resource Centre, 'Union Carbide / Dow lawsuit (re Bhopal, filed in India)' (2022) <www.business-humanrights.org/en/latest-news/union-carbidedow-lawsuit-re-bhopal/> accessed 07 April 2022.
[41] *In Re Union Carbide Corporation Gas Plant Disaster* (n 38) p. 853.
[42] ibid, pp. 855-856.
[43] ibid, pp. 856-857.
[44] ibid, p. 858.

its subsidiary, which highlights just one of the problems of holding the parent company accountable for the actions of their subsidiaries.
When turning to access to witnesses, again the need for translation was highlighted and the additional cost for transporting a vast amount of Indian witnesses to the U.S., which would impact negatively the proceedings of the trial.[45] As a result of the fewer obstacles to call witnesses in front of an Indian court, the District Court also weighed this criterion in favour of dismissal.[46]

Regardless of the plaintiffs argument that in product liability cases, an actual viewing of the site is often not necessary, considering the existence of videotapes, diagrams and models, which are often more informative, the District Court did not want to rule out the need to visit the location in the course of the trial and consequently, decided to weigh this in favour of dismissal as well.[47] Therefore, according to the District Court, the interests of the parties during trial would be better served with a trial in India.

These considerations are of a very practical nature, thus, comprehensible to a certain extent, bearing in mind that especially the translation and the transport of witnesses are time-consuming. Consequently, from an ex ante perspective, the issue could have been solved quicker in India, which generally aligns with victims' interests. However, these are inherent characteristics of the issue of parent company liability, meaning that following this argumentation would mean not being able to declare competency in any comparable case, unless it happened within the territory of the U.S, in which case the doctrine of *forum non conveniens* would not apply.

4.1.3. Public Interests

The above mentioned inconveniences of transporting documents and witnesses from India in combination with the defendant being a transnational operating enterprise, therefore, having a weaker bond with a forum in the U.S. than a merely internally operating business, led the District Court to conclude that the administrative weight should not be with a court within the U.S., but with the Indian Courts, as they have more significant contacts with the incident in question.[48] In addition, the impact of such a lengthy trial on the tax payer, directly by jury duty, and indirectly by financing the trial, would not have been adequate, considering the mere indirect connection of

[45] ibid, p. 859.
[46] ibid, p. 860.
[47] ibid.
[48] ibid, p. 861.

the tax payers to the subject matter.[49] With respect to the high value attributed to human rights protection within the whole of the international community and especially within the U.S., which often portrays itself as a fighter against injustices, strengthening the general public´s interest in its protection, one can indeed criticise to what extent monetary considerations are suitable in this context. Moreover, it is important to point out again, that the claims were not raised against the Indian subsidiary, but the parent company incorporated in the U.S, which could have justified the administrative burden on U.S. tax payers.

This argument was brought forward by the plaintiffs when arguing that "public interest is served […], when United States corporations assume responsibility for accidents occurring on foreign soil", and that this case entails the "opportunity of creating precedent which will bind all American multinationals henceforward", therefore, promoting international cooperation and avoiding double standards of liability.[50] Nevertheless, the District Court held that the plant was subject to Indian laws and agencies, therefore, "it would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country."[51] Consequently, the District Court emphasised the importance of India´s sovereignty to regulate and enforce its legislation in order to "vindicate the suffering of its own people within the framework of a legitimate legal system".[52] Following and exaggerating this line of reasoning would mean, every application of foreign laws by national courts due to an element of internationality, whichever it might be, should be considered paternalistic and inadequate, which from a euro-centric perspective seems to lack reasoning, taking into account the present interconnection of European societies, and consequently the multitude of cases with elements of internationality.

As a result, the District Court granted the defendant´s motion on grounds of *forum non conveniens*,[53] which was upheld by the United States Court of Appeals,[54] and a *writ of certiorari* against the appellate court's order was denied by the United States Supreme Court on the 5th of October 1987.[55]

[49] ibid, p. 862.
[50] ibid.
[51] ibid, p. 864.
[52] ibid, pp. 865-866.
[53] ibid, p. 867.
[54] *In Re Union Carbide Corporation Gas Plant Disaster* [1987] 809 F.2d 195 (2nd Cir.).
[55] *In Re Union Carbide Corporation Gas Plant Disaster* [1987] 809 F.2d 195 (2nd Cir.), cert. denied, 484 US 871.

4.1.4. Criticism

The District Court touched upon several of the key issues when regulating liability of transnational operating companies. While states want to refrain from interfering in the legal affairs of other sovereigns, they thereby accept the risk and defencelessness it possibly creates for the victims of human rights violations. Nevertheless, one cannot deny a certain notion of hypocrisy when considering the issue of double standards: the protection of human rights always entails not only a legal obligation, but also an ethical one. How can one justify ethically that corporations are held to higher standards in their home states, but as soon as their undertakings leave their home state, courts do not find themselves competent due to reasons of mere convenience? Hence, there is a necessity to decide on taking the risk of possible paternalism or agreeing to infringements of collectively agreed upon values.

In addition, by denying forum in the U.S., the judgement fails to take fully into account that the claims were raised against UCC as a company incorporated in the U.S., not its Indian subsidiary. Simply presuming that a parent company cannot and should not be held accountable for its operations abroad, further contributes to the diffusion of responsibility within corporate structures.[56] The issue at stake is not whether substantive law entails grounds to consider parent companies liable, but a rather procedural one, trying to avoid uncertainty at law by leaving too much discretion to individual judges and victims unprotected.

4.2. Alien Tort Statute

Starting in the mid-1990s, an almost forgotten legal instrument was being used to hold multinational corporations accountable within the U.S. The Alien Tort Statute (ATS), enacted with the Judiciary Act of 1789 and now entailed in the 28 U.S. Code §1350,[57] provides for the following: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Considering that the Bhopal case dealt with exactly this, claims for mass torts brought by aliens, meaning foreigners, this provision could have theoretically played a role in establishing jurisdiction of the court to hear the case. Attention needs to be drawn to the fact that due to the incorporation of UCC in New York, the District Court would have had jurisdiction over the case according to the alien diversity provision of 28 U.S. Code §1332(a)(2), regardless of the interpretation of the ATS. Nevertheless,

[56] Cassels (n 25), p. 18.
[57] United States Code, Title 28 – Judiciary and Judicial Procedure, § 1350.

U.S. human rights litigation in recent years is often based on ATS, therefore, it seems relevant to be discussed in the context of this paper.

