

---

# Edinburgh Student Law Review

---

Volume VI.

MARCH 2026



**Editors-in-Chief:**

Canel Atik | Hailey Craig | Alexandrine Lamarre



## **ACKNOWLEDGMENT**

We thank the University of Edinburgh Law School for funding this edition of the Edinburgh Student Law Review.

## FOREWORD BY LORD HOPE OF CRAIGHEAD

So much of the study of law involves reading. There are so many sources of law that need to be seen and understood, and so many comments on those sources that need to be seen and understood as well if one is to appreciate what our law is about and what it does for us. But it is important not just to read those sources but to think about them, and to communicate ideas by writing about them too.

That, after all, was the way that Roman Dutch law, to which we owe so much, was developed by the jurists all those years ago. The structure that it developed and the principles on which it was founded were the product of thoughts and ideas that were discussed and written about right across Europe as the years went on. Justinian's thoughts and ideas were just the beginning. So much more is owed to those who came afterwards. Their writings inspired the students who went abroad from our country to study in places like Utrecht and Leiden. They brought back to us not only books that the jurists had written but also their way of thinking which led to the creation of our own system of private law. Communication by dialogue and the exchange of ideas is what keeps any system of law alive and relevant to the demands of our time.

I congratulate all those who have contributed to this edition. They bring before us fresh thoughts and fresh ideas which deserve to be read, discussed and thought about as we follow the tradition which was brought back to this country by their predecessors. I hope very much that they will encourage others to contribute to future editions in the same way. They are setting a fine example for them to follow.

David Hope

Lord Hope of Craighead KT

## LETTER FROM THE EDITORS

To Our Readers,

We are delighted to present to you the latest edition of the *Edinburgh Student Law Review*. Our editorial board has devoted considerable time and effort to this publication, and we wish to thank every individual who contributed; this Issue would not have been possible without your dedication. We would like to highlight, in particular, the work of our Chief Content Editor, Kristine Gu, whose support of the editorial board extended well beyond her formal duties.

We are especially grateful for the continued support of the University of Edinburgh School of Law, and for the guidance of our Honorary Secretary, Professor Andrew Steven, and our Honorary President, Lord Hope of Craighead. Your support has been invaluable.

This year, we were honoured to receive a high volume of submissions from across the globe, reflecting a strong and sustained interest in scholarship at Scotland's oldest student law review. The contributions included in this edition were chosen for their distinctive perspectives, calibre of research, and contribution to ongoing legal debates. The articles in this Issue span a broad range of legal disciplines and encompass a wide array of international perspectives; we trust that the variety of topics will offer something of interest to every reader.

We are proud of this Issue and hope that readers will find it both engaging and thought-provoking. Our aim is that the Review will inspire future contributions and encourage student scholars to continue to explore, question, challenge, and advance legal thought. We remain committed to fostering rigorous critical discussion in the legal community, and we look forward to the insights, contributions, and debates that future Issues will bring.

Canel Atik, Hailey Craig, Alexandrine Lamarre

Editors-in-Chief

**EDINBURGH STUDENT LAW REVIEW 2025/2026**

**CHIEF CONTENT  
EDITOR**

Kristine Gu

**EDITORS-IN-CHIEF**

Canel Atik

Hailey Craig

Alexandrine Lamarre

**HONORARY  
PRESIDENT**

Lord Hope of Craighead

**CONTENT EDITORS**

Helena Bishop

Dishari Bose

Aiswaryya Dhamodaran

George Dick

Sofia Fomina

Ayman Faris Khalil

Vivika Gerogianni

Arjun Gupta

Palak Jain

Amrita Krishnakumar

Sophie Lampe

Oliver Roberts

Şükrü Kağan Sürücü

Rota Shima

Sanjana Srivastava

Liam Timmons

Lucy Tomkins

Joshua Ward

Yichen Xiang

Amelia Zochowska

**CHIEF COPY EDITORS**

Olivia Arkinson

Shakile Holden

**COPY EDITORS**

Stacy Aoko

Nicole Mikaiel Borges

Sophia Camacaro

Imogen Collins

Amanda Dong

Samuel Etchells

Ellie Little

Marina-Katerina Mavridis

Siobhan McWilliams

Charlie Murdoch

Liam Timmons

Caroline Sheehan

Lucy Sharp

**HONORARY  
SECRETARY**

Professor Andrew Steven

**PUBLICATIONS  
OFFICERS**

Meral Abibula

Emma Yee Jia Weng

**FINANCE OFFICER**

Ayman Faris Khalil

**CHIEF ENGAGEMENT  
OFFICERS**

Elisabete Ferreira

Aisha Marie Johannessen

**MEDIA & EVENTS  
OFFICERS**

Riya Ahuja

Zoya Ali Waqas

Robbie Brown

Gillian Gonnord

Olivia Hardy

Bailey Mulvey

## TABLE OF CONTENTS

Lily Blackhurst	The Impact of Juristic Writings on the Intellectual Development of Roman Law and Their Place as a Source of Law	1
Imogen Charlotte Collins	Should a Lie About Fertility Vitiates Consent to Sex?	11
Ryan Ashley Conover	Advancing Equality: A Convention on the Rights of LGBTI Persons	27
Emma Dhondt	Destroying UNESCO World Heritage: An Attack on the International Community?	40
Ayman Faris Khalil	The Currency of Culpability: A Critical Analysis of Guilty Plea Discounts	51
Elena Macomber	Modernising Grounds for Refugeehood in the Twenty-First Century: Post-1951 Lessons from the Cartagena Declaration and Latin America	67
Solomon Mayers	Greening the International Criminal Court: A Critical Inquiry into Environmental Liability under the Rome Statute	90
Gulsum Qane	Do The United Nations' Guiding Principles on Business and Human Rights Require a Fourth Pillar to Better Respect Human Rights? Contrasting Karp's 'Disembedded Liberalism' Thesis and Human Rights Due Diligence	103
Martina Semino	Supranational Protection and the Rome Statute: Should Drug Trafficking Join the Ranks?	112

**THE IMPACT OF JURISTIC WRITINGS ON THE INTELLECTUAL DEVELOPMENT OF  
ROMAN LAW AND THEIR PLACE AS A SOURCE OF LAW**

*Lily Blackburn\**

**A. INTRODUCTION**

**B. DIRECT IMPACT OF JURISTIC LITERATURE**

- (1) *The Responsa*
- (2) *The Ius Respondendi*
- (3) Law of Citations

**C. INDIRECT IMPACT OF JURISTIC LITERATURE**

- (1) Praetorian Edicts
- (2) Imperial Decrees

**D. LITERARY LEGACY**

- (1) The Digest
- (2) The Institutes and the Teaching of Roman Law

**E. CONCLUSION**

---

\* LLB Candidate, University of Edinburgh.

## A. INTRODUCTION

Until the third century BC, pontiffs (a form of priests)<sup>1</sup> were the only people learned in the law and able to interpret it.<sup>2</sup> They wielded control by withholding what the law was.<sup>3</sup> In 312 BC, however, Appius Claudius publicised the actions-at-law. With legal knowledge no longer the exclusive preserve of the pontiffs, those with expertise began offering public legal opinions, effectively creating the profession of a ‘jurist’ – though this account may well be mythical.<sup>4</sup> The first jurist to do so was Tiberius Coruncanius.<sup>5</sup> From this point, jurists were generally aristocratic men who advised on legal matters, provided commentary, and essentially wrote law.<sup>6</sup> The main juristic period spanned 150 BC to 250 AD, during which the nature of jurists and their influence continued to fluctuate.<sup>7</sup> Most scholarly discussion accepts that the jurists were a source of law; the assertions of Cicero, Gaius, and Justinian on this point are incontrovertible.<sup>8</sup> However, there is a continuous debate as to whether these writings enhanced the intellectual development of Roman law. This essay contends that juristic literature was both a source of law and a pivotal component in the intellectual development of Roman law. This will be demonstrated by the direct impact of juristic writings, like the *responsa*, on the Roman legal system; the indirect influence the jurists had on the law through the praetorian edict and the administration of imperial decrees; and the legacy of this juristic literature in later Roman times.

## B. DIRECT IMPACT OF JURISTIC LITERATURE

### (1) The *Responsa*

One important way in which juristic writings contributed to the development of Roman law is through their relationship with the public. One of the juristic writing categories was problematic literature which discussed both real and hypothetical legal or philosophical questions, giving answers to potential legal problems.<sup>9</sup>

---

<sup>1</sup> Fritz Schulz, *The History of Roman Legal Science* (Oxford Clarendon Press 1953) 7.

<sup>2</sup> O. F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (Routledge 2006) 32.

<sup>3</sup> Alan Watson, *The Spirit of Roman Law* (The University of Georgia Press 1995) 38.

<sup>4</sup> Schulz (n 1) 9.

<sup>5</sup> Paul J. Du Plessis, *Borkowski's Textbook on Roman Law* (6<sup>th</sup> edn, Oxford University Press 2020) 36.

<sup>6</sup> *ibid* 36; D 1. 2. 2. 35.

<sup>7</sup> Arthur A. Schiller, ‘Jurists’ Law’ (1958) 58 *Columbia Law Review* 1226.

<sup>8</sup> Robinson (n 2) 19.

<sup>9</sup> Paul J. Du Plessis (n 5) 46.

These answers included the vital '*responsa*' which answered specific queries.<sup>10</sup> This formally began in the first century AD as certain jurists were prompted to give public responses so that the people were informed. This ensured that the knowledge came from legal experts, with the answers generally being systematically written down, contributing to Roman legal literature.<sup>11</sup> Law was not a material force; it was something awaiting creation through human action, and the jurists fulfilled this responsibility.<sup>12</sup> Their *responsa* were amongst the vital components of the law, emanating from "those to whom it is granted to lay down the law."<sup>13</sup> This alludes to the later phenomenon that jurists of a certain prestige and authoritative reputation were given the emperor's endorsement of their *responsa* through the '*ius respondendi*'.<sup>14</sup>

## (2) The *Ius Respondendi*

The *ius respondendi* was first granted by Augustus and meant specific jurists could give public opinions with the emperor's affirmation.<sup>15</sup> Although the passages informing this introduction have been subject to alteration, the weight of evidence suggests that some form of *ius respondendi* existed.<sup>16</sup> Granted, prior to Augustus, the *responsa* literature still functioned as a source of legal development, since it was accepted that only those self-assured and proficient in their studies would publicise their opinions.<sup>17</sup> Augustus' *ius respondendi*, however, conferred a new level of authority upon juristic literature, solidifying it as a source of law within the legal system – a status further entrenched by Hadrian's reform.<sup>18</sup> Hadrian, in spite of what Gaius says,<sup>19</sup> officially proclaimed that the *ius respondendi* were legally binding.<sup>20</sup> Papinian exemplifies how this solidification advanced Roman law: his published *responsa* comprised nineteen books.<sup>21</sup> His work emphasised morality and introduced new ethical principles to Roman family law, as in his assertion that "where a dowry is confiscated because the marriage was unlawful, the husband must pay back all that he would have to in an action on dowry."<sup>22</sup> Thus, juristic literature developed Roman law and was able to do

---

<sup>10</sup> H. F. Jolowicz & Barry Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, Cambridge University Press 1972) 90.

<sup>11</sup> Dario Mantovani, 'More than Codes: Roman Ways of Organising and Giving Access to Legal Information' in Paul J. Du Plessis, Clifford Ando, and Tuori Kaius (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press 2016) 28.

<sup>12</sup> David Ibbetson, 'Sources of Law from the Republic to the Dominate' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press 2015) 30.

<sup>13</sup> G. Inst. 1.7.

<sup>14</sup> D. 1. 2. 2.

<sup>15</sup> Rafael Domingo, 'The Roman Jurists and the Legal Science' (2017) The Social Science Research Network, 2 <<https://ssrn.com/abstract=2994130>> accessed 27 January 2025.

<sup>16</sup> Schiller (n 7) 1228.

<sup>17</sup> Jolowicz & Nicholas (n 10) 359.

<sup>18</sup> *ibid* 360.

<sup>19</sup> W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (Cambridge University Press 1921) 24-25.

<sup>20</sup> Schiller (n 7) 1230.

<sup>21</sup> Du Plessis (n 5) 48.

<sup>22</sup> D. 23. 2. 61.

so by imperial validation – making the jurists the main instrument of legal development throughout the principate.<sup>23</sup> Although the *ius respondendi* gave authority to certain jurists, it is questionable whether this meant that these jurists actually contributed to the intellectual development of Roman law. Schulz alludes to a lack of juristic originality and to the absence of crucial change in jurisprudence methodology.<sup>24</sup> This would suggest that even where juristic literature constituted an explicit source of law, it did not necessarily advance the intellectual development of Roman law. Winkel disagrees, suggesting that Schulz’s description of the jurist creates the persona of an anomalous character<sup>25</sup> which is arguably due to later alterations to the jurist’s texts.<sup>26</sup> Ultimately, the development in Roman law through the *ius respondendi* is still unequivocal, but only until the third century since there is no trace of it after this – making the juristic impact through this mode temporary.<sup>27</sup>

### (3) Law of Citations

In 426 AD, the Law of Citations was introduced, giving authority to five jurists: Gaius, Papinian, Paul, Ulpian, and Modestinus.<sup>28</sup> Whether their work was inherently revolutionary is irrelevant in this context: the *index* was required to treat their work as primary authority where a majority agreed. If there was no majority then Papinian’s opinion prevailed, meaning that these specific five jurists heavily contributed towards the development of Roman law by influencing cases’ determinations.<sup>29</sup> However, this meant that those jurists who were not in the named five, were denied the authority some of their work deserved, stunting the further development of Roman law. Roman law was thereby deprived of literature which would have furthered its status as a science.<sup>30</sup> Buckland contends that this marked “the lowest point [in] Roman jurisprudence” since the notion that sheer numbers of jurists should override the content of juristic reasoning is absurd.<sup>31</sup> Nevertheless, the authoritative jurists were able to highlight other juristic work and continue the process of development. This is evident in the “global [jurist] communication... within the Empire.”<sup>32</sup> Paul references a letter sent by Nessenius Apollinaris, a jurist working in Ephesus, meaning that juristic literature which had not been given imperial sponsorship was still able to reach the public and influence the Roman legal system

---

<sup>23</sup> Jolowicz & Nicholas (n 10) 363.

<sup>24</sup> Jacob Giltaij, ‘Autonomy and Authority: The Image of the Roman Jurists in Schulz and Wieacker’ in Kaius Tuori and Heta Björklund (eds), *Roman Law and the Idea of Europe* (Bloomsbury Academic 2019) 75.

<sup>25</sup> *ibid* 75.

<sup>26</sup> *ibid* 75.

<sup>27</sup> J. A. C. Thomas, *Textbook of Roman Law* (North Holland Publishing Company 1976) 53-54.

<sup>28</sup> Du Plessis (n 5) 51.

<sup>29</sup> Jolowicz & Nicholas (n 10) 452.

<sup>30</sup> Ibbetson (n 12) 26.

<sup>31</sup> Buckland (n 19) 35.

<sup>32</sup> Mantovani (n 11) 32.

as a consequence.<sup>33</sup> This links to the interaction between jurists. From the reign of Augustus until the reign of Hadrian, there was a clear division between two groups of jurists: the Proculians and the Sabinians.<sup>34</sup> The former are regarded as more conservative and adherent to reason and principles, whereas the latter are considered more pragmatic and dynamic.<sup>35</sup> This means that jurists would have educated disagreements amongst each other based on their school of thought, as seen in the well-documented debate regarding the age of male puberty. The Sabinians advocated that it depended on the individual's bodily development, as opposed to the Proculians who contended that puberty should have a set, universal age of fourteen.<sup>36</sup> The debate was finally settled by Justinian who agreed with the Proculians.<sup>37</sup> This shows that not only were the jurists' writings a clear source of law, but that their academic disputes aided and enhanced the intellectual development of Roman law. However, Watson's criticism must be noted since he highlights that the jurists sometimes argued in isolation of societal factors, as if "in a vacuum, remote from economic, social, religious, and political considerations."<sup>38</sup> This might suggest that although the jurists did develop Roman law, their capacity to do so was limited by the lack of pragmatism and insufficient attention to how society functioned in practice. This may not have always been the case: Celsus commented on the politics of morality, proclaiming that "law is the art of the good and the fair"<sup>39</sup> and to know the laws one must grasp "their sense and application."<sup>40</sup> This demonstrates that the early jurists' literature still made reference to societal constructs and was not removed from practicality, and thus still able to effectively contribute to the intellectual development of Roman law. Despite this, the claims of innovation are undermined by the significant influence of Greek thought, particularly regarding the tension between equality and the law – eroding the originality one can attribute to the jurists.<sup>41</sup> However, holistically, one must accredit the jurists with the praise they deserve for their refreshing developments upon Roman law. Ulpian displays this unique ingenuity as instead of treating law as a system of principles, he added layers of equality, justice, and dignity, with Honoré considering him to be a founding pioneer of human rights.<sup>42</sup>

---

<sup>33</sup> *ibid* 32.

<sup>34</sup> Domingo (n 15) 18.

<sup>35</sup> Du Plessis (n 5) 45.

<sup>36</sup> Peter Stein, *The Two Schools of Jurists in the Early Roman Principate* (Cambridge Law Journal 1972) 27.

<sup>37</sup> J. Inst. 1.22.

<sup>38</sup> Du Plessis (n 5) 45.

<sup>39</sup> D. 1. 1. 1.

<sup>40</sup> D. 1. 3. 17.

<sup>41</sup> Domingo (n 15) 21.

<sup>42</sup> *ibid* 20.

## C. INDIRECT IMPACT OF JURISTIC LITERATURE

### (1) Praetorian Edicts

The jurists also had indirect influences on the law. An important way in which this transpired was through influencing the praetorian edict. The office of the praetor was created in 367 BC to administer justice. Praetors were involved in litigation but, most importantly, in issuing edicts.<sup>43</sup> Edicts were displayed on wooden boards outside the praetor's office to inform the citizens of the legal functions and procedures that they could use.<sup>44</sup> This praetorian system of law was called the *ius honorarium*. Since most praetors used the position as a stepping stone to higher political office, they generally lacked legal knowledge; consequently, the edicts evolved through consultation with, and consolidation by, the jurists.<sup>45</sup> Although Robinson advocates that this influence was more of a simple administration, advised by the jurists, it seems to be much more than this.<sup>46</sup> The jurists would answer judicial questions proposed by prospective litigants through the praetor and the *index* since neither were actually informed in the law.<sup>47</sup> This demonstrated that the jurists were effectively directing legal trials, constituting a source of legal development through a system of precedent – though not binding – that they explicitly shaped.<sup>48</sup> This was enabled through the formulary system which eventually expanded to both foreign and citizen usage around 140 BC.<sup>49</sup> This system meant that the praetor had more flexibility in terms of resolving disputes and did not have to strictly adhere to a narrow constraint of options. Thus, the praetor was afforded greater creativity, as were the jurists, with Schulz branding them the “real authors of the praetorian [...] edicts.”<sup>50</sup> Thus, they were enabled to pursue more adventurous, pragmatic solutions to trials, elevating the intellectual development of Roman law. Essentially, the praetorian discretion was managed by the jurist's interpretation<sup>51</sup> and allowed academic discourse since formulae would be perfected by other jurists, strengthening its validity.<sup>52</sup> This is reaffirmed by the fact that *ius honorarium* and *ius civile* merged into one, meaning the jurist's impact on the former ultimately influenced the latter as a consequence.<sup>53</sup> However, it should be recognised that the majority of litigation did not involve innovation and instead included an adherence to accepted outcomes in particular

---

<sup>43</sup> Du Plessis (n 5) 33.

<sup>44</sup> *ibid* 34.

<sup>45</sup> *ibid* 34.

<sup>46</sup> Robinson (n 2) 31.

<sup>47</sup> Schiller (n 7) 1227.

<sup>48</sup> Jolowicz & Nicholas (n 10) 95.

<sup>49</sup> Ibbetson (n 12) 28.

<sup>50</sup> Schulz (n 1) 53.

<sup>51</sup> Mantovani (n 11) 34.

<sup>52</sup> Schulz (n 1) 51.

<sup>53</sup> Robinson (n 2) 31.

situations, and so the jurist would plainly state the traditional solution, instead of creating pragmatic resolutions.<sup>54</sup> Regardless of this, when the law was evolving, it was invariably the jurists behind this, making the legal system a living, breathing body and exhibiting their clear position as a source of law.<sup>55</sup> This is seen through their establishment of good faith in contracts<sup>56</sup> as although in the background, the jurists were responsible for the revolutionary remedies of the edict, securing them as a major force in the development of Roman law.<sup>57</sup> Another mode in which the jurists influenced the use of the edict was through the edictal commentaries in the Republic, the first of which being completed by A. Ofilius.<sup>58</sup> By the later Republic, the practice of edictal interpretation was innovative, informing citizens of the edict's new mechanisms.<sup>59</sup> It should be considered that this form of legal influence was temporary; the final form of the edict was synthesised by Julian in the Empire.<sup>60</sup> Ultimately, this shows the power the jurists had in developing the Roman law as although the moulding of the edict ended, it was a jurist who delivered the conclusive edictal form.

## (2) Imperial Decrees

The jurists indirectly developed Roman law through their literary influence on imperial decrees. In the classical period, the jurists aided in drafting imperial decrees, giving them an unprecedented level of legal command.<sup>61</sup> This was facilitated by Septimius Severus, who created new posts for the jurists in the administration of justice; the jurists of the late classical period were of the equestrian order.<sup>62</sup> This is shown through jurists like Papinian, Paul, and Ulpian holding the position of Praetorian Prefect.<sup>63</sup> This position enabled the jurists to exercise jurisdiction under the emperor's name and thus developed the Roman law incognito. However, the writings of the classical jurists lacked the philosophical depth and reasoning seen in the work of their Republican predecessors, diminishing the intellectual development of Roman law.<sup>64</sup> By the post-classical period (around 230 AD), jurists became more of anonymous bureaucratic employees than legal pioneers.<sup>65</sup> It was the emperor who had the role of shaping the law since although there is an account of an emperor being persuaded by Paul, there is also evidence of him following Papinian's advice contrary

---

<sup>54</sup> Schiller (n 7) 1227.

<sup>55</sup> *ibid* 1227.

<sup>56</sup> Alan Watson, *Law Making in the Later Roman Republic* (Clarendon Press 1974) 103.

<sup>57</sup> *ibid* 101.

<sup>58</sup> Robinson (n 2) 33.

<sup>59</sup> Mantovani (n 11) 29.

<sup>60</sup> Robinson (n 2) 9.

<sup>61</sup> Du Plessis (n 5) 43.

<sup>62</sup> Domingo (n 15) 16.

<sup>63</sup> Robinson (n 2) 11.

<sup>64</sup> Du Plessis (n 5) 46.

<sup>65</sup> *ibid* 50.

to suggestions of Paul.<sup>66</sup> This demonstrates that juristic influence had become sporadic and ultimately dependent on the emperor's legal views, for "what pleases the prince has the force of law."<sup>67</sup>

## D. LITERARY LEGACY

### (1) The Digest

A final perspective in which juristic literature's impact as a source of law ought to be considered is through its legacy in Rome. The era following the classical period was bureaucratic in character, departing from classical jurisprudence owing to the transformed role of the jurist.<sup>68</sup> From the third century, the law became a simplistic network, with little originality.<sup>69</sup> Rather than creating law, jurists taught the existing state of law with a renewed urgency. This is seen through the makeup of Justinian's *Corpus Iuris Civilis*. This consisted of the Digest, the Institutes, the Novellas, and the Code.<sup>70</sup> In terms of juristic influence, the Digest and the Institutes are significant. The Digest was a compilation of Roman legal literature, with the five authoritative jurists named in the Law of Citations being heavily quoted.<sup>71</sup> Bluhme theorises that when the Digest was being constructed, it was divided into three separate genres: observations on the *ius civile*, the *ius honorarium* and edictal commentary, and problematic literature like *responsas*.<sup>72</sup> This reaffirms that the *ius honorarium* and *responsa* were pivotal sources of law and advanced the intellectual development of Roman law, ultimately showing the jurist's impact since they were the backbone of these two genres. However, the interpolations within the Digest compromise its authority as a source for assessing juristic impact, since one can "only observe the species [jurists] from far away through the bars of their cages," given that Justinian's editorial interventions may have altered the original juristic texts.<sup>73</sup> Although interpolations can, on occasion, be identified through faulty language or translation,<sup>74</sup> this nonetheless limits the conclusions one can draw about the jurists' impact on the subsequent intellectual development of Roman law. During compilation, sometimes if there was a difference of opinion amongst jurists, only one of the stances would be amended.<sup>75</sup>

---

<sup>66</sup> D. 36. 1. 76. 1; D. 29. 2. 97.

<sup>67</sup> D. 1. 4. 1.

<sup>68</sup> Schulz (n 1) 262.

<sup>69</sup> *ibid* 290.

<sup>70</sup> Du Plessis (n 5) 54.

<sup>71</sup> *ibid* 56.

<sup>72</sup> *ibid* 59.

<sup>73</sup> Sebastian Stepan, 'History of Legal Concepts and Historical Individuality of the Classical Roman Jurists' (2011) *Glossae: European Journal of Legal History*, 2 <<https://glossae.eu/glossaeojs/article/download/133/108/117> > accessed 30 January 2025.

<sup>74</sup> Du Plessis (n 5) 57.

<sup>75</sup> Jolowicz & Nicholas (n 10) 486.

This limits the literary legacy of the jurists as it dispels academic debate which would have had the capacity to enhance Roman law. The credibility of the jurist's writings as a source of law can be critiqued since some of their commentaries on imperial enactments were to be 'corrected', obscuring what some laws were and emphasising the emperor as the primary source of law. Nevertheless, one must ultimately recognise that the fact that there even was a collection of juristic literature shows that they were, in their time and beyond, a valued source of law and separate from the emperor's imperial enactments.<sup>76</sup>

## (2) The Institutes and the Teaching of Roman Law

The very concept and structure of the Institutes can be traced to juristic literary development, since Justinian's Institutes drew heavily upon Gaius' Institutes.<sup>77</sup> Gaius' legacy of his famous legal division of 'persons', 'things', and 'actions' became the model for Roman legal textbooks.<sup>78</sup> Gaius, however, was not a well-renowned jurist in his own time, suggesting that some juristic literature was neither a source of law nor a driver of intellectual development during its period of composition, achieving this status only retrospectively. Similarly, since the jurist's Institutions were created to be simple for law students, their literary element was not inherently developmental, as they were summaries of the law as is, not intrinsically sources of law themselves.<sup>79</sup> The flourishing of legal teaching and law schools did little to counteract the debasement of legal science.<sup>80</sup> Although the Institutes and the Digest were made up of the juristic writings, prior to Justinian's reorganisation of legal teachings, students read straight from the jurists since they read Gaius' Institutes and Papinian's *responsa*.<sup>81</sup> This means that there was now more likelihood of inaccuracy in Roman teaching since the jurist's writings were becoming a secondary source – eroding their impetus as an origin of law and their capacity to develop the law. Justinian, however, effectively abolished the Law of Citations,<sup>82</sup> enabling past jurists outside the selected five to regain retrospective authority and re-establish themselves as sources of law. His codification drew upon a variety of jurists, underscoring that the validity of a juristic opinion should be assessed by its reasoning, not by the number of jurists who shared it.<sup>83</sup> In spite of this, the legacy of juristic writing continued to decline due to 'vulgar law'; misunderstandings of the law created erroneous proclamations like intention and negligence becoming blurred together in terms of

---

<sup>76</sup> Robinson (n 2) 80.

<sup>77</sup> Du Plessis (n 5) 48.

<sup>78</sup> *ibid* 48.

<sup>79</sup> Michael Peachin, *In Search of a Roman Rule of Law* (6th edn, Legal Roots – The International Journal of Roman Law, Legal History and Comparative Law 2017) 43-45.

<sup>80</sup> Thomas (n 27) 52.

<sup>81</sup> Jolowicz & Nicholas (n 10) 498.

<sup>82</sup> Buckland (n 19) 35.

<sup>83</sup> Thomas (n 27) 54.

obligations.<sup>84</sup> However, one must acknowledge that juristic work remained relevant: the *lex Romana Visigothorum* of the Western Empire comprised Gaius' Institutes alongside writings of Paul and Papinian.<sup>85</sup> Despite their works being used in a vulgar law practice, this clearly shows the legacy of the jurists as a prevalent source of law, just by this time they had little positive impact in the development of Roman law since they were commonly cited erroneously.

## E. CONCLUSION

In conclusion, the writings of the Roman jurists were clearly a source of law to a significant extent, and these works played a crucial role in the intellectual development of Roman law. While some aspects of juristic work may be seen as a derivative of Greek thought, or as naive and impractical, the jurists' *responsa* nonetheless had a fundamental direct influence on the law through their engagement with moral principles. Similarly, jurists were the real authors of impactful works like the praetorian edict and imperial decrees which were the drivers of much of the law reform and development. Granted, this influence was temporary, as the emperor eventually became the only source of law – but nothing is eternal, and one must still credit the jurists for their unprecedented role in legal development during their era. Their legacy is just as important since they continued to be valued sources of law and develop the legal system even after their death. Interpolations and vulgar law do diminish this credibility, but one cannot scrutinise every statement and must take some assertions at face value to avoid an infinite regress of scepticism. It is true that the jurists' original work increasingly became secondary, supplanted by derivative sources, but this ultimately demonstrates the extent to which their writings had become an ingrained source of law within the Roman legal system – one that continuously shaped legal development. Thus, juristic literature was largely an explicit source of Roman law and was able to play a pivotal role in the intellectual development of Roman law.

---

<sup>84</sup> Jolowicz & Nicholas (n 10) 474.

<sup>85</sup> *ibid* 36-37.

## SHOULD A LIE ABOUT FERTILITY VITIATE CONSENT TO SEX?

*Imogen Charlotte Collins\**

- A. INTRODUCTION
- B. SEXUAL AUTONOMY
- C. THE IMPORTANCE OF CONSENT
  - (1) Conditional Consent
- D. FACTORS VITIATING CONSENT
  - (1) Nature or Purpose
- E. *R v LAWRANCE*
- F. ANALYSING *R v LAWRANCE*
  - (1) Pros
  - (2) Cons
- G. GOVERNING LEGISLATION
  - (1) Sexual Offences Act 2003
- H. ADVOCATING FOR REFORM
  - (1) Proposed legislation
  - (2) Applying Section 4A to Lawrance
  - (3) Changing the Definition in Section 74
- I. RISK OF OVERCRIMINALISATION?
- J. LEGAL HARM IS DIFFERENT FROM MORAL HARM
- K. CONCLUSION

---

\* LLB Candidate, University of Edinburgh.

## A. INTRODUCTION

This paper contends that a lie about fertility should vitiate consent because it undermines the legitimacy of the consent given and thus restricts the ability of those involved to exercise their sexual autonomy freely. The crux of this analysis is that the Sexual Offences Act 2003 fails to adequately protect those who are induced into sexual activity by deception. Thus, it falls short of its aim to ensure the protection of sexual autonomy.<sup>1</sup> Therefore, there is a demand for reform to protect future victims.

To conclude that a lie about fertility should vitiate consent to sex, the importance of sexual autonomy must first be established. Thereafter, consent and its significance to sexual intercourse will be discussed, noting previous instances where the victim's consent was vitiated and how these cases correlate to the deceit within the question posed. This will warrant an exploration of *R v Lawrance*,<sup>2</sup> the principal authority involving a fertility lie. An analysis of both the first instance and appeal will be considered, focusing on the latter.

Additionally, the pros and cons of the judgment will be balanced, anticipating what this means for the future of criminal law if a similar case were to arise. Finally, it will be suggested, having examined the relative sections of the Sexual Offences Act 2003 throughout, that the best course of action to take to truly protect the sexual autonomy of the complainer in cases of deception is to reform the current legislation. That way, if similar cases were to end up in court in the future, there would be a more equitable outcome. Before concluding, both the risk of overcriminalisation and the difference between legal and moral harm will be evaluated and rebutted to conclude that a lie about fertility should vitiate consent to sex. In advocating for reform, the basis of the analysis will slightly shift to demonstrate that by changing the law, a lie about fertility would, and should, vitiate consent to sex.

## B. SEXUAL AUTONOMY

---

<sup>1</sup> Home Office, *Setting the boundaries: Reforming the law on sex offences* (vol 1, July 2000), para 2.7.2.

<sup>2</sup> *R v Lawrance* [2020] EWCA Crim 971.

The right to sexual autonomy is individualistic.<sup>3</sup> This implies that individuals have the freedom to make their own decisions about their sexual activity. Thus, to force another person to engage in sexual activity without their consent is to infringe upon their personal autonomy and human dignity,<sup>4</sup> exemplifying a violation of both legal and moral norms where A fails to respect B's personal autonomy.<sup>5</sup> Sexual autonomy is the freedom to choose what sexual activity you engage in - When? Where? Who? The choice is yours.

O'Malley and Hoven express that everyone has a fundamental right to refuse or engage in sexual activity with a specific person or under specific circumstances.<sup>6</sup> This suggests, as they also go on to state, that the right to sexual autonomy is comprised of both a negative and positive dimension: the freedom to refuse and the freedom to choose.<sup>7</sup> Thus, if D (the defendant) intentionally lies to V (the victim) about his fertility status, knowing her consent is dependent on him being infertile, D is depriving V of exercising both her positive and negative sexual autonomy. This is because V cannot choose nor refuse to engage in the act as she is unaware of all the facts under D's deception.

### C. THE IMPORTANCE OF CONSENT

Consent has a transformative nature<sup>8</sup> and its absence is one of the things that can render sexual activity criminal.<sup>9</sup> Therefore, being able to identify when consent is absent in sexual intercourse is essential. When a case is brought to the court under sexual offences, the prosecution must establish the absence of consent. To do so, they must be able to decipher when consent is and is not present, as well as the factors negating it. Therefore, the law governing this area must be explicit.

The statutory definition of consent is stated under Section 74 of the Sexual Offences Act 2003, "... a person consents if he agrees by choice and has the freedom and capacity to make that choice."<sup>10</sup> The ambiguity around what exactly this "free and voluntary agreement" pertains to is just one of the many criticisms of the 2003 Act.<sup>11</sup> However, notwithstanding its obscurity, there are two stand-out concepts when

---

<sup>3</sup> Rachel Clement Tolley, 'Deception Mistake and Difficult Decisions' in *Reforming the Relationship between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network Report, 2023) 94.

<sup>4</sup> Tom O'Malley and Elisa Hoven, 'Consent in the Law Relating to Sexual Offences' in Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 136.

<sup>5</sup> *ibid* 139.

<sup>6</sup> *ibid* 138.

<sup>7</sup> *ibid*.

<sup>8</sup> *ibid* 136.

<sup>9</sup> Matthew Gibson, 'Deception, Consent and the Right to Sexual Autonomy' (n 3) 51.

<sup>10</sup> Sexual Offences Act 2003, s 74.

<sup>11</sup> O'Malley and Hoven (n 4) 155.

analysing consent in this area: agreement and choice.<sup>12</sup> It could be said, under this definition, one consents to have sex when they choose to have sex, and one consents to have sex when they agree to have sex.<sup>13</sup> However, not only is it important that V chose to engage in the sexual act, but how V reached that choice should also be a factor.<sup>14</sup> Debates are common between academics about when consent is invalid - specifically, what circumstances do and should vitiate one's consent to engage in sexual activity?<sup>15</sup> However, if there is one thing they agree on, it is that consent is paramount to engaging in sexual intercourse.