After not being used for centuries, the statute first appeared again in *Filártiga v Peña-Irala*,[58] when the Paraguayan family of a torture victim brought a suit against a Paraguayan police official residing in New York. This case is especially relevant when it comes to the interpretation of "law of nations" as a requirement for the applicability of the ATS, since the Court of Appeal understood it as current customary international law, and thereby refrained from limiting it to its original and narrower meaning in 1789.[59] The ATS was used again in *Kadic v Karadžic*, where the Court of Appeal explicitly mentioned that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[60] Consequently, the Court left open the possibility of corporate accountability.[61] In 1996, the first relevant case against an US-based company was brought with *Doe I v Unocal Corp,*[62] where the Court found that Unocal indeed could be held liable for aiding and abetting the Burmese military in its human rights violations. Having established the general possibility of holding corporations accountable by using the ATS, questions such as the extent of international law covered by "law of nations" or the issue of corporations not being traditionally subjects of international law were raised, but only some of the questions were answered by the U.S. Supreme Court. With special regard to the disaster in Bhopal, the question could be whether unusual torts, such as gas pollution causing fatalities, fall within the scope of the statute.

With these three benchmark cases, more than 150 suits against transnational corporations were brought on the grounds of ATS in the U.S.[63] However, in 2004 in *Sosa v Alvarez-Machain*,[64] the Supreme Court limited the jurisdiction of federal courts to claims "defined by the law of nations and recognized at common law,"[65] highlighting the "strictly jurisdictional nature"[66] of the ATS, which in itself does not constitute grounds for a claim.

[58] [1980] 630 F 2d 876 (2nd Cir.).
[59] Hugh King, 'Corporate Accountability under the Alien Tort Claims Act' (2008) 9 Melbourne Journal of International Law 472, p. 473 et seq.
[60] [1995] 70 F 3d 232 (2nd Cir.), p. 239.
[61] King (n 59), p. 474.
[62] [2002] 395 F 3d 932 (9th Cir.).
[63] Lauren Reynolds and Mark Zimmer, 'Die Einschränkung der extraterritorialen Zuständigkeit amerikanischer Gerichte durch den US Supreme Court' (2013) 8 Recht der Internationalen Wirtschaft 509, p. 510.
[64] [2004] 542 US 692.
[65] ibid, p. 712.
[66] ibid, p. 713.

When searching for an appropriate cause of action, great caution should be applied, meaning that only laws which are as specific, universal and obligatory as their predecessors, at the time of the enactment of the ATS, could be recognised.[67] This test limits the applicability of the ATS to the most serious human rights violations, such as war crimes, crimes against humanity or torture.[68] Already with this ruling, it becomes obvious that tortious acts, such as the one in Bhopal, would not fall within the scope of ATS.

The scope of application of the ATS was further limited by the Supreme Court's decision in *Kiobel v Royal Dutch Petroleum*,[69] stating that the presumption against extraterritoriality applies to claims under ATS.[70] This presumption provides that if a statute does not indicate clearly its extraterritorial application, it does not have one,[71] which acts as a safeguard against clashes between bodies of law and international tensions among sovereigns deriving thereof.[72] This line of reasoning is similar to the argument laid out by Judge Keenan in the District Court's opinion, and tries to avoid the U.S. imperialism at law.[73] Additionally, it was affirmed in *Jesner v Arab Bank*[74] that foreign corporations may not be defendants in cases brought under the ATS.[75]

The question to what extent U.S. based corporations can be held liable under the ATS for aiding and abetting human rights violations abroad, by virtue of their corporate conduct in the U.S., was addressed in the case of *Nestlé USA, Inc. v Doe I*,[76] in which the Supreme Court did not completely deny the application but narrowed it down to cases of domestic conduct exceeding general corporate activity common to most corporations.[77]

The restrictive development, especially the one found in *Jesner* with respect to the application of ATS needs to be criticised. Taking into account that because of doctrines like *forum non conveniens*, raised by UCC in the Bhopal litigation, and the presumption against extraterritoriality, claims on the basis of ATS against foreign corporations were hardly ever successful.

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[67] Bastian Brunk, 'Der ´kurze Arm` der US-Justiz bei internationalen Menschenrechtsverletzungen' (2018) 8 Recht der Internationalen Wirtschaft 503, p. 506.
[68] Schniederjahn (n 2), pp. 103 et seq.
[69] [2013] 569 US 108.
[70] ibid, p. 108.
[71] *Morrison v National Australia Bank Ltd*. [2010] 561 US 247, p. 255.
[72] *EEOC v Arabian American Oil Co*. [1991] 499 US 244, p. 248.
[73] Brunk (n 67), p. 505.
[74] [2018] No. 16-499, 584 US __.
[75] ibid.
[76] [2021] No. 19-416, 593 US __.
[77] ibid.

Forum was only granted if there was a specific connection between the corporation and the U.S.[78] Moreover, this development again neglects the fact that most human rights violations are committed in third or developing countries, which do not have the legal infrastructure to successfully implement human rights regimes. In order to allow for access to justice, as foreseen by the third pillar of the Guiding Principles, a *forum necessitatis*, such as the ATS, needs to be established.[79]

5. Access to Justice in Germany

According to a study conducted by Maastricht University, Germany is one of the top five states in which businesses, that allegedly committed human rights abuses, are located.[80] Nevertheless, only a few claims were filed against German companies in German courts, such as RWE[81] and Kik,[82] and the judgements still did not contain a substantive decision as to the circumstances under which a German company can be held liable for the damage resulting from extraterritorial human rights violations by its subsidiaries or suppliers.[83] In order to answer the question of why not more claims have been filed, it is necessary to analyse to what extent German courts have jurisdiction in cases of violations committed abroad. The analysis will be illustrated by referring to the previously mentioned hypothetical case of a German company active in the chemical sector with Indian subsidiaries.

5.1. EU Law

The jurisdiction of civil matters in the EU is primarily regulated by unified EU law, which is to be applied by domestic courts.

5.1.1. Regulation (EU) No 1215/2012

[78] Brunk (n 67), p. 511.
[79] Ibid.
[80] Menno T. Kamminga, 'Company Responses to Human Rights Reports: An Empirical Analysis' (2015) 1 Business and Human Rights Journal 95, p. 101 et seq.
[81] *Saúl Luciano Lliuya v RWE AG* [2016] NVwZ 2017, 734 (LG Essen).
[82] *Jabir and others v KIK Textilien and non-Food GmbH* [2019] Beck RS 2019, 388 (LG Dortmund).
[83] Birgit Kramer, 'Wann haftet ein deutsches Unternehmen für extraterritoriale Menschenrechtsverletzungen?' (2020) 2 Recht der Internationalen Wirtschaft 96, p. 98.

Regulation (EU) No 1215/2012[84] scarcely amended its predecessor, Council Regulation (EC) No 44/2001,[85] and is applicable to all legal proceedings in the realm of civil and commercial matters starting from the 10th of January 2015, as indicated by articles 1.1 and 66.1. As a general venue, the Regulation establishes in article 4.1 the jurisdiction of the courts of the Member State in which the defendant is domiciled. In case of a company, article 63.1 of the Regulation clarifies, that it has its domicile at the place of its statutory seat, its central administration or principal place of business. Transferring this back to our hypothetical case, in which a German parent company is sued for a chemical disaster occurring in its Indian subsidiary, domicile in Germany in line with the Regulation would be given and it could be sued in German courts.

As a special jurisdiction, Regulation (EU) No 1215/2012 provides in article 7.2 for the defendant to be sued in another Member State in matters relating to tort, delict, or quasi-delict, in the courts for the place where the harmful event occurred or may occur. This covers both the places in which the harmful conduct, as well as where the actual harm occurred.[86] The Regulation tries to consider the special needs of tort cases, where it might be necessary to view the site or to have a special understanding of the local governing laws. Nevertheless, considering that most human rights violations do not occur in Member States of the EU, but in developing countries, apart from the fact that the Regulation is not binding for courts outside of the EU, this special jurisdiction is not adequate to solve the hypothetical case at hand.

However, it could be discussed whether the incompliance of the parent company to adequately exercise their due diligence, and therefore, avoid tortious acts by their subsidiaries causing human rights abuses, counts towards the harmful conduct initiating the final harm. Taking into account that the parent company in our example is domiciled in Germany, this would lead to the jurisdiction of the German courts on grounds of the special jurisdiction for torts. It is questionable though, whether this additional effort of having to establish this argument is really required, considering that the special jurisdictions of article 7 and the general venue of article 4.1 are alternative forums, as indicated by the wording "may be sued" in article 7.

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[84] Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters [2012] OJ L 351, pp. 1-32.

[85] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L 12, pp. 1-23.

[86] Peter Gottwald, 'Brüssel Ia-VO art. 7' in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (6th edition, C.H. Beck 2022), para. 54.

5.1.2. Applicability of Forum non Conveniens within the EU

In 2005, the Court of Justice of the European Union (CJEU) ruled on the question whether the doctrine of *forum non conveniens*, as frequently used in common law jurisdictions and which constituted legal grounds to refer the Bhopal case to the Indian courts, can be used to decline the jurisdiction of courts within the EU. Firstly, the CJEU highlighted the mandatory nature of article 2 of the 1986 Brussels Convention,[87] which was the predecessor of Council Regulation (EC) No 44/2001 and Regulation (EU) No 1215/2012,[88] meaning that there can only be a derogation in cases expressly foreseen in the regulatory instrument.[89] Besides the fact that the doctrine of *forum non conveniens* was not mentioned as an exception in the Convention, it generally allows the court to exercise discretion on finding a foreign court to be more suitable, which fundamentally limits the predictability entailed in the principle of legal certainty.[90] Further, the CJEU considered the undermining of the legal protection of the defendants, whose defence is easier conducted before the courts of their domicile.[91] In cases of human rights abuses, this argument is still valid, but also needs to be understood in favour of the plaintiffs. The aim is to file a claim in front of a court, which does not allow corporate lawyers to ambush the legal system, but provides effective legal remedy for the harm experienced. Therefore, the focus needs to lie with the necessary legal protection of victims, not the transnational corporations as defendants. Finally, the application of *forum non conveniens* would hinder the uniform application of the rules of jurisdiction, contravening the actual aim to establish common rules within the contracting parties.[92] As a result, the Court found that jurisdiction cannot be declined on the grounds of *forum non conveniens*[93], meaning that due to EU law being applicable, companies with their statutory seat, central administration or principal place of business in Germany can be sued in German courts,

[87] 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters [1972] OJ L 299, pp. 32-42.

[88] Astrid Stadler, 'Europäisches Zivilprozessrecht Vorbemerkungen' in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung mit Gerichtsverfassungsgesetz* (19th edition, Franz Vahlen 2022), para. 12.

[89] Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-inn Villas' and Others* [2005] ECLI:EU:C:2005:120, para. 37.

[90] ibid, paras. 40-41.

[91] ibid, para. 42.

[92] ibid, para. 43.

[93] ibid, para. 46.

regardless of their domicile being the only element connecting the case to the EU.[94]

5.2. German Code of Civil Procedure

Regardless of the fact that in most cross-border cases the German Code of Civil Procedure is not applicable due to the existing EU law, which as European secondary law prevails over the legislation of the Member States,[95] it is interesting to note that German law follows a similar approach to the Regulation (EU) No 1215/2012. In section 12, read in conjunction with section 17.1 of the German Code of Civil Procedure, the general venue of the Courts where a legal person has its registered seat is established.

Furthermore, section 32 of the German Code of Civil Procedure foresees the competence of the court in the jurisdiction in which the tortious act was committed. The established forum is an alternative for the plaintiff to choose apart from the general venue of sections 12 and 17.1 of the German Code of Civil Procedure.[96] In addition, it also recognises the jurisdiction of the place where the harm occurred and where the harmful conduct was initiated.[97] Nevertheless, similar to the general venue, its scope of application is suppressed by the existing European regulation.[98]

Interesting in the realm of finding an adequate forum in cases of human rights violations could be the specific jurisdiction of assets and of an object, entailed in section 23 of the German Code of Civil Procedure. This specific jurisdiction is not regulated by EU law, therefore it could constitute a legal basis for jurisdiction of German courts in cases where it is not yet attributed to a court of a Member State. It expands the jurisdiction of the German courts to cases in which the defendant does not have its registered seat in Germany, but some of the assets are located there, meaning that, technically, foreign companies could be sued in Germany on the ground of this provision.[99] Furthermore, in order to avoid discrimination of foreigners,

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[94] Robert Garbosch, 'Rechtsschutz vor deutschen Zivilgerichten gegen Beeinträchtigungen von Menschenrechten durch transnationale Unternehmen' in Ralph Nikol, Thomas Bernhard and Nina Schniederjahn (eds), *Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht* (Nomos Verlagsgesellschaft 2013), p. 79.
[95] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.
[96] Christian Heinrich, '§ 32 Besonderer Gerichtsstand der unerlaubten Handlung' in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung mit Gerichtsverfassungsgesetz* (19th edition, Franz Vahlen 2022), para. 20.
[97] Reinhard Patzina, '§ 32 Besonderer Gerichtsstand der unerlaubten Handlung' in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (6th edition, C. H. Beck 2020), para. 41.
[98] Heinrich (n 96), para. 24.
[99] Garbosch (n 94), p. 79.

plaintiffs can generally be nationals or foreigners regardless of their citizenship.[100] Consequently, a certain resemblance to the ATS could be argued. Despite section 23 being fairly unusual from a comparative perspective, both the German Federal Court of Justice and academia consider this provision to be constitutional and in line with international public law.[101] Nevertheless, its application has been limited by the requirement to not only have assets in Germany, but the case needs to additionally entail sufficient connection with Germany.[102] This connection is given when the plaintiff resides in Germany, when the defendant actively participates in German business life or follows investment activities in Germany, but is denied in cases of insufficient assets.[103] Due to this requirement of additional connection to Germany, it is unlikely for German courts to find themselves competent in cases without direct business relations between the foreign defendant and a German company.[104] With respect to the hypothetical case, possible claimants would not have to rely on this provision due to the forum in sections 12, 17 of the German Civil Procedure Code.