### **(1) Conditional Consent**

In exercising sexual autonomy, everyone should be able to choose what happens to their body. Therefore, it is common for people to place conditions on their agreement to engage in sexual conduct. This is known as conditional consent: when consent is provided under certain conditions, and if these are not met, the act is non-consensual.<sup>16</sup> Noted above, Section 74 of the Sexual Offences Act 2003 states that a person consents if he, "has the freedom and capacity."<sup>17</sup> Therefore, if either of these are absent, so is the consent. For this reason, if sexual autonomy is truly important, V then gets to choose the conditions under which she consents to sex.<sup>18</sup>

Consent is required for every sexual act. For instance, if the condition upon which V consented to have sex with D — say, condom usage — is then ignored by D, it therefore cannot be said that V's consent remains valid for sex without the condition.<sup>19</sup> Just because V consented to act A does not mean V also consents to act B despite how similar they may be, if at all. V is deprived of her ability to make a full and free choice if D violates the condition upon which V initially agreed, thus preventing her from fully exercising her sexual autonomy. Perhaps V would not have otherwise consented to the act had she known all the facts and instead refused to engage. Indeed, V would be deprived of exercising her freedom to refuse if so. Therefore, the removal/absence of any agreed protection or contraception during sexual activity

---

<sup>12</sup> Chloe Kennedy, 'Sex, selfhood and deception' (n 3) 63.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> Beatrice Krebs, 'Rape, Consent and a Lie about Fertility: R v Lawrance [2020] EWCA Crim 971' (2020) 84 *The Journal of Criminal Law* 622-5, 622.

<sup>16</sup> Gavin Doig and Natalie Wortley, 'Conditional consent? An emerging concept in the law of rape' (2013) 77 *The Journal of Criminal Law* 286-291, 286.

<sup>17</sup> Sexual Offences Act 2003, s 74.

<sup>18</sup> UCL Laws, 'Consent to Sex, Deception and R v. Lawrance' (14 August 2020)

<<https://www.youtube.com/watch?v=TBR3jIWR69Y>> accessed 29 November 2024.

<sup>19</sup> *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

renders the act non-consensual and provokes discussions around conditional consent. If this is the case, then it is nonsensical that a lie about one's fertility status does not generate the same outcome.<sup>20</sup>

## D. FACTORS VITIATING CONSENT

There are multiple circumstances where someone can be deceived, though every deception negates consent to sex. There exists much academic discourse about when consent to sex is and should be vitiated.

Following a variety of cases involving deception,<sup>21</sup> Section 76(2) of the Sexual Offences Act 2003 sought to put two well-established common law grounds where deceit and fraud negate one's consent to sex into statute. However, as noted by Krebs, case precedent has demonstrated that consent-vitiating deceptions are not restricted to those within this section.<sup>22</sup> Nonetheless, Section 76 sets out conclusive presumptions about consent, including (a) being intentionally deceived by D as to the "nature or purpose" of the act,<sup>23</sup> and (b) being intentionally induced by D to consent to the act by impersonating someone known to V.<sup>24</sup> If it were applied, a fertility lie would come under the "nature or purpose" of the act rather than impersonation. However, it did not and thus, the former warrants further exploration.

### (1) Nature or Purpose

Notably, two examples where Section 76(2) was applied and proven include: (a) D deceiving V into thinking he was going to wear a condom, but D desists,<sup>25</sup> and (b) D is a different gender than what was believed by V.<sup>26</sup> In both instances, the court ruled that the complainer was deceived about the nature or purpose of the act, and thus, her consent to it was vitiated, resulting in sexual assault charges.

How, then, should the law conceptualise the position of the victim deceived as to her partner's fertility status? Such deception bears a close resemblance with the facts of *Assange*,<sup>27</sup> where consent was conditional upon D's use of a condom which he removed. However, this analogy was rejected by the Court

---

<sup>20</sup> *Lawrance* (n 2). Evident in the quashed conviction.

<sup>21</sup> *R v Linekar* [1995] 3 All ER 69 73; *R v Elbekkay* [1994] EWCA Crim 1.

<sup>22</sup> Krebs (n 15) 622.

<sup>23</sup> Sexual Offences Act 2003, s 76(2)(a).

<sup>24</sup> *ibid* s 76(2)(b).

<sup>25</sup> *Assange* (n 19).

<sup>26</sup> *R v McNally* [2013] EWCA Crim 1051.

<sup>27</sup> *Assange* (n 19).

of Appeal in *Lawrance*,<sup>28</sup> where the facts were held to fall outside the scope of s 76(2).<sup>29</sup> This decision is difficult to reconcile with prior case law.

### **E. *R v LAWRENCE***

Jason Lawrance (D) was convicted of two counts of raping a woman (V) in the first instance. D and V met on a dating website and began exchanging sexually charged messages. As the conversation progressed, the pair discussed the use of contraception, where D asked V if her previous partner had used any protection, to which she informed him this was not needed as he had a vasectomy. In response, D then claimed he too had undergone this procedure and thus was infertile. Upon arriving at her home, V sought further assurance twice more from D that he was infertile and expressed she did not want to get pregnant. D reassured V he had a vasectomy, and the two then had unprotected sexual intercourse. Unbeknownst to V, D had not undergone a vasectomy and had lied to her. The next day, D texted V, confessing he was still fertile. Consequently, V underwent an abortion after realising she was pregnant.

D appealed his charge on the basis that V had consented to the intercourse, and thus, he could not be guilty of rape.<sup>30</sup> His defence also claimed V's account was challengeable in cross-examination as the two had not engaged in further discussion regarding the vasectomy upon his arrival at her flat.<sup>31</sup> Contrastingly, the prosecution argued the deception of the appellant vitiated V's consent.<sup>32</sup> The latter claim from the trial has been a key focal point for a lot of criminal academics and sexual offending more generally.

### **F. ANALYSING *R v LAWRENCE***

Notwithstanding many claims that *Lawrance* is “seriously flawed,”<sup>33</sup> it should be noted that the judgment also has some merits:

---

<sup>28</sup> *Lawrance* (n 2) [43]. Conviction quashed.

<sup>29</sup> *ibid* [27].

<sup>30</sup> *ibid* [7].

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid* [6].

<sup>33</sup> Mark Dsouza, ‘Deception, Consent to Sex, and R v Lawrance [Part 2]’ (UCL Discovery, 6 August 2020) <[https://discovery.ucl.ac.uk/id/eprint/10158186/1/blogpost\\_part\\_2.pdf](https://discovery.ucl.ac.uk/id/eprint/10158186/1/blogpost_part_2.pdf)> accessed 29 November 2024.

## (1) Pros

### (a) *Removes the distinction between active deception and non-disclosure*

A change warmly welcomed, Krebs notes that *Lawrance* removes the distinction between active deceptions and non-disclosures.<sup>34</sup> This distinction was unsatisfactory and lacked logical routes within the Sexual Offences Act 2003.<sup>35</sup> The removal is evident at the end of the judgment, where the court described deceit and deception as “slippery concepts,”<sup>36</sup> between which it is hard to distinguish one from the other.<sup>37</sup> The court then stated it makes no difference to the issue of consent whether the deception was expressed, as it was here, or implied, like in *R v B*.<sup>38</sup>

The central issue is whether the deceit mattered to V. According to the court, this is so where it is “closely connected to the performance of the act, rather than the broad circumstances surrounding it.”<sup>39</sup> The distinction was hard to decipher in practice, and thus, it is better to be removed. Furthermore, it simplifies the law. If the court is not concerned with whether the deception was expressed or implied, they can devote more time to the questions that matter.<sup>40</sup> For example, whether V consented and whether her consent depended on D’s deception. This would result in more effective adjudication as the court would not linger on fruitless distinctions. Suppose a case with the same facts arose in the future; the court’s focus would instead be whether D’s fertility lie mattered to V’s exercise of her sexual autonomy in choosing to engage with him, and if so, whether her consent should be vitiated.

### (b) *Removes “common sense” approach*

A second asset from the *Lawrance* judgment is that it removes the common-sense approach and instead focuses on legal principles,<sup>41</sup> distinguishing it from previous case decisions.

Evidence of the common-sense approach is notable in *Monica*,<sup>42</sup> where Lord Judge CJ claimed the evidence pertaining to the “choice” and “freedom” to decide was to be approached in a “common-sense way.”<sup>43</sup> This was also evident in *McNally*,<sup>44</sup> where Sir Brian Leveson P expressed that the facts were to be

---

<sup>34</sup> Krebs (n 15) 622.

<sup>35</sup> UCL Laws (n 18) 57.03.

<sup>36</sup> *Lawrance* (n 2) [40].

<sup>37</sup> *ibid.*

<sup>38</sup> *R v B* [2007] 1 WLR 1567.

<sup>39</sup> *Lawrance* (n 2) [41].

<sup>40</sup> UCL Laws (n 18) 57.07.

<sup>41</sup> Krebs (n 15) 623.

<sup>42</sup> *R (Monica) v DPP* [2018] EWHC 3508 (Admin).

<sup>43</sup> *ibid* [26].

<sup>44</sup> *McNally* (n 26).

dealt with using a “common sense” view.<sup>45</sup> Departing from this approach, the COA in *Lawrance* noted this should instead turn to governing principles.<sup>46</sup> Recognised by Krebs, this approach demonstrated minor merit in calculating whether one’s consent had been vitiated.<sup>47</sup> This is because facts around sexual offending are far from “common sense,” and thus should not be dealt with as such. Without a justifying rationale, this common-sense approach swerved the law in error of producing unpredictable results,<sup>48</sup> and therefore, it suffices that the *Lawrance* judgment parted from it. Likewise, if similar facts were to arise in the future, it is good practice knowing they would not be approached in a common-sense manner.

## (2) Cons

### (a) *Wrongly distinguishes Lawrance from Assange and R(F)*

The first flaw of *Lawrance* is that it wrongfully distinguishes the facts at issue from those in *Assange*<sup>49</sup> and *R(F)*.<sup>50</sup> This is evident in the judgment, where it states the court considers a lie about fertility different than a lie about condom usage or intended withdrawal.<sup>51</sup> This distinction is mistaken. Comparing the facts at hand to the cases prior, Mr. Emanuel QC claimed, unlike *Assange* and *R(F)*, V in *Lawrance* had, “consented to every aspect of the physical act,”<sup>52</sup> having “imposed no physical restrictions.”<sup>53</sup> This is not correct. None of the victims in *Lawrance*, *Assange*, or *R(F)* had consented to every aspect of the physical act and had all imposed physical restrictions, which evidence provided by Williams supports.<sup>54</sup> For instance, in both *Assange* and *R(F)*, V had not consented to semen, including sperm, and in *Lawrance*, V had consented to semen but not sperm. Thus, the court’s claim that V did not impose any physical restrictions on the act is unsound.

Additionally, *R v B*<sup>55</sup> is another example of an imposed physical restriction where V had consented to semen, including sperm, but not to the HIV they later contracted. In every case, V lacked consent to the presence of a specific physical entity.<sup>56</sup> Thus, they lacked consent to part of the act, demonstrating a lack of distinction between the cases as incorrectly implied by the court. Moreover, when measured against the

---

<sup>45</sup> *ibid* [26].

<sup>46</sup> *Lawrance* (n 2) [33].

<sup>47</sup> Krebs (n 15) 623.

<sup>48</sup> *ibid*.

<sup>49</sup> *Assange* (n 19).

<sup>50</sup> *R (F) v DPP* [2013] EWHC 945 (Admin).

<sup>51</sup> *Lawrance* (n 2) [36].

<sup>52</sup> *ibid* [20].

<sup>53</sup> *ibid* [37].

<sup>54</sup> UCL Laws (n 18) 57.46.

<sup>55</sup> [2006] EWCA Crim 2945; [2007] 1 WLR 1567.

<sup>56</sup> UCL Laws (n 18) 58.04.

facts of *McNally*,<sup>57</sup> V, in this case, consented to digital penetration which took place, the difference being the birth-gender of the person digitally penetrating V. Therefore, as suggested by Williams, if there is a distinction to be made, it is with *McNally*, not *Lawrance*.<sup>58</sup> Hence, like in the cases involving lies about condom usage or intended withdrawal, so too should a lie about fertility vitiate V's consent to sex.

(b) *Focusing on the physical act rather than emotional harm*

Akin to the preceding point, a second notable flaw in the *Lawrance* judgment is its focus on the “physical act” rather than the emotional harm it caused the victim. In the *Lawrance* judgment, the court failed to show compassion for the victim's sexual autonomy. This is evidenced when they expressed D's lie about his fertility status did not deprive V of her sexual autonomy, the freedom to choose whether to engage in the sexual intercourse as per the Section 74 definition of consent.<sup>59</sup> Similarly, this fact is also incorrect. If D intentionally lied to V, having claimed he had undergone a procedure he had not and was infertile as a result, she was indeed deprived of her freedom to choose. This is because she is deprived of her ability to exercise her sexual autonomy in making a free choice if she is not aware of all the facts. This reinforces the importance of sexual autonomy.

Instead of considering what emotional harm the act may have caused the victim, the court instead focuses on their claim that V consented to every aspect of the physical act.<sup>60</sup> Based on the findings noted above under “conditional consent,” consent is absent outside the conditions set out by the complainer. Applicable here, V's consent to have intercourse with D in *Lawrance* was conditional on the fact he was infertile.<sup>61</sup> Thus, it is argued that she may have consented to the physical act, though not every part.<sup>62</sup> Nonetheless, the court errs in failing to express its compassion for the lasting effects sexual violation has on victims. Applying the autonomy-oriented position noted above, like V's counsel in *Monica*,<sup>63</sup> here the jury should consider whether D's deceit mattered to V's state of affairs prior to the sexual act.<sup>64</sup> If considered, it would be clear, as concluded by the jury, that V would have not otherwise consented to the act as she relied upon D's deception.<sup>65</sup> Therefore, her consent should be vitiated by D's fertility lie as she was unable to exercise her sexual autonomy freely.

---

<sup>57</sup> *McNally* (n 26).

<sup>58</sup> UCL Laws (n 18) 58.47.

<sup>59</sup> *Lawrance* (n 2) [38].

<sup>60</sup> *ibid* [20].

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid* [34].

<sup>63</sup> R (*Monica*) (n 42).

<sup>64</sup> Chloe Kennedy, ‘Sex, Identity and Recognition: Rethinking rape and deception’ (Inherently Human: Critical perspectives on Law, Gender and Sexuality, 7 February 2019) <<https://inherentlyhuman.wordpress.com/2019/02/07/sex-identity-and-recognition-re-thinking-rape-by-deception/>> accessed 3 December 2024.

<sup>65</sup> *Lawrance* (n 2) [34].

## G. GOVERNING LEGISLATION

“A major piece of law reform,” two aims of the Sexual Offences Act 2003 included creating coherent and clear sexual offences and protecting sexual autonomy.<sup>66</sup> Prior to the Sexual Offences Act 2003, English law lacked a statutory definition of consent. Instead, this was left to the common law. There are multiple flaws in the legislation: length, placement, and wording. For these reasons, it is not surprising that there are so many advocates for reform.<sup>67</sup> Many of those favouring reform are eager to reduce the focus on complainers at trial, instead, focusing on the defendant and their conduct.<sup>68</sup> This approach would be more mindful of the complainer’s dignity in an already distressing situation. Accordingly, Williams, amongst others, believes the solution to some of the problems with the Sexual Offences Act 2003 rests in reforming primary legislation.<sup>69</sup>

### (1) Sexual Offences Act 2003

Dsouza notes that the Home Office 2000 Report, ‘Setting the Boundaries: Reforming the law on sex offences’ clarified that the protection of sexual autonomy was fundamental to the Sexual Offences Act 2003.<sup>70</sup> Although this may have plausible grounding, the Sexual Offences Act 2003 is unsatisfactory.

Amongst its criticisms is the claim that the Sexual Offences Act 2003 does not adequately account for sexual activity induced by deception. Therefore, it cannot truly be said to protect the sexual autonomy of those subject to such deceit. An examination of the current legislation reveals the Sexual Offences Act 2003 should be reformed by amending its section related explicitly to deception-induced sexual activity. Referring back to the *Lawrance* judgment, if D’s vasectomy lie did not vitiate V’s consent to have sex with him, and thus his rape conviction was quashed, he faced no legal consequence for his deceit.<sup>71</sup> *Lawrance*’s rape conviction was overturned as his fertility lie was not capable of negating consent under the Sexual Offences Act 2003.<sup>72</sup> Is this satisfactory? What about the psychological harm his deception caused V?

---

<sup>66</sup> Jeremy Horder, *Ashworth’s Principles of Criminal Law* (10<sup>th</sup> ed, OUP 2022) 345.

<sup>67</sup> Clement Tolley (n 3) 94.

<sup>68</sup> Kennedy (n 12) 64.

<sup>69</sup> UCL Laws (n 18) 56.21.

<sup>70</sup> Dsouza (n 33).

<sup>71</sup> *Lawrance* (n 2) [43].

<sup>72</sup> Sandra Paul, ‘Law regarding consent is not confused, wrong or unfair - Sandra Paul writes for the Law Society Gazette’ (*Kingsley Napley*, 26 August 2020) <<https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/law-regarding-consent-is-not-confused-wrong-or-unfair-sandra-paul-writes-for-the-law-society-gazette>> accessed 9 December 2024.

Sexual offences often have long-lasting psychological consequences impacting the victim's quality of life.<sup>73</sup> Therefore, this should not just be a physical consideration.<sup>74</sup> Despite having this conviction quashed,<sup>75</sup> *Lawrance's* lie is morally reprehensible and thus should be criminalised. Sandra Paul claimed if this change were to occur, this would be best achieved through legislation rather than case precedent.<sup>76</sup>

## H. ADVOCATING FOR REFORM

Prior to the Sexual Offences Act 2003, Section 3(1) of the Sexual Offences Act 1956, titled 'Procurement of woman by false pretences,' stated it was, "an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse."<sup>77</sup> Upon the passing of the Sexual Offences Act 2003, there is currently no Parliamentary legislation replicating this offence. However, the Sexual Offences Act 2003 includes both evidential and conclusive presumptions about consent instead. These are found in Section 75<sup>78</sup> & Section 76 of the Sexual Offences Act 2003 and are as close as the current law gets to replicating Section 3(1) of the Sexual Offences Act 1956. Noted above, Section 76 provides B's consent to sexual intercourse with A is only vitiated by deception on two grounds: (a) the nature or purpose of the relevant act;<sup>79</sup> (b) impersonating a person known to V.<sup>80</sup> Therefore, under this section, as was claimed by the judges in the *Lawrance* appeal, a lie about fertility does not vitiate the complainer's consent to sex as per this criterion. The absence of such an offence is just one of the factors proving the Act inadequate. Therefore, it is logical to suggest legislative reform in this area. To test this, below is part of a suggested reform of the Sexual Offences Act 2003 provided by Rogers, Child & Jarvis that adheres to sex induced by deception and thus better protects the victim's sexual autonomy as the Sexual Offences Act 2003 was originally intended.<sup>81</sup>

---

<sup>73</sup> Horder (n 66) 345.

<sup>74</sup> Krebs (n 15) 625.

<sup>75</sup> *Lawrance* (n 2) [43].

<sup>76</sup> Paul (n 72).

<sup>77</sup> Sexual Offences Act 1956, s 3(1).

<sup>78</sup> s 75 of the Sexual Offences Act 2003 sets out the evidential presumptions about consent. This section provides the circumstances under which a complainer is taken to not have consented and include threats of violence (s 75(2)(a)); unconsciousness (s 75(2)(c)) and others. Though these sections discuss where consent is not present, focusing on s 76 bears more relevance to the discussion about a fertility lie and thus is examined further.

<sup>79</sup> Sexual Offences Act 2003, s 76(2)(a).

<sup>80</sup> *ibid* s 76(2)(b).

<sup>81</sup> Jonathan Rogers, John Child and Paul Jarvis, 'A gap in the law: sexual activity by deception' (*Counsel*, 10 July 2023)

<[https://www.counselmagazine.co.uk/articles/a-gap-in-the-law-sexual-activity-by-deception#:~:text=Under%20s%2076\(2\),\(that%20believed%20by%20the%20complainer.>](https://www.counselmagazine.co.uk/articles/a-gap-in-the-law-sexual-activity-by-deception#:~:text=Under%20s%2076(2),(that%20believed%20by%20the%20complainer.>)

> accessed 4 December 2024.

## **(1) Proposed legislation**

*Section 4A. Inducing a person to engage in sexual activity by deception*

*(1) A person commits this offence if—*

*(a) A deceives B*

*(b) A intends to deceive B*

*(c) B engages in sexual activity*

*(d) B's decision to engage in the sexual activity is induced by A's deception*

*(e) A has no excuse for deceiving B*

*(2) A will deceive B under subsection (1) whenever:*

*(a) A knowingly makes a false representation to B about something A knows is important to B's decision to engage in the sexual act; or*

*(b) A intentionally fails to disclose information A knows would be or believes would be important to B's decision to engage in the sexual act.<sup>82</sup>*

Supporting this proposed legislative reform, it is clear this would provide better protection of a victim's sexual autonomy in cases of deception. If reformed like this, the *Lawrance* case and others alike would have had a different outcome. To test this, it is worth applying the facts of *Lawrance* to the proposed legislation.

## **(2) Applying Section 4A to *Lawrance***

Unbeknownst to everyone apart from him, it is unclear what D's true intentions were when lying to V (perhaps *inter alia* dominance, misogyny, contempt). Regardless, what can be inferred, as correctly stated by the prosecution at appeal, is that even if D honestly believed V was consenting, such belief was unreasonable.<sup>83</sup> This is evident as he knew he was lying to her and thus intended to deceive her into sex, satisfying Section 4A(1)(b). As for Section 4A(1)(e), D had no reasonable excuse to lie to V. Perhaps it

---

<sup>82</sup> *ibid.*

<sup>83</sup> *Lawrance* (n 2) [6].

could be argued that he omitted telling V about his fertility status because he did not want to worry her. However, if he were genuinely motivated by concern for her wellbeing, he would have sought the use of protection or eschewed the act entirely, which he did not. Thus, satisfying Section 4A(1)(e).

It makes no difference how deception is communicated as the nub of the matter is whether this mattered to V's consent.<sup>84</sup> Without rigorous explanation, it is clear that both Section 4A(1)(a) and (c) are satisfied by the facts as D deceived V and the two had sex. Likewise, the threshold for both Section 4A(2)(a) and (b) are fulfilled where: (a) D made a false representation to V about his apparent vasectomy, implying he was infertile,<sup>85</sup> and (b) D intentionally failed to disclose that he had not had a vasectomy and was fertile, knowing, as expressed by V,<sup>86</sup> that this was paramount to her consent due to unwanted pregnancy.<sup>87</sup> Therefore, it is clear that if the Sexual Offences Act 2003 were to include Section 4A, the judges in *Lawrance* could not possibly come to the same conclusion — a quashed conviction<sup>88</sup> — if the criterion set out in Section 4A is satisfied by D. This demonstrates the need for legislative reform in this area to sufficiently protect the sexual autonomy of those who are deceived into sexual activity through lies, such as one's fertility status.

### **(3) Changing the Definition in Section 74**

A second reform considered here is the current definition of consent set out in Section 74. As established, the definition of consent stated in the Sexual Offences Act 2003 is rife with ambiguity and accompanying criticism, and the *Lawrance* appeal shed a light on the consent definition stated in the Sexual Offences Act 2003.<sup>89</sup> There are long-standing problems in distinguishing consent from non-consent.<sup>90</sup> Therefore, suggesting legislative reform is entirely rational. This is particularly true in instances involving consent given under deception, as Section 76 of the Sexual Offences Act 2003 fails to cover adequate ground as far as deceptions go.

---

<sup>84</sup> Krebs (n 15) 624.

<sup>85</sup> *Lawrance* (n 2) [3].

<sup>86</sup> *ibid* [4].

<sup>87</sup> *ibid* [4].

<sup>88</sup> *ibid* [43].

<sup>89</sup> *Lawrance* (n 2) [1].

<sup>90</sup> Horder (n 66) 346.

Provided by Matthew Dyson, a proposed reformation of the consent definition:

Section 74. “Consent”

*‘... a person consents when a free, informed and deliberate agreement is made.’<sup>91</sup>*

The key word in this proposed legislation is “informed.” As expressed by Dyson, if D deceives V about something which would have otherwise changed V’s decision to engage with D, then her consent was not informed and thus immediately vitiated.<sup>92</sup>

Referring to the discussion on both sexual autonomy and conditional consent, Dyson’s proposed definition would better define the importance of respecting sexual autonomy. This would require the prosecution to prove that the consent given by V was informed - which, in cases involving deceit and lies, cannot be proven. This is because V is not fully informed if she is lied to, and thus her consent should be vitiated. Therefore, adopting this approach would provide further safeguarding for the deceived. If indeed people have a fundamental right to sexual autonomy, whereby they choose when and with whom they have sex, then providing informed consent cannot depend on D’s deception.<sup>93</sup> This is because V’s decision to consent is restricted by their ignorance of the full facts.

Similar to the other proposal, it is worth applying the facts of *Lawrance* to Dyson’s suggested reform, though this time, it is much simpler. The main question is, was V explicitly informed of D’s actual fertility status and sham vasectomy? No. Therefore, her consent would be vitiated. This ties in with the claim that the court in *Lawrance* erred in distinguishing the facts at hand with both *Assange* and *R(F)*. Hence, under this proposed definition of consent, a lie about fertility would, as it should, vitiate consent to sex.

## **I. RISK OF OVERCRIMINALISATION?**

It may be argued that employing both proposed reforms could lead to overcriminalisation. Given the severity of sexual offending, any reform must be made cautiously. However, to rebut this suggestion, it is important to consider the wording of Section 4A(1)(b) above. The key word here is “intends.” This implies

---

<sup>91</sup> Matthew Dyson, ‘Redefining Sexual Conditions’ in ‘Reforming the Relationship between Sexual Consent, Deception and Mistake’ (n 3) 36.

<sup>92</sup> *ibid* 41.

<sup>93</sup> O’Malley and Hoven (n 4) 156.

someone plans or means to do something. Therefore, if the law requires D to have intended to deceive V, it is unlikely that this would lead to overcriminalisation as D would have satisfied the *mens rea* (intention) for the crime and thus should be punished. Paired with Section 4A(2)(b), D is required to fail “intentionally” to disclose information to V that is important to her decision-making. Therefore, if intention is required, this cannot be committed by accident and would unlikely lead to overcriminalisation. Additionally, the word “deliberate” also bears great importance in analysing Dyson’s proposed reform of Section 74.<sup>94</sup> That is because it requires V to have been informed of the relevant facts and still decide to engage.<sup>95</sup> This would also be less likely to lead to overcriminalisation as V would be required to make a deliberate decision. Hence, by reforming Section 74 and adding Section 4A to the Sexual Offences Act 2003 like so, a lie about fertility would, as it should, vitiate consent to sex.

## J. LEGAL HARM IS DIFFERENT FROM MORAL HARM

There are conflicting viewpoints about whether a lie about fertility should vitiate consent to sex, as expected with such a complex matter. One opposing perspective is of Sandra Paul who expresses there often exists a “world of difference” between legal wrongness and moral wrongness.<sup>96</sup> This implies that though something may be immoral, it does not necessarily mean it should be criminal. Whilst this has plausible grounding, it falls short of recognising the overlapping consequences between the two, especially in cases involving sexual deceit. For example, legal harm often arises by moral judgments made by society; thus, laws are often influenced by prevailing moral standards. Therefore, there is an intersection between both types of harm and their impact on individuals and society alike. Indeed, the two converge when considering sexual autonomy because if legislative frameworks fail to align with moral understandings of consent, one’s autonomy can be undermined as a result. For example, if the law fails to recognise some forms of deception as harmful (like in *Lawrance*), individuals are able to exercise their autonomy in morally questionable ways.

Conversely, if moral standards advocate for certain rights and protections, this can influence legal reforms that better protect one’s sexual autonomy. This highlights the demand for legislative reform and the overlap between law and morality in cases of deception. Indeed, a lie about one’s fertility status is immoral as it limits the other person’s ability to make informed decisions about their sexual activity, restricting them from exercising their sexual autonomy. Therefore, if the law were clearer about what does

---

<sup>94</sup> Dyson (n 91) 42.

<sup>95</sup> *ibid.*

<sup>96</sup> Paul (n 72).

and does not spoil an individual's consent to sex, this would result in more equitable sentencing. Hence, a lie about fertility should vitiate consent to sex.

## K. CONCLUSION

Examining whether a lie about fertility should vitiate consent to sexual activity concerning the *R v Lawrance* judgment, it has been contended this should be the case. To reach this conclusion, the importance of sexual autonomy in consent was first evaluated. This then provided a backbone for the remainder of the argument, finding that where V is induced into sexual activity by D's deception, she is unable to exercise her sexual autonomy freely. This fact was then considered through an analysis of the definition of consent, instances where it has been vitiated and a look at the legislation governing this area of the law. In addition to this, legislative reform was also advocated for and applied to the facts of *Lawrance*, considering the possibility of a similar case arising in the future and how the changes suggested would hopefully provide a better outcome notwithstanding the danger of over-criminalisation. Finally, the claim that there exists a world of difference between legal harm and moral harm was considered and refuted to conclude that though they can differ, they also overlap in reference to sexual offending. Thus, there is little difference between the two. In summary of the findings, it can be concluded a lie about fertility should vitiate one's consent to sexual activity and that legislative reform is the best way forward.

# ADVANCING EQUALITY: A CONVENTION ON THE RIGHTS OF LGBTI PERSONS

*Ryan Ashley Conover\**

## A. INTRODUCTION

## B. LGBTI RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

### (1) The United Nations

(a) *Charter of the United Nations and the Twin Covenants*

(b) *Resolutions and treaty body actions*

### (2) Analysis

## C. EXPLORING THE NEED FOR A NEW COVENANT

### (1) LGBTI Discrimination: Theoretical and Observable Phenomena

### (2) Criminalisation and Discrimination

(a) *Criminalisation and discrimination in focus: the right to health*

(b) *Criminalisation and discrimination: the role of intersectionality*

## D. ADDRESSING EXPECTED RESISTANCE

### (1) A New Covenant, Moving Forward or Backward?

## E. CONCLUSION

---

\* LLM Human Rights Law, University of Edinburgh.

## A. INTRODUCTION

The respect and protection for LGBTI<sup>97</sup> rights have measurably improved over the last decade. States have taken monumental action to recognise marriage equality, implement anti-discrimination protections, defend the dignity of transgender persons, and more. The shift toward greater inclusion and acceptance of queer people in recent years is uplifting and a testament to the work done by national and international advocacy groups to create change. Additionally, the progress made by the United Nations (UN) thus far to protect LGBTI rights and document abuses is admirable. Nonetheless, “while the success of marriage-equality campaigns in North America, Europe, and elsewhere might suggest that further advances in LGBTQ rights are inevitable... empirical evidence of state-sponsored homophobia does not support this claim.”<sup>98</sup> There remains a substantial divide in LGBTI freedoms across world regions,<sup>99</sup> and it is no secret that the rise of inclusivity for the LGBTI community has, in turn, emboldened those in its opposition. The increased rates of intolerance and current gaps in international law necessitate that the UN take further action to better define and protect the rights of the LGBTI community.

## B. LGBTI RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

### (1) The United Nations

#### (a) *Charter of the United Nations and the Twin Covenants*

To establish an analysis of the current state of LGBTI rights within international law, primary sources of law will be prioritised and supplemented by soft law sources. To begin, the UN Charter maintains the fundamental principle of human rights law in the Preamble by calling upon member states “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person ...”.<sup>100</sup> This stance is furthered by Article 55 of the Charter, that states *shall* “...promote: universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>101</sup> The

---

<sup>97</sup> This research will use LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) in accordance with the United Nations and in tandem with ‘queer’ to discuss members of the LGBTI community.

<sup>98</sup> Robyn Linde, ‘A Seat at the Table: International LGBTQ Rights at the United Nations’ (E-International Relations, 26 June 2015) <<https://www.e-ir.info/2015/06/26/a-seat-at-the-table-international-lgbtq-rights-at-the-united-nations/>> accessed 24 November 2025.

<sup>99</sup> *ibid.*

<sup>100</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Preamble.

<sup>101</sup> *ibid.* art 55.

language of the Charter is essential, as it promotes the core principle of international human rights through binding documentation originally written in the Universal Declaration of Human Rights (UDHR); human rights are universal and must be respected at all times. In the spirit of the UDHR, two covenants arise: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These documents are the core of international human rights law. Each Covenant promotes the universality of human rights, enumerating that they are derived from the inherent dignity of every person and that states are required to respect, protect, and fulfil the rights found in each Covenant.

These documents outline rights and freedoms particularly important regarding LGBTI equality, such as the freedoms of expression and association, and the rights to privacy, equality, and non-discrimination. States are obliged, as parties to these Covenants, to take action to ensure that the rights of individuals or groups are fulfilled and to refrain from any action that may interfere with the fulfilment of any right. Together, these documents serve a key purpose as the “basis for the conclusion that the content and application of international human rights [does] not distinguish between human beings.”<sup>102</sup>

(b) *Resolutions and treaty body actions*

To address this disconnection, the United Nations Human Rights Council (HRC) has passed multiple resolutions that specifically address topics regarding sexual orientation, gender identity, and sex characteristics. The first of these, adopted in 2011, requested that the United Nations High Commissioner for Human Rights (UNHCR) “commission a study... documenting discriminatory law and practices and acts of violence against individuals based on their sexual orientation and gender identity.”<sup>103</sup> The study also considered how international human rights law might be used to end violence and rights violations against individuals based on their perceived characteristics.<sup>104</sup> Subsequent resolutions reiterate these sentiments by condemning instances of violence and discrimination and reaffirming state obligations to respect, protect, and fulfil basic human rights. The most recent, adopted in 2024, takes a step forward by mandating the UNHCR to also examine discriminatory laws and policies, their root causes, and best practices toward realising the fulfilment of human rights of intersex persons.<sup>105</sup> The United Nations General Assembly has also passed numerous resolutions that explicitly address “sexual orientation” or “gender identity,” including

---

<sup>102</sup> Michael T Tiu Jr, ‘The Rainbow Flag among the Flag of Nations: Are LGBTQ Rights International Human Rights?’ (2020) 93 *Philippine Law Journal* 56, 68.

<sup>103</sup> Human Rights Council, ‘Human rights, sexual orientation and gender identity’ (17 June 2011) UN Doc A/HRC/RES/17/19.

<sup>104</sup> *ibid.*

<sup>105</sup> Human Rights Council, ‘Combating Discrimination, Violence and Harmful Practices against Intersex People’ (4 April 2024) UN Doc A/HRC/RES/55/14.

eleven resolutions on “extrajudicial, summary or arbitrary executions” that elaborate on the right to life for all.<sup>106</sup> As the conversation surrounding queer rights on the international stage has become increasingly more commonplace, the incorporation of “sexual orientation” and “gender identity” as terminology in international human rights mechanisms has been beneficial for ensuring awareness of these issues.

The Human Rights Committee (CCPR), other treaty bodies, and special procedures of the UN, have further issued decisions and recommendations that support LGBTI persons. Monumental cases, such as *Toonen v. Australia* (1994),<sup>107</sup> determined that laws in Tasmania criminalising sexual relations between men violated the ICCPR.<sup>108</sup> Since then, the HRC; the Committee on Economic, Social and Cultural Rights; the Committee on the Rights of the Child; the Committee Against Torture; the Committee on the Elimination of Discrimination Against Women; and others have all reaffirmed that the rights contained in their respective Conventions apply to all persons, regardless of their sexual orientation, gender identity, or sex characteristics.<sup>109</sup> General comments released by these committees regularly address state duties concerning non-discrimination provisions and state obligations to protect LGBTI individuals. Additionally, the HRC’s mechanism, the Universal Periodic Review (UPR), frequently engages with states on the topic of sexual orientation and gender identity and has called for the repeal of criminalisation laws in respective states.<sup>110</sup> In addition to these forms of soft law, state obligations regarding LGBTI persons are enumerated in many sources of customary international law, such as the UDHR. Further, bodies of legal and human rights experts, such as the International Commission of Jurists, have frequently reaffirmed the position that LGBTI rights are protected under current international human rights law.<sup>111</sup>

---

<sup>106</sup> United Nations, ‘United Nations Resolutions on Sexual Orientation, Gender Identity and Sex Characteristics’ (Office of the High Commissioner for Human Rights, 2024) <<https://www.ohchr.org/en/sexual-orientation-and-gender-identity/united-nations-resolutions-sexual-orientation-gender-identity-and-sex-characteristics>> accessed 24 November 2025.