An additional benefit of the German jurisdiction in cases of human rights abuses is the fact that section 114 of the German Code of Civil Procedure provides parties, which due to their personal and economic circumstances are unable to pay the costs of litigation, with financial assistance. This support is also requestable by foreigners living abroad,[105] therefore, offering help to financially struggling victims. Moreover, section 4a of the Act on the Remuneration of Lawyers foresees the possibility to agree on a contingency fee for lawyers, further lifting the financial burden of initiating proceedings against economically powerful corporations. This falls in line with principle 25 of the Guiding Principles, which requires states to provide financial or expert aid for accessing mechanisms for effective remedy.[106] On the contrary, the lack of class action suits and punitive damages in the continental European legal systems restricts opportunities for

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[100] Reinhard Patzina, '§ 23 Besonderer Gerichtsstand des Vermögens und des Gegenstands' in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (6th edition, C. H. Beck 2020), paras. 10, 13.
[101] Garbosch (n 94), p. 80.
[102] Patzina (n 100), para. 1.
[103] Patzina (n 100), para. 15.
[104] Garbosch (n 94), p. 80.
[105] Erik Kießling, '§ 114 Voraussetzungen' in Ingo Saenger (ed), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassungs, Europäisches Verfahrensrecht* (9th edition, Nomos 2021), para. 9.
[106] United Nations Human Rights Council (n 12), commentary to principle 25.

the plaintiffs.[107] Considering that very often human rights abuses are committed on a large scale, the consolidation of individual claims puts more pressure on large corporations, which can further compensate the imbalance between the parties.

6. Conclusion

International human rights law has traditionally been created to protect the individual against the overwhelming power of the State. While states are still considered the primary duty bearers of obligations deriving from human rights law, repeated occurrences such as the chemical disaster in Bhopal have highlighted the influence of private actors on individuals. However, this increased impact has not yet translated into an increase in responsibility, which demonstrates the detached development of extended ethical arguments for corporate accountability and legislative change. Even though the issue of human rights abuses by transnational corporations has received growing attention in the last decades and has been highly politicised, the tragedy in Bhopal from over 30 years ago still stands symbolic for the difficulties that victims face when trying to hold corporations accountable.

Human rights are fundamental values that the international community commonly agreed upon, which was manifested in the Guiding Principles on Business and Human Rights. Nevertheless, already the search for adequate jurisdiction, which is apt to handle often large-scale abuses and mass torts, is undeniably difficult due to existing reservations not to infringe the sovereignty of other states. Considering the common use of *forum non conveniens* or the presumption against extraterritoriality and the rather restrictive interpretation of the ATS indicates that human rights litigation will possibly fade even further within the U.S. in the upcoming years.

However, European courts, which are bound to consider themselves competent due to article 4 of Regulation (EU) No 1215/2012, could offer a good opportunity for victims to hold parent companies accountable, without having to establish difficultly their jurisdiction. In addition, European courts could be considered less hesitant to apply foreign law in cases of human rights violations, often the law where the abuse occurred, taking into account the coexistence of legal systems within the EU and the rise in cases with an international element, especially in the realm of family and inheritance law. Consequently, less burden to find adequate jurisdiction means legal resources can rather be spent on the question of how the material law can cope with the difficulties of the issue at hand, since access to effective

[107] Garbosch (n 94), p. 82.

domestic judicial mechanisms, as required by principle 26, depends majorly on aspects of both procedural and substantive law. Suitable substantive provisions are required to prevent the procedural access to remedy from turning into an empty promise. With regard thereto, positive developments could be noted in several European countries. Litigation in the United Kingdom has developed a duty of care approach in the cases of *Vedanta Resources v Lungowe*[108] and *Okpabi v Royal Dutch Shell*.[109] A similarly interesting case took place in the Netherlands with the case *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell*.[110] While not aiming at entering into the substantive content, such proceedings indicate a promising movement with respect to material questions of civil liability of parent companies for human rights abuses abroad.

Additional change is noticeable with respect to non-judicial measures such as the use of National Contact Points for the OECD Guidelines for Multinational Enterprises or the growing importance of naming and shaming by civil society actors such as non-governmental organisations, trade unions or newspapers. While not offering the same certainty as legal proceedings, these measures constitute complementary possibilities to pressurize private actors into taking accountability. Moreover, they demonstrate the ongoing change in society, which over time will potentially translate into a more comprehensive access to remedy for victims as entailed in the UN Guiding Principles. Therefore, it will be interesting in the upcoming years to monitor how human rights litigation and the material questions of holding transnational parent companies accountable will develop in Europe.

[108] *Vedanta Resources PLC and another (Appellants) v Lungove and others (Respondents)* [2019] UKSC 20.
[109] *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3.
[110] *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc and another* [2021] ECLI:NL:GHDHA:2021:132 (Oruma), ECLI:NL:GHDHA:2021:133 (Goi) and ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo).

Terms and Conditions May Apply: The Application of the EU Unfair Contract Terms Directive to "Gratuitous" Digital Content Contracts

Nicole Binder

1. Introduction

In the advent of rapid technological development, contract law has been brought into the digital world, with "gratuitous" digital content contracts becoming increasingly common. In stark contrast with traditional sales contracts (where the consumer provides monetary consideration in return for the service in question), in "gratuitous" digital contracts consumers "pay" by providing the trader with their personal data. The conclusion of contracts in an online environment, about which most consumers have (at best) rudimentary knowledge, as well as consumers' "payment" with their personal data, has dramatically increased the vulnerability of the consumer to fall prey to unfair consumer contract terms drafted by more powerful and knowledgeable traders.

Unlike cases where a consumer concludes a traditional non-gratuitous offline contract which contains unfair terms that are economically disadvantageous, "gratuitous" digital content contracts expose consumers to terms that negatively impact their rights to privacy rather than their finances. Although this issue's intersection with European data protection law falls outside the scope of this paper, the lack of sufficient consumer protection in this field exposes consumers to exploitative terms and conditions drafted by predatory traders with the aim of generating a profit. The adage that "if the service is free, you are the product" seems particularly apt to describe this consumer protection issue. As will be explored later in this paper, with insufficient regulation of non-negotiable terms and conditions, traders are free to impose conditions that strip consumers of rights of ownership over their user-generated content, or to use and transfer personal data for advertising purposes under the catch-all excuse that the consumer has consented to such terms by accepting the terms and conditions of the service. Research into the field of consumer protections in "gratuitous" digital content contracts is thus of paramount importance to correct the power imbalance between consumers and digital traders.

The Unfair Contract Terms Directive (UCTD)[1] - as a legislative instrument that entered into force before the rapid development of online contracts - conspicuously lacks provisions explicitly addressing the issues posed by the wide-spread conclusion of "gratuitous" digital content contracts. As a mainstay of consumer protection in EU law, the UCTD's concerning absence of digital-contract-specific provisions to correct the exacerbated power-imbalance between consumers and traders in "gratuitous" digital content contracts, gives rise to the question: "In what ways do the consumer protection standards imposed by the UCTD protect EU consumers in "gratuitous" digital content contracts relative to the Directive's protection of non-digital consumers?"

In order to address the disparity between consumer protections for traditional consumer contracts and digital content contracts, this research paper will be assessing the UCTD's consumer protection framework, focusing on the unfairness test and the transparency principle. The position of "gratuitous" digital content contracts will then be evaluated within the scope of the Directive. Finally, this paper will explore the EU's new Directive for the Supply of Digital Services and Content (DCD)[2] to assess the protections it aims to extend to digital consumers and evaluate the problems that the UCTD still encounters in its application to digital contracts.

The methodology for this research paper will be doctrinal analysis by way of close reading, European Court of Justice (ECJ) case-law and EU legislation examination, and literature review. This paper will be mainly focusing on the UCTD (which remains a key piece of EU legislation on consumer protection) but will briefly touch on the forthcoming DCD (which serves to modernize the existing UCTD). In order to analyse the UCTD, reference must be made to existing ECJ case-law which clarifies and expands on the contents of the same. Through the use of doctrinal analysis, this paper aims to critically evaluate existing gaps in the protective framework set up by the UCTD with regards to "gratuitous" digital consumer contracts.

2. Analysis of the Unfair Contract Terms Directive

[1] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJL 095/29 (Unfair Contract Terms Directive).

[2] Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services [2019] OJL 136/1 (Directive on the Supply of Digital Content and Digital Services).

2.1. Aims of the Unfair Contract Terms Directive

In order to critically assess the position "gratuitous" digital consumer contracts occupy within the protection framework set up by the UCTD, the framework in question must be evaluated as it stands. EU legislators drafted the Directive with the aim of providing protection to the usually powerless consumer, and to promote transparency in the internal market.[3] This is achieved by regulation of procedural and substantive unfairness in such contracts.[4] Procedural unfairness is founded on the notion of "abuse of power" which, according to ECJ case-law, is predicated on the consumer's weak position relative to the seller "as regards both his bargaining power and his level of knowledge".[5] As such, the Directive aims to counteract the consumer's inherent weakness by limiting the power of the seller to draft unfair terms in advance which the vulnerable consumer is likely to agree to. The second prong regulating substantive unfairness concerns the prohibition of unfair non-individually negotiated terms that unduly burden the consumer and result in a significant imbalance in the parties' rights and obligations under the contract.[6]

2.2. Definitions of "Consumer" and "Seller"

Having established the overarching aims of the Directive, one must assess its definitions of "consumer" and "seller". A consumer is any natural person who acts for purposes outside of his trade, business, or profession.[7] A seller is any natural or legal person who acts for purposes relating to their trade, business, or profession, whether publicly or privately owned.[8] In keeping with the Directive's "abuse of power" doctrine and its aim of providing high-level consumer protection, the term "seller" is to be interpreted broadly.[9] As clarified by Recital 10 to the Directive, the UCTD applies to all contracts concluded between consumers and sellers. Regarding the nature of the contract, the ECJ has held that monetary consideration is not required, with case-law indicating that where contracts for guaranteeing the loan of a third

[3] Lukasz Czebotar, 'Unfair Contract Terms in European Union Law' (2011) 16 Rev Comp L 11, p. 12.
[4] ibid, p. 13.
[5] Joined cases C-240/98 and C-241/98 *Oceano Grupo Editorial SA v Rocio Murciano Quintero* and *Salvat Editores SA v Jose M. Sanchez Alcon Prades* [2000] ECR 1-04941, para. 25.
[6] Unfair Contract Terms Directive (n 1), Art. 3(1).
[7] ibid, Art. 2(b).
[8] ibid, Art. 2(c).
[9] Case C-147/16 *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers* [2018] ECLI:EU:C:2018:320, para. 48.

party are concluded, the guarantor falls within the Directive's definition of "consumer".[10] In the absence of sufficient case-law or legislation on the issue, it is assumed that "gratuitous" digital content contracts - such as contracts between consumers and social media service providers - equally fall within the ambit of the Directive.[11]

2.3. The Unfairness Test

The next key component of the Directive is its definition of unfair contract terms through the unfairness test and the transparency principle. Article 2(a) read in conjunction with Article 3(1) limits the scope of the Directive to contractual terms that have not been individually negotiated. The ECJ has ruled that (among others) terms that have been drafted in advance by the seller, and that the consumer has not been able to negotiate the substance of, may be regarded as unfair, particularly in the context of pre-formulated standard contracts, such as "General Terms and Conditions" agreements.[12] Under Article 3(2), the burden of proof lies with a seller who claims a standard term has been individually negotiated. The general unfairness test builds on this definition of standard terms, and cites the "requirement of good faith" and the "significant imbalance in the parties' rights and obligations arising under the contract" as conditions for evaluating unfairness.[13] Good faith is further expanded on in Recital 16 to the Directive, as well as Article 4 of the same, as the requirement that the seller "deals fairly and equitably with the other party whose legitimate interests he has to take into account." The test requires a holistic evaluation of the different interests involved. The requirement of good faith is supplemented by the condition of "imbalance in the parties' rights and obligations", which requires a significant power imbalance between the consumer and seller, for example in the context of contract termination or non-performance clauses.[14] Importantly, Article 3(3) refers to an annex of indicative and non-exhaustive terms which may be regarded as unfair. Often referred to as a "grey list",[15] the weight of the annex varies based on the transposition and interpretation of Member States.