<sup>107</sup> *Toonen v. Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994).

<sup>108</sup> Ignacio Saiz, ‘Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the UN’ (2004) 7 *Health and Human Rights* 48, 49.

<sup>109</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (2nd edn, 2019) R/PUB/12/06/Rev.1 9-11.

<sup>110</sup> Melanie Bejzyk, ‘Criminalisation on the Basis of Sexual Orientation and Gender Identity: Reframing the Dominant Human Rights Discourse to Include Freedom from Torture and Inhuman and Degrading Treatment’ (2017) 29 *Canadian Journal of Women and the Law* 375, 386.

<sup>111</sup> International Commission of Jurists (ICJ), *Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007)

<<https://www.refworld.org/legal/resolution/icjurists/2007/en/58135>> accessed 24 November 2025.

## **(2) Analysis**

While the foundations provided by the above sources are valuable in defending LGBTI rights, they are not sufficient to protect queer persons and their rights around the globe. LGBTI rights are included under the universality clause of human rights, which should guarantee their protection. Despite this, there is no universal respect and recognition of the mere existence of LGBTI rights. Only protecting these rights under the umbrella of universality does not address the unique challenges and harms experienced by queer persons, nor does it accurately provide protection and redress from harm. Furthermore, attempting to protect LGBTI rights in this way ignores the fact that queer persons are a vulnerable minority that lacks much-needed protection. International human rights law has made important strides in recognising particularly vulnerable groups such as women, children, migrants, and persons with disabilities. However, there is no singular piece of binding or non-binding instrument of law that explicitly recognises the right of LGBTI individuals to be free from discrimination and violence or one that designates the rights that LGBTI persons are entitled to.<sup>112</sup> Despite the plethora of treaty body sources that now recognise equal protection with respect to sexual orientation or gender identity, there are no primary or hard forms of law that include sexual or gender minorities of their own accord. Omitting these aspects of identity has created gaps in legal clarity and enforceability regarding LGBTI rights, perpetuates homophobic and discriminatory worldviews, and has proven ineffective under the status quo.

## **C. EXPLORING THE NEED FOR A NEW COVENANT**

### **(1) LGBTI Discrimination: Theoretical and Observable Phenomena**

The best way to demonstrate the necessity for a new covenant on LGBTI rights is to examine the many threats facing the LGBTI community that warrant their unique protection. To paint a complete picture of these threats, one must first discuss societal organisations and structures to understand how LGBTI persons are excluded from them. As social identity theorists explain, individuals within a society form groups “as a means of establishing social identity and purpose.”<sup>113</sup> Within these groups, tendencies to associate under

---

<sup>112</sup> Francine D’Amico, ‘LGBT and (Dis)United Nations: Sexual and Gender Minorities, International Law and UN Politics’ in Manuela Lavinás Picq and Markus Thiel (eds), *Sexualities in World Politics: How LGBTQ Claims Shape International Relations* (Routledge 2015) 54.

<sup>113</sup> Chelsea Lee and Robert L Ostergard Jr, ‘Measuring Discrimination against LGBTQ People: A Cross-National Analysis’ (2017) 39 *Human Rights Quarterly* 37, 41.

“labels” create tension through the comparison of one group to another, which manifests into “preconceived stereotypes and distinctions between the in-group and out-group, a war of ‘us versus them.’”<sup>114</sup> Discrimination often arises when the in-group perceives the out-group as a threat, an instance of ‘othering’. This theory is predominant in comparing heterosexual and homosexual relationships because homosexual relationships represent “symbolic threats” to perceived social norms since they contradict “cultural, moral, and traditional belief systems.”<sup>115</sup> Internalised heteronormative structures form the basis for these “traditional” belief systems and are what drive rates of homophobia and opposition to LGBTI equality.<sup>116</sup> This belief system often manifests in political and legal frameworks as “state-sponsored homophobia.”<sup>117</sup> For the purposes of this argument, “homophobia” is considered “formally and informally institutionalised hatred that manifests in discriminatory policies at the national and societal levels.”<sup>118</sup> Many organisations globally, including the UN, recognise “state-sponsored homophobia as acts that have allowed the humiliation, intimidation, and violence toward [LGBTI] individuals to occur.”<sup>119</sup> This exists as the deliberate criminalisation of LGBTI sexual acts, banning LGBTI “propaganda”, or simply a state’s refusal to pass legislation that would outlaw discrimination against queer people. Whatever role that a given state plays in this, it only serves to significantly reinforce the labelling of the LGBTI community as “other.”<sup>120</sup>

## (2) Criminalisation and Discrimination

Principally, one must examine the data regarding the current rate of criminalisation and discriminatory laws globally. As of 2024, sixty-three jurisdictions still sanction the criminalisation of “private, consensual, same-sex sexual activity.”<sup>121</sup> Of these, twelve allow for the possibility of the death penalty for engaging in same-sex activities, and fourteen criminalise the expression of transgender people.<sup>122</sup> Beyond the criminalisation of LGBTI actions, nineteen states as of 2019, additionally maintain ‘morality’ or ‘homosexual propaganda’ laws that target and criminalise the promotion of particular values and condemn LGBTI persons as a class.<sup>123</sup> These laws have been created to “protect public morality,” but “rather than protect anyone, the laws prohibit the dissemination of information, promotion of same-sex sexual behaviour, and sharing of

---

<sup>114</sup> *ibid* 41.

<sup>115</sup> *ibid* 42.

<sup>116</sup> Berta Hernández-Truyol, ‘LGBTI Transnational Law: Sex as Crime, Violence as Control’, in Donald P Haider-Markel (ed), *The Oxford Research Encyclopedia of LGBT Politics and Policy* (OUP 2021).

<sup>117</sup> Lee and Ostergard (n 17) 41.

<sup>118</sup> *ibid* 41.

<sup>119</sup> *ibid* 41.

<sup>120</sup> *ibid* 40.

<sup>121</sup> ‘Map of Jurisdictions that Criminalise LGBT People’ (Human Dignity Trust, 2024)

<<https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>> accessed 24 November 2025.

<sup>122</sup> *ibid*.

<sup>123</sup> Hernández-Truyol (n 20) 8.

information about gender identity.”<sup>124</sup> The presence of discriminatory laws such as these, or the lack of explicit protection in states that are “more accepting” of LGBTI persons, results in measurable and concrete harm. These laws are considered violations of numerous rights, including rights to equality, non-discrimination, privacy, family life, and freedom of expression, among others.<sup>125</sup> Increasingly, awareness is growing of laws that criminalise LGBTI activity and of how the impact of these laws may amount to violations of the right to freedom from cruel, inhuman, or degrading treatment for queer individuals.<sup>126</sup> The role of state-sponsored homophobia is of pressing concern as it is widespread and growing. The next section will highlight the urgent need for greater clarity and protection in international law for LGBTI individuals considering these harmful laws.

Unfortunately, the complete impact of criminalisation and discrimination directed toward LGBTI individuals cannot be completely quantified:<sup>127</sup> “It’s extremely difficult to define the magnitude of the problem of LGBTIQI discrimination, not least because it is extremely difficult to identify the number of queer people in the world.”<sup>128</sup> Additionally, rates of crime, violence, and discrimination experienced by the LGBTI community are so frequent that instances of “everyday violence” go unreported.<sup>129</sup> Despite potential gaps in data, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) Europe reported that 2022 was the most violent year for LGBTI people across Europe and Central Asia in the past decade.<sup>130</sup> In 2023, ILGA reported that only six of fifty-four reporting countries recorded no instances of hate crimes against queer individuals, with the majority of physical and verbal violence targeting transgender people.<sup>131</sup> The types of violence directed at LGBTI individuals range from acts of aggression such as hate speech or bullying, to sexual violence, murder, or “honour killings.”<sup>132</sup> Concerningly, discriminatory rhetoric is often used deliberately to incite homophobic and transphobic violence: “Such language is used by some political, community, and religious leaders to promote negative stereotypes, stir up prejudice, and harass particular individuals, especially during electoral periods, and during periods of political tension and armed conflict.”<sup>133</sup> Further, LGBTI individuals often experience abuse and mistreatment amounting to cruel and inhuman punishment, particularly in police custody, prisons, other

---

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid.*

<sup>126</sup> Bejzyk (n 14) 375-400.

<sup>127</sup> Hernández-Truyol (n 20) 13.

<sup>128</sup> Maksym Eristavi and Daniel Baer, ‘Recognizing the Rights of LGBTIQI People’ in Carla Koppell (ed), *Untapped Power: Leveraging Diversity and Inclusion for Conflict and Development* (OUP 2022) 156, 158.

<sup>129</sup> Hernández-Truyol (n 20) 13.

<sup>130</sup> ‘Deadliest Rise in Anti-LGBTI Violence in Over a Decade, Our Annual Report Shows’ (International Lesbian, Gay, Bisexual, Trans and Intersex Association Europe, 20 Feb 2023) <<https://www.ilga-europe.org/press-release/deadliest-rise-anti-lgbti-violence-decade/>> accessed 24 November 2025.

<sup>131</sup> ‘Annual Review 2024’ (International Lesbian, Gay, Bisexual, Trans and Intersex Association Europe, 29 Sep 2024) <<https://www.ilga-europe.org/?s=&view=grid&documenttype=all&orderresultsby=priority&categories=report>> accessed 24 November 2025.

<sup>132</sup> OHCHR (n 13) 15.

<sup>133</sup> *ibid.* 21.

places of detention, hospitals, and medical settings.<sup>134</sup> This mistreatment may take the form of physical and sexual violence, forced or degrading medical examinations, and solitary confinement.<sup>135</sup> In medical settings, individuals may be subjected to involuntary “conversion therapy,” forced sterilisation or gender reassignment surgery, and medically unnecessary surgery for intersex individuals.<sup>136</sup> The continuation of mistreatment against LGBTI individuals exemplifies how states persist in disregarding even the most fundamental human rights as they apply to LGBTI persons, despite clear prohibitions under international law.

For this reason, increased violations of so-called “non-derogable” human rights, such as the prohibition against torture and cruel or inhuman treatment, against queer people are particularly concerning. The Office of the United Nations High Commissioner for Human Rights (OHCHR) defines “non-derogable” rights as those that constitute “*jus-cogens* - a peremptory norm of international law that is binding on all states.”<sup>137</sup> As previously stated, LGBTI individuals are sometimes subjected to experiences that amount to torture or cruel and degrading treatment, often in places of detention or medical settings:

The Special Rapporteur on torture has emphasized that States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorises, explicitly or implicitly, prohibited acts to be performed with impunity.<sup>138</sup>

The Rapporteur has also noted that violations occur when states are complicit in any violence against the LGBTI community when discriminatory laws are implemented that “foster a climate in which such violence by both state and non-state actors is condoned and met with impunity.”<sup>139</sup> Demonstrated by the myriad of documentation reporting the infringements of the human rights of LGBTI persons discussed above, states are regularly in violation of these non-derogable rights through either direct action or the failure to take any action to protect the rights of the community.

These acts of state-sponsored homophobia or violence represent only part of the violations of core human rights and freedoms that LGBTI individuals regularly experience. The second edition of *Born Free and Equal*, published by the OHCHR, provides in-depth insight into the multitude of rights violations that

---

<sup>134</sup> *ibid* 27.

<sup>135</sup> *ibid* 26-34.

<sup>136</sup> *ibid* 34-39.

<sup>137</sup> *ibid* 27.

<sup>138</sup> *ibid* 28.

<sup>139</sup> *ibid*.

occur due to a person's sexual orientation, gender identity, or sex characteristics as they relate to fundamental human rights. A direct result of criminalisation and discriminatory laws is the impediments that prevent LGBTI people from exercising their rights. These occur in relation to the rights to health, education, employment, housing, self-determination, and other fundamental rights. Furthermore, individuals experience barriers to fully engaging in meaningful aspects of society that do not exist for heterosexuals, such as access to justice and remedies, political participation, the right to family life, and recognition of relationships.<sup>140</sup> Additionally, the prevalence of “morality” laws discussed above prohibits or restricts the freedoms of expression, peaceful assembly, and association as they relate to subjects concerning LGBTI people.<sup>141</sup> This is by no means a comprehensive list of the rights violations experienced by queer people; however, it is necessary to illustrate how discrimination, violence, and ill-treatment negatively affect the daily life of all LGBTI people.

(a) *Criminalisation and discrimination in focus: the right to health*

To best demonstrate the inequalities affecting the LGBTI community, one may look to the right to health. This right encompasses the highest attainable standard of physical and mental health, autonomy over one's body and health, and freedom from interference, such as torture.<sup>142</sup> LGBTI people face discrimination in many areas related to medical care, such as accessing general health services and receiving necessary medical information. This results in health inequalities for both physical and mental health. In Europe, lesbian, gay, and bisexual people experience increased incidences of long-term health conditions that restrict daily activities.<sup>143</sup> LGB people are also at a higher risk of developing certain types of cancer at younger ages, and “there is a gap in high-quality international research on both the cancer burden, general health profile, and care needs of trans and intersex people.”<sup>144</sup> Regarding mental health, LGBTI people generally experience increased rates of depression, anxiety, and suicide.<sup>145</sup> This is due in part to the concept of “othering”, as LGBTI people experience “pressure to hide their sexuality or gender identity in order to appear respectable within their community.”<sup>146</sup> Additionally, LGBT individuals are two to three times more likely to report enduring psychological and emotional issues, and one and a half times more likely to report suicide attempts, suicidal ideation, as well as depression and anxiety disorders compared to the general population.<sup>147</sup> Intersex

---

<sup>140</sup> *ibid* 56-77.

<sup>141</sup> *ibid* 79-83.

<sup>142</sup> *ibid* 57.

<sup>143</sup> Laetitia Zeeman and others, ‘A Review of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Health and Healthcare Inequalities’ (2019) 29 *European Journal of Public Health* 974, 977.

<sup>144</sup> *ibid* 978.

<sup>145</sup> Megan E Springate, ‘A Note about Intersectionality, LGBTQ Communities, History and Place’ in Katherine Crawford-Lackey and Megan E Springate (eds), *Identities and Place* (Routledge 2019) 1, 8.

<sup>146</sup> *ibid* 8.

<sup>147</sup> Zeeman and others (n 47) 978.

individuals also report higher incidences of suicide attempts.<sup>148</sup> As demonstrated by this example of the right to health, the continued stigma surrounding people who identify as LGBTI has measurable and tangible effects on the daily lives of people who identify as members of this community.

(b) *Criminalisation and discrimination: the role of intersectionality*

As a last note, an analysis of the current state of LGBTI rights would be incomplete without a discussion regarding intersectionality and the LGBTI community. Essentially, intersectionality involves recognising that the categories defining people, such as race, ethnicity, gender, sexuality, intersect to shape individual experiences:<sup>149</sup> “This means that oppression and prejudice (including racism, classism, transphobia, homophobia, and sexism) also affect individuals and communities in multiple interdependent ways.”<sup>150</sup>

With this understanding:

A wide range of United Nations human rights bodies have recognized that discrimination based on sexual orientation, gender identity, and/or sex characteristics is commonly compounded by discrimination on other grounds, including gender, race, age, religion, disability, health, immigration status, and economic status.<sup>151</sup>

It is well documented that queer people who are also members of other marginalised groups are significantly more likely to experience violence.<sup>152</sup> For example, “the rise of murder rates of trans-Americans (particularly trans women of colour), the historically high rates of violent deaths of queer Brazilians, and the rising number of homophobic attacks in France are all indicative.”<sup>153</sup> Additionally, the concept of intersectionality within the LGBTI community is crucial to understanding how international human rights law currently fails to fully reflect their needs and protect their rights. This will be an important consideration in guiding the international community toward genuine protection and equality for LGBTI individuals.

---

<sup>148</sup> *ibid.*

<sup>149</sup> Springate (n 49) 1.

<sup>150</sup> *ibid.*

<sup>151</sup> OHCHR (n 13) 56.

<sup>152</sup> Eristavi and Baer (n 32) 159.

<sup>153</sup> *ibid.*

## D. ADDRESSING EXPECTED RESISTANCE

In campaigning for a new covenant on LGBTI rights, it is essential to examine potential arguments that could hinder progress toward this proposed law. As evidenced above, the opposition of numerous states to a convention of this nature is expected. A rise in homophobic policies has been observed alongside recent advances in the recognition of LGBTI rights.<sup>154</sup> Opposition to greater acceptance of LGBTI individuals has manifested in various ways, including an increase in discriminatory legislation and violence, and stems from multiple factors. States that are opposed to LGBTI rights utilise positions such as “traditional values”<sup>155</sup> and cultural relativism<sup>156</sup> to continue to “shield themselves from criticism and condemnation of their anti-LGBTQ laws...”.<sup>157</sup> Indeed, many states “do not see the equal protection resolutions or free expression provisions of their constitutions as protecting same-sex individuals.”<sup>158</sup> States continue to enact deliberately discriminatory legislation that limits the fulfilment of rights and freedoms, as they perceive themselves to be exempt from any obligations to respect the rights of LGBTI people:

Supporters of the prohibition on [LGBTI] discrimination have sought to subsume it within established human rights...and within established human rights procedures and institutions. Opponents of the prohibition have, to various degrees, rejected these arguments. They see the prohibition as a ‘new’ additional right to which they have not and are not going to consent.<sup>159</sup>

Opposition to LGBTI rights is not a new phenomenon, nor is it unique within the broader struggle for human rights.<sup>160</sup> There was once significant opposition to the Twin Covenants,<sup>161</sup> now regarded as a milestone accomplishment in the history of human rights. Widespread disregard for human rights initially prompted the international community to adopt the Two Covenants, laying the foundation for subsequent

---

<sup>154</sup> *ibid* 157.

<sup>155</sup> Anthony J Langlois, ‘International Political Theory and LGBTQ Rights’ in Chris Brown and Robyn Eckersley (eds), *The Oxford Handbook of International Political Theory* (OUP 2018) 270, 372.

<sup>156</sup> Tiu (n 6) 58.

<sup>157</sup> *ibid*.

<sup>158</sup> Andrew Malec, ‘Expanding International LGBTQ Rights: International Human Rights law, Equal Protection, and Freedom of Expression’ (2021) 29 *Michigan State Law Review* 77, 97.

<sup>159</sup> Dominick McGoldrick, ‘The Development and Status of Sexual Orientation Discrimination under International Human Rights Law’ (2016) 16 *Human Rights Law Review* 613, 668.

<sup>160</sup> *ibid* 616.

<sup>161</sup> Maya Hertig Randall, ‘The History of the Covenants: Looking Back Half a Century and Beyond’ in Corina Heri, Helen Keller and Daniel Moeckli (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (OUP 2018) 7-30.

treaties aimed at protecting vulnerable communities. In the same way, opposition to LGBTI equality must not be regarded as an insurmountable barrier to progress.

### **(1) A New Covenant, Moving Forward or Backward?**

Additionally, one must acknowledge concerns regarding promoting LGBTI equality through the normative human rights framework. Some advocates for LGBTI rights have long pursued a “living” interpretation of human rights law, insisting that these rights are protected within existing legal frameworks as analysed above.<sup>162</sup> However, some scholars and activists recognise that the current framing of human rights and its focus on “universality” is naturally incompatible with LGBTI rights, as queer individuals exist outside of this normative framework.<sup>163</sup> While this course of defence has had its share of victories, it is obvious that this current path of discourse surrounding LGBTI rights has been less successful than hoped. As alluded to in the discussion regarding intersectionality, without truly engaging with international human rights law through an intersectional lens, the protections created will always be incomplete. It is for this reason that many activists for LGBTI inclusion view representation as the dismantling of numerous societal norms. Therefore, attempting to include queer rights in current human rights law, which is rooted in existing norms, is likely ineffective.<sup>164</sup>

These concerns are valid, and this paper concurs with that assessment. Efforts to fit LGBTI individuals into the existing international human rights framework have proven ineffective and fail to truly represent the community. Nevertheless, the evidence presented above clearly demonstrates that the LGBTI community warrants formal protection. A viable path forward may involve initiating discussion on a new covenant. As with all human rights advancements in the past, this undertaking will inevitably challenge existing norms, paving the way for a more inclusive and representative framework.

---

<sup>162</sup> McGoldrick (n 63) 617.

<sup>163</sup> Ryan Richard Thoreson, ‘The Queer Paradox of LGBTI Human Rights’ (2011) 6 *Central European Journal of Social Sciences and Humanities* 1-27.

<sup>164</sup> *ibid.*

## E. CONCLUSION

As a final note, due recognition of the existing victories for LGBTI equality is necessary. These victories, on international and regional scales, have paved the way for increased acceptance, awareness, and protection of queer identities and representation. Many human rights advocates have devoted their efforts to ensuring that LGBTI people are protected within current human rights frameworks, but greater progress is possible. It is undeniable that the status quo perpetuates the violations that queer persons experience in the exercise of their rights. Any current reluctance of the international community to address this matter only indirectly validates claims that the right to equality or other freedoms does not exist for LGBTI persons.

A new covenant would not establish ‘new’ human rights but would ensure that all queer persons and identities are accurately represented and explicitly protected. It can serve to clarify state obligations and articulate the steps a state must take to ensure the full enjoyment of these rights. Properly drafted, a new covenant can create a more inclusive and enforceable branch of human rights law that will ensure LGBTI rights are recognised and protected globally. Through deliberate and representative inclusion, the rights of LGBTI people can be recognised on their own terms, and the international community will make momentous strides toward a safer and more accepting world.

**DESTROYING UNESCO WORLD HERITAGE:  
AN ATTACK ON THE INTERNATIONAL COMMUNITY?**

*Emma Dhondt* \*

- A. INTRODUCTION**
- B. THE WORLD HERITAGE CONVENTION AND THE ROME STATUTE**
- C. CONSIDERATIONS OF INTERNATIONAL COURTS AND TRIBUNALS**
  - (1) World Heritage Listing: A Threshold to Convict?**
  - (2) Gravity of the Crime**
  - (3) An Element for the Determination of Reparations**
- D. NEW WORLD HERITAGE IN PALESTINE AND UKRAINE**
  - (1) Ukraine**
  - (2) Palestine**
- E. CONCLUSION**

---

\* University of Edinburgh & KU Leuven, PhD Candidate

## A. INTRODUCTION

Since the outbreak of the current armed conflicts in Ukraine and Palestine, both States have actively invested in their nominations to the World Heritage List established by the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (hereafter ‘World Heritage Convention’). Both Palestine and Ukraine have relied on emergency procedures to nominate certain sites, while simultaneously inscribing several other properties – which had previously been added to the World Heritage List – to the List of World Heritage in Danger. The destruction of such cultural and natural heritage would be an impoverishment for the whole international community.<sup>1</sup> As such, this article assesses the influence of an inscription on the World Heritage List on the conviction of an individual for the war crime of intentionally directing attacks against buildings dedicated to art or historic monuments that are inscribed on the World Heritage List.

First, this article will discuss the jurisprudence of the International Criminal Court and previous decisions of the International Criminal Tribunal for the Former Yugoslavia to determine how a World Heritage listing has affected their assessment of the crime. This article will then reflect on the recent Palestinian and Ukrainian inscriptions on the World Heritage List as opportunities for the enforceability of the World Heritage Convention concerning the intentional destruction of cultural heritage.

## B. THE WORLD HERITAGE CONVENTION AND THE ROME STATUTE

In 1972, States agreed that certain cultural and natural properties were of such great universal importance to the international community and that their loss would traverse geographical borders and negatively affect individuals in the present and the future. Since then, 1,248 properties have been inscribed on the World Heritage List. In accordance with the Convention, each State thus has a duty to protect World Heritage sites so they can be transmitted to future generations, and States Parties have an obligation not to take any deliberate measures which might cause direct or indirect damage to cultural and natural properties on the World Heritage List located on the territory of other States Parties.<sup>2</sup> However, the World Heritage Convention does not provide a specific scope or legal framework for the enforceability of these obligations. While they might be owed to all States Parties to safeguard their collective interest in World Heritage protection (and thus be considered *erga omnes partes* obligations), no State has invoked the responsibility of

---

<sup>1</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (World Heritage Convention), preamble.

<sup>2</sup> *ibid.*, arts 4 and 6(3).

another State Party for the intentional destruction of a World Heritage site.<sup>3</sup> Considering 196 States are party to the World Heritage Convention, such responsibility could, in principle, be invoked by nearly every State. Moreover, in his Separate Opinion to the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear*, Judge Cançado Trindade even argued that “the prohibition of destruction of cultural heritage of an outstanding universal value and great relevance for humankind,” could be considered as an *erga omnes* obligation, owed to all States.<sup>4</sup>

While the World Heritage Convention imposes a range of obligations on States Parties, it remains silent on any such obligations for individuals. Nevertheless, the International Criminal Court has considered the provisions of this Convention when establishing the war crime of intentionally directing attacks against cultural heritage. The Rome Statute of the International Criminal Court (hereafter ‘the Rome Statute’) explicitly includes “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, [...], provided they are not military objectives” as a war crime, in international and non-international armed conflicts.<sup>5</sup>

The scope of protected sites is thus narrower in the Rome Statute than in the World Heritage Convention. For instance, the Rome Statute only refers to cultural objects, while the World Heritage List also comprises 235 natural properties.<sup>6</sup> Moreover, the Rome Statute only includes certain categories of cultural heritage, such as buildings dedicated to art and historic monuments, while the World Heritage Convention contains a broader definition of cultural heritage, also including other properties such as cave dwellings and archaeological sites.<sup>7</sup> Nevertheless, the World Heritage Convention only aspires to protect heritage of an “outstanding universal value,”<sup>8</sup> thus establishing a high threshold, while the Rome Statute does not require any degree of international importance for a property to be protected.

---

<sup>3</sup> Roger O’Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?* (2004) 53 *International and Comparative Quarterly* 189, 190.

<sup>4</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Provisional Measures: Order of 18 July 2011) (Separate Opinion of Judge Cançado Trindade) [2011] ICJ Rep 537, 93; Francesco Francioni and Federico Lenzerini, ‘The Destruction of the Buddhas of Bamiyan and International Law’ (2003) 14 *EJIL* 619, 634 and 638.

<sup>5</sup> Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July (2002) 2187 UNTS 38544 (Rome Statute), arts 8(2)(b)(ix) and 8(2)(e)(iv).

<sup>6</sup> Rome Statute, art 8(b)(iv) does refer to ‘widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.’ Moreover, in paragraph 16 of its 2021 Policy on Cultural Heritage, the Office of the Prosecutor referred to cultural heritage as including ‘natural heritage (natural sites of cultural value, including certain natural or cultivated landscapes and physical, biological, or geological formations).’ It is, however, unclear under which of these provisions the intentional destruction of natural World Heritage sites could be categorised.

<sup>7</sup> World Heritage Convention, art 1.

<sup>8</sup> *ibid*, arts 1, 2, 11(2).

## C. CONSIDERATIONS OF INTERNATIONAL COURTS AND TRIBUNALS

### (1) World Heritage Listing: A Threshold to Convict?

Even though the intentional destruction of cultural property is prohibited under the Rome Statute, convictions for this crime have remained rare in the history of the International Criminal Court, with the Court applying Article 8(2)(e)(iv) of the Statute for the first time in 2016 in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*.<sup>9</sup> Mr Al Mahdi became the first person to be convicted by the International Criminal Court for the sole crime of intentionally targeting cultural heritage. By exclusively focusing on this particular crime, the Court took a symbolic stance affirming the intentional targeting of cultural heritage as a serious offence, since it affects both the local and international community.<sup>10</sup>

Between June and July 2012, Mr. Al Mahdi directed attacks against ten Malian historic monuments and religious buildings.<sup>11</sup> These monuments and buildings included nine mausoleums and one mosque in Timbuktu. All but one of these properties were protected as UNESCO World Heritage sites.<sup>12</sup> In 2016, Mr. Al Mahdi was found guilty and sentenced to nine years in prison.<sup>13</sup>

The International Criminal Court determined that five elements must be proven to establish the crime of the intentional destruction of cultural property. First, the perpetrator must have directed the attack. Second, the attack must have been directed against, *inter alia*, buildings dedicated to art or historic monuments, which were not military objectives. Third, the perpetrator must have intended for the building or monument to be the object of the attack. Fourth, the conduct must have taken place in the context of a non-international armed conflict and fifth, the perpetrator must have been aware of the factual existence of that armed conflict.<sup>14</sup>

For the establishment of this threshold, the World Heritage designation of a property is especially relevant for the second element. This was a consideration made by the International Criminal Court in *Al Mahdi*, when it determined whether the attack was directed against buildings dedicated to art or historic monuments. The Court decided that all the properties were indeed sites dedicated to religion or historic monuments, and not military objectives, as all, except the Sheikh Mohamed Mahmoud Al Arawani

---

<sup>9</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016).

<sup>10</sup> International Criminal Court – The Office of the Prosecutor, ‘*Policy on Cultural Heritage*’ (June 2021) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>> accessed 23 January 2025, para 6.

<sup>11</sup> *Al Mahdi* (n 9) [49].

<sup>12</sup> *Al Mahdi* (n 9) [39].

<sup>13</sup> *ibid* [49].

<sup>14</sup> *ibid* [13].

Mausoleum, had the status of UNESCO World Heritage sites.<sup>15</sup> According to the Court, the designation of these properties as UNESCO World Heritage “reflects their special importance to international cultural heritage” and attacking these sites “was clearly an affront to [the] values [embodied in the UNESCO Constitution]”.<sup>16</sup> Moreover, the Court also quoted Mr. Al Mahdi saying, “those UNESCO jackasses – [...] they think this is heritage. Does ‘heritage’ include worshipping cows and trees?” to illustrate how he took the World Heritage designation of the properties into consideration when attacking the Djingareyber Mosque.<sup>17</sup> Thus, to the International Criminal Court, the mere inscription of these properties on the World Heritage List was sufficient to determine their religious and historic nature. The Court did not elaborate on any further elements for non-inscribed properties to also meet this threshold.<sup>18</sup>

The International Criminal Tribunal for the Former Yugoslavia had previously followed a similar reasoning in *Prosecutor v Pavle Strugar*.<sup>19</sup> However, its jurisprudence is of limited relevance as the Tribunal decided in a different legal context since its applicable law focused on the “destruction or wilful damage” of cultural objects, rather than “attacks” against them.<sup>20</sup> In *Strugar*, the Tribunal determined that the destruction of the Old Town of Dubrovnik met the threshold for “institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science” in Article 3(d) of its Statute, as the entirety of the Old Town was added to the World Heritage List in 1979.<sup>21</sup> The Tribunal did not elaborate further on this issue, and this view was later affirmed by the Appeals Chamber.<sup>22</sup> Both in *Al Mahdi* and in *Strugar*, the inscription of a property on the List was thus sufficient to qualify as a historic monument or institution dedicated to the arts.

## (2) Gravity of the Crime

While the Court noted that crimes against property are generally less grave than crimes against persons, it did consider that the World Heritage designation added to the gravity of the crime as the property destruction affected both the people of Mali and the international community. Not only did the people of

---

<sup>15</sup> *ibid* [39], [46].

<sup>16</sup> *ibid* [46].

<sup>17</sup> *Al Mahdi* (n 9).

<sup>18</sup> Audrey Adu-Appiah and others (eds), ‘Prosecutor v. Ahmad Al Faqi Al Mahdi - International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage’ (2017) 130 Harvard Law Review 1978, 1984.

<sup>19</sup> *Prosecutor v. Pavle Strugar* (Judgment) IT-01-42-T, T Ch II (31 January 2005).

<sup>20</sup> *Al Mahdi* (n 9) [16]; Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by resolution 827, as amended on 19 May 2003 by resolution 1481), Art 3(d); *Prosecutor v. Pavle Strugar* (Judgment) IT-01-42-T, T Ch II (31 January 2005) [308]. Overall, the International Criminal Tribunal for the Former Yugoslavia issued charges against individuals for the destruction of cultural property in eleven cases but always did so in combination with other crimes. Only two of these cases referenced the destruction of UNESCO World Heritage specifically: the case of Miodrag Jokić and the case of Pavle Strugar.

<sup>21</sup> *Strugar* (n 19) [327].

<sup>22</sup> *Prosecutor v. Pavle Strugar* (Appeal Judgment) IT-01-42-A (17 July 2008) [279].

Timbuktu have an emotional attachment to the properties, and the destruction of these properties was intended to break their souls, but the entire international community also suffered from the losses.<sup>23</sup> The destruction of a property on the World Heritage List was thus particularly severe, as its impact went beyond the local community and affected all States and persons worldwide. Since the Court had already considered the World Heritage designation when assessing the gravity of the crime, it did not take this into account again as an aggravating circumstance, nor the fact that the crime affected multiple victims.<sup>24</sup> However, the destruction of cultural heritage sites is generally intended to hurt the persons and communities for whom this heritage forms part of their cultural identity, thus by extension making it a crime against persons rather than property. Reducing the crime to only its material component could lead to an underestimation of the gravity of the crime.<sup>25</sup>

In *Prosecutor v Miodrag Jokić*, the Tribunal similarly considered the special status of the Old Town of Dubrovnik as a World Heritage site when determining the gravity of the crime but did not consider this for the establishment of aggravating circumstances.<sup>26</sup> According to the International Criminal Tribunal for the Former Yugoslavia, an attack against the Old Town of Dubrovnik was not only an attack “against the history and heritage of the region, but also against the cultural heritage of humankind.”<sup>27</sup> The Trial Chamber assessed that it is “a crime of even greater seriousness to direct an attack on an especially protected site.”<sup>28</sup> Moreover, the Tribunal referred to the awareness of Mr Jokić of the protected status of the whole of the Old Town as a UNESCO World Heritage site.<sup>29</sup> Similarly, in *Strugar*, the Tribunal determined that the World Heritage status of the Old Town of Dubrovnik was a “matter of renown,” as was its “unique cultural and historical character.”<sup>30</sup> From this evidence, the Chamber inferred the perpetrators’ intent to deliberately destroy the Old Town.<sup>31</sup>

However, even though attacks against World Heritage are inherently of a particular gravity, the International Criminal Tribunal for the Former Yugoslavia did not require all cultural heritage to be of such importance to determine the unlawfulness of attacks against it.<sup>32</sup> Moreover, the particular gravity of World

---

<sup>23</sup> *Al Mabdi* (n 9) [80]. For an elaboration on the impact of the destruction of these properties on the local communities, see Oumar Ba, ‘Contested Meanings: Timbuktu and the Prosecution of Destruction of Cultural Heritage as War Crimes’ (2020) 63 *African Studies Review* 743, 746.

<sup>24</sup> *Al Mabdi* (n 9) [87].

<sup>25</sup> Federico Lenzerini, ‘Intentional Destruction of Cultural Heritage, Crimes Against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law’ (2017) 74 *Europa Ethnica* 66, 68.

<sup>26</sup> *Prosecutor v. Miodrag Jokić* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) [67].

<sup>27</sup> *ibid* [51].

<sup>28</sup> *ibid* [53].

<sup>29</sup> *ibid* [55].

<sup>30</sup> *Strugar* (n 19) [329].

<sup>31</sup> *ibid*.

<sup>32</sup> International Criminal Court (n 10) para 43; *Jokić* (n 26) [51]-[53], [67].