[10] Case C-74/15 *Dumitru Tarcau and Ileana Tarcau v Banca Comerciala Intesa Sanpaolo Romania SA and Others* [2015], ECLI:EU:C:2015:772, para. 30.
[11] Rafal Manko, 'Contracts for supply of digital content: a legal analysis of the Commission's proposal for a new directive' (2016) PE 582.048 European Parliamentary Research Service 3.
[12] Case C-191/15 *Verein fur Konsumenteninformation v Amazon EU Sarl* [2016] ECLI:EU:C:2016:612, para. 63.
[13] Unfair Contract Terms Directive (n 1), Art. 3(1).
[14] ibid, Art. 3(1).
[15] Case C-143/13 *Bogdan Matei and Ioana Ofelia Matei v SC Volksbank Romania SA* [2015] ECLI:EU:C:2015:127, para. 60.

2.4. The Principle of Transparency

Finally, the Directive sets out the principle of transparency for the use of not individually negotiated contract terms. Where terms are offered to the consumer in writing, they must be drafted in plain, intelligible language.[16] In case of doubt, the interpretation most favourable to the consumer must prevail. In order to better protect less knowledgeable consumers, the principle must be interpreted broadly.[17] The conditions for the principle of transparency as established by ECJ case-law are twofold; firstly, the seller has an obligation to ensure that the consumer has the opportunity to acquaint themselves with the terms before contract conclusion.[18] This obligation is anchored in Recital 20 to the Directive. Secondly, the terms must be "understandable" should the consumer make use of their opportunity to examine the terms in question.[19] Under this condition, terms must not only be formally and grammatically intelligible, but also broadly understandable, since the Directive is based on the consumer's weak position and lack of legal knowledge relative to the seller .[20] Specifically, the terms must be plainly and intelligibly set out so as to allow a "reasonably well-informed and reasonably observant and circumspect consumer" to evaluate their implications.[21] This high benchmark presupposes the consumer to be a rational actor who acts rationally in their own best interests and aims to maximize their utility or personal satisfaction.[22]

3. Analysis of "Gratuitous" Digital Content Contracts

Having assessed the consumer protection framework the UCTD establishes, the next issue to address before applying the Directive's protection standards to "gratuitous" digital content contracts, is what precisely constitutes a "gratuitous" digital content contract.

[16] Unfair Contract Terms Directive (n 1), Arts. 4(2) and 5.
[17] Ola Svensson, 'The Unfair Contract Terms Directive: Meaning and Further Development' (2020) 3 NJEL 24.
[18] Marco Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23 European Review of Private Law 179, p. 181.
[19] ibid.
[20] Case C-186/16 *Ruxandra Paula Andriciuc and Others v Banca Romaneasca SA* [2017] ECLI:EU:C:2017:703, para. 44.
[21] Case C-186/16 *Ruxandra Paula Andriciuc and Others v Banca Romaneasca SA* [2017] ECLI:EU:C:2017:703, paras. 44, 47.
[22] Iain Ramsay, *Consumer Law and Policy* (3rd edn, Oxford, Hart Publishing, 2012), p. 47.

Broadly speaking, such contracts are made between a consumer and a digital trader for the provision of digital content where - importantly - the consumer does not provide monetary compensation as consideration for the service rendered.[23] There is some disagreement, however, as to whether such contracts are more similar to traditional gratuitous contracts or to traditional sales contracts. Services provided through "gratuitous" digital content contracts are typically perceived as "free" given that they do not require monetary compensation, much like traditional gratuitous contracts.[24] A key difference between these two contract forms, however, is that providing data in "gratuitous" digital content contracts is a form of counter-performance, while gratuitous contracts do not involve any (economic) counter-performance.[25] Given this distinction, it can be argued "gratuitous" digital content contracts are a misnomer, and are in fact closer in character to traditional sales contracts for money.[26] Although consumers view payment with data to be "free", personal data can have economic value for digital traders, be it through (for example) sale to third party advertisers, or the tailoring of digital content to the consumer's preferences to increase their engagement with the platform.[27] Thus, similarly to sales contracts, the consumer is obliged to compensate the trader, who benefits economically from the transaction. A key difference between these two contract forms, however, is the fact that the consumer does not suffer an appreciable economic loss by offering consideration for the service rendered.[28] If anything, such academic controversy surrounding the categorization of "gratuitous" digital content contracts as gratuitous or sales contracts points to the larger issue of the tenuous position such contracts hold in the world of contract law and EU consumer protection.

4. Application of the Unfair Contract Terms Directive to "Gratuitous" Digital Contracts

4.1. Issues with the Definition of "Consumer"

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[23] Carmen Langhanke and Martin Schmidt-Kessel, 'Consumer Data as Consideration' (2015) 4 EuCML 218.
[24] Madalena Narciso, '"Gratuitous" Digital Content Contracts in EU Consumer Law' (2017) 5 EuCML 198, p. 198.
[25] Jan Smits, *Contract Law* (Edward Elgar, 2014), p. 72.
[26] Narciso (n 24), p. 200.
[27] Sloboda D. Midorovic and Milos B. Sekulic, 'A New Function of Personal Data in the Light of the Contract for the Supply of Digital Content and Digital Services' (2019) 53 Zbornic Radova 1145, p. 1154.
[28] Narciso (n 24), p. 200.

Given the novelty of "gratuitous" digital content contracts, the contract form's disputed categorization in contract law, and the entry into force of the UCTD long before the emergence of contracts for digital services, such contracts pose a challenge to the consumer protection framework of the Directive.

A preliminary issue is that of the scope of the term "consumer". For the purposes of the UCTD, a consumer is a natural person who acts for purposes outside of their business.[29] At its broadest, this test stipulates that the purpose related to the person's trade/profession must be so small as to be negligible.[30] An issue thus arises in cases where consumers conclude "gratuitous" digital content contracts for social media accounts for both personal and professional purposes, or for a cloud-based storage service on which professional documents are stored.[31] Given that the Directive aims at minimum harmonization,[32] national courts have the discretion to decide whether such users can be defined as consumers and thus claim protection under the UCTD. This may jeopardize the consumer's right to claim protection under the UCTD while party to a "gratuitous" digital content contract which may jeopardize a consumer in a 'gratuitous' digital contract's right to claim protection under the UCTD.

4.2. Issues with the Principle of Transparency

Another issue lies with the difficulty of enforcing the principle of transparency for "gratuitous" digital content contracts. Although the principle emphasizes the consumer's right to a "real opportunity" to inspect the contractual terms,[33] this right can be circumvented by digital service providers' unclear delineation of contracts. This can be done by setting up multiple pages outlining their privacy policy, general terms of service, etc. but unclearly indicating the exact scope of the contract the consumer means to agree to.[34] The trader's ability to separate the service's privacy policy from the contract[35] becomes particularly problematic in the context of "gratuitous" digital content contracts, given the direct impact such a policy

[29] Unfair Contract Terms Directive (n 1), Art. 2(b).
[30] Marco Loos and Joasia Luzak, 'Wanted: A Bigger Stick on Unfair Terms in Consumer Contracts with Online Service Providers' (2015) 39(1) Journal of Consumer Policy 63, p. 66.
[31] ibid.
[32] Unfair Contract Terms Directive (n 1), Art. 8.
[33] Loos (n 18), p. 181.
[34] Marco Loos and Joasia Luzak, 'Update the Unfair Contract Terms Directive for Digital Services' (2021) PE 676.006 Policy Department for Citizens' Rights and Constitutional Affairs, p. 42.
[35] ibid.

has on the personal data the consumer offers as consideration for the service to be provided.

4.3. Issues with the Unfairness Test and Gray-Listed Terms

Another far-reaching issue concerning the application of the UCTD to "gratuitous" digital content contracts, is that of the interpretation of "unfairness" under Arts. 3 and 5 and the annex to Art. 3(3) of grey-listed contractual terms. Although the grey-listed terms enumerated in the annex to Art. 3(3) are non-exhaustive, Member States were obliged to include it in their respective transposition instruments to promote legal certainty and roughly indicate - both to the public and to legal professionals - the general scope of the Directive.[36] Indeed, as of 2000, out of 1,849 cases based on the consumer protection framework set out by the Directive as transposed by Member States, 1,689 concerned terms from national blacklists (which offered stricter consumer protections pursuant to the UCTD's minimum harmonization).[37] This suggests the influence of the gray-listed terms set out in the annex to Art. 3(3), and indicates the importance of amending it to reflect the rise of new unfair terms that have developed specifically within the context of "gratuitous" digital content contracts.

Among other terms, the annex states that clauses "enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract" may be deemed unfair.[38] The annex further specifies that such terms can be unilaterally modified only where the contract is of indeterminate duration, and the seller informs the consumer with reasonable notice, giving the latter the freedom to dissolve the contract.[39] The ECJ has specifically indicated that such unilateral modification can only be considered fair when (1) the contract indicates under which conditions the price may be changed and with what criteria the change will be measured; and (2) the consumer has the right to terminate the contract upon being informed of the trader's intention to change the price.[40]

[36] European Commission, 'Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts' [2000] COM/2000/0248.

[37] European Commission, 'Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts' [2000] COM/2000/0248.

[38] Unfair Contract Terms Directive (n 1), Annex I (1)(j).

[39] Unfair Contract Terms Directive (n 1), Annex I (2)(b)(i).

[40] Loos and Luzak (n 30), p. 68; Case C-472/10 *NFH v Invitel* [2012] ECLI:EU:C:2012:242; Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:C:EU:2013:180; Case C-26/13 *Kasler and Kaslerne Rabai v OTP Jelzalogbank Zrt.* [2014] ECLI:EU:C:2014:282.

The CJEU has not decided on any cases regarding "gratuitous" digital content contracts under this provision of the Directive. However, digital consumers can undeniably be negatively impacted by digital service providers unilaterally changing their contracts, particularly in terms of alterations to the consumers' rights and obligations under the contract.[41] Thus, it may be proposed that this provision be extended to all unilateral amendment clauses regardless of whether they involve the changing of prices.[42]

A particularly pressing issue is that of gratuitous licenses to digital traders for user-generated content. Not individually negotiated contract terms are subject to a test of whether they give rise to "significant imbalance in the parties' rights and obligations arising under the contract".[43] Terms such as those regarding user-generated content found in the "content" section of TikTok's terms of service[44] (which is a "gratuitous" digital content contract) - may give the platform and any connected third parties "an unconditional irrevocable, non-exclusive, royalty-free, fully transferable (…), perpetual worldwide license to use, modify, adapt (…)"[45] content generated by the consumer who agrees to them. Although the ECJ has yet to rule on issues regarding the unfairness of such terms, judgements issued by the Paris Court of First Instance have recently ruled that similar terms used in Twitter's and Facebook's terms of service are unfair under the unfairness test.[46] In both cases, the Court concluded that such terms allowing for indefinite, gratuitous usage/sale of user-generated data and content were ambiguous and unclear. Through the application of the unfairness test, the Court found that the terms did not sufficiently clarify the scope of such license, potentially allowing for its extension even in the case of termination of the "gratuitous" digital contract through account deletion.

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[41] Candida Leone, 'Transparency revisited—on the role of information in the recent case-law of the CJEU' (2014) 10 ERCL, pp. 312–325.

[42] Loos and Luzak (n 30), p. 68.

[43] Unfair Contract Terms Directive (n 1), Art. 3(1).

[44] TikTok 'Terms of Service' (July 2020) <www.tiktok.com/legal/new-terms-of-service?lang=en> accessed 15 December 2021.

[45] TikTok 'Terms of Service' (July 2020) <www.tiktok.com/legal/new-terms-of-service?lang=en> accessed 15 December 2021.

[46] Que Choisir 'Donnees personnelles: L'UFC Que Choisir obtient la condemnation de Facebook' (10 April 2019) <https://www.quechoisir.org/action-ufc-que-choisir-donnees-personnelles-l-ufc-que-choisir-obtient-la-condamnation-de-facebook-n65523/> accessed 15 December 2021; Que Choisir 'Resaux sociaux et clauses abusives: L'UFC-Que Choisir obtient la suppression de centaines de clauses des conditions d'utilisation de Twitter' (8 August 2018) <https://www.quechoisir.org/action-ufc-que-choisir-reseaux-sociaux-et-clauses-abusives-l-ufc-que-choisir-obtient-la-suppression-de-centaines-de-clauses-des-conditions-d-utilisation-de-twitter-n57621/> accessed 15 December 2021.

An added layer of complexity in such cases is the interaction between the unfairness test (specifically, the good faith principle) and the transparency principle. The good faith principle applies to contract terms when the seller (dealing fairly and equitably with the consumer) could reasonably assume that they would have agreed to such a term in individual contract negotiations.[47] Terms like the ones discussed above in theory comply with the good faith and transparency principles, but in practice may fail to give consumers the protection intended by these principles. Such broad user-generated data/content terms are often difficult for consumers to understand, embedded within long terms of service agreements, and clearly create a significant imbalance of rights between the consumer and the trader. It is therefore difficult to claim that merely including such clauses in the terms of service (which the consumer likely does not read or fully understand) complies with the spirit of the principles of good faith and transparency; namely that the consumer is given the tools to make an informed decision when agreeing to a "gratuitous" digital content contract. Therefore, inclusion of such clauses in the grey-listed terms may be appropriate. Such terms may be presumed to be unfair, subject to the trader proving that they have been explicitly brought to the consumer's attention in accordance with the principles of transparency and good faith.