Heritage properties depends on their inscription as such, irrespective of the regard “held by their immediate society at the material time.”<sup>33</sup>

### **(3) An Element for the Determination of Reparations**

The World Heritage listing of the destroyed cultural property was not only considered by the International Criminal Court for the judgment of Mr Al Mahdi, but also in the determination of the reparations to be made. According to the Rome Statute, reparations for the victims of attacks on cultural property must be provided, while the preamble of the World Heritage Convention states that the destruction of cultural and natural heritage constitutes a loss for the international community as a whole.<sup>34</sup> Thus, the international community must be included among the victims of the crime of the intentional destruction of World Heritage.

However, UNESCO decided not to submit any application for reparations as it argued the principal victims of the crime had been the local communities.<sup>35</sup> Nevertheless, the Chamber determined that one symbolic euro should be given to UNESCO, which acted as a representative of the international community.<sup>36</sup>

Unlike *Al Mahdi*, the issue of reparations was not taken into consideration in *Strugar* and *Jokić* as the Tribunal’s Statute did not include any provisions regarding reparations.<sup>37</sup>

## **D. NEW WORLD HERITAGE IN PALESTINE AND UKRAINE**

### **(1) Ukraine**

The above analysis emphasises the central role of the World Heritage Convention for the establishment of the threshold, gravity and reparations for the war crime of the intentional destruction of cultural property. Since the outbreak of the ongoing armed conflict between Russia and Ukraine on 24 February 2022,

---

<sup>33</sup> International Criminal Court (n 10) para [47].

<sup>34</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) [14].

<sup>35</sup> *ibid* [52].

<sup>36</sup> *ibid* [107].

<sup>37</sup> Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP 2012) 91.

UNESCO has identified damage to more than 400 cultural sites in Ukraine.<sup>38</sup> Considering the dangers to Ukrainian cultural heritage, the World Heritage Committee decided to inscribe three properties on the List of World Heritage in Danger in 2023: the ‘Kyiv: Saint-Sophia Cathedral and Related Monastic Buildings, Kyiv-Pechersk Lavra,’ ‘L’viv – the Ensemble of the Historic Centre’ and ‘the Historic Centre of Odesa.’ While each of these properties experienced its own specific threats, the World Heritage Committee also noted several common risks to all Ukrainian cultural and natural heritage, especially those sites located in larger urban areas.<sup>39</sup> In total, Ukraine has eight properties inscribed on the World Heritage List: seven cultural sites and one natural site.<sup>40</sup>

‘The Historic Centre of Odesa’ was inscribed on an emergency basis on both the World Heritage List and the List of World Heritage in Danger in 2023 after the seaport of Odesa was hit by missiles in July 2022.<sup>41</sup> Both buildings in the nominated area, such as the Vorontsov Palace, and buildings in the proposed buffer zone were damaged during this attack. The International Council on Monuments and Sites (ICOMOS) noted in its evaluation that the damage to the five affected properties had been limited to broken glass in several windows and the roof, but considered a listing of ‘the Historic Centre of Odesa’ useful to protect the site in the future, and to gather support of the international community to protect the property during the remainder of the ongoing conflict.<sup>42</sup> ICOMOS thus assumed that an addition to the World Heritage List would increase international solidarity to protect properties endangered by war and counted on the international community to raise its voice together.

## (2) Palestine

Similarly, UNESCO has identified damage to more than 100 sites in the Gaza Strip since 7 October 2023.<sup>43</sup> Several Palestinian properties have also been inscribed on the List of World Heritage in Danger due to the ongoing conflict with Israel. The State of Palestine ratified the World Heritage Convention in 2011 after

---

<sup>38</sup> UNESCO, ‘Damaged Cultural Sites in Ukraine Verified by UNESCO’ (16 April 2025) <<https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>> accessed 21 April 2025; UNESCO, ‘Ukraine: Nearly 30 States Pledge to Support UNESCO’s Efforts in the Recovery of the Cultural Sector’ (7 June 2023) <<https://whc.unesco.org/en/news/2695>> accessed 23 January 2025.

<sup>39</sup> UNESCO World Heritage Committee, ‘State of Conservation of Properties Inscribed on the World Heritage List’ (31 July 2023) WHC/23/45.COM/7B.Add, 112.

<sup>40</sup> UNESCO, ‘Ukraine’ (UNESCO World Heritage Convention) <<https://whc.unesco.org/en/statesparties/ua>> accessed 1 September 2024.

<sup>41</sup> UNESCO World Heritage Committee, ‘Any Other Matter: Nominations to the World Heritage List - Nominations to be Processed on an Emergency Basis - Ukraine’ (24-25 January 2023) 18 EXT.COM 5.2; UNESCO World Heritage Committee, ‘Update of the List of World Heritage in Danger (Retained Properties)’ (21-31 July 2024) 46 COM 8C.2.

<sup>42</sup> ICOMOS, ‘Advisory Body Evaluation: Historic Center of Odesa (Ukraine)’ (2023) No 1703, 35.

<sup>43</sup> UNESCO, ‘Gaza Strip: Damage Assessment’ (*UNESCO World Heritage Convention*, 9 April 2025) <<https://www.unesco.org/en/gaza/assessment>> accessed 21 April 2025.

becoming a member of UNESCO earlier that year and currently has five properties inscribed on the World Heritage List, three of which were also added to the List of World Heritage in Danger.<sup>44</sup> However, only ‘Saint Hilarion Monastery/Tell Umm Amer’ was added to the World Heritage List and the List of World Heritage in Danger in 2024 after the renewed outbreak of the conflict. Nevertheless, the other two properties, ‘Palestine: Land of Olives and Vines – Cultural Landscape of Southern Jerusalem, Battir’ and ‘Hebron/Al-Khalil Old Town’, were inscribed on the List of World Heritage in Danger partly because of the already ongoing tensions between Israel and Palestine.

For instance, the Land of Olives and Vines were inscribed on an emergency basis on both the World Heritage List and the List of World Heritage in Danger in 2014 due to the vulnerability of the area caused by socio-cultural and geo-political changes.<sup>45</sup> The cultural landscape faced the threat of the construction of a fence of five hundred meters long with a security zone of fifty to ninety meters on either side, which would irreversibly damage the natural landscape and physically prevent Battir farmers from accessing their fields.<sup>46</sup> ICOMOS considered even the potential construction of such a fence, in addition to new Israeli settlements being built in the buffer zone of the nominated property and mass-displacements of residents, as a sufficiently large and concrete risk to the nominated property.<sup>47</sup> Moreover, ‘Hebron/Al-Khalil Old Town’ was equally inscribed on an emergency basis on both the World Heritage List and the List of World Heritage in Danger in 2017 after more than twenty violations of the property’s integrity had taken place between February and April 2017.<sup>48</sup> ICOMOS reported these violations ranged from the occupying forces preventing the restoration of a roof, to these forces conducting illegal excavations.<sup>49</sup> Additionally, they had also restricted the freedom of movement of inhabitants of the Old Town.<sup>50</sup>

Most recently, in 2024, ‘Saint Hilarion Monastery/Tell Umm Amer’ was inscribed on an emergency basis on both the World Heritage List and the List of World Heritage in Danger.<sup>51</sup> As the oldest monastery in Palestine, it had been on the Palestinian Tentative List for several years, but the State only decided to nominate it in 2024 after two other sites on its Tentative List had been partially or fully destroyed.<sup>52</sup>

---

<sup>44</sup> UNESCO World Heritage List, *Palestine: Land of Olives and Vines – Cultural Landscape of Southern Jerusalem, Battir* (inscribed 2014); *Hebron/Al-Khalil Old Town* (inscribed 2017); *Saint Hilarion Monastery / Tell Umm Amer* (inscribed 2024).

<sup>45</sup> UNESCO World Heritage Committee, ‘*Nominations to be Processed on an Emergency Basis: Palestine: Land of Olives and Vines – Cultural Landscape of Southern Jerusalem, Battir*’ (15-25 June 2014) 38 COM 8B.4.

<sup>46</sup> ICOMOS, ‘Advisory Body Evaluation: Cultural Landscape of Southern Jerusalem, Battir (Palestine)’ (2014) Nr. 1492, 7, 12.

<sup>47</sup> *ibid.*

<sup>48</sup> UNESCO World Heritage Committee, ‘Hebron/Al-Khalil Old Town (Palestine)’ (2-12 July 2017) 41 COM 8B.1.

<sup>49</sup> ICOMOS, ‘Advisory Body Evaluation: Hebron/Al-Khalil Old Town (Palestine)’ (2017) Nr. 1565, 9.

<sup>50</sup> *ibid.*

<sup>51</sup> UNESCO World Heritage Committee, ‘Saint Hilarion Monastery/Tell Umm Amer (State of Palestine)’ (21-31 July 2024) 46 COM 8B.44.

<sup>52</sup> UNESCO World Heritage, ‘Saint Hilarion Monastery/Tell Umm Amer – Emergency Nomination File’ (June 2024) Nr. 1749, 5. The *Wadi Gaza Coastal Wetlands* has been on Palestine’s Tentative List since 2012. Palestine had been investing in the restoration of this area as part of its environmental management, but these efforts were undone by the recent conflict (UN Environment Programme, ‘Damage to Gaza Causing New Risks to Human Health’ (*UN Environment Programme*, 18 June 2024) <<https://www.unep.org/news-and-stories/press-release/damage-gaza-causing-new-risks-human-health-and-long-term-recovery>> accessed 12 January 2025). The *Athedon Harbour*, the archaeological site of an Ancient Greek port in Gaza, was

Compared to these other properties, the Saint Hilarion Monastery had only suffered minor damage at the time of nomination. However, its location near a refugee camp and the city of Nuseirat makes the property extremely vulnerable.<sup>53</sup> In the Monastery's nomination file, the State Party chose to draw parallels between the impact of the current conflict on the monastery and its impact on Palestinian properties generally.<sup>54</sup> Moreover, the file emphasised that cultural heritage "serves as a source of social cohesion and humanitarian values, and gives people a sense of place, belonging and identity."<sup>55</sup> Notably, ICOMOS could not provide an evaluation of the property considering the ongoing security conditions and could thus not determine whether it fulfilled the requirements for an "outstanding universal value." However, ICOMOS agreed that a nomination under the emergency procedure was justified due to the threats of the ongoing armed conflict in the area.<sup>56</sup>

## E. CONCLUSION

Both the Ukrainian and Palestinian examples illustrate how ICOMOS and the nominating States Parties rely on a listing as World Heritage in Danger to draw the attention of the international community. Considering the great weight the International Criminal Court has previously given to such a World Heritage listing, these emergency inscriptions could become strategic decisions for States to facilitate the proceedings regarding the intentional destruction of cultural property in the future. While there is no indication in the nomination files that the Ukrainian and Palestinian governments acted with such proceedings in mind, this approach might create a hierarchy among cultural heritage protection, and lead to the misuse of the World Heritage List as a tool towards conviction by the International Criminal Court. Moreover, considering the limited scope of the Court's current jurisprudence, such an inscription might seem like the only course to conviction since the Court did not indicate under which conditions non-World Heritage sites could fall within the protection of the Rome Statute.<sup>57</sup>

---

damaged by bombings in 2023 (Human Rights Watch, 'Destroying Cultural Heritage: Explosive Weapons' Effects in Armed Conflict and Measures to Strengthen Protection' (*Human Rights Watch*, 18 April 2024) <<https://www.hrw.org/report/2024/04/18/destroying-cultural-heritage/explosive-weapons-effects-armed-conflict-and>> accessed 12 January 2025). Considering the situation in Palestine as of January 2025, it is still unclear what the full extent of the damage of the conflict has been to Palestinian cultural and natural properties.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid* Annex 2.

<sup>56</sup> ICOMOS, 'Notification Regarding the Saint Hilarion Monastery/ Tell Umm Amer (State of Palestine) Nomination' (19 July 2024) WHC/24/46.COM/INF.8B1.Add.2; ICOMOS, 'Advisory Body Evaluation: Hebron/Al-Khalil Old Town (Palestine)' (2017) Nr. 1565, 9.

<sup>57</sup> Adu-Appiah (n 18) 1984.

However, based on this narrow interpretation, certain types of heritage, such as the natural properties on the World Heritage List, fall between the cracks of the Rome Statute.<sup>58</sup> Furthermore, the current interpretation of the International Criminal Court would exclude cultural heritage that has not been inscribed on the World Heritage List, such as the 149 Ukrainian religious sites which have been damaged since 24 February 2022 or the nine Palestinian monuments which have been damaged since 7 October 2023.<sup>59</sup> The large-scale destruction of cultural heritage in Ukraine and Palestine, as identified by UNESCO, thus provides pivotal opportunities for the enforceability of the World Heritage Convention if the Prosecutor were to investigate these. Looking forward, the next decade will be crucial to further determine the scope of the obligations regarding cultural heritage in the Rome Statute, and to await whether the International Criminal Court will look beyond a property's World Heritage listing to determine the scope and gravity of this specific crime.

---

<sup>58</sup> *ibid* 1983-1984.

<sup>59</sup> UNESCO World Heritage Convention, 'Damaged Cultural Sites in Ukraine Verified by UNESCO' (16 April 2025) <<https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>> accessed 21 April 2025; UNESCO World Heritage Convention, 'Gaza Strip: Damage Assessment' (9 April 2025) <<https://www.unesco.org/en/gaza/assessment>> accessed 21 April 2025.

# THE CURRENCY OF CULPABILITY: A CRITICAL ANALYSIS OF GUILTY PLEA DISCOUNTS

*Ayman Faris Khalil*\*

## A. INTRODUCTION

## B. THE RISE OF PLEA BARGAINING: FROM EXPEDIENCE TO INSTITUTIONAL NORM

## C. A PHILOSOPHICAL CRITIQUE

- (1) The Law as a Moral Institution
- (2) A Trade-Off Between Leniency and Human Dignity
- (3) The Issue of Performative Remorse

## D. UTILITARIAN EFFICIENCY: CAN JUSTICE BE SERVED WITHOUT IT?

- (1) Alleviating the Emotional Toll on Victims and Witnesses
- (2) A Cost-Effective Resolution?
- (3) Concluding Thoughts

## E. A COMPARATIVE JURISDICTIONAL EXAMINATION OF GUILTY PLEA DISCOUNTS

- (1) Scotland: Proportionality as Ethical Restraint
- (2) The United States: Efficiency at the Expense of Justice
- (3) Money vs. Moral Undertakings: The Ethical Divide

## F. PROPOSED REFORMATION

- (1) A Relational Model of Guilty Plea Discounts
- (2) Abolition of Financial Bail Systems
- (3) Victim-Centred Practices to Mitigate Emotional Toll

## G. CONCLUDING REFLECTIONS

---

\* Law LLB (Hons) Candidate, University of Edinburgh.

## A. INTRODUCTION

What price should a legal system demand for justice, and at what cost to its moral integrity? The practice of offering sentence discounts to defendants who plead guilty lies at the intersection of justice's competing practical and philosophical imperatives. Ostensibly, these discounts reward responsibility: incentivising admissions of wrongdoing, alleviating the suffering of victims, and relieving systemic burdens on courts. Yet, this practice also casts justice in a troubling light: as a state-sanctioned transaction in which culpability becomes a currency, where time can be bought in exchange for entering a guilty plea. By reducing sentences not on culpability alone but on procedural expedience, guilty plea discounts risk recasting justice as a commodified process rather than a principled moral enterprise.

This essay critically examines guilty plea discounts in two contrasting jurisdictions: the United States (US) and Scotland, to illuminate how differing legal norms and institutional contexts shape their operation and ethical consequences.<sup>1</sup> The US, dominated by plea bargaining, highlights the dangers of prosecutorial overreach and systemic inequities that incentivise even innocent defendants to plead guilty under immense pressure. Scotland, in contrast, with a fixed framework for reduction, demonstrates a greater regard for sentencing proportionality. This comparative approach provides a unique analytical advantage to uncover how variations in sentencing frameworks amplify or mitigate the ethical tensions inherent in guilty plea discounts.

Engaging deeply with the work of Kant, Rawls, and virtue ethicists, this essay will argue that such discounts risk violating defendants' autonomy, reducing their moral agency to mere procedural compliance. With emphasis on dignity and institutional integrity, discounts are shown to further exacerbate systemic inequalities, transforming coercion into a pervasive injustice for marginalised defendants, trivialising the gravity of criminal conduct and resulting in the distortion of the moral equilibrium between harm and culpability. While utilitarian defences, emphasising efficiency and victim relief, are not dismissed outright, they are critically problematised for their ethically fraught compromises.

This essay concludes by advancing the novel perspective that guilty pleas must be reconceptualised as instruments of relational justice rather than transactional efficiency. This framework reimagines discounts as mechanisms that foster moral accountability and preserve the dignity of all stakeholders: defendants,

---

<sup>1</sup> Scotland was selected for comparative analysis due to its distinct legal and ethical approach to guilty plea discounts, which contrasts sharply with the deeply entrenched plea-bargaining practices of the United States. While empirical data and scholarly literature on Scotland's system remain relatively limited, this very lacuna renders it a compelling site for normative inquiry. Its inclusion allows for the examination of a jurisdiction where guilty plea discounts are implemented within a more proportionate and structurally restrained framework – one that has thus far received insufficient theoretical engagement. Investigating Scotland alongside the United States not only highlights critical jurisdictional divergences but also contributes to addressing a gap in the existing literature on comparative sentencing ethics.

victims and society at large. Within this model, discounts are no longer commodified rewards but tools for cultivating substantive acts of remorse, restitution, and restorative engagement. Such a transformation requires transparency in sentencing, robust safeguards against coercion, and an emphasis on justice as a moral relationship rather than a procedural calculus.

## **B. THE RISE OF PLEA BARGAINING: FROM EXPEDIENCE TO INSTITUTIONAL NORM**

The practice of guilty plea sentence discounts is not an incidental innovation, but the product of a systemic evolution shaped by the growing demands of overburdened legal systems. Historically, adversarial justice systems were predicated on rigorous trials where evidence was tested, and culpability was meticulously adjudicated. However, by the late 19<sup>th</sup> century, surging caseloads in common law jurisdictions exposed the unsustainability of this model, with plea bargaining emerging as a pragmatic response, allowing defendants to forgo trial in exchange for reduced sentences, alleviating pressures on courts and conserving resources.<sup>2</sup>

In the US, urbanisation and industrialisation in the early 20<sup>th</sup> century led to a surge in criminal activity.<sup>3</sup> By the 1930s, with the onset of the Great Depression, courts became overwhelmed with increasing case backlogs, and the criminal justice system struggled to cope with the demand.<sup>4</sup> To address these pressures, plea bargaining was formalised in the 1970 *Brady v. United States* decision, recognising its value in reducing trial backlogs by offering defendants reduced sentences in exchange for guilty pleas.<sup>5</sup> By 1991, crime in the US reached its peak with over 14 million crimes recorded, including a sharp increase in violent crimes and property offences.<sup>6</sup> This crisis in the criminal justice system made plea bargaining central to the legal process, helping to expedite case resolution and alleviate the strain on courts.

Similarly, in Scotland, the 1990s saw a rise in criminal activity, culminating in a peak in 1991, with 572,921 crimes recorded.<sup>7</sup> This spike was driven by significant increases in non-sexual violent crimes and crimes of dishonesty, which rose to 430,153 cases recorded.<sup>8</sup> The dramatic rise during this period, coupled with an already overwhelmed legal system, led to the introduction of sentence reductions for early guilty

---

<sup>2</sup> Mark Haller, 'Plea Bargaining: The Nineteenth Century Context' (1979) 13 Law & Society Review 273.

<sup>3</sup> Louise Shelley, *Crime and Modernization: The Impact of Industrialization and Urbanization on Crime* (Southern Illinois University Press 1981) 16-28, 74-80.

<sup>4</sup> Dan Allosso, *US History II: Gilded Age to Present* (Minnesota Libraries Publishing Project) ch 7 <<https://mlpp.pressbooks.pub/ushistory2/>> accessed 10 November 2025.

<sup>5</sup> *Brady v. United States* 397 US 742 (1970).

<sup>6</sup> US Department of Justice, *Crime in the United States 1994: Uniform Crime Reports* (NCJRS 1995).

<sup>7</sup> Scottish Government, *Recorded Crime in Scotland: 2018-2019* (2019) <<https://www.gov.scot/publications/recorded-crime-scotland-2018-19/pages/13/>> accessed 10 November 2025.

<sup>8</sup> *ibid.*

pleas under Criminal Procedure (Scotland) Act 1995, s 196(1)(a). Defendants who pleaded guilty at an early stage were offered up to a one-third reduction in their sentences, aimed at reducing court congestion and encouraging swift case resolution.

### **C. A PHILOSOPHICAL CRITIQUE**

The adoption of guilty plea sentence discounts, while rooted in pragmatic responses to overloaded legal systems, precipitates significant ethical concerns that merit rigorous scrutiny. Designed to alleviate judicial congestion, these discounts also risk undermining the foundational principles of justice by prioritising efficiency over moral integrity. The shift from a system focused on substantive, impartial adjudication to one centred on procedural expedience raises critical questions about fairness, autonomy, and the very nature of culpability. This section will interrogate how such discounts threaten to commodify justice, reducing moral accountability to mere transactional exchange.

#### **(1) The Law as a Moral Institution**

The ethical implications of guilty plea sentence reductions become starkly evident when examined through Dworkin's concept of law as integrity.<sup>9</sup> Dworkin envisions the law as far more than a procedural framework designed to deliver efficient outcomes; it is a moral enterprise underpinned by a coherent set of principles that reflect and reinforce society's deepest ethical commitments. For the law to retain its legitimacy, it must transcend mechanical expediency and embody a unified and principled vision of justice. Guilty plea discounts, however, disrupt this moral architecture by subordinating the substantive ideals of justice to the demands of administrative efficiency, thereby transforming the law into a transactional system divorced from its moral obligations to uphold accountability and dignity.

At the heart of Dworkin's theory lies the imperative that every legal decision must affirm the autonomy and moral worth of individuals.<sup>10</sup> Guilty plea discounts violate this foundational tenet by commodifying culpability, reducing moral accountability to a procedural currency. Under this practice, culpability becomes negotiable – a commodity to be traded in exchange for a lighter sentence. This transactional model shifts the focus of justice from principled adjudication to systemic expedience, undermining the law's role as a moral arbiter. By incentivising defendants to forfeit their right to a full trial

---

<sup>9</sup> Ronald Dworkin, *Law's Empire* (Fontana Press 1986) 188-192.

<sup>10</sup> *ibid* 178-184.

in favour of efficiency, the justice system compromises the autonomy of the defendant, diminishing them from active participants in justice to passive instruments of bureaucratic expediency. The defendant's moral accountability, which ought to be central to the legal process, is eclipsed by pragmatic concerns, rendering justice an administrative mechanism rather than a moral enterprise.

## (2) A Trade-Off Between Leniency and Human Dignity

Despite its superficial pragmatic appeal, the utilitarian argument raises further concerns regarding human dignity. From a Kantian perspective, such efficiency-driven practices risk instrumentalising defendants, rendering them means to an end rather than ends in themselves.<sup>11</sup> Kant's categorical imperative insists on respecting the intrinsic value of individuals, their autonomy and moral agency.<sup>12</sup> However, guilty plea discounts, by prioritising expediency, effectively reduce defendants to procedural instruments – tools solely used to give the impression of alleviating systemic burdens rather than agents deserving of impartial adjudication.

The coercive dynamics inherent in guilty plea discounts starkly illustrate the ethical hazards of prioritising procedural expediency over the autonomy and dignity of defendants. The sharp disparity between sentences following a guilty plea and those imposed after a contested trial operates as a *de facto* penalty for exercising the right to trial, pressuring defendants into pleading guilty. This pressure is acutely felt by the most vulnerable, those with cognitive impairments, socio-economic disadvantages, or inadequate legal representation, who may plead guilty not out of culpability but from fear of harsher consequences. In such instances, the utilitarian pursuit of efficiency irreconcilably clashes with the deontological imperative to uphold defendants' moral agency, reducing criminal proceedings to a mechanistic process of convenience rather than a principled forum for justice.

Moreover, Rawls' difference principle, which permits inequalities only if they benefit the least advantaged members of society, is flagrantly undermined by guilty plea discounts.<sup>13</sup> Far from benefiting the vulnerable, these discounts exacerbate their disadvantage by exploiting their precarious position within the legal system. Defendants with limited means or understanding are forced into decisions that perpetuate systemic inequities, while those with greater resources retain the ability to contest charges without undue fear of disproportionate repercussions. This structural imbalance renders the legal process fundamentally

---

<sup>11</sup> Immanuel Kant, *Critique of Judgment* (Hafner Press 1951) 323-324.

<sup>12</sup> Immanuel Kant, *Grounding of the Metaphysics of Morals* (2nd edn, Hackett Publishing Company 1994) 25, 30 and 42.

<sup>13</sup> John Rawls, *A Theory of Justice* (2nd edn, Harvard University Press 1999) 69-74, 81-97.

unfair, contravening Rawls' vision of a justice system that seeks to mitigate, rather than entrench, societal inequalities.

By failing to align with Rawlsian principles, guilty plea discounts expose their ethical deficiencies on both individual and structural levels. They undermine the very idea of justice as fairness by creating a system in which outcomes are determined not by culpability but by an individual's ability to navigate systemic coercion. Such practices erode the moral foundation of justice, transforming it from a mechanism for equity into one that perpetuates inequality and disregard of one's own dignity.

### **(3) The Issue of Performative Remorse**

Beyond utilitarian considerations, guilty plea discounts are frequently defended on ethical grounds as a recognition of remorse.<sup>14</sup> A guilty plea, it is argued, signals an offender's acceptance of responsibility, acknowledgment of wrongdoing, and willingness to atone. Under this rationale, discounts are not mere procedural incentives but rewards for moral contrition. From a virtue ethics perspective, this defence finds its foundation in Aristotle's emphasis on the cultivation of moral character, which underscores the value of actions rooted in genuine repentance and moral growth.<sup>15</sup> Acknowledging guilt is seen as the offender's first step toward self-reflection, accountability, and rehabilitation. By fostering these virtues, guilty plea discounts align sentencing practices with broader goals of restorative justice and the moral development of offenders.

However, when guilty pleas are entered strategically to secure leniency or "buy time," they undermine the very ethical framework that virtue ethics seeks to preserve. Aristotle's conception of virtue demands authenticity; actions must be motivated by genuine moral intent rather than self-serving expedience.<sup>16</sup> Performative remorse, contrived contrition feigned to manipulate the justice system, erodes this foundation, replacing sincerity with calculated deception. This is especially corrosive in the context of criminal justice, as offenders who have already committed a transgression compound their wrongdoing by dishonestly exploiting mechanisms designed to reward accountability. Far from fostering moral growth, such practices entrench dishonesty as an acceptable mode of behaviour, perpetuating a cycle in which the system's leniency mechanisms incentivise further immorality.

This institutionalised deception has far-reaching societal consequences. A justice system that rewards insincerity as a path to leniency signals a troubling abdication of its moral responsibilities. It ceases

---

<sup>14</sup> Kate Rossmannith, 'Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse' (2015) 21 *British Journal of Sociology of Law* 167-168.

<sup>15</sup> Aristotle, *Nicomachean Ethics* (Batoche 1999) 30-36.

<sup>16</sup> *ibid* 25-30.

to serve as a forum for cultivating virtue or reinforcing ethical norms, instead legitimising the very behaviours it ostensibly seeks to deter. This degradation of moral standards undermines public confidence in the justice system, fostering cynicism and mistrust. If offenders can manipulate the system through performative compliance, the law forfeits its role as a moral arbiter and becomes complicit in the erosion of societal ethics. Such practices do not merely distort the relationship between culpability and accountability; they corrode the justice system's capacity to act as a vehicle for moral rehabilitation.

Critics such as Field and Tata have rightly argued that remorse and guilt are conceptually distinct.<sup>17</sup> A system that conflates procedural compliance with genuine contrition risks rewarding the mere appearance of repentance rather than its substantive moral content. This conflation not only distorts sentencing outcomes but also compromises the adversarial process's capacity to rigorously test claims of accountability. In prioritising procedural expedience over the verification of genuine remorse, the system abandons its role as a principled adjudicator of justice and instead reduces itself to a transactional entity. Performative remorse, rather than advancing the goals of justice, subverts them, enabling offenders to exploit legal mechanisms while evading the ethical responsibility that sentencing should demand.

Unregulated guilty plea discounts exacerbate this problem by failing to distinguish between genuine moral accountability and strategic deceit. Without mechanisms to verify sincerity, the justice system risks institutionalising dishonesty, eroding its legitimacy and moral coherence. Aristotle's virtue ethics warns against such degradation, demanding a justice system that fosters genuine moral growth rather than one that rewards calculated manipulation.<sup>18</sup> In the absence of robust safeguards, the continued existence of guilty plea discounts reinforces systemic inequities and perpetuates moral corruption, damaging not only individual offenders but the integrity of justice itself.

#### **D. UTILITARIAN EFFICIENCY: CAN JUSTICE BE SERVED WITHOUT IT?**

The ethical critique of guilty plea discounts highlights a troubling paradox: while these mechanisms claim to promote accountability and justice, their practical application often undermines these ideals, rewarding performative compliance and eroding the integrity of the justice system. However, defenders of guilty plea discounts frequently pivot to a pragmatic defence, asserting that such measures are essential to maintaining systemic efficiency in overburdened justice systems. This raises a critical question: can the pursuit of efficiency ever align with justice's foundational principles, or does it inevitably sacrifice fairness, dignity,

---

<sup>17</sup> Stewart Field and Cyrus Tata, *Locating the Ideal Defendant: Punishment, Violence and Legitimacy* (Hart Publishing 2023) 10.

<sup>18</sup> Aristotle (n 15) 68.

and proportionality at the altar of expedience? The next section examines this utilitarian justification, questioning whether systemic efficiency can truly serve the moral purpose of justice or whether it perpetuates the very ethical failings it seeks to mitigate.

### **(1) Alleviating the Emotional Toll on Victims and Witnesses**

Finding support in Bentham's principle of utility, which asserts that the moral worth of an action is predicated on its capacity to promote the greatest net happiness for the greatest number, the ethical justification for guilty plea discounts becomes increasingly persuasive.<sup>19</sup> The utilitarian calculus, when applied, suggests that the emotional relief proffered to victims and their families through a more expedited resolution of cases substantially outweighs ethical reservations regarding incentivising defendants to waive their right to a full trial.

A salient consideration in this analysis is the phenomenon of secondary victimisation, whereby the victims of an initial crime become victims of the justice system itself.<sup>20</sup> The demands of sustained cross-examination, the emotional upheaval of confronting the accused and the inevitable re-traumatisation that accompanies public testimonies can contribute to a deterioration in mental health that far exceeds the psychological distress caused by the original offence. By extending the trauma of the offence through prolonged judicial proceedings, the system inadvertently subjects victims to an additional layer of suffering, often far more corrosive than the harm they initially experienced. It is within this framework that the expedient resolution offered by guilty plea sentence discounts becomes not merely a procedural convenience, but a moral imperative, mitigating further harm to victims.

### **(2) A Cost-Effective Resolution?**

In the context of an increasingly strained and underfunded judicial system, the utilitarian justification for guilty plea discounts extends beyond a pragmatic concession to resource scarcity and functions as a necessary mechanism for preserving the integrity and functionality of justice itself. In 2022, the UK allocated only £181 per capita for the justice system, a figure markedly disproportionate when compared to

---

<sup>19</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Batoche 2000) 14-18.

<sup>20</sup> Carolina Gutiérrez, Elisa Colonel and Carlos Andrés Pérez, 'Theoretical Review of the Concept of Secondary Victimisation' (2009) SFP 49, 52-58.

the funding devoted to defence (£820 per capita) and transport (£640 per capita).<sup>21</sup> This imbalance underscores the systemic fiscal inadequacies that strain the judicial infrastructure, creating a pressing need for strategic allocation of resources to maintain the overall functionality of the legal system. In this context, guilty plea discounts should be seen not merely as procedural shortcuts, but as a necessary response to the systemic exigencies confronting an overstretched justice system.

The instrumentalisation of justice, often associated with the promotion of efficiency, need not be framed as an ethical compromise but as a defensible mechanism for the preservation of the system's core functions. The utilitarian rationale does not suggest that justice is synonymous with expediency but instead posits that expediency serves as a necessary precondition for ensuring that the system's substantive aims are achieved within the constraints of available resources. By expediting less contentious cases, guilty plea discounts enable the allocation of judicial attention to more complex and contested matters, where the pursuit of substantive justice requires thorough and impartial adjudication. Thus, rather than eroding the ethical foundation of justice, guilty plea discounts, when implemented thoughtfully, serve as a mechanism for ensuring that the legal system can fulfil its moral obligations without succumbing to systemic collapse. In this sense, the moral compromise attributed to efficiency is not inherent to the practice itself but lies in the broader context of the judicial system's ability to manage its ever-increasing caseload amidst fiscal limitations.

### **(3) Concluding Thoughts**

In conclusion, the utilitarian justification for guilty plea discounts, often criticised for undermining the moral integrity of justice, warrants a more nuanced examination within the context of a beleaguered and resource-deprived judicial system. These discounts cannot merely be dismissed as procedural expediences that erode fairness; rather, they must be understood as a crucial, albeit imperfect, adaptation to the exigencies of a system that, in the face of fiscal and systemic collapse, must prioritise the preservation of its core functions. When viewed through the lens of necessity, guilty plea reductions transcend their apparent instrumentalisation, emerging as a strategic means of balancing the pursuit of substantive justice with the pragmatic constraints imposed by limited resources. This recalibration of justice, although not without ethical trade-offs, positions expediency as a partially morally defensible tool for mitigating secondary victimisation and alleviating the undue psychological burden that protracted legal proceedings impose on

---

<sup>21</sup> Bianca Castro, 'Justice System Underfunded by £3.5 billion, Bar Report Reveals' (2024) *Law Gazette* <<https://www.lawgazette.co.uk/news/justice-system-underfunded-by-35-billion-bar-report-reveals/5120744.article#:~:text=In%202022%2F23%2C%20funding%20for,overseas%20aid%2C%20the%20report%20said>> accessed 10 November 2025.

victims. By facilitating swifter resolutions, these discounts not only preserve the viability of the judicial process but also safeguard the system's capacity to adjudicate more complex cases with the thoroughness and impartiality they demand. In this respect, rather than undermining the ethical foundations of justice, guilty plea discounts represent a critical recalibration of justice's aims, ensuring that the system remains responsive to its moral obligations and capable of fulfilling its role in an increasingly resource-constrained environment. Far from signifying a departure from justice, this practice reflects a necessary evolution, a moral compromise embedded in the very act of preserving justice in a world where the cost of idealistic adjudication is increasingly untenable.

### **E. A COMPARATIVE JURISDICTIONAL EXAMINATION OF GUILTY PLEA DISCOUNTS**

A comparative analysis of guilty plea discounts across jurisdictions reveals how legal frameworks and systemic pressures shape their ethical implications. By examining Scotland and the United States, two systems that diverge sharply in their approach to procedural justice, the ethical vulnerabilities of guilty plea discounts are exposed. This analysis demonstrates that their defensibility hinges not only on their stated objectives but on the institutional safeguards – or lack thereof – that mediate their application. Scotland offers a model of measured proportionality, where guilty plea discounts remain a functional but restrained tool. In contrast, the United States exemplifies a justice system where guilty plea discounts have become instruments of systemic coercion, amplifying pre-existing inequities and eroding the moral fabric of justice.