With regards to the grey-listed contract terms listed in the annex to Art. 3 UCTD, reform is clearly needed to account for the new forms of unfair contract terms consumers find themselves bound by through the conclusion of 'gratuitous' digital content contracts.

5. Impact of The Directive for the Supply of Digital Content and Digital Services

In light of the issues with applying the UCTD to "gratuitous" digital content contracts, the Directive for the Supply of Digital Content and Digital Services (DCD) has been set to apply in all EU Member States by the 1st of January 2022.[48] Both digital content and digital services fall within its scope.[49] Given this paper's focus on "gratuitous" digital content contracts, discussion will be limited to digital content. Exceptionally, the DCD explicitly recognizes that content can be supplied for the price of inter alia the provision of personal data by the consumer.[50] This this is in contract with

[47] Case C-415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona I Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164, para. 69.
[48] Directive for Supply of Digital Content and Digital Services (n 2), Art. 24.
[49] ibid, Art. 1.
[50] ibid, Art. 3(1).

the UCTD's tacit acknowledgement of such consideration and solidifies the position of such consumers within the EU consumer protection framework.

The DCD also extends certain transparency requirements set out in the UCTD. Digital content must fulfil the objective requirements of the terms of the contract,[51] and be fit for the purposes stated by the consumer provided the trader's acceptance thereof.[52] Compliance with such objective requirements is only excepted when the consumer has been informed that the digital content will not comply with these, and when the consumer has explicitly and separately accepted this.[53] This indicates a high level of protection for digital consumers, imposing a strict requirement for the use of plain and intelligible language, as well as ensuring the consumer has an opportunity to familiarize themselves with the key terms that may negatively impact their rights under the contract before they accept.[54]

Another interesting facet of the DCD is its stance on termination for non- conformity. Art. 15 gives the consumer a right of termination by giving notice to the trader, while Art. 16 lays out the trader's obligation to reimburse the consumer all sums paid under the contract, and certain obligations regarding the data and user-generated content provided by the consumer. There is significant overlap with the GDPR's protection framework within this provision, which is outside the scope of this research. However, Art. 16(3) DCD obliges the trader to refrain from using or making available the data provided/generated by the consumer that does not constitute personal data.[55] This creates an obligation of restitution of data under the scope of restitution obligations known in general contract law, as is reflected by the traditional restitution obligation of Art. 16(1) DCD regarding return of all sums paid under the contract.[56] This strengthens the "gratuitous" consumer's position in contract termination within the EU consumer protection framework and (by relation) within the UCTD, as the UCTD was originally drafted to protect consumers in case of economic loss, a difficult issue to prove with regards to loss of personal data with no economic impact on the consumer.

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[51] ibid, Arts. 7(a), (c), and (d).
[52] ibid, Art. 7(b).
[53] ibid, Art. 8(1).
[54] Hugh Beale, 'Digital Content Directive and Rules for Contracts on Continuous Supply' (2021) 12 JIPITEC 96, pp. 97-98.
[55] Karin Sein and Gerald Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services- Conformity Criteria, Remedies and Modifications- Part 2' (2019) 15(4) ERCL 365, p. 379.
[56] ibid.

6. CONCLUSION

This paper has analysed the existent consumer protection framework set up by the UCTD, paying particular attention to its relatively narrow definition of a consumer, the principle of transparency, and the unfairness test (and its adjacent annex of gray-listed contractual terms). In light of the contentious position of "gratuitous" digital content contracts in traditional contract law, this paper applied the doctrines set out in the UCTD to such contracts, finding gaps in its consumer protection framework. Issues with the lack of transparency in digitally concluded contracts and with the lack of sufficiently specialized gray-listed contractual terms were identified. The DCD has been found to effectively expand the scope of EU consumer protection law - and by extension the UCTD - by broadening consumer rights with regard to the explicit recognition of "gratuitous" digital content contracts, and the provision for (limited) restitution of data upon contract termination.

These findings can somewhat answer the question of how the consumer protection standards imposed by the UCTD protect EU consumers in "gratuitous" digital contracts relative to the Directive's protection of non-digital consumers. The protection the UCTD - a Directive drafted for offline, traditional contracts - provides to "gratuitous" digital consumers has substantial gaps. The primary issue with the UCTD has been identified as its lack of sufficiently specialized grey-listed contractual terms to account for terms specific to "gratuitous" digital content contracts. The annex's prohibition of terms allowing for the unilateral modification of the contract and price of the service (bar certain conditions) does not provide for modifications independent of price changes. Although consumers in "gratuitous" digital content contracts do not suffer economic loss through such modifications, the UCTD does not explicitly provide for the impact such changes may have on the consumer's rights and obligations under the contract in such situations. A further concern with the annex is its lack of mention of user-generated content and data. "Gratuitous" licenses to digital traders have on several occasions been found to be unfair by domestic courts applying the unfairness test, yet remain unmentioned in the UCTD despite their prevalence in digital contracts concluded with social media platforms. Concerns with transparency have been raised given the complexity of the online environment relative to traditional offline contracts. The DCD has been found to effectively improve the position of consumers by expanding on the transparency principle for non-conformity of digital content, as well as by explicitly extending its scope to "gratuitous" digital content contracts.

Despite the important steps the DCD has taken to strengthen the position of consumers in "gratuitous" digital content contracts and to legitimize such contracts in EU law, the UCTD remains a mainstay in EU consumer protection, and as such requires strengthening in its own right. Given how widespread "gratuitous" digital content contracts have become and the sensitivity of the use of data as payment for a service, reform of the UCTD to protect consumers more effectively is urgently needed. The key implication of this research paper is the need for further research regarding practicable changes to be made to the UCTD to tighten the net of consumer protection around exploitative digital traders. The Directive's conception of transparency, for example, may be deemed insufficient to protect consumers rendered more vulnerable by the online contract conclusion environment, but as the situation stands, effective solutions to this issue remain unclear. This paper highlights a small fraction of "gratuitous"-digital-content-contract-specific issues that remain insufficiently covered by the UCTD, pointing towards the need for reform of the Directive's grey-listed contractual terms. Furthermore, the paper's brief foray into the new DCD illustrates the benefits of instituting similar changes to remedy the power-imbalance between consumers and digital traders (for example, regarding data restitution) in the UCTD. The DCD's approach to some of the problems faced by digital consumers may serve as a rough guide as to how the UCTD could be improved for the 21st Century consumer.