## (1) Scotland: Proportionality as Ethical Restraint

Sheriff summary courts	Guilty plea at first calling		Guilty plea at intermediate diet		Guilty plea at trial diet		Total number of Guilty plea	
	Number of guilty pleas	Percentage of guilty pleas	Number of guilty pleas	Percentage of guilty pleas	Number of guilty pleas	Percentage of guilty pleas	Number of guilty pleas	Percentage of guilty pleas
Financial year								
FY2014/15	20,430	28%	10,137	11%	12,514	24%	43,081	20%
FY2015/16	19,540	27%	9,806	10%	14,613	25%	43,959	20%
FY2016/17	19,490	27%	9,427	11%	15,155	27%	44,072	21%
FY2017/18	16,956	26%	8,837	11%	15,043	27%	40,836	20%
FY2018/19	16,045	27%	8,246	11%	13,652	28%	37,943	21%
FY2019/20	16,748	25%	8,349	11%	13,091	29%	38,188	20%
FY2020/21	11,162	21%	4,556	7%	5,010	19%	20,728	14%
FY2021/22	11,917	21%	6,863	7%	12,756	22%	31,536	15%
FY2022/23	11,441	22%	6,078	7%	15,974	25%	33,493	16%

**Figure 1:** Number of guilty pleas at different diet stages of the accused in Sheriff summary courts by financial year.<sup>22</sup>

Scotland's approach to guilty plea discounts reflects a deliberate effort to balance efficiency with fairness, underpinned by structural safeguards that limit coercive pressures. Data from Sheriff Summary Courts illustrates a system where guilty pleas are incentivised but not over-relied upon. Early pleas at the first calling range from 21% to 28% between 2014 and 2022, while guilty pleas at the trial diet remain similarly consistent at 24% to 29% over the same period. Crucially, the total proportion of guilty pleas in Scotland has never exceeded 22%, indicating a restrained and proportionate reliance on this mechanism.<sup>23</sup>

One of the most critical features of the Scottish system is its rejection of financial bail, which decisively eliminates a major source of coercion present in other jurisdictions. In Scotland, pretrial liberty is not purchased but guaranteed through personal undertakings, reflecting a legal culture that prioritises procedural fairness over monetary leverage. By decoupling pretrial release from financial capacity, Scotland removes the financial duress that often forces economically vulnerable defendants in other systems to plead guilty prematurely. This structural safeguard ensures that decisions to plead guilty are made on the basis of culpability rather than socio-economic desperation.

Furthermore, the consistent application of guilty plea discounts across procedural stages signals a commitment to proportionality. Defendants who plead guilty at later stages, such as the trial diet, are not disproportionately penalised compared to those who plead earlier, reflecting a legal framework that avoids weaponising guilty plea discounts as punitive tools. This measured approach preserves defendants' autonomy while maintaining the justice system's integrity as a principled arbiter of culpability. While no

<sup>22</sup> Criminal Justice Board, *Management Information System* (Safer Communities Directorate, 24 May 2023) <<https://www.gov.scot/publications/foi-202300352445/>> accessed 10 November 2025.

<sup>23</sup> *ibid.*

system is immune to critique, Scotland's restrained application of guilty plea discounts, combined with the absence of financial bail, mitigates many of the ethical risks associated with their use.

## (2) The United States: Efficiency at the Expense of Justice

The United States provides a stark counterpoint, illustrating how guilty plea discounts, when intertwined with structural inequities, can erode the moral legitimacy of justice. In a system where nearly 98% of federal convictions and 95% of state convictions arise from guilty pleas,<sup>24</sup> the reliance on plea bargaining is so pervasive that the US Supreme Court, in *Missouri v. Frye*, has described it as “a system of pleas, not a system of trials.”<sup>25</sup> This systemic reliance on plea bargains reflects a justice model that prioritises expediency, but at a profound ethical cost.

At the heart of this ethical failing lies the United States' financial bail regime, which exacerbates the coercive dynamics of guilty plea discounts. Bail amounts in the United States are routinely set at exorbitant levels, disproportionately impacting economically disadvantaged defendants. Those unable to pay are forced to endure prolonged pretrial detention, creating an intolerable pressure to plead guilty – even when the defendant is innocent. The case of Myles Martin illustrates this grim reality: unable to pay \$115,000 in bail, Martin languished in jail for thirty months before his release.<sup>26</sup> For such defendants, pleading guilty becomes less a decision based on accountability and more a survival strategy, a means of escaping the punitive weight of pretrial incarceration.<sup>27</sup>

The entanglement of financial coercion and guilty plea discounts in the United States reduces justice to a transactional process. Defendants are faced with an impossible choice: plead guilty to secure immediate release or contest charges at the risk of prolonged detention and economic ruin. This dynamic perpetuates systemic inequities, where wealthier defendants are insulated from coercion while economically

---

<sup>24</sup> Lucian Dervan, 'Fourteen Principles and a Path Forward for Plea Bargaining Reform' (American Bar Association 2024) <[<sup>25</sup> \*Missouri v. Frye\* 566 US 134 \(2012\) para 8.](https://www.americanbar.org/groups/criminal_justice/resources/magazine/2024-winter/fourteen-principles-path-forward-plea-bargaining-reform/#:~:text=Plea%20bargaining%20accounts%20for%20almost,of%20trials.%E2%80%9D%20Missouri%20v.> accessed 10 November 2025.</a></p></div><div data-bbox=)

<sup>26</sup> Nazish Dholakia, 'How the Criminal Legal System Coerces People into Pleading Guilty' (Vera Institute of Justice, 2024) <<https://www.vera.org/news/how-the-criminal-legal-system-coerces-people-into-pleading-guilty> -: ~:text=In 2022, nearly 90 percent, go to trial at all.> accessed 10 November 2025.

<sup>27</sup> *ibid.* The case of Myles Martin exemplifies the coercive dynamics of pretrial detention and plea bargaining within the US criminal justice system. Held in Hays County, Texas, from October 2019 to March 2022, Martin spent over two years in jail without trial due to his inability to pay an exorbitant bail and the chronic inaccessibility of his court-appointed attorney. Despite maintaining his innocence, Martin was repeatedly pressured to accept plea deals, including by jail staff and his own lawyer, who failed to investigate the case or file motions on his behalf. The prolonged detention, combined with inadequate legal representation and institutional pressure to plead guilty, created a system in which asserting one's innocence became not only untenable but penalised, illustrating how structural deficiencies in bail and public defence can erode the right to a fair trial and render guilty pleas a mechanism of coercion rather than accountability.

disadvantaged individuals bear the brunt of these pressures. The result is a justice system that prioritises administrative efficiency and fiscal pragmatism over fairness, autonomy, and proportionality. By institutionalising coercion, the US forfeits the moral legitimacy of its plea practices, transforming justice into a commodified enterprise that privileges expedience over equity.

### **(3) Money vs. Moral Undertakings: The Ethical Divide**

The comparative lens reveals two contrasting trajectories: one in which guilty plea discounts are mediated by safeguards that uphold fairness, and another in which they amplify structural inequities. Scotland's rejection of financial bail demonstrates that guilty plea discounts need not function as coercive tools. By removing financial barriers, Scotland ensures that defendants' decisions to plead guilty are less likely to be driven by socio-economic desperation, preserving the justice system's commitment to fairness and dignity.

In the US, however, the confluence of financial bail and guilty plea discounts compounds the structural inequities of the system. By intertwining monetary coercion with procedural incentives, the US effectively transforms justice into a system of economic gatekeeping. This commodification not only erodes public confidence in the justice system but also perpetuates cycles of inequality, where the vulnerable are disproportionately pressured into surrendering their rights.

## **F. PROPOSED REFORMATION**

The pervasive ethical challenges surrounding guilty plea discounts necessitate transformative reforms that preserve justice's foundational principles while addressing systemic inequities and coercive pressures. True reform must transcend mere procedural adjustments to reimagine guilty plea discounts as instruments of moral accountability and fairness, ensuring that justice is not compromised for expediency. This section proposes three analytically robust and ethically sound reforms: the adoption of a relational justice model, the abolition of financial bail systems, and victim-centred practices to mitigate the emotional toll of trials. Each reform addresses specific ethical failings and aligns guilty plea discounts with the overarching goals of justice and fairness.

## **(1) A Relational Model of Guilty Plea Discounts**

The first reform redefines guilty plea discounts within a relational justice framework, shifting the focus from procedural timing to moral accountability and substantive rehabilitation. Under this model, reductions in sentencing would no longer be contingent solely on when a guilty plea is entered but would instead require verifiable acts of accountability and restorative engagement. These may include participation in restorative justice programs, engagement in meaningful dialogue with victims, or tangible efforts to make restitution.

This approach addresses the fundamental ethical flaw of existing guilty plea discount systems: the reduction of justice to a transactional process. By linking discounts to demonstrable moral growth, the relational model ensures that defendants engage authentically with the consequences of their actions. It also mitigates the problem of performative remorse by requiring substantive evidence of rehabilitation rather than incentivising strategic compliance. From a virtue ethics perspective, this reform aligns with Aristotle's emphasis on the cultivation of moral character, fostering genuine accountability over superficial admissions of guilt.

## **(2) Abolition of Financial Bail Systems**

The second reform directly targets one of the most coercive and ethically indefensible aspects of guilty plea discount regimes: the financial bail system. Nowhere is this issue more pronounced than in the United States, where exorbitant bail amounts drive economically disadvantaged defendants into invidious situations, pressuring them to plead guilty to avoid prolonged pretrial detention, even if it means accepting a shorter jail sentence that compounds their financial and personal hardship. The abolition of financial bail would remove this systemic pressure, ensuring that pretrial liberty is not contingent on wealth but rather on criteria such as risk assessments or personal undertakings, as exemplified by Scotland's model.

The ethical argument for abolishing financial bail is both compelling and urgent. In its current form, financial bail institutionalises inequality, disproportionately penalising the most vulnerable while shielding the wealthy from equivalent pressures. This dynamic not only undermines the autonomy of marginalised defendants but also distorts the justice process by making plea decisions contingent on economic considerations rather than culpability. The abolition of financial bail would eliminate this "pay-or-plead" dilemma, restoring fairness by ensuring that all defendants, regardless of socio-economic status, have equal access to a fair trial.

### **(3) Victim-Centred Practices to Mitigate Emotional Toll**

The third reform recognises the often-overlooked emotional toll that trials impose on victims and witnesses – a factor frequently invoked to justify the existence of guilty plea discounts. Rather than relying on plea discounts to spare victims from testifying, justice systems should adopt victim-centred practices that alleviate emotional distress without compromising defendants’ rights or the adversarial process.

One such practice is the expanded use of pre-recorded testimony, allowing victims to provide their accounts in controlled environments without enduring the adversarial dynamics of the courtroom. Remote participation for victims could also be offered, reducing the psychological burden of face-to-face confrontation while preserving the integrity of the trial process. These innovations would address the systemic inefficiencies often attributed to trial proceedings while safeguarding the dignity and well-being of victims.

## **G. CONCLUDING REFLECTIONS**

Guilty plea sentence discounts epitomise the fraught tension between the ideals of justice and the pragmatics of expedience, revealing a justice system perilously close to abandoning its moral essence. What purports to be a mechanism of procedural efficiency and victim relief is, in fact, a practice that trades justice’s foundational principles: fairness, proportionality, and dignity – for administrative convenience. These discounts are not merely a procedural innovation; they are a philosophical rupture, transforming culpability into a commodity and the courtroom into a marketplace where moral accountability is bartered for leniency. In doing so, they erode the moral legitimacy of justice itself, reducing it to an exercise in bureaucratic calculation rather than an institution dedicated to equity and truth.

At their most pernicious, guilty plea discounts subvert the autonomy and dignity of defendants, particularly the vulnerable, coercing them into entering guilty pleas under the guise of pragmatism. Kantian ethics exposes this moral transgression, decrying the instrumentalisation of individuals whose worth is subordinated to systemic expedience. Simultaneously, Rawlsian justice condemns the structural inequities these mechanisms perpetuate, coercing those least equipped to navigate the system into surrendering their fundamental rights. The comparative lens reveals these failings with stark clarity: Scotland demonstrates how guilty plea discounts, when tempered by proportionality and the abolition of financial bail, can coexist with fairness. The US, by contrast, exemplifies a justice system degraded by its reliance on plea bargaining,

where wealth dictates liberty and guilt is manufactured through coercion, rendering justice stratified and ethically bankrupt.

Reform, then, is not merely desirable but morally imperative. The relational model proposed herein reimagines guilty plea discounts as instruments of moral restoration, tethering reductions to substantive acts of remorse, restitution, and rehabilitation. The abolition of financial bail is equally vital, severing the toxic link between wealth and pre-trial liberty, and ensuring that defendants' decisions are shaped by culpability, not socio-economic desperation. Victim-centred innovations provide an additional avenue, addressing the emotional toll of trials without compromising the moral integrity of the justice process. These reforms collectively offer a blueprint for restoring guilty plea discounts to their rightful place as mechanisms that serve justice rather than subvert it.

What this inquiry ultimately reveals is not merely a procedural dilemma but a profound existential crisis for justice systems worldwide. Guilty plea discounts, in their current form, signal a justice system that has lost its way, privileging resolution over rectitude, efficiency over ethics. Yet within this crisis lies an opportunity to redefine these mechanisms as tools of principled justice, capable of balancing systemic efficiency with the imperatives of fairness and accountability. The stakes could not be higher. The future of guilty plea discounts will not merely determine the fate of sentencing practices; it will decide whether justice retains its status as a moral ideal or devolves into a hollow administrative exercise, unworthy of the very name it bears.

**MODERNISING GROUNDS FOR REFUGEEHOOD IN THE TWENTY-FIRST  
CENTURY: POST-1951 LESSONS FROM THE CARTAGENA DECLARATION AND  
LATIN AMERICA**

*Elena Macomber\**

**A. INTRODUCTION**

**B. LEGAL INSTRUMENTS AND FRAMEWORKS**

- (1) 1951 Convention relating to the Status of Refugees and the 1967 Protocol
- (2) Convention Governing the Specific Aspects of Refugee Problems in Africa
- (3) Cartagena Declaration on Refugees

**C. APPLICATION OF THE CARTAGENA DECLARATION IN BRAZIL AND MEXICO**

- (1) Human Rights Situation in Venezuela
- (2) Brazil's Asylum Regime and Response to the Venezuelan Crisis
- (3) Mexico's Asylum Regime and Response to the Venezuelan Crisis

**D. EXPLAINING STATES' WILLINGNESS TO APPLY THE CARTAGENA DECLARATION**

- (1) Individual State Officials Making Determinations
- (2) UNHCR Influence
- (3) Nationality-based Discrimination
- (4) International Relations and Politics

**E. APPLYING THE CARTAGENA DECLARATION TO OTHER HUMANITARIAN CRISES**

**F. CONCLUSION**

---

\* LLM., Public International Law Candidate at the London School of Economics (LSE); JD., University of Minnesota Law School.

## A. INTRODUCTION

Over the past seven decades, the 1951 Convention Relating to the Status of Refugees<sup>1</sup> has become the primary instrument for determining who constitutes a refugee across multiple jurisdictions globally. Persecution based on an individual's race, religion, nationality, membership in a particular social group, or political opinion provides the main grounds upon which to qualify for asylum. Many scholars refer to the 1951 formulation as the 'traditional' definition of a refugee.<sup>2</sup> While the 1951 Convention's grounds gained the most traction in national legal systems, it would be incorrect to assume that the grounds upon which an individual could claim asylum were fixed in the middle of the twentieth century. Over the past half-century, regional bodies have formulated other bases for refugeehood.<sup>3</sup>

An enduring critique of the 1951 Convention's conceptualisation of refugeehood is its limited recognition of the reasons an individual or community is persecuted.<sup>4</sup> The 1951 Convention is a product of its post-World War II environment, and while it has been essential in protecting many individuals around the world, it has failed to adequately protect those persecuted for reasons other than their intersecting identities.<sup>5</sup> Recognised grounds of protection reflect post-World War II concerns involving fascist European state actors.<sup>6</sup>

This article explores the formulation, development, and implementation of regional asylum frameworks created in the Global South. Two key regional documents expanded the grounds for asylum, which were originally established in the 1951 Convention: the 1969 Organisation of African Unity (OAU) Convention and the 1984 Cartagena Declaration. These regional documents incorporate considerations excluded by Western drafters of the 1951 Convention – namely, external aggression, internal conflicts, and widespread violation of human rights.<sup>7</sup>

---

<sup>1</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

<sup>2</sup> Rachel Schmidtke and Daniela Gutiérrez Escobedo, 'Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing' (Refugees International, 20 July 2021). <<https://www.refugeesinternational.org/reports-briefs/mexicos-use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing/>> accessed 18 November 2024.

<sup>3</sup> James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) *International and Comparative Law Quarterly* 348; Guy S Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 *International Journal of Refugee Law* 651.

<sup>4</sup> L W Marshall, 'Toward a New Definition of 'Refugee': Is the 1951 Convention Out of Date?' (2011) 37 *European Journal of Trauma and Emergency Surgery* 61, 65.

<sup>5</sup> B S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) *Journal of Refugee Studies* 350.

<sup>6</sup> Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3. *International Journal of Refugee Law* 185; Luiz Leomil, 'Displaced Venezuelans and the Politics of Asylum: The Case of Brazil's Group Recognition Policy' (2022) *Carta Internacional* 1, 2; Marshall (n 4).

<sup>7</sup> Eduardo Arboleda, 'The Cartagena Declaration of 1984 and Its Similarities to the 1969 OAU Convention – A Comparative Perspective' (1995) 7 *International Journal of Refugee Law* 87; Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and Its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development* 599.

While these conceptualisations are innovative, aspiration has failed to be met by implementation. A notable exception is the application of the Cartagena Declaration to Venezuelan refugees by the governments of Brazil and Mexico in 2018. At least 47,766 Venezuelans in Brazil and 14,000 Venezuelans in Mexico have received asylum on the basis of widespread human rights violations in Venezuela, a ground recognised under the Cartagena Declaration.<sup>8</sup> Although the application of the Declaration in these specific circumstances may ultimately be primarily driven by social and political considerations of the Brazilian and Mexican governments, the grant of asylum to 61,000 people based on a humanitarian crisis – as opposed to identity-based persecution – warrants recognition. Thus, advocates should build upon the recent momentum of the Cartagena Declaration by pushing international bodies and national governments to implement and apply broader bases of asylum established in these regional documents. By extending protection to those experiencing persecution or harm not accounted for in the 1951 Convention, states can begin to modernise asylum to better address twenty-first-century harms.

## **B. LEGAL INSTRUMENTS AND FRAMEWORKS**

Since 1951, there have been six major legal formulations of grounds for refugeehood. The first and most well-known is the 1951 Convention Relating to the Status of Refugees, which was updated by the 1967 Protocol Relating to the Status of Refugees. The majority of asylum claims around the world are adjudicated through states' incorporation of these instruments into domestic legislation. In addition to these international instruments, more expansive regional frameworks of refugeehood emerged in conventions and agreements from Africa in 1969 and Latin America in 1984.

### **(1) 1951 Convention relating to the Status of Refugees and the 1967 Protocol**

The grounds contained in the 1951 Convention were developed in response to the horrors of World War II.<sup>9</sup> One of the primary sources of tension in crafting a definition was how broadly to construe the term

---

<sup>8</sup> Comitê Nacional para os Refugiados (CONARE), 'Painel interativo de decisões sobre refúgio no Brasil' (*UNHCR and Ministério da justiça e segurança pública*).

<<https://app.powerbi.com/view?r=eyJrIjoizTk3OTdiZjctNGQwOC00Y2FhLTgxYTctNDNlN2ZkNjZmMWVliwidCI6ImU1YzM3OTgxLTY2NjQtNDZlZjY1NDNkMmFmODBiZSIsImMiOjh9&pageName=ReportSection>> accessed 18 November 2024; Comisión Mexicana de ayuda a refugiados (COMAR), 'Cierre Marzo 2023-1 Abril' (*Gobierno Mexicano*, 1 April 2023) <[https://www.gob.mx/cms/uploads/attachment/file/814283/Cierre\\_Marzo-2023\\_\\_1-Abril\\_.pdf](https://www.gob.mx/cms/uploads/attachment/file/814283/Cierre_Marzo-2023__1-Abril_.pdf)> accessed 18 November 2024; Schmidtko and Gutiérrez Escobedo (n 2).

<sup>9</sup> Vanessa Holzer, 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' in Volker Türk, Alice Edwards, and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's*

‘refugee’, and there were two primary schools of thought: the ‘Europeanists’ and the ‘universalists’.<sup>10</sup> Due to concerns about the financial and resource obligations associated with a broad formulation of refugee status, the Europeanists felt the term should be limited geographically to Europe and temporally to events predating 1951.<sup>11</sup> The universalists, by contrast, advocated for an inclusive definition applicable to those in need of protection, regardless of origin or year.<sup>12</sup> A compromise between these groups produced a definition of refugeehood contingent upon persecution linked to events predating 1951.<sup>13</sup>

Therefore, under Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees, the term ‘refugee’ applies to an individual who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>14</sup>

Article 1(B)(1) further stipulates that states can choose between applying this definition solely to ‘events occurring in Europe before 1 January 1951’ or ‘events occurring in Europe or elsewhere before 1 January 1951’.<sup>15</sup> Thus, the Convention still maintained a European focus even with compromise between negotiating states.

Notably, recognising the continuing and evolving landscape of refugee crises post-World War II, the United Nations adopted the Protocol Relating to the Status of Refugees in 1967.<sup>16</sup> The Protocol modified the Convention, eliminating the temporal and geographic limitations on the definition of a refugee

---

Consultations on Refugee Status and Other Forms of International Protection (Cambridge University Press 2017); Otto Kirchheimer, ‘Asylum’ (1959) 53 *American Political Science Review* 985.

<sup>10</sup> Irial Glynn, ‘The Genesis and Development of Article 1 of the 1951 Refugee Convention’, (2012) 25 *Journal of Refugee Studies* 134, 139-140; Holzer (n 9) 69.

<sup>11</sup> Glynn (n 10) 137-139.

<sup>12</sup> *ibid.*

<sup>13</sup> Guy S Goodwin-Gill, ‘International Refugee Law: Where It’s Come and Where It’s Going?’ (2017) 45 *International Journal of Legal Information* 24, 27; Glynn (n 10) 139-140; 1951 Convention (n 9) art 1(B)(1).

<sup>14</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (1951 Convention) art 1(A)(2) (emphasis added).

<sup>15</sup> 1951 Convention (n 9) art 1(B)(1).

<sup>16</sup> Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 *Harvard Human Rights Journal* 229; Marshall (n 4) 61-62.

found in Articles 1(A)(2) and 1(B)(1).<sup>17</sup> The 1951 Convention and 1967 Protocol have been widely incorporated into domestic legal systems across the world, with 146 states party to the *1951 Convention* and 147 to the *1967 Protocol*.<sup>18</sup>

One of the principal shortcomings of the 1951 Convention's conceptualisation of refugeehood is its reflection of mid twentieth century Western conceptions of persecution.<sup>19</sup> Entire communities are subjected to violence for reasons unrelated to identity or belief, yet such persecution often falls outside the definitional scope of the *1951 Convention*. Despite the expansion introduced by the *1967 Protocol*, these documents fail to offer protection from widespread persecution by corrupt and repressive governments.<sup>20</sup> Although regional refugee frameworks offer linguistic recognition of broader grounds, the United Nations High Commissioner for Refugees (UNHCR) reports that the vast majority of asylees receive legal protection through the 1951 Convention and not regional agreements.<sup>21</sup>

## **(2) Convention Governing the Specific Aspects of Refugee Problems in Africa**

The 1969 OAU Convention was designed to complement and not replace the 1951 Convention.<sup>22</sup> The document's legislative history can be traced back to growing concerns over ethnic divisions in Rwanda in 1964.<sup>23</sup> As the 1960s progressed, refugee populations began to emerge across the continent, particularly in the Great Lakes region and eastern Africa.<sup>24</sup> Article 1(1) retains the language of the 1951 Convention, although the Convention is not explicitly cited.<sup>25</sup> The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa enumerates more expansive bases for asylum in Article 1(2) than those listed in the 1951 Convention:

---

<sup>17</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) art 1(2).

<sup>18</sup> UNHCR, 'States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention' (UNHCR) <<https://www.unhcr.org/media/38230>> accessed 18 November 2024; UNHCR, 'States Parties, Including Reservations and Declarations, to the 1967 Protocol Relating to the Status of Refugees' (UNHCR), <<https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1967-protocol-relating-status-refugees>> accessed 18 November 2024.

<sup>19</sup> Krause (n 7).

<sup>20</sup> Catherine Jane Tinker and Laura Madrid Sartoretto, 'New Trends in Migratory and Refugee Law in Brazil: the Expanded Refugee Definition' (2016) 47 *Revista do Direito* 118, 122; Marshall (n 4) 61-62.

<sup>21</sup> Holzer (n 9) 72.

<sup>22</sup> Bonaventure Rutinwa, 'Relationship between the 1951 Refugee Convention and the 1969 OAU Convention on Refugees: A Historical Perspective', in Volker Türk, Alice Edwards and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press 2017); Arboleda (n 6) 195.

<sup>23</sup> Rutinwa (n 22) 96-97.

<sup>24</sup> *ibid* 98.

<sup>25</sup> OAU Convention (n 22) art 1(1).

The term “refugee” shall also apply to every person who, *owing to external aggression, occupation, foreign domination or events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>26</sup>

From the outset of negotiations, drafters of the OAU Convention sought to expand the bases of refugeehood arguing that the 1951 Convention was overly European in scope.<sup>27</sup> Although the 1967 Protocol amended this language before the 1969 Convention was adopted, negotiations for the 1969 document started in 1964.<sup>28</sup> The inclusion of those persecuted ‘elsewhere’ in provision Article 1 (B)(1) rendered the 1951 Convention’s application in Africa, or anywhere outside of Europe, rather secondary.

The 1951 Convention failed to capture the political and social realities confronting African states in the mid-twentieth century.<sup>29</sup> Challenges stemming from colonialism and decolonisation were not addressed in the 1951 Convention’s grounds of refugeehood – namely repressive foreign governments, systems of apartheid, arbitrarily drawn borders often dividing ethnic, cultural, and tribal groups, struggles for self-determination, and independence.<sup>30</sup> These factors contributed to substantial mass migration in many African countries, creating at least twelve distinct refugee crises on the continent during the 1960s alone.<sup>31</sup> The prolonged and violent colonial experiences of African states directly account for granting asylum based on external aggression, occupation, or foreign domination.<sup>32</sup> Consequently, the broader OAU Convention’s formulation reflected the distinct and complex factors that contributed to forced mass migration in the African context more effectively than the 1951 Convention.<sup>33</sup>

Additionally, the OAU Convention emphasised community-level persecution, as opposed to individual persecution, in assessing refugee status.<sup>34</sup> The 1951 Convention’s emphasis on individual experiences was seen as incapable of reflecting refugee situations in Africa.<sup>35</sup> Thus, the OAU Convention introduced a Refugee Status Determination (RSD) regime wherein the situation of a country is evaluated as

---

<sup>26</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention) art 1(2) (emphasis added).

<sup>27</sup> George Okoth-Obbo, ‘Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20 *Refugee Studies Quarterly* 79, 109; Micah Bond Rankin, ‘Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *South African Journal of Human Rights* 406; Arboleda (n 6) 189; Bond Rankin (n 27).

<sup>28</sup> Rutinwa (n 22) 94.

<sup>29</sup> José H Fischel de Andrade, ‘Regional Policy Approaches and Harmonization: A Latin American Perspective’ (1998) 10 *International Journal of Refugee Law* 389; Rutinwa (n 22) 99.

<sup>30</sup> Okoth-Obbo (n 27) 109; Arboleda (n 6) 190-191; Rutinwa (n 22) 94; Tinker and Madrid Sartoretto (n 20) 125.

<sup>31</sup> Rutinwa (n 22) 98.

<sup>32</sup> Arboleda (n 6) 189.

<sup>33</sup> Krause (n 7); Arboleda (n 6) 195.

<sup>34</sup> Glynn (n 10) 141.

<sup>35</sup> Chimni (n 5); Rutinwa (n 22) 102-103.

the basis for granting asylum, compared to the individual analysis of the 1951 Convention.<sup>36</sup> As such, asylum seekers under the OAU Convention are not required to demonstrate or declare that they fear persecution, as is required under the 1951 Convention, and thousands of people can simultaneously be granted asylum.<sup>37</sup> A similar practice is found in the Cartagena Declaration, discussed later on.<sup>38</sup>

The country-level focus in the OAU Convention alleviates a significant burden for a claimant, as obtaining asylum simply requires proof of one's connections to a particular country instead of evidence of individualised persecution. This conceptualisation more accurately reflects the reality that violence is not always directed at someone because of a unique part of their identity, but because they are a resident in a particular area or are a citizen of a repressive government. Therefore, at least theoretically, more claimants can more efficiently claim and receive asylum under the OAU Convention's refugeehood bases since RSD is not dependent upon individualised scrutiny by adjudicators.<sup>39</sup>

However, despite broadening the 1951 Convention to reflect migration experiences in Africa, the OAU Convention possesses notable shortcomings. Key terms in Article 1(2), such as aggression, occupation, and foreign domination, remain undefined and unexplained in the Convention's *travaux préparatoires*.<sup>40</sup> Such terms are also not clearly defined in international law.<sup>41</sup> Consequently, it is challenging to adjudicate potential claims under the OAU Convention without a common legal understanding of the legal thresholds for aggression, occupation, or foreign domination.<sup>42</sup> These issues contribute in part to what is arguably the most significant shortcoming of the OAU Convention: its limited practical application to grant asylum.<sup>43</sup> While 46 out of the 56 member states of the current African Union have ratified the Convention, many states have yet to incorporate its provisions into domestic legislation.<sup>44</sup> Despite the OAU Convention's innovative language, refugees across Africa face barriers to seeking asylum based on the

---

<sup>36</sup> Arboleda (n 6) 189; Rutinwa (n 22) 102-103.

<sup>37</sup> Arboleda (n 6) 194-195; Rutinwa (n 22) 102-103.

<sup>38</sup> Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', in Volker Türk, Alice Edwards and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press 2017); Felipe Sánchez Nájera and Luisa Feline Freier, 'The Cartagena Refugee Definition and Nationality-Based Discrimination in Mexican Refugee Status Determination' (2022) 60 *International Migration* 37, 38.

<sup>39</sup> Rutinwa (n 22) 109.

<sup>40</sup> *ibid* 98, 109.

<sup>41</sup> Arboleda (n 6) 195.

<sup>42</sup> Rutinwa (n 22) 110.

<sup>43</sup> Marina Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (UNHCR, January 2013).

<<https://www.refworld.org/docid/50fd3edb2.html>> accessed 18 November 2024.

<sup>44</sup> *ibid*; UNHCR, 'African Refugee Convention Turns 50 to Warm Welcome' (UNHCR, 11 September 2019)

<<https://www.unhcr.org/africa/news/news-releases/african-refugee-convention-turns-50-warm-welcome#:~:text=UNHCR%2C%20the%20UN%20Refugee%20Agency,the%201951%20UN%20Refugee%20Convention.>> accessed 18 November 2024.

grounds developed to address African concerns.<sup>45</sup> They must instead rely on the 1951 Convention and 1967 Protocol.

While the OAU Convention has limited practical effect in Africa, it nevertheless directly influenced and contributed to the formation of more expansive refugee bases in the Global South.<sup>46</sup> The subsequent 1984 Cartagena Declaration incorporated Article 1(2) of the 1969 Convention into its own definition of refugee status.<sup>47</sup> By formulating broader grounds for asylum to respond to a wider range of humanitarian crises and realities involving mass migration, the OAU Convention established a critical theoretical precedent in international law.<sup>48</sup>

### (3) Cartagena Declaration on Refugees

Latin America has a longstanding history of regional asylum agreements, the earliest dating back to 1889.<sup>49</sup> However, they found themselves confronted with mass migration which started in the 1960s and continued into the 1980s.<sup>50</sup> Although the legacies of colonialism were less immediate in Latin America than they were in Africa, the region experienced pervasive human rights violations and systemic governmental violence in the mid-twentieth century.<sup>51</sup> Mass migration was particularly intense in the Southern Cone region due to state-sponsored disappearances and murders at the hands of repressive dictatorships.<sup>52</sup> This violence resulted in hundreds of thousands of people fleeing across borders.<sup>53</sup> As in Africa, the grounds for refugeehood in the 1951 Convention and the 1967 Protocol failed to offer sufficient bases for protection in the Latin American social and political contexts and proved ill-equipped to adjudicate the massive number of refugee claims on the continent.<sup>54</sup> Thus, the Cartagena Declaration complemented the 1951 Convention but also accounted for the realities of forced migration in Latin America.<sup>55</sup>

---

<sup>45</sup> United Nations Treaty Collection, '2. Convention Relating to the Status of Refugees' (United Nations Treaty Collection) <[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtmsg\\_no=V-2&chapter=5&Temp=mtmsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtmsg_no=V-2&chapter=5&Temp=mtmsg2&clang=_en)> accessed 18 November 2024; United Nations Treaty Collection, '5. Protocol relating to the Status of Refugees' (United Nations Treaty Collection). <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=V-5&chapter=5#:~:text=4%20October%201967%2C%20in%20accordance%20with%20article%20VIII.&text=United%20Nations%2C%20Treaty%20Series%20%2C%20vol,606%2C%20p.>](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=V-5&chapter=5#:~:text=4%20October%201967%2C%20in%20accordance%20with%20article%20VIII.&text=United%20Nations%2C%20Treaty%20Series%20%2C%20vol,606%2C%20p.>)> accessed 18 November 2024; Okoth-Obbo (n 27) 85.

<sup>46</sup> Fischel de Andrade (n 29).

<sup>47</sup> Cartagena Declaration on Refugees, Sec III, art 3, 22 November 1984 (Cartagena Declaration).

<sup>48</sup> Arboleda (n 6) 195.

<sup>49</sup> Arboleda (n 6) 197-198.

<sup>50</sup> *ibid* 199-200.

<sup>51</sup> Luisa Feline Freier and others, 'The Cartagena Refugee Definition and Venezuelan Displacement in Latin America' (2022) 60 *International Migration* 18, 20.

<sup>52</sup> Reed-Hurtado (n 38).

<sup>53</sup> Fischel de Andrade (n 29); Reed-Hurtado (n 38) 147.

<sup>54</sup> Feline Freier and others (n 51) 20; Arboleda (n 6) 194, 203.

<sup>55</sup> Fischel de Andrade (n 29); Feline Freier and others (n 51) 20; Arboleda (n 6) 194.

Section III, Article 3, of the 1984 Cartagena Declaration on Refugees states that a refugee should be defined according to the 1951 Convention, the 1967 Protocol, as well as:

[P]ersons who have fled their country because their lives, safety or freedom have been threatened by *generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*<sup>56</sup>

This demonstrates that a refugee can be defined according to the criteria listed in the 1951 Convention and 1967 Protocol.<sup>57</sup> In listing the possible bases for asylum, Article 3 states that “in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee... in the light of the situation prevailing in the region.”<sup>58</sup> This Article also invokes the precedent established by the OAU Convention in justifying the Cartagena Declaration’s expanded bases of refugeehood.<sup>59</sup>

While the Cartagena Declaration drew upon the OAU Convention’s language, it introduced distinct legal innovations in its own right.<sup>60</sup> It remains the sole regional refugee instrument to include ‘generalised violence, internal conflicts, and massive human rights violations’ as bases for asylum.<sup>61</sup> Such language exceeds the already expansive protections of the OAU Convention to ‘constitute the most expansive language so far used to define refugees.’<sup>62</sup> The Cartagena Declaration’s expanded conceptualisation not only affirms the regional historical practice of granting asylum but directly addresses the phenomenon of widespread state violence and human rights abuses.<sup>63</sup>

Section III, Article 3 of the Cartagena Declaration also incorporates a group-based process for adjudicating asylum claims, “in contrast to the individualised procedures prescribed by the 1951 Convention.”<sup>64</sup> Like the OAU Convention, the enumerated grounds of protection in the Cartagena Declaration focus on the factors causing swaths of communities to flee a region or country as opposed to the subjective fear of persecution held by an individual due to their identity or beliefs.<sup>65</sup> The group-based

---

<sup>56</sup> Cartagena Declaration on Refugees (n 47) arts 3, 22 (emphasis added).

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> José H Fischel de Andrade, ‘The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance’ (2019) 38 *Refugee Studies Quarterly* 341; Cartagena Declaration (n 47) Sec III, art 3.

<sup>60</sup> Okoth-Obbo (n 26) 85; Reed-Hurtado (n 37) 151.

<sup>61</sup> Arboleda (n 6) 189.

<sup>62</sup> *ibid* 203; OAU Convention (n 22) art 1(1).

<sup>63</sup> Arboleda (n 6) 203.

<sup>64</sup> Feline Freier and others (n 51) 20.

<sup>65</sup> Sánchez Nájera and Feline Freier (n 38) 38; Reed-Hurtado (n 38) 152.

approach enables enhanced procedural efficiency in granting asylum claims because decision-makers are less preoccupied with analysing the personal experiences of an individual.<sup>66</sup> Consequently, this approach inherently lowers the threshold for determining if one is eligible for asylum under the Cartagena Declaration because an individual need only establish that: (1) a threat to their life, security, or liberty exists; and (2) that this threat emanates from generalised violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances that seriously disturb public order.<sup>67</sup> These bases are verifiable with knowledge of violence occurring in another state. It should be noted, however, that not all these grounds possess a singular legal understanding under international law, like the grounds listed in the OAU Convention.<sup>68</sup>

Nevertheless, the Cartagena Declaration has yielded more success in granting asylum claims than the OAU Convention, albeit to a lesser extent than under the 1951 Convention. While the Cartagena Declaration is a non-binding instrument, it was signed by seventeen countries in Latin America.<sup>69</sup> Since its creation, scholars have asserted the document has created regional customary international law and *opinio juris* despite its non-obligatory status.<sup>70</sup>

Although the Cartagena Declaration's formulation has been applied to over 60,000 people, most adjudicators in Latin America give greater weight to the 1951 Convention's bases and rarely invoke the Cartagena Declaration.<sup>71</sup> Furthermore, the Declaration's conceptualisation of refugeehood is often only applied to cases where the more restrictive formulation of the 1951 Convention already found to apply – thus depriving the Declaration of its own independent legal significance.<sup>72</sup>

A further obstacle to implementing the Cartagena Declaration is that it has been inconsistently incorporated into the domestic legislation of Latin American states.<sup>73</sup> Of the seventeen signatory states, seven have directly incorporated Section III Article 3 into their asylum laws, six countries used different language to describe the five additional grounds for asylum protection, and three nations did not incorporate the Declaration's language into their laws at all.<sup>74</sup> Such discrepancies prevent the development of uniform jurisprudence, relegating the Declaration to another source of asylum for those countries that desire it instead of rendering it a readily applicable legal basis for asylum across the region.<sup>75</sup> Consequently, between these legal inconsistencies and the fact that only a few states use the Cartagena Declaration's

---

<sup>66</sup> Reed-Hurtado (n 38) 152.

<sup>67</sup> 1951 Convention (n 9) art 1(A)(2); Glynn (n 10) 141; Arboleda (n 6) 203.

<sup>68</sup> Rutinwa (n 22) 110.

<sup>69</sup> Arboleda (n 6) 185; Sánchez Nájera and Feline Freier (n 38) 39.

<sup>70</sup> Arboleda (n 6) 185; Feline Freier and others (n 51) 20.

<sup>71</sup> Reed-Hurtado (n 38) 142, 162; CONARE (n 8); COMAR (n 8).

<sup>72</sup> Sánchez Nájera and Feline Freier (n 38) 39.

<sup>73</sup> Feline Freier and others (n 51) 21.

<sup>74</sup> Reed-Hurtado (n 38) 158.

<sup>75</sup> Feline Freier and others (n 51) 26.

formulation in practice, the Declaration derives much of its value from its broad theoretical conceptualisation instead of actual relief for those fleeing perilous situations.<sup>76</sup> Additional shortcomings and procedural challenges associated with the Cartagena Declaration are explored in Sections Three and Four.

### **C. APPLICATION OF THE CARTAGENA DECLARATION IN BRAZIL AND MEXICO**

As explained, despite the regional bases for refugeehood discussed in Section One, few people have managed to receive asylum based on internal conflict or serious disruption of public order. A notable exception is the recent invocation of the Cartagena Declaration in Latin America. Over 60,000 Venezuelans have received asylum in Brazil and Mexico through the ‘massive human rights violations’ ground stipulated in Section III, Article 3 of the Declaration.<sup>77</sup> Section Three of this Article briefly examines the context behind the widespread deterioration of human rights in Venezuela, before analysing Brazilian and Mexican refugee legislation and asylum responses.

#### **(1) Human Rights Situation in Venezuela**

Venezuela operates as a petrostate, where the ultra-powerful government relies upon widespread corruption and oil exports.<sup>78</sup> President Nicolas Maduro, successor to Hugo Chávez, has led the nation with an iron fist since 2013, and is viewed by many as a dictator.<sup>79</sup> Overdependence on oil revenue, falling levels of oil production, a shrinking GDP, and hyperinflation have caused Venezuela’s economy to collapse in the middle of the last decade.<sup>80</sup> The price of living consequently skyrocketed, making it increasingly difficult to obtain food, medicine, and healthcare.<sup>81</sup> Venezuelans first started fleeing the country *en masse* in 2015, with

---

<sup>76</sup> Reed-Hurtado (n 38) 142.

<sup>77</sup> Sánchez Nájera and Feline Freier (n 38) 39; Schmidtke and Gutiérrez Escobedo (n 2); COMAR (n 8); CONARE (n 8).

<sup>78</sup> Amelia Cheatham and others, ‘Venezuela: The Rise and Fall of a Petrostate’ (Council on Foreign Relations, 22 December 2023) <<https://www.cfr.org/backgroundunder/venezuela-crisis>> accessed 18 November 2024.

<sup>79</sup> Ryan Dube and others, ‘Venezuela’s Maduro, Clinging to Power, Uses Hunger as an Election’ (Wall Street Journal, 22 March 2018) <<https://www.wsj.com/articles/venezuelas-maduro-clinging-to-power-uses-hunger-as-an-electoral-weapon-1521734622>> accessed 18 November 2024; Cheatham and others (n 78).

<sup>80</sup> *ibid.*

<sup>81</sup> Oriana Van Praag, ‘Understanding the Venezuelan Refugee Crisis’ (Wilson Center, 13 September 2019) <<https://www.wilsoncenter.org/article/understanding-the-venezuelan-refugee-crisis>> accessed 18 November 2024.

numbers rising sharply in the following years.<sup>82</sup> As of August 2023, over 7.7 million people have left Venezuela —comprising almost a quarter of the country’s entire 2014 population.<sup>83</sup>

Approximately 230,000 Venezuelans have obtained asylum around the world since 2013, mostly via the 1951 Convention’s political opinion ground.<sup>84</sup> However, in Brazil and Mexico, over 60,000 Venezuelans received asylum through each country’s respective ‘massive human rights violations’ statutory provision: 47,766 in Brazil and 14,000 in Mexico.<sup>85</sup>

## (2) Brazil’s Asylum Regime and Response to the Venezuelan Crisis

Brazil incorporated the Cartagena Declaration into national law in 1997 through the “*Ley brasileña de protección a personas refugiadas*” (Brazilian Law for the Protection of Refugees).<sup>86</sup> Despite developing one of the most progressive asylum systems in Latin America, Brazil’s incorporation of the Declaration varies more than other countries because of its phrasing of the ‘massive violation of human rights’ ground.<sup>87</sup> Brazilian law grants refugee status to those who are forced to leave their country because of ‘*serious and widespread* violations of human rights’ — a higher standard than the one found in the Declaration.<sup>88</sup>

In Brazil, the trier of fact for asylum cases is *CONARE* or the National Committee for Refugees.<sup>89</sup> Created in 1997 by Article 11 of the Brazilian Law for the Protection of Refugees, *CONARE* possesses jurisdiction to rule on asylum applications across the country.<sup>90</sup> Under Article 12 of this law, *CONARE* officials first consider the 1951 Convention and 1967 Protocol as the primary bases for granting asylum

---

<sup>82</sup> Leomil (n 6) 10.

<sup>83</sup> UNHCR, ‘Emergency Appeal: Venezuela Situation’ (UNHCR) <<https://www.unhcr.org/emergencies/venezuela-situation>> accessed 18 November 2024; ‘Population, total - Venezuela, RB’ (World Bank) <<https://data.worldbank.org/indicator/SP.POP.TOTL?locations=VE>> accessed 18 November 2024.

<sup>84</sup> ‘Emergency Appeal: Venezuela situation’ (n 83); *CONARE* (n 8).

<sup>85</sup> Sánchez Nájera and Feline Freier (n 38) 39; *CONARE* (n 8); Schmidtke and Gutiérrez Escobedo (n 2); Law N° 9.474 of 22 July 1997, s 1 (Lei N° 9.474 de 22 de Julho de 1997, s 1 (Braz)).

<sup>86</sup> UNHCR, ‘ACNUR felicita a Brasil por reconocer la condición de refugiado a las personas venezolanas con base en la Declaración de Cartagena’ (UNHCR, 29 July 2019) <<https://www.acnur.org/noticias/comunicados-de-prensa/acnur-felicita-brasil-por-reconocer-la-condicion-de-refugiado-las>> accessed 18 November 2024.

<sup>87</sup> Sánchez Nájera and Feline Freier (n 38) 40; Cartagena Declaration (n 47) Sec III, art 3; Reed-Hurtado (n 38) 162.

<sup>88</sup> Law N° 9.474 of 22 July 1997, s 1 (emphasis added).

<sup>89</sup> UNHCR and *CONARE*, ‘O reconhecimento dos refugiados pelo Brasil Decisões comentadas do’ *CONARE*’ (UNHCR and *CONARE*, 11 November 2007). <<https://www.acnur.org/fileadmin/Documentos/Publicaciones/2007/5780.pdf?file=fileadmin/Documentos/Publicaciones/2007/5780>> accessed 18 November 2024.

<sup>90</sup> Natalia Cintra de Oliveira Tavares and Vinicus Pureza Cabral, ‘La Aplicación de la Declaración de Cartagena sobre Refugiados para los Venezolanos en Brasil: un análisis del proceso de la toma de decisiones por el Comité Nacional para los Refugiados’ (2020) 5 *Latin American Law Review* 121, 122; Tinker and Madrid Sartoretto (n 20) 129; Law N° 9.474 of 22 July 1997, s 11.

before considering the Cartagena Declaration.<sup>91</sup> However, the ideological bent of the executive branch highly influences the outcome of *CONARE*'s decisions, which will be explained later.<sup>92</sup>

Brazil first applied its legal incorporation of the Cartagena Declaration in 2019 to 174 Venezuelans — marking the first time a Latin American country utilised this broad regional refugee framework to grant asylum *en masse*.<sup>93</sup> In December 2019, the government introduced a 'simplified application procedure' to adjudicate Venezuelan asylum claims.<sup>94</sup> Under this procedure, the characterisations to receive automatic asylum are as follows: Venezuelans who currently live in Brazil, do not possess any other residence permit in the country, are over 18 years old, possess a Venezuelan identity document, and have no Brazilian criminal record.<sup>95</sup> Through these expedited asylum proceedings, at least 47,766 Venezuelans obtained asylum, making Brazil the country with the highest number of recognised Venezuelan refugees in the world.<sup>96</sup> In fact, these Venezuelan refugees represent 81% of all successful asylum claims in Brazil since 1985.<sup>97</sup>

This 'serious and widespread violations of human rights' provision thus comprises the backbone of granting asylum status in Brazil in recent years.<sup>98</sup> The government reports a 100% grant rate for those who seek asylum based on the 'serious and widespread violations of human rights' provision.<sup>99</sup> Apart from 47,766 Venezuelans, 1,361 Syrians, as well as several dozen Afghans, Malians, Iraqis, and Palestinians obtained asylum in Brazil on this ground.<sup>100</sup> Thus, nearly 50,000 people received asylum in Brazil based on language originating from the Cartagena Declaration, making the 'serious and widespread violations of human rights' ground by far the most common basis for granting asylum in one of the world's largest countries.<sup>101</sup> In contrast, only 1,150 people received asylum in Brazil based on their political opinion, which is the second most common basis upon which asylum is granted.<sup>102</sup> Brazil's grant of asylum to 47,766 Venezuelans is the largest use of regional asylum definitions in history.

---

<sup>91</sup> Fischel de Andrade (n 29); Sánchez Nájera and Feline Freier (n 38) 38; Law N° 9.474 of 22 July 1997, s 12.

<sup>92</sup> Cintra de Oliveira Tavares and Vinicius Pureza Cabral (n 90); Leomil (n 6) 12-13.

<sup>93</sup> Liliana Lyra Jubilit and João Carlos Jarochinski Silva, 'Group recognition of Venezuelans in Brazil: An Adequate New Model' (Forced Migration Review, November 2020) <<https://www.fmreview.org/recognising-refugees/jubilit-jarochinskisilva>> accessed 18 November 2024; 'ACNUR felicita a Brasil por reconocer la condición de refugiado a las personas venezolanas con base en la Declaración de Cartagena' (n 86).

<sup>94</sup> Babar Boloch, 'UNHCR Welcomes Brazil's Decision to Recognize Thousands of Venezuelans as Refugees' (UNHCR, 6 December 2019) <<https://www.unhcr.org/us/news/briefing-notes/unhcr-welcomes-brazils-decision-recognize-thousands-venezuelans-refugees>> accessed 18 November 2024.

<sup>95</sup> *ibid.*

<sup>96</sup> Leomil (n 6) 14.

<sup>97</sup> *CONARE* (n 8).

<sup>98</sup> Leiza Brumat and Andrew Geddes, 'Refugee Recognition in Brazil under Bolsonaro: The Domestic Impact of International Norms and Standards' (2023) 44 *Third World Quarterly* 484, 486; *CONARE* (n 8); Cartagena Declaration (n 47) Sec III, art 3; Law N° 9.474 of 22 July 1997, s 1.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*

### (3) Mexico's Asylum Regime and Response to the Venezuelan Crisis

In 1990, Mexico became the first country to incorporate the Cartagena Declaration into its national legislation without any modifications and did so a full decade before ratifying the 1951 Convention or the 1967 Protocol.<sup>103</sup> In 2011, Mexico passed the '*Ley sobre refugiados, protección complementaria y asilo político*' ('Law on refugees, complementary protection and political asylum'), which incorporated both the 1951 Convention and Cartagena Declaration grounds of refugeehood, found in Article 13.<sup>104</sup>

The Mexican Government has demonstrated a high level of commitment to adjudicating and granting asylum. With the 1951 Convention and Cartagena Declaration, there are ten total bases upon which one could claim asylum in Mexico, whereas most states possess only five. Furthermore, by adopting the bases for refugeehood established in the Cartagena Declaration, before the 1951 and 1967 formulations, the Mexican Government displayed a high level of commitment to regional cooperation and an expansive understanding of persecution. The executive branch also developed associated administrative regulations and interpretive guidelines to assist in carrying out this law in 2012 — one of the only Latin American countries to do so.<sup>105</sup> Mexico's commitment to asylum is further evidenced by the fact that 1.1 million refugees resided in Mexico in 2022, while only 538,331 resided in the more populous country of Brazil.<sup>106</sup>

The trier of fact for asylum applications in Mexico is *COMAR*, the Mexican Commission for Refugee Assistance, established in 1980 by Presidential Decree.<sup>107</sup> *COMAR* generally first analyses an asylum claim using criteria from the 1951 Convention, and if a claim fails to align with these bases, it proceeds by using the Cartagena Declaration's grounds.<sup>108</sup> Mexico introduced a simplified RSD procedure for cases with highly similar claims and circumstances.<sup>109</sup>

In recent years, Venezuelans have been the primary beneficiaries of Mexican asylum law.<sup>110</sup> Between 2013 and 2023, *COMAR* approved over 96% (23,016 total) of asylum applications made by Venezuelans,

---

<sup>103</sup> Schmidtke and Gutiérrez Escobedo (n 2); *COMAR* (n 8); Sánchez Nájera and Feline Freier (n 38) 40; '2. Convention Relating to the Status of Refugees' (n 45); '5. Protocol Relating to the Status of Refugees' (n 45).

<sup>104</sup> Dolores Mayo Lara, 'Legislación en materia de refugiados: consideraciones internacionales y en México' (2023) 4 *LATAM Revista Latinoamericana de Ciencias Sociales y Humanidades* 5192; Sánchez Nájera and Feline Freier (n 38) 40; Schmidtke and Gutiérrez Escobedo (n 2); *Law on Refugees, Complementary Protection and Political Asylum 2022*, s 13 (*Ley sobre refugiados, protección complementaria y asilo político*) (Mex).

<sup>105</sup> Reed-Hurtado (n 38) 160.

<sup>106</sup> UNHCR, Mexico (UNHCR) <<https://reporting.unhcr.org/operational/operations/mexico?year=2022>> accessed 18 November 2024; Brazil (UNHCR) <<https://reporting.unhcr.org/operational/operations/brazil?year=2022>> accessed 18 November 2024.

<sup>107</sup> Comisión Mexicana de ayuda a refugiados (*COMAR*), 'Presencia de los Refugiados Guatemaltecos en México' (*COMAR*) <<https://www.diputados.gob.mx/comisiones/pofroy/reunwash/COMAR.htm>> accessed 18 November 2024; Sánchez Nájera and Feline Freier (n 38) 38.

<sup>108</sup> Schmidtke and Gutiérrez Escobedo (n 2).

<sup>109</sup> *ibid.*

<sup>110</sup> *COMAR* (n 8); Socorro Arzaluz and Gabriela Zamora, 'El refugio y el procedimiento de solicitud de la condición de refugiado en México' (2021) *Transdisciplinar* 33, 35.

compared to 76% of Hondurans (45,228 total) and 66% of Salvadorans (14,392).<sup>111</sup> These three nations comprise the bulk of asylum claims made in Mexico over the past decade.<sup>112</sup> Grants of asylum to Venezuelans included both those made under Mexico's incorporation of the 1951 Convention and the Cartagena Declaration.<sup>113</sup> Over 14,000 Venezuelans have received asylum in Mexico through the grounds devised in the Cartagena Declaration and its use skyrocketed between 2013 and 2016.<sup>114</sup> In 2013, only 3.49% of applicants received asylum based on the Cartagena Declaration's criteria and by 2016, this figure had risen to 89.5%.<sup>115</sup>

Mexico's legal treatment of Venezuelan refugees bears several similarities to the Brazilian response. Most notably, both countries primarily rely on expansive wording originating from the Cartagena Declaration to grant asylum to Venezuelans instead of the 1951 Convention.<sup>116</sup> Additionally, Venezuelans seem to be the primary beneficiaries of asylum under the Cartagena Declaration in both Brazil and Mexico.<sup>117</sup> Lastly, both nations report granting nearly 100% of claims by Venezuelans who apply for asylum via the 'massive human rights violations' provision, or its national equivalent.<sup>118</sup>

Asylum seekers in Mexico have also made claims using other Declaration grounds. Although 90.3% of successful claims fell under the 'massive human rights violations' category, 5.9% of grants fell under the internal conflict ground and 2.7% fell under the generalised violence ground.<sup>119</sup> Individuals who obtained asylum on these other bases came from Colombia, the Ivory Coast, Nigeria, and Ukraine, not Venezuela.<sup>120</sup> Therefore, although *COMAR* has granted asylum under three out of five of the grounds under the Cartagena Declaration, the vast majority of grants fell under the 'massive human rights violations.' Yet, considering that few countries have utilised regional refugeehood formulations in practice, grant rates of 5.9% and 2.7% on these bases are noteworthy.

---

<sup>111</sup> *COMAR* (n 8).

<sup>112</sup> Sánchez Nájera and Feline Freier (n 38) 43; *COMAR* (n 8).

<sup>113</sup> Sánchez Nájera and Feline Freier (n 38) 38, 43; Schmidtke and Gutiérrez Escobedo (n 2); *COMAR* (n 8); Law on Refugees, Complementary Protection and Political Asylum 2022, s 13.

<sup>114</sup> Schmidtke and Gutiérrez Escobedo (n 2).

<sup>115</sup> Ibero, 'Declaración de Cartagena en México' (Ibero and Observatorio de Protección Internacional, September 2018) <<https://asiloenmexico.ibero.mx/informes/declaracion-de-cartagena-en-mexico/>> accessed 18 November 2024.

<sup>116</sup> *CONARE* (n 8); *COMAR* (n 8); Sánchez Nájera and Feline Freier (n 38).

<sup>117</sup> *CONARE* (n 8); Schmidtke and Gutiérrez Escobedo (n 2); Sánchez Nájera and Feline Freier (n 38) 44-45.

<sup>118</sup> 'Declaración de Cartagena en México' (n 115) 13; Sánchez Nájera and Feline Freier (n 38) 44; *CONARE* (n 8).

<sup>119</sup> 'Declaración de Cartagena en México' (n 115) 13; Sánchez Nájera and Feline Freier (n 38) 44-45.

<sup>120</sup> *ibid.*

## D. EXPLAINING STATES' WILLINGNESS TO APPLY THE CARTAGENA DECLARATION

There is no singular answer as to why Brazil or Mexico voluntarily chose to use the Cartagena Declaration's bases of refugeehood instead of the 1951 Convention in response to mass flight from Venezuela. Potential explanations include the decisions of individuals engaged in making refugee status determinations, financial and institutional influence of the UNHCR, positive nationality-based discrimination, and international politics. Furthermore, while some factors were likely at play in both countries, there also appear to be specific motivations only applicable in Brazil or Mexico.

### (1) Individual State Officials Making Determinations

One critical factor to consider when examining why states choose to utilise broader bases for refugeehood is that asylum is not granted *en masse* at the executive or legislative level. While thousands of people have received asylum under broader Cartagena-based language, these processes are circumscribed by the resources of state agencies and determinations by individual decision-makers.<sup>121</sup> Researchers have found that an individual asylum officer's subjective perceptions, political calculations, and personal views influence their decision on how to apply the Cartagena Declaration to a particular case, if it is applied at all.<sup>122</sup> This is particularly relevant given that the 1951 Convention's grounds are typically applied before the Cartagena Declaration in Brazilian and Mexican RSD proceedings, and a claim's failure to meet standards under the former may negatively impact how a decision-maker views its success under the latter.<sup>123</sup>

An Argentinian asylum officer spoke to the power individual decision-makers hold in some asylum systems, saying “[w]e do not necessarily go through all the possible elements of the definition contained in the national regime. You just look at the case, and you work it out, according to where [you] believe it fits.”<sup>124</sup> Thus, even for countries that have implemented the Cartagena Declaration into national legislation like Brazil and Mexico, the broader bases for asylum can nevertheless be narrowed in practice by individuals. Additionally, multiple researchers have found that decision-makers often lack certainty as to what criteria an applicant or group of applicants must meet to receive protection under enumerated grounds laid out in

---

<sup>121</sup> Cintra de Oliveira Tavares and Pureza Cabral (n 90); 121; Reed-Hurtado (n 38) 162.

<sup>122</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>123</sup> Sánchez Nájera and Feline Freier (n 38) 38; Law N° 9.474 of 22 July 1997, s 12; Schmidtke and Gutiérrez Escobedo (n 2).

<sup>124</sup> Reed-Hurtado (n 38) 164.

the Cartagena Declaration.<sup>125</sup> However, the impact of potential biases of individual decision-makers is less strong in the case of Venezuelans in Brazil, as *CONARE* specifically created an accelerated RSD procedure for this group, enabling asylum to be granted to thousands at a time.<sup>126</sup>

## (2) UNHCR Influence

The United Nations High Commissioner for Refugees (UNHCR) is an influential force pushing Latin American governments to apply the Cartagena Declaration to Venezuelans. The UN agency possesses persuasive influence in international politics and has shaped states' responses to refugee crises, particularly in the case of Brazil where it helped draft the 1997 Refugee Act and regularly participates in *CONARE* meetings.<sup>127</sup> In 2010, the UNHCR announced its approval of the Mexican Law on refugees, complementary protection, and political asylum after it was formally passed by the Senate.<sup>128</sup>

The UNHCR first encouraged countries to apply the Cartagena Declaration's grounds for refugeehood to Venezuelans in March 2018, and pushed for this expanded wording to be used as a basis for accelerated asylum processing.<sup>129</sup> In May 2019, the UNHCR stated that it considered the majority of Venezuelans to be 'in need of international protection under the criteria contained in the Cartagena Declaration on the basis of threats to their lives, security or freedom resulting from the events that are currently seriously disturbing public order in Venezuela.'<sup>130</sup> Interestingly, Venezuelans have obtained asylum through the 'massive violations of human rights' provision, not the 'other circumstances which have seriously disturbed public order' provision. The UNHCR also encouraged countries to apply the Declaration to Venezuelan nationals through group-based procedures in December 2019.<sup>131</sup>

Brazil was both internationally praised and financially rewarded for heeding the UNHCR's recommendations. The UNHCR publicly lauded Brazil's decision to accept thousands of Venezuelan

---

<sup>125</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>126</sup> Lyra Jubilut and Jarochinski Silva (n 93); Boloch (n 94).

<sup>127</sup> Guy S Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69 *International and Comparative Law Quarterly* 1; Leomil (n 6) 15.

<sup>128</sup> UNHCR, 'ACNUR expresa satisfacción ante aprobación de Ley sobre Refugiados en México' (UNHCR, 10 December 2010) <<https://www.acnur.org/noticias/historias/acnur-expresa-satisfaccion-ante-aprobacion-de-ley-sobre-refugiados-en-mexico>> accessed 18 November 2024.

<sup>129</sup> UNHCR, 'Guidance Note on the Outflow of Venezuelans' (UNHCR, March 2018) <<https://www.refworld.org/docid/5a9ff3cc4.html>> accessed 18 November 2024.

<sup>130</sup> UNHCR, 'Guidance Note on International Protection Considerations for Venezuelans – Update I' (UNHCR, May 2019) <<https://www.refworld.org/docid/5cd1950f4.html>> accessed 18 November 2024; Sánchez Nájera and Feline Freier (n 38) 46.

<sup>131</sup> Cécile Blouin and others, 'The Spirit of Cartagena? Applying the Extended Refugee Definition to Venezuelans in Latin America' (Forced Migration Review, February 2020) <<https://www.fmreview.org/cities/blouin-berganza-freier>> accessed 18 November 2024.

asylum seekers under the Cartagena Declaration, with the regional UNHCR office proclaiming the 1997 refugee law as ‘one of the most advanced’ of its kind in 2022.<sup>132</sup> The UNHCR’s regional funding platform also allocated an additional \$82.2 million to Brazil between 2019 and 2020 for its acceptance of thousands of Venezuelan refugees.<sup>133</sup> Therefore, the organisational and financial influence of the UNHCR likely played a leading role in Brazil’s response to the humanitarian crisis in Venezuela. In recent years, the UNHCR does not appear to be as publicly involved with the Mexican government regarding Venezuelan refugee claims.<sup>134</sup>

### **(3) Nationality-based Discrimination**

One of the most apparent trends gleaned from the application of the Cartagena Declaration in Brazil and Mexico is that it has almost been exclusively applied to Venezuelan nationals. Despite the UNHCR publicly stating that the Cartagena Declaration could be applied to other groups, like those fleeing gang violence, Brazil and Mexico have sparingly provided asylum to other nationalities under provisions formulated by the Cartagena Declaration, even for other Latin Americans.<sup>135</sup> Central American countries, namely El Salvador, Honduras, and Nicaragua, experience widespread violence and instability but nationals from Central America have not been offered the same level of protection as Venezuelans.<sup>136</sup>

A study of Venezuelan, Honduran, and Salvadoran asylum seekers in Mexico revealed that 68% of Hondurans and 76% of Salvadorans reported direct threats to their lives, while only 52% of Venezuelans reported experiencing such persecution.<sup>137</sup> However, 38% of Venezuelans cited economic concerns as their main motivation for leaving the country, while only 3% of Hondurans and 0% of Salvadorans cited economic factors motivating their decision to flee.<sup>138</sup> As stated earlier, in Mexico, Honduran and Salvadoran asylum seekers had average grant rates of 76% and 66% respectively, while Venezuelans had a grant rate of 96%.<sup>139</sup> Thus, while more Central Americans in this study reported fleeing dangerous situations than

---

<sup>132</sup> André de Carvalho Ramos and others, ‘70 Anos da Convenção relativa ao Estatuto dos Refugiados - (1951-2021)’ (UNHCR, 2022) <<https://www.acnur.org/portugues/wp-content/uploads/2021/12/70-anos-projeto-WEB.pdf>> accessed 18 November 2024; Tinker and Madrid Sartoretto (n 20) 127-128.

<sup>133</sup> Leomil (n 6) 16.

<sup>134</sup> Eduardo Arboleda, ‘El ACNUR, las migraciones internacionales y el derecho de asilo y refugio’ (1994) 44 *Revista Mexicana de Política Exterior* 144.

<sup>135</sup> Blouin and others (n 131); Sánchez Nájera and Feline Freier (n 38) 40, 48.

<sup>136</sup> Sánchez Nájera and Feline Freier (n 38) 45.

<sup>137</sup> *ibid.*

<sup>138</sup> *ibid.*

<sup>139</sup> COMAR (n 8).

Venezuelans, such factors did not lead to higher grants of asylum. These numbers suggest that nationality is more determinative of receiving asylum in Mexico than claims of persecution.

Scholars have posited multiple theories as to why Venezuelans as a national group are broadly favoured in asylum proceedings, while Salvadorans and Hondurans enjoy less success.<sup>140</sup> One possibility is that Venezuelans constitute a recent group seeking protection abroad, as most Venezuelans only started fleeing in the past few years.<sup>141</sup> Venezuelans thus may not yet have exhausted their welcome in host countries.<sup>142</sup> Another possibility is that Venezuelans are associated with ‘more favourable socio-racial characteristics’ than Central Americans.<sup>143</sup> Thus, despite the geographic proximity and shared cultural heritage between Mexico, Honduras, and El Salvador, Venezuelans may be seen as more ‘deserving’ or ‘worthy’ of asylum by some Mexican decision-makers. In Brazil, it is harder to elucidate nationality-based outcomes because Venezuela borders the country, and few Central Americans have applied for asylum there.<sup>144</sup>

#### (4) International Relations and Politics

However, what is likely the most decisive factor in the Brazilian and Mexican government’s decision to grant asylum *en masse* to Venezuelans are international political considerations. Granting asylum to thousands of another country’s nationals is a bold political statement—a state is implying that they are potentially willing to provide a permanent path to residency based on the perceived failure of another state to sufficiently protect its own people.<sup>145</sup> By granting asylum to at least 61,000 people owing to a finding of a ‘massive violation of human rights’, the Brazilian and Mexican governments are sending a message that they view the Venezuelan government as an enabler of or contributor to systemic human rights crises.<sup>146</sup> While such political considerations were not intended to be a factor in adjudicating asylum claims in 1984, it seems to be an unavoidable reality.<sup>147</sup>

---

<sup>140</sup> *ibid.*

<sup>141</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>142</sup> Luciana Gandini and others, “Aprender a ser migrante: Bondades y tensiones que enfrenta la comunidad venezolana en México”, in Luciana Gandini and others (eds), *Crisis y migración de población venezolana: Entre la desprotección y la seguridad jurídica en Latinoamérica* (Universidad Nacional Autónoma de México 2019).

<sup>143</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>144</sup> CONARE (n 8).

<sup>145</sup> Fiona Adamson and Gerasimos Tsourapas, ‘Migration as Diplomacy in World Politics’ (2018) 19 *International Studies Perspectives* 1.

<sup>146</sup> Isabel Berganza Setién and others, ‘El elemento situacional de violación masiva de derechos humanos de la definición ampliada de Cartagena : hacia una aplicación en el caso venezolano’ (2020) 47 *Revista Chilena de Derecho* 385; Reed-Hurtado (n 38) 164; Leomil (n 6) 14.

<sup>147</sup> Reed-Hurtado (n 38) 164.

The leadership of the Brazilian and Mexican governments therefore presumably granted asylum to thousands of foreign nationals to signal its condemnation of the Venezuelan socialist government, either to win political points domestically and/or to align themselves with other foreign governments that oppose the Venezuelan state. Both scenarios are equally likely regarding the Brazilian government. Relations between Venezuela and Brazil were poor after President Maduro came to power and sank to an all-time low when right-wing President Jair Bolsonaro took office in 2019.<sup>148</sup>

The Bolsonaro administration publicly called Maduro a dictator, questioned the stability of the country's rule of law, and sought to delegitimize the Venezuelan government in international arenas.<sup>149</sup> The administration also selected agency leaders for *CONARE* who would not be concerned about further harming relations between Brazil and Venezuela.<sup>150</sup> Most notably, Brazil's mass acceptance of Venezuelan refugees directly coincided with President Bolsonaro's rise to power in 2019. In 2018, Brazil accepted three Venezuelan refugees and in 2019 this number jumped to 20,696.<sup>151</sup> Therefore, the Bolsonaro administration inferably sought to score political points at home and align itself with the Trump administration, which was also highly critical of the Venezuelan government.<sup>152</sup>

Academics have argued that former Mexican President Enrique Peña Nieto enabled the mass grant of asylum to Venezuelans to send a critical message to the Maduro government and align himself with U.S. interests.<sup>153</sup> However, while the Mexican Government and its recent leaders have been periodically critical of President Maduro and the Venezuelan government, there is far less public political animosity between Mexico and Venezuela compared to Brazil and Venezuela.<sup>154</sup> Additionally, unlike Brazil's rapid increase in accepting refugees in 2019 coinciding with the start of President Bolsonaro's term, Mexico has consistently accepted Venezuelan refugees during centrist Peña Nieto's administration and the more left-wing López Obrador administration.<sup>155</sup> In other words, once Mexico's more liberal President came to power in 2018, the number of accepted Venezuelan asylum seekers did not drastically decrease as a signal of Mexico's alignment with the left-wing Venezuelan government. Ultimately, given the unprecedented number of asylum claims granted under the Cartagena Declaration by Brazil and Mexico, these governments were likely driven primarily by political self-interest, rather than an altruistic desire to help the Venezuelan people.<sup>156</sup>

---

<sup>148</sup> Leomil (n 6) 12.

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.* 13.

<sup>151</sup> *CONARE* (n 8).

<sup>152</sup> Leomil (n 6) 14.

<sup>153</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>154</sup> Genaro Lozano, 'How to Understand Mexico's Lonely Stance on Venezuela' (*Americas Quarterly*, 13 February 2019) <<https://www.americasquarterly.org/article/how-to-understand-mexicos-lonely-stance-on-venezuela/>> accessed 18 November 2024.

<sup>155</sup> *COMAR* (n 8).

<sup>156</sup> Leomil (n 6) 14; Adamson and Tsourapas (n 145) 1.

## E. APPLYING THE CARTAGENA DECLARATION TO OTHER HUMANITARIAN CRISES

Before precedent or guidance can be extrapolated from the applications of the Cartagena Declaration's bases for refugeehood, two considerations must be kept in mind. First, it is crucial to remember that administrative bodies like *CONARE* and *COMAR* enjoy fluctuating amounts of resources and independence over time.<sup>157</sup> Brazil and Mexico have been led by multiple Presidents and administrations since the Venezuelan economy collapsed. Therefore, a state's decision to apply a broader understanding of refugeehood will largely be determined by the administration leading a country. Secondly, even though over 60,000 people received asylum through language originating from the Cartagena Declaration, this does not automatically create legal precedent.<sup>158</sup> Between the varied legislation across Latin American countries, individual decision-making authority, and political considerations, there is no requirement that Brazil, Mexico, or any other country utilise the Cartagena Declaration's grounds in the future.<sup>159</sup> However, despite these caveats, valuable inferences can be drawn by advocates hoping to apply the broader formulation to other circumstances.

The 'massive human rights violations' provision under the Cartagena Declaration is thus far from the only successful vehicle for employing more expansive bases of refugeehood anywhere in the world. Other innovative grounds for asylum originating in the Global South, like occupation, are not yet actionable. Regarding other bases for asylum found in the Cartagena Declaration, the lack of application of 'foreign aggression' as grounds for asylum in the past forty years is not surprising in the Latin American context. However, although not legally defined, the ground 'circumstances which have seriously disturbed public order' also seem to coincide with the Venezuelan context given widespread instability and the inaccessibility of food and medicine. This begs the question as to whether advocates can push for asylum on this ground, as well as for other individuals and communities in similarly situated circumstances.

Looking ahead, there are three likely conditions that must be satisfied before wider application of the Cartagena Declaration can be considered. First, countries need to incorporate all grounds in the Declaration into national legislation. Cuba, Panama, the Dominican Republic, and Venezuela have not introduced the Cartagena Declaration into national legislation at all.<sup>160</sup> Secondly, advocates should lobby the UNHCR and its regional offices to explicitly state that governments should apply the Cartagena Declaration because of a serious human rights situation. The UNHCR was a persuasive player in pushing

---

<sup>157</sup> Reed-Hurtado (n 38) 162.

<sup>158</sup> *ibid*; Sánchez Nájera and Feline Freier (n 38) 48.

<sup>159</sup> Luisa Feline Freier and Cristián Doña-Reveco, 'Introduction: Latin American Political and Policy Responses to Venezuelan Displacement' (2022) 60 *International Migration* 9; Reed-Hurtado (n 38) 162.

<sup>160</sup> Blouin and others (n 131).

Brazil to use the Cartagena Declaration in response to the Venezuela crisis.<sup>161</sup> Finally, national governments need a strong reason to grant asylum outside of the traditional 1951 Convention's bases, and as the case of Brazil and Mexico demonstrate, this reason will almost certainly be political and not purely altruistic. Therefore, advocates should pay attention to and take advantage of geopolitical strife if a certain administration would be receptive to granting individuals relief from persecution to send a political message.

Furthermore, regarding international relations, it is presumably less politically costly for a state to grant asylum based on systemic human rights violations than on a deterioration of public order. Granting asylum is an implicit recognition by one nation that another country cannot adequately protect its own people.<sup>162</sup> The disruption of public order implies that such deteriorative effects are felt at all levels of society, whereas massive human rights violations could still be directed against a select group. Thus, while relations between states could deteriorate because of mass asylum grants based on a finding of massive human rights violations, such deterioration would potentially be less severe than recognizing that another country lacks widespread public order. Consequently, the most crucial step advocates can take when seeking to use a regional document to help more claimants gain asylum is to think politically and act strategically.

There is no guarantee that a situation like that of Venezuela, Brazil, and Mexico will ever be replicated in the future. Nevertheless, given that Brazil and Mexico responded in similar ways to the Venezuelan crisis, it does not seem improbable that these states could respond similarly in the future. This could subsequently encourage other countries in Latin America to follow suit and begin the creation of regional customary law. Of course, in Africa, states would need to take unprecedented steps to facilitate the OAU Convention's use in practice. Although these regional conceptualisations have existed for decades, the Cartagena Declaration was not extensively used in practice even ten years ago. Therefore, it is conceivable that the invocation of the Cartagena Declaration in Latin America could continue to proliferate and inspire other nations in the Global South to follow suit.

---

<sup>161</sup> 'ACNUR felicita a Brasil por reconocer la condición de refugiado a las personas venezolanas con base en la Declaración de Cartagena' (n 86).

<sup>162</sup> Reed-Hurtado (n 38) 164; Leomil (n 6) 14.

## F. CONCLUSION

As the last century has shown, the legal grounds for refugeehood are far from fixed. They demonstrably continue to evolve to account for new bases of persecution and human rights imperatives. While the 1969 OAU Convention and the 1984 Cartagena Declaration have not gained as much global traction as the 1951 Convention, their broadened encapsulations of refugeehood offer substantial aspirational value. These regional formulations not only entail broader bases upon which to pursue asylum but were designed in response to harm emanating from historical experiences not accounted for in the 1951 Convention.<sup>163</sup> The persecution of thousands of individuals, notably from countries in the Global South, cannot always be directly connected to race, religion, nationality, membership in a particular social group, or political opinion. Such individuals may not be eligible for relief based on Western, post-World War II conceptions of persecution. Yet, these people could obtain legal relief for fleeing harms associated with foreign occupation and internal conflicts if the option is available.

Furthermore, although these regional documents have been applied sparingly, their application in Brazil and Mexico nevertheless provides a template for advocates to replicate in the future. The supposed 100% success rate of the 61,000 Venezuelan asylees who received protection in Brazil and Mexico account for 0.2% of Venezuela's total 2014 population—which should not be discounted.<sup>164</sup> While exact replication of this success to other communities or populations is unlikely, advocates should nevertheless look to the factors that influenced the successful application of the Cartagena Declaration for Venezuelans and attempt to apply them in their own jurisdictions. Advocates should not discount the power that the UNHCR and international politics can wield in major crises.

Law is not stagnant. It slowly but surely evolves, building upon mistakes of the past. The OAU Convention and the Cartagena Declaration have already laid theoretical foundations for the legal advancement of the 1951 Convention. Advocates and receptive governments should utilise the recent momentum of the Cartagena Declaration's application to begin modernising asylum law and firmly establish more bases for protection in the twenty-first century.

---

<sup>163</sup> Fischel de Andrade (n 29).

<sup>164</sup> 'Declaración de Cartagena en México' (n 115) 13; Sánchez Nájera and Feline Freier (n 38) 44; CONARE (n 8); 'Population, Total - Venezuela, RB' (n 83).

**GREENING THE INTERNATIONAL CRIMINAL COURT: A CRITICAL INQUIRY INTO  
ENVIRONMENTAL LIABILITY UNDER THE ROME STATUTE**

*Solomon Mayers\**

**A. INTRODUCTION**

**B. CONTEXT**

**C. ENVIRONMENTAL DAMAGE AS A WAR CRIME**

(1) Material Scope

(2) Damage and Proportionality

(3) Article 8(2)(b)(iv): An Impotent Mechanism

**D. ENVIRONMENTAL DAMAGE AS AN UNDERLYING ACT**

(1) Genocide

(2) Crimes Against Humanity

(3) Environmental Liability Through an Anthropocentric Lens

**E. CONCLUSION**

---

\* Research Intern and Scots Law LLB Graduate from the University of Glasgow.

## A. INTRODUCTION

The International Court of Justice speaks of the natural environment as the “living space, the quality of life and the very health of human beings, including generations unborn.”<sup>1</sup> However, this vital asset faces a profound threat. The very ecosystems that sustain all life are at risk of destabilisation due to decades of deforestation, habitat clearance, carbon emissions, unsustainable resource extraction, destructive methods of warfare, and pollution of land, water and air.<sup>2</sup> Given the emerging consensus that the “triple planetary crisis” of climate change, biodiversity loss and pollution bears existential implications,<sup>3</sup> international organisations have faced heightened calls to confront the causes of environmental decline. Although not typically associated with ecocentric ambitions, attention has nevertheless turned to the role of international criminal law and its institutional body, the International Criminal Court (ICC), to mobilise its enforcement machinery against the authors of environmental degradation. Hence, this article examines the ICC’s substantive criminal law framework to appraise its viability as a forum for addressing serious incidents of environmental harm. Therein, it is argued that the ICC’s green jurisdiction is too narrowly framed to pursue environmental concerns in either a practically meaningful or normatively satisfactory manner.

## B. CONTEXT

An examination of environmental liability under international criminal law benefits from surveying its normative and policy context. The Preamble to the Rome Statute of the International Criminal Court (the Rome Statute)<sup>4</sup>, the ICC’s constitutive document, casts its jurisdiction over the “most serious crimes of concern to the international community,” which “threaten the peace, security and well-being of the world.”<sup>5</sup> As Triffterer and Ambos observe, the drafters of the Rome Statute deliberately inserted the term “world” over more anthropocentric language to signal concern not only for humanitarian rights, but also the natural

---

<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226, 241-242.

<sup>2</sup> For a comprehensive explanation: see Polly Higgins, Damien Short and Nigel South, ‘Protecting the planet: a proposal for a law of ecocide’ (2013) 59 *Crime Law Social Change* 251, 252-255.

<sup>3</sup> United Nations Environmental Programme, *Global Resources Outlook – Bend the trend: pathways to a liveable planet as resource use spikes* (2024) ix; International Governmental Panel on Climate Change, *Climate Change 2023: Synthesis Report – Summary for Policymakers* (2023) 24-25.

<sup>4</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

<sup>5</sup> *ibid.* Art. 5 and Preamble paras. 3-4.

conditions on which they depend.<sup>6</sup> This interpretation suggests an interdependence between environmental integrity and the core collective values protected by international criminal law, reinforcing the notion that effective protection of human interests requires the preservation of the vital ecosystems upon which they depend.<sup>7</sup> However, caution is warranted in assigning too much significance to this subtle preambular clue, as its normative influence is undermined by an unmistakable anthropocentric disposition in the substantive text of the Rome Statute.

The ICC's jurisdiction *ratione materiae* is confined to the four "core crimes": aggression, war crimes, genocide, and crimes against humanity.<sup>8</sup> Proposals for a discrete, ecocentric crime against nature were ultimately discarded by drafters of the Rome Statute.<sup>9</sup> Nevertheless, in response to the calls for the ICC to engage more directly with global environmental decline, the Office of the Prosecutor has, since 2016, placed a policy emphasis on crimes committed by means of (or resulting in) environmental destruction within case selection strategies.<sup>10</sup> However, any expectation that this "green shift" would induce a sharper focus on environmental concerns is dispelled by the lack of such substantial investigations, prosecutions, or convictions by the ICC hitherto.<sup>11</sup> Several factors may explain this outcome. For one, empirical research into the Prosecutor's exercise of discretion indicates an aesthetic bias towards highly visible instances of human casualty or suffering, steering attention away from suspected environmental wrongdoing which yields less immediate humanitarian implications.<sup>12</sup> This article advances evidence of this structural preference at a more doctrinal level, positing that the Rome Statute's substantive criminal law embeds an overly narrow view of environmental liability. Thus, even with a strong policy impetus, the ICC can exert only a modest jurisdiction over perpetrators of environmental degradation.

---

<sup>6</sup> Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (CH Beck 2022) 10.

<sup>7</sup> Rosemary Mwanza, 'Enhancing Accountability for Environmental Damage under International Criminal Law: Ecocide as a Legal Fulfilment of Ecological Integrity' (2018) 19 MJIL 586, 597.

<sup>8</sup> Rome Statute (n 4) art. 5.

<sup>9</sup> The International Law Commission proposed a crime of "wilful and severe damage to the environment" in its draft code of crimes against the peace and security of mankind, although this was excluded from the final document. See International Law Commission, *Yearbook of the International Law Commission 1991, vol II, pt. 2, Report of the Commission to the General Assembly on the Work of its 43<sup>rd</sup> Session* UN Doc A/CN.4/SER.A/1991/Add.1, 97.

<sup>10</sup> Office of the Prosecutor, *Policy paper on case selection and prioritisation* (15 September 2016) 3-4; OTP, *Draft Policy on Environmental Crimes under the Rome Statute* (18 December 2024).

<sup>11</sup> Despite relevant communications from situations in Cambodia and Nigeria. See ICC-OTP, *Report on Preliminary Examination Activities 2020* (14 December 2020) 11; ICC-OTP, *Report on Preliminary Examination Activities 2018* (5 December 2018) 58.

<sup>12</sup> Rachel Hamilton, 'Criminalizing Ecocide: An Opportunity to Embed the Inseparability of Humans from Nature into Law' (2025) 38 Harvard Human Rights Journal 69; Randle DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (1<sup>st</sup> edn, CUP 2022) 251.

### C. ENVIRONMENTAL DAMAGE AS A WAR CRIME

Environmental destruction routinely accompanies armed conflict. This phenomenon is well-evidenced in the “Agent Orange” herbicide deployed by the US military across six million acres of land during the Vietnam War, the scorched earth tactics of Iraqi soldiers combusting oil wells and polluting adjacent water sources in Kuwait, and the destruction of the Kakhovka dam in Ukraine by Russian forces, resulting in catastrophic flooding and environmental devastation.<sup>13</sup> Given this legacy, Additional Protocol I to the Geneva Conventions (AP I)<sup>14</sup> and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)<sup>15</sup> sought to regulate wartime environmental damage, introducing a proscription on such significant and excessive harm into international humanitarian law.<sup>16</sup> Article 8(2)(b)(iv) of the Rome Statute embeds these norms, criminalising the intentional launching of an attack with knowledge that it would cause “widespread,” “long-term,” and “severe” damage to the natural environment, where such damage is “clearly excessive” to the concrete and direct military advantage anticipated. This represents the singular ecocentric clause in the Rome Statute that ascribes intrinsic significance and independent protection to the natural environment, such that an attack is sufficient to trigger liability, even in the absence of a direct humanitarian impact. As Cusato posits, this dissent from the anthropocentric consensus of harm otherwise maintained by the Rome Statute carries strong symbolic weight.<sup>17</sup>

#### (1) Material Scope

Although an ecocentric crime is expressively potent, its application is curtailed by strict conditions of liability. As a war crime, Article 8(2)(b)(iv) requires the coincidence of environmental damage with international armed conflict.<sup>18</sup> This factual nexus is problematic for two key reasons. First, the conduct of non-international armed conflict has an equally, if not greater, adverse impact on the natural environment, due both to the higher frequency of internal conflicts and the often more localised and aggressive nature of

---

<sup>13</sup> Bronwyn Leebaw, ‘Scorched Earth: Environmental War Crimes and International Justice’ (2014) 12 *Perspectives on Politics* 770; Shah Maruf, ‘Environmental Damage in Ukraine as Environmental War Crime Under the Rome State: The Kakhovka Dam Breach in Context’ (2024) 22 *JCIJ* 99, 103-105.

<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I).

<sup>15</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Technique (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD).

<sup>16</sup> AP I, art. 35(3); ENMOD, art. 1(1).

<sup>17</sup> Eliana Cusato, ‘Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC’ (2017) 15 *JCIJ* 491, 496.

<sup>18</sup> Rome Statute (n 4) arts. 8 and 8(2)(b); Assembly of State Parties to the Rome Statute of the International Criminal Court, *Elements of Crimes* (in force 9 September 2002) ICC-ASP/1/3 108; Art. 8(2)(b)(iv) Element 5.

insurgency warfare.<sup>19</sup> The extensive land-mining of biodiverse natural parks during the 1990-1994 Rwandan civil war, contamination of water sources by Colombian anti-government rebels sabotaging oil pipelines, and scorched earth tactics of Islamic State militants igniting oil wells outside Mosul and polluting surrounding land, all exemplify the destructive military practices that elude international criminal law scrutiny under Article 8(2)(b)(iv).<sup>20</sup> The restriction of its application to wartime scenarios neglects the greater global environmental decline caused by the industrial and unsustainable exploitation of natural resources during peacetime.<sup>21</sup> Even the upstream conduct of such activities to finance military operations is unlikely to fall within Article 8(2)(b)(iv), since the provision envisages a kinetic “attack” directly associated with active hostilities.<sup>22</sup> Criticism that this provision overlooks peacetime environmental damage is perhaps misplaced, given war crimes are conceived to regulate *jus in bello* rather than to provide comprehensive protection of environmental interests. Yet if the Rome Statute already condemns certain environmentally destructive practices during armed conflict, the absence of an equivalent peacetime provision speaks to both a substantive oversight and normative inconsistency in international criminal law that is difficult to justify on factual grounds.<sup>23</sup>

## (2) Damage and Proportionality

The specific objective and subjective elements of Article 8(2)(b)(iv) are equally restrictive. The *actus reus* refers to an impact threshold of “severe,” “widespread,” and “long-term” harm. In their ordinary meaning, “severe” relates to the intensity of the environmental damage caused, whereas “long-term” and “widespread” connote a specific temporal and geographical impact, respectively.<sup>24</sup> However, the Rome Statute and the Elements of Crimes are silent on the precise threshold at which the intensity and scale of an attack trigger liability; the ICC has yet to provide any substantial guidance on this point within its jurisprudence.<sup>25</sup> Without

---

<sup>19</sup> Mark Drumbl, ‘Waging War Against the World: The Need to Move From War Crimes To Environmental Crimes’ in Jay Austin and Carl Bruch (eds), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* (CUP 2010) 631; Jessica Lawrence and Kevin Jon Heller, ‘The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime’ (2007) 20 *Georgetown International Environmental Law Review* 61, 85.

<sup>20</sup> Lawrence and Heller (n 19) 84-85; Thibaud de La Bourdonnaye, ‘Greener insurgencies? Engaging non-State armed groups for the protection of the natural environment during non-international armed conflicts’ (2020) 102 *International Review of the Red Cross* 574, 583-84.

<sup>21</sup> Mwanza (n 7) 598-605; Mark Drumbl, ‘International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?’ (2001) 6(2) *ILSA Journal of International and Comparative Law* 305, 325.

<sup>22</sup> Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (CUP 2022) 96-97.

<sup>23</sup> Frédéric Mégret, ‘The Case for a General International Crime against the Environment’ in Sébastien Jodoin and Marie-Claire Cordonier Segger (eds), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (CUP, 2013) 56.

<sup>24</sup> For further detail, see Ananya Mukherjee, ‘Article 8(2)(b)(iv) of the Rome Statute: All Bark and No Bite?’ (2021) 3 *International Journal of Legal Science and Innovation* 997, 999-1001.

<sup>25</sup> According to: ICC, ‘Case Law Database’ (ICC Legal Tools Database) <<https://legal-tools.org/cld>> accessed 1 April 2025, input ‘Keyword Search’ and ‘Article 8(2)(b)(iv)’; seventeen results were provided, none defined the impact criteria.

statutory or judicial clarity, the ICC may resort to existing interpretations of identical terminology in the ENMOD and AP I.<sup>26</sup> On this view, liability would attach where environmental harm causes serious disruption to human life or natural and economic resources, encompassing an area of several hundred square kilometres and enduring for a period of either months or decades, depending on the definition consulted.<sup>27</sup>

Should Article 8(2)(b)(iv) import the standard envisaged by the ENMOD and AP I, two key limitations would arise. First, these instruments adopt anthropocentric measurements of scale and intensity, which presuppose that environmental damage can be neatly quantified and assessed along such parameters;<sup>28</sup> this claim does not align with contemporary scientific knowledge, which recognises the more complex and non-linear dynamics governing ecological processes that do not observe such arbitrary boundaries.<sup>29</sup> Second, the criteria of “severe,” “widespread,” and “long-term” apply conjunctively. Thus, assuming the definitions offered by the ENMOD and AP I are correct, liability for this crime can arise only in the most extreme cases. Save for the use of certain nuclear, chemical, or biological weaponry, conventional means and methods of warfare that are unable to attain the requisite gravity face no meaningful resistance from Article 8(2)(b)(iv).<sup>30</sup>

As such, the proportionality element of Article 8(2)(b)(iv) merits attention. It demands the damage be “clearly excessive” to the “concrete and direct overall military advantage anticipated.” By inserting the qualifier “clearly” and adopting the less stringent “military advantage” test, as opposed to the more exacting doctrine of “military necessity” in international humanitarian law, Article 8(2)(b)(iv) applies a proportionality analysis that is deferential to military interests.<sup>31</sup> This latitude is expanded by the vexing *mens rea* element which requires the specific perpetrator’s foreknowledge that the environmental damage would be clearly excessive.<sup>32</sup> Given the conviction that commanders and political leaders attach to military objectives, it would be difficult for the ICC to refute any subjective value judgment that the environmental damage was disproportionate to the aim pursued.<sup>33</sup> Therefore, this test performs an exculpatory function,

---

<sup>26</sup> Rome Statute (n 4) art. 21(1)(b).

<sup>27</sup> UNGA, ‘Report of the Conference of the Committee on Disarmament’ (Volume 1, 1976) UN Doc A/31/27, understanding of ENMOD, art. 1; travaux préparatoires to AP I measure “long-term” in decades but omit a definition of “severe” or “widespread.”

<sup>28</sup> ENMOD and AP I measure “severe” by disruption to human life or economic resources, “long-term” by decades, seasons or months, and “widespread” by kilometres.

<sup>29</sup> Harriet Nash, ‘Defining Appropriate Spatial and Temporal Scales for Ecological Impact Analysis’ (2014) 16 *Environmental Practice* 281, 284; Jean Clobert and Michel Loreau, ‘Theory and experiments to decipher the role of time and space in ecological systems, from populations to ecosystems’ (Research Features, 15 July 2021) <<https://researchfeatures.com/theory-experiments-decipher-time-space-ecological-systems-populations-ecosystems/>> accessed 16 November 2024; Drumbl (n 19) 625.

<sup>30</sup> Karen Hulme, ‘Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies’ (1997) 2 *JACL* 45, 61.

<sup>31</sup> Drumbl (n 21) 319-320.

<sup>32</sup> *Elements of Crimes* (n 18) art. 8(2)(b)(iv) Element 3.

<sup>33</sup> Gillet (n 22) 109-110.

enabling even the most serious instances of severe, widespread, and long-term environmental harm to be authorised on speculative military grounds.

### **(3) Article 8(2)(b)(iv): An Impotent Mechanism**

Article 8(2)(b)(iv) has merit by indirectly acknowledging the environment as an independent interest in international criminal law. Yet, given the way the contextual, objective, and subjective elements conspire to truncate its prohibitive force, this recognition is largely cosmetic. Indeed, while appealing to ecocentric aspirations on a symbolic level, Article 8(2)(b)(iv) offers little prospect of enforcing this interest against the perpetrators of environmental destruction.

## **D. ENVIRONMENTAL DAMAGE AS AN UNDERLYING ACT**

Without a strong basis to ground environmental liability under Article 8(2)(b)(iv), attention turns to the capacity of other substantive crimes to perform this function, namely, genocide and crimes against humanity.<sup>34</sup> In contrast to war crimes, genocide and crimes against humanity dispense with the nexus of armed conflict,<sup>35</sup> expanding the factual circumstances in which international criminal law may be applied to environmental destruction. However, express protection for the environment is not directly bestowed in peacetime scenarios, requiring environmental liability to be inferred from humanitarian atrocity. In this respect, the rule on *nullum crimen sine lege* binds the ICC to a strict interpretation of existing definitions,<sup>36</sup> cautioning against an artificially expansive construction of Articles 6 and 7. Nevertheless, there remains scope to read a green dimension into underlying acts of genocide or crimes against humanity while remaining faithful to the principle of legality.

---

<sup>34</sup> Rome Statute (n 4) arts. 5-7.

<sup>35</sup> Neither the Rome Statute, arts. 6-7, nor the *Elements of Crimes* indicate a requirement of armed conflict.

<sup>36</sup> Rome Statute (n 4) art. 22.

## (1) Genocide

Article 6 of the Rome Statute defines genocide as any underlying act committed with intent to entirely or partly destroy a certain ethnic, national, religious, or racial group. Thus, the operative core is the intention to erase a protected group, with environmental destruction potentially serving as a means of realising that aim. This thesis finds support in the *Prosecutor v Akayesu* decision, where the International Criminal Tribunal for Rwanda recognised the use of systematic rape as a tool to further genocidal objectives.<sup>37</sup> Although this tribunal jurisprudence does not assume automatic relevance for the ICC as a matter of doctrinal precedent,<sup>38</sup> the *Akayesu* case nonetheless sets out the logical basis for similarly conceptualising environmental harm as a means of perpetrating genocide.<sup>39</sup> Most relevant to this approach is Article 6(c) of the Rome Statute, which identifies the deliberate infliction of conditions of life calculated to bring about the physical destruction of a protected group, in whole or in part, as a possible genocidal act. The Elements of Crimes define such “conditions of life” as including resources indispensable for a group’s survival;<sup>40</sup> thus, it is plausible to conceive of a directed attack on a protected group’s natural means of subsistence as forming part of a broader genocidal policy. This nexus between environmental harm and genocide was acknowledged by the ICC in *Prosecutor v Al-Bashir*, where the Pre-Trial Chamber found the contamination of wells and water pumps in areas of Sudan specifically occupied by the Fur, Masalit, and Zaghawa ethnic groups contributed to the infliction of unsustainable conditions calculated to bring about their destruction.<sup>41</sup> While the ICC has yet to apprehend Al-Bashir to substantively test this logic at trial, there is no reason to suspect it cannot be applied in other cases.<sup>42</sup>

However, prospects for prosecuting genocide by environmental means are limited by the crime’s exacting *mens rea*. Article 6 requires that the perpetrator act with *dolus specialis*, a specific intention to destroy a protected group, in whole or in part. Scholars acknowledge the significant legal and evidentiary barriers to establishing *dolus specialis* in ordinary circumstances,<sup>43</sup> which are particularly acute in an environmental context. International law has steadily crystallised the concept of “sustainable development” as the normative paradigm for reconciling human wellbeing with sustainability objectives.<sup>44</sup> It is therefore

---

<sup>37</sup> *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) paras 731-732.

<sup>38</sup> Rome Statute, art. 21(1)(b): “the Court shall apply [...] where appropriate, [...] the principles and rules of international law [...]”

<sup>39</sup> Tara Weinstein, ‘Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities’ (2005) 17 *Georgetown International Environmental Law Review* 697, 714.

<sup>40</sup> International Criminal Court, *Elements of Crimes* (2011), art. 6(c) element 4 (n 4).

<sup>41</sup> *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Pre-Trial Chamber Decision) ICC-02/05-01/09 (12 July 2010) 7.

<sup>42</sup> Cusato (n 17) 499.

<sup>43</sup> For example, see Kai Ambos, ‘What does ‘intent to destroy’ in genocide mean?’ (2009) 91 *International Review of the Red Cross* 833, 840.

<sup>44</sup> The Rio Declaration on Environment and Development (adopted by UN Conference on Environment and Development 3-14 June 1992) UN Doc A/CONF.151/26 (Vol 1) (Rio Declaration); see also, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) 1997 ICJ Rep 7 (25 September 1997), Separate Opinion of Vice-President Weeramantry, 95.

premised on the acceptance of some level of environmental destruction in pursuit of socioeconomic development.<sup>45</sup> The Rio Declaration on Environment and Development, for instance, expressly affirms the right of states to exploit resources pursuant to environmental and developmental policies within their jurisdiction.<sup>46</sup> As Sharp observes, this right to development provides a strong conceptual basis for state or corporate actors to excuse the fatal deterioration of vital environmental conditions affecting a local ethnic or indigenous population by reference to some communal benefit.<sup>47</sup>

It is illustrative to examine the case of the Shiite Ma'Dan people who inhabited marshlands in Southern Iraq. Sustained attempts to destroy the indigenous group were precipitated when the Iraqi state constructed a system of dams and canals to drain these marshlands and destroy indispensable resources, resulting in the death and displacement of an estimated 200,000 to 400,000 individuals.<sup>48</sup> Yet, allegations of genocide were obfuscated by the contrary developmental objectives proffered by Iraqi officials.<sup>49</sup> Without strong evidence of *dolus specialis*, thinly disguised socioeconomic justifications remain an effective tool to thwart genocide prosecutions, even where facts align with the crime's objective element. Thus, persuading the ICC that a case of targeted environmental harm alone amounts to an act of genocide would be decidedly challenging, weakening the potential of Article 6 as an effective mechanism for environmental liability.

## **(2) Crimes Against Humanity**

Article 7 offers a more expansive basis for environmental liability under the crimes against humanity rubric when knowingly committed as part of a widespread or systematic attack against the civilian population.<sup>50</sup> While articulating an exhaustive list falls outside the scope of this paper, the crimes of extermination, deportation, or forcible transfer of population, and persecution are the most relevant underlying acts for the present purposes.<sup>51</sup> "Extermination" is understood to include the infliction of conditions of life calculated to cause the destruction of a part of the population,<sup>52</sup> thereby encompassing the same conduct

---

<sup>45</sup> Raymond Cléménçon, 'Is sustainable development bad for global biodiversity conservation?' (2021) 4 Global Sustainability 1, 2.

<sup>46</sup> Rio Declaration (n 44) Principle 2.

<sup>47</sup> Peter Sharp, 'Prospects for Environmental Liability in the International Criminal Court' (1999) 18 Virginia Environmental Law Journal 217, 234.

<sup>48</sup> Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, Marsh Arabs, and Environmental Damage in Non-International Conflicts' (2004) 27 Colorado Environmental Law Journal 1, 3-4.

<sup>49</sup> Weinstein (n 39) 718-19.

<sup>50</sup> Rome Statute (n 4) art. 7(1).

<sup>51</sup> *ibid.* Arts. 7(1)(b), (d) and (h).

<sup>52</sup> *ibid.* Art. 7(2)(b).

examined in respect of genocide, albeit within the framework of a “mass killing” of the civilian population as part of a widespread or systematic attack.<sup>53</sup>

“Deportation or forcible transfer” refers to the forced displacement of persons from an area in which they were lawfully present, through expulsion or coercive acts.<sup>54</sup> This can incorporate environmental harm where displacement is induced by destabilising essential resources and ecosystems relied upon by local populations; examples of this are defoliating a forested region or discharging pollutants into a water source to compromise means of subsistence.<sup>55</sup> Such acts are frequently associated with “land-grabbing”, whereby communities are evicted from fertile land for exploitation and economic gain.<sup>56</sup> For instance, a communication under Article 15 of the Rome Statute invited the Prosecutor to initiate a *proprio motu* investigation into the mass expulsion of civilians from their lands following a land-grab and associated deforestation by the “Ruling Elite” in Cambodia.<sup>57</sup>

Finally, “persecution” refers to the intentional and severe deprivation of fundamental rights, contrary to international law, against a protected group.<sup>58</sup> Although international law has yet to articulate a distinct and uniform right to a healthy environment, an emerging body of green human rights scholarship supports environmental integrity by situating it within established rights, including the rights to life, physical health, adequate nutrition, housing, privacy, and cultural life.<sup>59</sup>

Prosecutors could draw on these insights to ground charges of persecution in instances of environmental manipulation carried out pursuant to a discriminatory animus. This is particularly pertinent in cases where Indigenous communities face habitat destruction or the destabilisation of shelter or subsistence, in breach of fundamental rights, as a result of occupying profitable land that obstructs developmental agendas.<sup>60</sup> However, it is important to note that persecution can only occur in connection with another international crime,<sup>61</sup> limiting its utility as an independent mechanism for environmental liability.<sup>62</sup>

---

<sup>53</sup> ICC, *Elements of Crime*, art. 7(1)(b) Elements 2-3.

<sup>54</sup> Rome Statute (n 4) art. 7(2)(d).

<sup>55</sup> Luigi Prospero and Jacopo Terrosi, ‘Embracing the ‘Human Factor’ (2017) 15 JICJ 509, 520.

<sup>56</sup> *ibid.*

<sup>57</sup> Global Diligence, ‘Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia – July 2002 to Present’ (7 October 2014) <[https://www.fidh.org/IMG/pdf/executive\\_summary-2.pdf](https://www.fidh.org/IMG/pdf/executive_summary-2.pdf)> accessed 30 March 2025; Gillet (n 22) 82.

<sup>58</sup> Rome Statute, art. 7(2)(g).

<sup>59</sup> Mark Gray, ‘The International Crime of Ecocide’ (1996) 26 California Western International Law Journal 215, 222-223; Lisa Oldring and Kate Mackintosh, ‘The Crime of Ecocide Through Human Rights: A New Tool for Climate Justice’ (International Crimes Database, Brief 27, 2022) 2.

<sup>60</sup> Alessandra Mistura, ‘Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework’ (2018) 43 Columbia Journal of Environmental Law 181, 209.

<sup>61</sup> Rome Statute (n 4) art. 7(1)(h); ICC, *Elements of Crime*, art. 7(1)(h) Element 4.

<sup>62</sup> Gillet (n 22) 86.

Establishing that environmental harm amounts to extermination, deportation or forcible transfer, or persecution is contingent upon satisfying the contextual and mental elements of crimes against humanity, namely the existence of a widespread or systematic attack directed against a civilian population.<sup>63</sup> The former carries a quantitative connotation, referring to the large-scale scope of the attack, while the latter denotes a qualitative standard relating to the organised nature of the conduct in question.<sup>64</sup> Either criterion may be satisfied under the disjunctive formulation of Article 7. Thus, prosecuting environmental harm as a crime against humanity benefits from dispensing with the *scienter mens rea* element that is fatal to a genocide conviction, although the underlying act must nevertheless be executed pursuant to a state or organisational policy directed against the civilian population.<sup>65</sup> Again, the risk of liability being confounded arises when the policy underpinning the perpetrator's conduct is rooted in developmental, commercial, or economic objectives rather than by a motivation to oppress a human collective.<sup>66</sup> Nevertheless, the mental element of crimes against humanity requires only the perpetrator's knowledge of the broader attack on the civilian population and of the contribution their conduct would make to that attack.<sup>67</sup> Thus, where the continuous and foreseeable consequence of environmentally deleterious activities is the destruction or displacement of the local population, an organisational policy sustaining such activities is akin to a policy to attack that population.<sup>68</sup> By allowing liability to flow from *dolus eventualis*, rather than the stringent *dolus specialis* requirement of genocide, the crimes against humanity framework provides a more viable basis for establishing environmental jurisdiction before the ICC.

### **(3) Environmental Liability Through an Anthropocentric Lens**

The preceding sections have surveyed the possibility of prosecuting genocide or crimes against humanity perpetrated through environmental damage. However, relying on these provisions to impose international justice on perpetrators of environmental degradation remains an inherently constrained approach. Genocide and crimes against humanity predicate liability on a demonstrable human impact, thereby exhibiting a clear anthropocentric orientation. It follows that the ICC contemplates peacetime

---

<sup>63</sup> Rome Statute (n 4) art. 7(1).

<sup>64</sup> *Prosecutor v Germain Katanga* (Trial Chamber II) ICC-01/04-01/07-3436-T (7 March 2014) para 1098.

<sup>65</sup> Rome Statute (n 4) art. 7(2)(a).

<sup>66</sup> Jessica Durney, 'Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court' (2018) 24 *Hastings Environmental Law Journal* 413, 417.

<sup>67</sup> *Prosecutor v Bemba* (Pre-Trial Chamber II) ICC-01/05-01/08-424 (15 June 2009) para 88.

<sup>68</sup> ICC, *Elements of Crime*, art. 7 Element 3 fn 6; see also Sharp (n 47) 239.

environmental harm only insofar as it intersects with identifiable humanitarian consequences, rather than recognising the environment as an object of independent legal concern.<sup>69</sup>

This framework may be more readily applied in straightforward cases, such as incidents of extermination, deportation or forcible transfer, persecution, or the infliction of conditions of life intended to cause the destruction of a protected group, where the proximity between the environmentally destructive act and its specific human impacts allows a clear causal link to be established.<sup>70</sup> These consequences cannot be traced to a single act of harm. Instead, they emerge gradually and indirectly, making it difficult to describe them as a targeted attack on a specific population under the definitions of genocide or crimes against humanity.<sup>71</sup> In short, framing environmental liability through an anthropocentric lens overlooks the full extent of destructive practices and their complex causality with humanitarian outcomes, yielding only a modest space in which the ICC may exercise jurisdiction.

Beyond the foregoing practical constraints, this approach reflects a deeper normative prejudice. Although the prosecutor maintains a policy that the Rome Statute recognises and protects the “inherent value” of the natural environment,<sup>72</sup> this claim withers under closer doctrinal scrutiny. Notwithstanding the ecocentric war crime, which affords little meaningful protection, the Rome Statute subordinates environmental harm to humanitarian interests,<sup>73</sup> assigning it only to incidental or instrumental significance. Therefore, invoking a green interpretation of crimes predisposed toward anthropocentrism fails to challenge the marginalisation of ecocentric concerns within international criminal law. This embeds the regressive normative position that environmental damage warrants redress only insofar as it violates core human interests.<sup>74</sup> This view also aligns with the expressive function of the ICC, which conveys the international community’s condemnation of atrocity crimes.<sup>75</sup> Adjudicating environmental destruction from an anthropocentric perspective signals condemnation of the humanitarian atrocity but dilutes equivalent opprobrium for the severity of harm inflicted upon the natural world itself.

---

<sup>69</sup> Payal Patel, ‘Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court’s Mandate to Prosecuting Environmental War Crimes’ (2016) 14 *Loyola University Chicago International Law Review* 175, 182.

<sup>70</sup> Ammar Bustami and Marie-Christine Hecken, ‘Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute’ (2021) 11 *GJIL* 145, 166.

<sup>71</sup> *ibid.*; Mégret (n 23) 65-66.

<sup>72</sup> Albeit conceding the Rome Statute is primarily anthropocentric. See OTP (n 10) 3.

<sup>73</sup> Gillet (n 22) 6-7.

<sup>74</sup> *ibid.*; Mwanza (n 7) 598-99.

<sup>75</sup> Florian Jeßberger and Julia Geneuss, ‘The Many Faces of the International Criminal Court’ (2012) 10 *JICJ* 1081, 1086-87.

## E. CONCLUSION

In the context of accelerating global ecological decline, the effective protection of environmental interests under international law has become an urgent undertaking. The ICC is often promoted as a forum for strengthening accountability by prosecuting agents of environmental degradation. Although this impulse is informed by laudable aims, the prospects for imposing environmental justice under the current apparatus of international criminal law remain limited. The Rome Statute criminalises direct assaults on the natural environment under Article 8(2)(b)(iv) but restricts its application to international armed conflict. The same Statute subjects liability to stringent thresholds of damage and disproportionality, providing little, if any, protection. In peacetime, environmental harm may constitute an underlying act of genocide or crimes against humanity, but it is not recognised as a matter of independent legal concern. Aside from being a normatively reductive position, this incidental treatment provides little legal basis for prosecuting environmentally destructive practices that do not immediately target human populations but *will* manifest harmful effects over the long term.

By omitting an ecocentric provision in peacetime contexts, international criminal law fails to acknowledge that effective protection of humanitarian and environmental interests is inextricably entwined. This doctrinal shortcoming cannot be remedied by an ambitious prosecutorial policy. Rather, a meaningful “green shift” at the ICC requires the development of a mechanism for environmental liability independent of wartime or anthropocentric crime.

**DO THE UNITED NATIONS' GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS REQUIRE A FOURTH PILLAR TO BETTER RESPECT HUMAN RIGHTS? CONTRASTING KARP'S 'DISEMBEDDED LIBERALISM' THESIS AND HUMAN RIGHTS DUE DILIGENCE**

*Gulsum Qane\**

- A. INTRODUCTION**
- B. UNGPs AND THE 'MISSING' FOURTH PILLAR**
  - (1) Neoliberalism and the Public-Private Divide**
- C. THE 'NO HARM' PRINCIPLE AND HRDD**
- D. CONCLUSION**

---

\* LLM International Commercial Law, University College London

## A. INTRODUCTION

This paper considers whether the existing three-pillar framework of the United Nations Guiding Principles on Business and Human Rights (UNGPs) effectively combats human rights abuses, or whether the addition of a fourth pillar is necessary. Firstly, I provide a background to the UNGPs and explore the concept of ‘disembedded liberalism’ in a world shifting towards neoliberalism. Secondly, I critique David Karp’s theoretical framework for a “missing” fourth pillar of the UNGPs:

A collective political responsibility to challenge and change our current world order, and to act politically to change it to enable human rights to be better respected, protected and fulfilled (‘the Framework’)<sup>1</sup>

Thirdly, I consider how the addition of this pillar could strengthen respect for human rights. Finally, I analyse the ‘do no harm’ principle within the UNGPs’ approach to human rights due diligence (HRDD) and draw on this analysis to propose Karp’s reconstruction of HRDD grounded in the positive value of equality (‘the Reconstruction’).

## B. UNGPs AND THE ‘MISSING’ FOURTH PILLAR

The UNGPs were created by John Ruggie in 2008 and unanimously endorsed by the United Nations Human Rights Council in 2011.<sup>2</sup> The UNGPs’ ‘Protect, Respect, Remedy’ framework and its thirty-one constituent principles<sup>3</sup> have been described as the most authoritative business and human rights framework,<sup>4</sup> designed to prevent and remedy human rights abuses arising from corporate activity.<sup>5</sup>

---

<sup>1</sup> David Karp, ‘Business and Human Rights in a Changing World Order: Beyond the Ethics of Disembedded Liberalism’ (2023) 8(2) *Business and Human Rights Journal* 135, 135.

<sup>2</sup> David Birchall and Nadia Bernaz, ‘Business Strategy as Human Rights Risk: the Case of Private Equity’ (2023) 24 *Human Rights Review* 1, 3.

<sup>3</sup> UNHRC ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31.

<sup>4</sup> ‘United Nations Guiding Principles on Business and Human Rights’ UNDP India <<https://www.undp.org/sites/g/files/zskgke326/files/migration/in/UNGP-Brochure.pdf>> accessed 23 February 2024; ‘What is the Right to a Healthy Environment?’ (UNDP) <<https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf>> accessed 4 April 2024.

<sup>5</sup> Nicholas Griffin and Sian Lea, ‘The Modern Slavery Act 2015 and the Evolution of Supply Chain Transparency in the UK’ (2024) 35(1) *International Company and Commercial Law Review* 4, 14.

Karp contends that, although conceptions of HRDD focused on mitigating and accounting for human rights impacts within the UNGPs, they “cannot succeed in their current form.”<sup>6</sup> A proposed fourth pillar may allow human rights to be more effectively “respected, protected and fulfilled”<sup>7</sup> by working alongside business and human rights (BHR) as an effective mechanism.<sup>8</sup> The idea of collaboration seems shared, as Karp’s proposal reflects Nadia Bernaz’s suggestion for a fourth pillar.<sup>9</sup> I will present Karp’s criticism, which focuses on the ethics behind disembodied liberalism, by way of a twofold argument comprising: (1) the neoliberal derivation of the UNGPs, which consequently possess limited response capacity to combat BHR issues; and (2) the incompleteness of HRDD based on the do no harm principle.<sup>10</sup> Thereafter, I shall discuss whether Karp’s fourth pillar is important in promoting greater respect for human rights, by analysing the ineffectiveness of the UNGPs’ three-pillar body framework.

### **(1) Neoliberalism and the Public-Private Divide**

To understand the basis of Karp’s framework, it is important to explore the ethical theory of disembodied liberalism. Disembodied liberalism contradicts the theory of embedded liberalism, which Ruggie understands as combining “international economic order, based on international markets, with domestic social purpose”.<sup>11</sup> The distinction was developed by Karl Polanyi, who described the 1940s post-war order as a “great transformation” emphasising the reassertion of social control over the market.<sup>12</sup> This promoted the metaphorical idea of a “compromise of embedded liberalism” between domestic welfare states and international openness, causing the continuation of embedded liberalism in the domestic social order.<sup>13</sup>

The nineteenth-century *laissez-faire* policies promoted disembodied markets which were challenged by liberalism.<sup>14</sup> This was followed by World War II liberal capitalism, which became disembodied by neoliberalism.<sup>15</sup> This conveys the industrialisation of nineteenth-century political appearances and *laissez-*

---

<sup>6</sup> Karp (n 1) 135.

<sup>7</sup> Karp (n 1) 137.

<sup>8</sup> *ibid* 150.

<sup>9</sup> Nadia Bernaz, ‘International Cooperation and Solidarity: The Missing 4th Pillar of the UNGPs’ (*Rights as Usual*, 30 January 2024) <<https://rightsasusual.com/2024/01/30/international-cooperation-and-solidarity-the-missing-4th-pillar-of-the-ungps/>> accessed 21 February 2024.

<sup>10</sup> Karp (n 1) 137.

<sup>11</sup> *ibid* 139.

<sup>12</sup> John Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36(2) *International Organizations* 385; Robert Wolfe and Matthew Mendelsohn, ‘Values and Interests in Attitudes toward Trade and Globalization: The Continuing Compromise of Embedded Liberalism’ (2005) 38(1) *Canadian Journal of Political Science* 45.

<sup>13</sup> Wolfe and Mendelsohn (n 12) 45.

<sup>14</sup> *ibid*.

<sup>15</sup> Ruggie (n 12) 381; Karp (n 1) 139.

*faire* capitalism<sup>16</sup> into the twentieth century and beyond, instigating the deterioration of human rights and arguably simultaneously promoting Karl Marx's 'crisis theory'.<sup>17</sup> Such a position was emphasised by Margaret Thatcher's adoption of neoliberalism, 'Thatcherism', which contradicted the belief that governments possessed responsibilities to provide a safety net for poverty-stricken individuals and employment opportunities.<sup>18</sup> Thatcherism privatised national industries like British Airways and destroyed labour unions, thus undermining workers' rights under a neoliberal framework.<sup>19</sup> Hence, disembedded liberalism conveys Karp's restatement that there is no compromise between workers and capitalists, widening the divide between state duties and corporate responsibilities. As Karp suggested, "the UNGPs' separation of the 'state duty to protect' from the 'corporate responsibility to respect' reflects a contestable conception of companies as private actors: free to act/transact in any way that is not harmful," and results in a disruption of the social guarantee of human rights.<sup>20</sup> This reveals the insufficiencies of the current three-pillar framework and suggests the need for a fourth pillar.<sup>21</sup>

The first pillar, concerning the state duty to protect (UNGPs 1 to 10), compels states to: (1) "...[take] action at the domestic level to operationalise existing international human rights obligations that pertain to BHR"; and (2) "... work with other actors to ensure an internationally coordinated approach to BHR."<sup>22</sup> Under the first pillar, the state-business nexus claims to cover these areas by encouraging states to "take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State."<sup>23</sup> However, this does not directly emphasise states' responsibilities for enterprises as private actors and is ineffective, as states are merely 'welcome' to adopt action plans, particularly when they allocate responsibilities across actors; this is insufficient in ensuring respect for human rights. Furthermore, denoting companies as private actors makes it difficult for states to assign effective targets, as harm can be invisible.<sup>24</sup>

Thus, regarding the first focus, Karp argues that the domestic scope of the UNGPs' state duty to protect is not entirely effective in a neoliberal world, characterised by limited government intervention within markets and 'private enterprise primacy', which benefits capitalism through the transfer of wealth

---

<sup>16</sup> Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014); Duncan Bell, 'What is Liberalism?' (2014) 42(6) *Political Theory* 682, 685.

<sup>17</sup> Claus Offe, "'Crisis of Crisis Management': Elements of a Political Crisis Theory' (1976) 6(3) *International Journal of Politics* 29, 34.

<sup>18</sup> Hallie Spear, 'Disembedded Liberalism: The Global Pressure on Democracy' (BA thesis, Claremont McKenna College 2022) 68.

<sup>19</sup> *ibid.*

<sup>20</sup> Karp (n 1) 135.

<sup>21</sup> Karp (n 1) 149.

<sup>22</sup> Karp (n 1) 141.

<sup>23</sup> UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (n 3) 9.

<sup>24</sup> UN Committee on Economic, Social and Cultural Rights 'General comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24; Karp (n 1) 135.

from the public to corporate entities in the private sector.<sup>25</sup> This can be demonstrated by events like globalisation, which has caused transnational corporations' subsidiaries to increasingly conduct cross-border operations in underdeveloped countries with corrupt governmental organisations, making the state duty to protect human rights increasingly challenging.

The second focus, which centres around international coordination, is similar to Wettstein's 'second wave': the intersection between BHR and corporate social responsibility, a period that experienced a race to the bottom in working standards and consumer activism, suggesting that we are re-experiencing this social phenomenon.<sup>26</sup> The 1990s confirmed that global coordination by interstate organisations, including the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO),<sup>27</sup> was not enough to combat BHR-related issues.<sup>28</sup> The proposed fourth pillar could enhance the first and second focuses of the first pillar,<sup>29</sup> urging activist individuals and groups to challenge current social structures. In contrast to contemporary society, where activists' freedom of speech can be suppressed, a fourth pillar based on BHR activists working alongside states would effectively promote better respect for human rights. Such a pillar could compel states to collaborate with activists who possess knowledge of human rights abuses, gained from victim interactions, to find solutions, allowing victims who are afraid to express their experiences directly to the state to be heard.

Finally, regarding the first and second pillars, the idea of working collectively could bridge the gap between the state duty to protect and the corporate responsibility to respect, reflecting the neoliberal public and private divide. For instance, companies are presently encouraged to implement ethical decision-making within their operations, even though states may lack this. This links to the third pillar, 'access to remedy,' as through collaboration and challenging the current world order, effective remedies can and should be increasingly accessible to victims. This analysis showcases that Karp's proposed fourth pillar is a beneficial step towards strengthening respect for human rights, as BHR activists could encourage states and companies alike to consider their ethics to avoid reputational and financial damage from claims.

---

<sup>25</sup> Robert Jupe and Warwick Funnell, 'Neoliberalism, Consultants and the Privatisation of Public Policy Formulation: The Case of Britain's Rail Industry' (2015) 29 *Critical Perspectives on Accounting* 65.

<sup>26</sup> Karp (n 1) 142.

<sup>27</sup> *ibid.*

<sup>28</sup> Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses' (OHCHR, 2013)

<<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>> accessed 3 March 2024.

<sup>29</sup> Karp (n 1) 142; 'Human Rights' (*United Nations*) <<https://www.un.org/en/global-issues/human-rights>> accessed 7 April 2024.

### C. THE 'NO HARM' PRINCIPLE AND HRDD

A critique of the second element of Karp's argument will be made, considering the incompleteness of HRDD under the UNGPs due to their exclusion of an underlying commitment to human equality. Through this analysis, I shall determine whether 'the Reconstruction' could enhance the UNGPs' HRDD strategies.

HRDD is "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks."<sup>30</sup> As a continuous process, HRDD is expected to be implemented by companies in their operations to "identify, prevent, mitigate and account for how they address their impacts on human rights."<sup>31</sup> As per the Office of the High Commissioner for Human Rights' (OHCHR) guidance on the corporate responsibility to respect, 'adverse' human rights impacts may occur "when an action removes or reduces the ability of individual(s) to enjoy their human rights."<sup>32</sup> HRDD is important for companies, including parent companies with subsidiaries in foreign countries, to promote ethical practices and mitigate litigation.<sup>33</sup> However, questions remain regarding the effectiveness of the UNGPs' HRDD strategies in preventing harm.<sup>34</sup>

The second pillar of the UNGPs currently encourages enterprises to conduct HRDD by: (1) considering "adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships";<sup>35</sup> (2) understanding that due diligence "will vary in complexity with the size of enterprises, the risk of severe human rights impacts, and the nature and context of operations";<sup>36</sup> and (3) "recognizing that the human rights risks may change" and that HRDD "should be ongoing".<sup>37</sup> HRDD under the UNGPs lacks the necessary completeness to operationalise the corporate responsibility to respect human rights,<sup>38</sup>

---

<sup>30</sup> UNHRC 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework' (22 April 2009) UN Doc A/HRC/11/13, para 71; UNGA, 'The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (16 July 2018) UN Doc A/73/163, para 10; OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) 16; Robert McCorquodale and Justine Nolan, 'The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses' (2021) 68 *Netherlands International Law Review* 455.

<sup>31</sup> UNHRC 'Guiding Principles' (n 3) 15; Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899, 908.

<sup>32</sup> Birchall and Bernaz (n 2) 3; UNHRC 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (22 June 2021) UN Doc A/HRC/47/39/Add.2; David Birchall, 'Any Act, Any Harm, to Anyone: The Transformative Potential of Human Rights Impacts Under the UN Guiding Principles on Business and Human Rights' (2019) 1 *University of Oxford Human Rights Hub Journal* 120.

<sup>33</sup> Lucas Roorda and Daniel Leader, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court' (2021) 6(2) *Business and Human Rights Journal* 368, 374.

<sup>34</sup> Bonnitcha and McCorquodale (n 31) 455.

<sup>35</sup> UNHRC 'Guiding Principles' (n 3) 16.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> Karp (n 1) 143.

rather than requiring corporations to prevent human rights breaches through undertaking a positive human rights approach, the ‘do no harm’ principle merely places a negative obligation on corporations not to perpetrate such abuses.<sup>39</sup> Such an approach thus lacks the tools to cause corporations to effectively take active steps in actually preventing harms directly and indirectly caused by their operations. By way of example, Shell was ‘silently complicit’ when it failed to utilise its influence to stop the execution of Ken Saro-Wiwa, who protested against environmental destruction in the Niger Delta.<sup>40</sup>

Furthermore, the UNGPs fail to clearly outline what constitutes a human right. By positioning human rights violations alongside criminal offences and breaches of tortious duties, they neglect to consider that harms may be jurisdictionally dependent.<sup>41</sup> For instance, in certain states such as India, the sale of skin-bleaching products like ‘Fem’, which contain harmful chemicals such as hydrogen peroxide, continues to be regarded as unproblematic and has been promoted to consumers since the sixteenth century.<sup>42</sup> Not allowing the existence of such products would remove the private divide’s “right to a private self that sets and pursues its own values within the boundaries of the law.”<sup>43</sup> Thus, the UNGPs assume that private actors are free to act as they please, so long as they remain within bounds and understand their human rights impacts.<sup>44</sup>

Although Karp agrees that HRDD is a pragmatic solution for a world moving towards neoliberalism, he asserts that the UNGPs’ HRDD approach is not entirely successful in combating human rights abuses. To enhance ‘the Framework’, Karp proposes ‘the Reconstruction’. Firstly, the Reconstruction encourages companies to think more broadly about the negative implications arising from their social connections, rather than merely fixating on the current framework.<sup>45</sup> The Reconstruction enables companies to adopt a renewed focus on invisible and structurally mediated harms by going beyond the defined links to their operations and business relationships. This relates to the dispute regarding businesses being mere agents, as “they also coordinate production and enable social connections”.<sup>46</sup> In reference to the skin-bleaching example explored above, the Reconstruction would enable companies to implement effective decision-making regarding the negative implications that may arise from selling such products, including the potential health risks posed by their chemical composition and their role in perpetuating colourism.<sup>47</sup>

---

<sup>39</sup> Karp (n 1) 144; Florian Wettstein, ‘Silence as Complicity: Elements of a Corporate Duty to Speak Out Against the Violation of Human Rights’ (2012) 22(1) *Business Ethics Quarterly* 37, 49.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> Antoine Petit, ‘Skin Lightening and its Motives: A Historical Overview’ (2019) 146(5) *Annales de Dermatologie et de Vénérologie* 399.

<sup>43</sup> Karp (n 1) 144.

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.* 147.

<sup>46</sup> Karp (n 1) 135.

<sup>47</sup> *ibid.* 147.

Secondly, to combat the incompleteness of the UNGPs' HRDD approach, the Reconstruction accounts for enterprises' "causes of, contributions to, and broader links with, structural inequalities."<sup>48</sup> Thus, instead of enterprises merely focusing on conducting no harm, businesses would be encouraged to respect human rights through a lens of equality, "as this is what gives human rights their normative force."<sup>49</sup> Anne Phillips contends that "equality is relational; [thus], it directs us more urgently to differential powers and capabilities."<sup>50</sup> As such, an equality-based HRDD system, like that embedded in Karp's proposals, would drive companies to consider their "[roles] in and [responsibilities] for sustaining structural differences in power and capabilities across individuals and groups,"<sup>51</sup> thereby promoting better respect for human rights. The Reconstruction, embedded in the Framework, could strengthen the UNGPs' three-pillared structure and act as an effective guide for companies and states to address human rights.

The theoretical effectiveness of Karp's proposed fourth pillar will be tested via a case study regarding Zara's human rights abuses, focusing on labour rights, particularly in the case of sweatshops. Zara sourced clothes from Brazilian workshops under modern slavery conditions, hiding behind complex supply chains.<sup>52</sup> The working conditions were egregious, as invisible workers were working sixteen - to eighteen-hour days and earning \$156 to \$290 monthly, despite the minimum wage being \$344.<sup>53</sup> Under the hypothetical situation where the four-pillar framework existed, Zara would have likely been placed in a better position to deeply consider the effects of its social connections and its lack of preventive measures in causing human rights abuses. While not obligated to follow the UNGPs, due to their global recognition and usage among competitors such as Abercrombie & Fitch, who have reflected the UNGPs in their 'Vendor Code of Conduct' in response to forced labour accusations, Zara could have viewed the issues broadly, beyond the 'do no harm' principle.<sup>54</sup> Thus, considering the UNGPs' increasingly global usage among corporations, through the fourth pillar, Zara could have felt pressured to collectively work alongside activist groups and individuals to address the implications arising from its operations by paying its workers appropriately, thereby better respecting human rights. This case study illuminates the need for a fourth pillar.

---

<sup>48</sup> Karp (n 1) 137.

<sup>49</sup> *ibid.*

<sup>50</sup> Anne Phillips, 'Feminism and Liberalism Revisited: Has Martha Nussbaum Got It Right?' (2001) 8(2) *Constellations* 249, 264; Karp (n 1) 147; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

<sup>51</sup> Karp (n 1) 147.

<sup>52</sup> 'CASE STUDY: Zara Fights Sanctions for Forced Labour in Brazilian Supply Chain' (*Mind the Gap*, 6 July 2020) <[www.mindthegap.ngo/harmful-strategies/constructing-deniability/hiding-behind-complex-supply-chains/zara-fights-sanctions-for-forced-labour-in-brazilian-supply-chain](http://www.mindthegap.ngo/harmful-strategies/constructing-deniability/hiding-behind-complex-supply-chains/zara-fights-sanctions-for-forced-labour-in-brazilian-supply-chain)> accessed 7 March 2024.

<sup>53</sup> Stephen Burgen and Tom Phillips, 'Zara accused in Brazil Sweatshop Inquiry' *The Guardian* (Barcelona and Rio de Janeiro, 18 August 2011) <<https://www.theguardian.com/world/2011/aug/18/zara-brazil-sweatshop-accusation>> accessed 5 March 2024; 'CASE STUDY' (n 52).

<sup>54</sup> Abercrombie & Fitch, 'Vendor Code of Conduct' <<https://corporate.abercrombie.com/sustainability/policies-resources/vendor-code-of-conduct/>> accessed 7 November 2025.

## D. CONCLUSION

Within this paper, I have investigated Karp's framework for a fourth pillar of the UNGPs, accounting for the disembedded liberal foundation of the current three-pillar structure and demonstrating its insufficiencies. Furthermore, I considered the incompleteness of HRDD within the UNGPs, which does not account for an underlying commitment to human equality. The distinction between private and public has disrupted the social guarantee of human rights and demonstrated the necessity of a fourth UNGP pillar: "a collective political responsibility to challenge and change our current world order."<sup>55</sup> I analysed how Karp's reconstruction of HRDD could allow for better respect for human rights, including for victims of invisible harms, by testing the Framework against a case study of Zara. Arguably, collective action by states, companies, activist individuals, and groups is a pragmatic solution to combat human rights abuses and enhance the UNGPs. Although worldwide government intervention may be required to precipitate significant global change, more sustainable and accountable businesses can be created if the UNGPs embrace the proposed reconstruction of HRDD through implementing Karp's framework for a fourth pillar.

---

<sup>55</sup> Karp (n 1) 135.

**SUPRANATIONAL PROTECTION AND THE ROME STATUTE: SHOULD DRUG  
TRAFFICKING JOIN THE RANKS?**

*Martina Semino\**

**A. INTRODUCTION**

**B. JUSTIFYING THE CORE CRIME UNDER THE ROME STATUTE**

(1) What Distinguishes Core Crimes from Other Types of Crimes?

(2) Justifying the Four Core Crimes

**C. SHOULD DRUG TRAFFICKING BECOME A CORE CRIME**

(1) A Historical Account

(2) Can Additional Supranational Protection for Drug Trafficking be Justified?

(a) *Formal requirements*

(b) *Normative and pragmatic arguments*

**D. CONCLUSION**

---

\* LLM Criminal Law and Criminal Justice, University of Edinburgh.

## A. INTRODUCTION

The International Criminal Court (ICC) was established in 2002 to decrease impunity for the “perpetrators of the most serious crimes of concern to the international community.”<sup>1</sup> Since then, it has adjudicated 32 cases and issued 60 arrest warrants for crimes recognised under the Rome Statute (the Statute).<sup>2</sup> The crimes that fall under the ICC’s jurisdiction through the Statute are genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>3</sup> The Rome Statute itself emerged after years of negotiation over which crimes should, and which should not, fall under the jurisdiction of the court.<sup>4</sup> The four ultimately included crimes are formally known as international crimes or core crimes.

Since the foundation of the ICC, questions have been raised as to whether it is justified to have these four core crimes enjoy an additional level of supranational protection under the Rome Statute and the jurisdiction of the ICC. Understanding a possible justification for these crimes extends both to what makes these crimes so special that an extra level of protection is needed, and to why other crimes are not provided with the same protection.

This paper seeks to clarify the justification for having the crimes as the core crimes of the Rome Statute that require additional supranational protection. While it concludes that the special nature of these crimes warrants additional supranational protection through the ICC, it also argues that drug trafficking should be similarly recognised.

This paper therefore addresses a twofold research question: Are the currently selected core crimes under the Rome Statute justified in receiving an additional level of supranational protection, and should drug trafficking be granted similar status under the ICC? To answer this question, the paper will commence by explaining what distinguishes core crimes from other types of crimes, followed by a historical and social analysis of the currently existing core crimes which justifies their supranational protection. It will then proceed to examine the crime of drug trafficking to assess whether its exclusion from being a core crime is justified or whether, on the contrary, the Rome Statute should be amended to include it. It will be concluded that while the currently existing core crimes are justified in enjoying an additional level of supranational protection because of their historical background and their seriousness, the same protection should also be extended to the crime of drug trafficking.

---

<sup>1</sup> International Criminal Court, ‘The ICC at a Glance’ (ICC 2024)

<<https://www.icc-cpi.int/sites/default/files/ICCAAtAGlanceEng.pdf>> accessed 14 April 2025, 1.

<sup>2</sup> International Criminal Court, ‘About the Court’ (ICC) <<https://www.icc-cpi.int/about/the-court>> accessed 14 April 2025.

<sup>3</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 5.

<sup>4</sup> Paola Gaeta, ‘International criminal law’ (2010) *International Law for International Relations* 258, 272.

## B. JUSTIFYING THE CORE CRIME UNDER THE ROME STATUTE

To understand whether an additional level of supranational protection for the core crimes under the Rome Statute is justified, two steps need to be undertaken. First, it is necessary to understand what core crimes are and what distinguishes them from other types of crimes. Second, the four core crimes under the Rome Statute need to be specifically analysed to understand whether their identification as core crimes is legitimised and warrants additional supranational protection.

### (1) What Distinguishes Core Crimes from Other Types of Crimes?

The label core crime emerged during diplomatic discussions over the establishment of the ICC, though without a clear legal definition distinguishing what can and what cannot be classified as such a crime.<sup>5</sup> The label nevertheless conferred a new level of supranational protection through the existence of the ICC.<sup>6</sup> To understand what makes core crimes so peculiar as to warrant an additional level of protection, it is necessary to compare them to other ‘ordinary’ crimes, specifically domestic crimes and transnational crimes. Domestic crimes and core crimes are distinct in their locus of criminalisation.<sup>7</sup> Core crimes occur on the international plane, and thus warrant international prosecution, whereas domestic crimes fall exclusively within national jurisdiction.<sup>8</sup> Such a distinction between domestic and core crimes seems relatively straightforward.

The boundaries between ordinary and core crimes become more difficult to draw when considering transnational crimes. Transnational crimes have been defined as “conduct that has actual or potential transboundary effects of national and international concern.”<sup>9</sup> These crimes are often addressed in treaties or suppression conventions, earning the label “treaty crimes.”<sup>10</sup> The level of internationality inherently implied in the definition of transnational crimes makes distinguishing them from core crimes more difficult. Scholars have brought forward different theories to understand the distinction between these types of crimes.

---

<sup>5</sup> Rafael B da Silva, ‘Synergies between core and transnational crimes: An analysis from the perspective of the Rome Statute’ (2020) 21(1) *Melbourne Journal of International Law* 1, 5.

<sup>6</sup> *ibid.*

<sup>7</sup> da Silva (n 5) 6.

<sup>8</sup> *ibid.*; Christine Schwöbel-Patel, ‘The Core Crimes of International criminal Law’, in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (online edn, Oxford Academic 2020) 774.

<sup>9</sup> Neil Boister, ‘Transnational Criminal Law?’ (2003) 14(5) *EIJL* 953, 954.

<sup>10</sup> Schwöbel-Patel (n 8) 771.

Transnational crimes require cross-border impact, whereas core crimes may not.<sup>11</sup> For example, an act of genocide, a core crime, may occur entirely within one state but still be subject to international concern because of its seriousness and harmfulness to humankind broadly speaking.<sup>12</sup> With transnational crimes, on the other hand, the crime needs to, at the very least potentially, impact more than one country. Such a distinction has, however, not received much credit, as core crimes can often involve more than one state, which makes the line between the types of crimes anything but clear-cut.

The difference in perpetrators committing core crimes and transnational crimes has been argued to be the distinctive factor between the two.<sup>13</sup> Core crimes are claimed to be perpetrated by individuals on behalf of the state or by state officials themselves.<sup>14</sup> Transnational crimes, on the other hand, do not have state participation when being committed.<sup>15</sup> By using such a distinction, it is argued that transnational crimes do not warrant supranational prosecution as state parties are not involved and can therefore prosecute the crime at the domestic level themselves.<sup>16</sup> With core crimes, on the contrary, since the states are directly involved in the perpetration of the crime, supranational prosecution is needed to avoid impunity. While logically such a justification for supranational protection of core crimes is clear, the reality discredits this type of distinction. Indeed, transnational crimes have been found to be connected to states parties almost as much as core crimes, having state officials directly or indirectly involved in the perpetration of such crimes.<sup>17</sup> Simultaneously, non-state parties have been prosecuted for core crimes.<sup>18</sup>

The characteristic that defines core crimes is their direct impact on common international values and interests.<sup>19</sup> Crimes that infringe upon these are seen as the most severe and heinous international violations that need an additional level of supranational protection to be combatted. Transnational crimes are seen as lacking the degree of seriousness required to classify them as core crimes.<sup>20</sup> Even though they have an international aspect to them, the lack of seriousness of violation of common values only warrants domestic prosecution.<sup>21</sup> Notably, domestic prosecution can be uniformised with other states through suppression conventions; these do not include the creation of a supranational body to prosecute them.<sup>22</sup> When keeping this argument theoretical, such a theory can capture the difference between these types of

---

<sup>11</sup> da Silva (n 5) 6.

<sup>12</sup> United Nations, 'Definition of Genocide' (*UN Office on Genocide Prevention*) <<https://www.un.org/en/genocide-prevention/definition>> accessed 14 April 2025.

<sup>13</sup> da Silva (n 5) 6.

<sup>14</sup> Andre Nollkaemper, 'System Criminality in International Law: Introduction' (2008) *Amsterdam Center for International Law* 1, 7.

<sup>15</sup> Sara Wharton, 'Redrawing the Line? Serious Crimes of Concern to the International Community beyond the Rome Statute' (2015) 52 *Canadian Yearbook of International Law* 129, 174.

<sup>16</sup> *ibid.*

<sup>17</sup> da Silva (n 5) 16.

<sup>18</sup> Wharton (n 15) 161.

<sup>19</sup> da Silva (n 5) 9.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.* 10.

<sup>22</sup> *ibid.*

crimes. Practically, when considering cases of crimes against humanity (qualified as core crimes) against cases of human trafficking, drug trafficking, or terrorism (qualified as transnational crimes), scholars have found it difficult, if not almost impossible, to support the claim that the latter types of crimes are not serious enough to infringe upon common international values.<sup>23</sup> As such, having this seriousness as the distinctive element between core crimes and transnational crimes has found little support.

Considering all the above, scholars have tried to find clear-cut theories to understand the distinction between core crimes and transnational crimes, giving the former a justification for an additional level of supranational protection denied to the latter. Such theories have, however, been hard to find, and it seems as though the distinguishing factor between these types of crimes rather comes from arbitrary decisions on which crimes qualify as core crimes through diplomatic discussions than from substantive characteristics that core crimes possess and transnational crimes do not.<sup>24</sup> Consequently, a clear cut-off point to differentiate between these types of crimes has not been found, which brought scholars such as Roger O’Keefe to refer to social and historical reasons that make certain crimes qualify as core crimes by claiming that “you know one (core crime) when you see it.”<sup>25</sup>

While this section argued that it is difficult to justify an additional level of supranational protection for core crimes as compared to ordinary crimes when looking at theoretical reasons distinguishing these types of crimes, such justification might lie more specifically in the four crimes currently protected in the Rome Statute. The next section will therefore discuss how the international community agreed on having these four crimes enjoy an additional layer of supranational protection and whether this justifies the additional protection.

## **(2) Justifying the Four Core Crimes**

There is a possibility that states could simply decide that theft could infringe on some common values and ignore the four core crimes of the Rome Statute.<sup>26</sup> Such an example demonstrates the ability that a lack of theory defining core crimes could be exploited, and it remains essential to comprehend how states came to the decision of the four core crimes under the Rome Statute, which warrants the existence of the ICC. To do so, a historical account of the process in drafting the Rome Statute is necessary.

---

<sup>23</sup> *ibid* 11-12.

<sup>24</sup> *ibid* 6-7.

<sup>25</sup> Roger O’Keefe, ‘The Concept of an International Crime’ (2015) *Oxford International Law Library* 47, 56.

<sup>26</sup> Mayeul Hiéramente, ‘The Myth of ‘International Crimes’: Dialectics and International Criminal Law’ (2011) 3(2) *Goettingen Journal of International Law* 551, 556.

While the existence of international law was a topic that had arisen before the Second World War, only after its conclusion did the possibility of holding individuals accountable for wartime atrocities under international law materialise.<sup>27</sup> During the Nuremberg Trials and before the International Military Tribunal, perpetrators of crimes against peace, war crimes, and crimes against humanity committed during the Second World War were prosecuted.<sup>28</sup> Furthermore, the term genocide was coined and became subject of international law soon after the end of the war.<sup>29</sup> The Nuremberg Trials presented an opportunity to create permanent international tribunals to ensure that certain atrocities would not go unpunished, which brought the UN General Assembly to request the International Law Commission (ILC) to draft a code of offences that should become the blueprint for the foundation of a permanent international court.<sup>30</sup> Because of the Cold War, however, the progress in creating a permanent court and a draft code was stagnant for over fifty years.<sup>31</sup> Indeed, the Cold War made it impossible to find an agreement on the definition of some of the crimes under the draft code, as well as an agreement on surrendering some degree of sovereignty.<sup>32</sup>

Since the process of creating an international tribunal was blocked for years, states started adopting suppression conventions specific to certain crimes with an international aspect, such as drug trafficking.<sup>33</sup> Such conventions, however, criminalised these crimes still under domestic law with only domestic prosecution. Only in the 1990s, with the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, did the idea of establishing a permanent international court dealing with atrocity crimes resurface.<sup>34</sup> The process of drafting the Rome Statute was shortly thereafter started. While discussions about including in the Rome Statute the crimes that were, during the Cold War, regulated through suppression conventions were considered, the final statute excluded all of these and merely focused on the four core crimes that were also the subject matter of the Nuremberg Trials.<sup>35</sup> The choice of crimes was restricted to extremely serious crimes that “shock the conscience of humanity.”<sup>36</sup> The four core crimes were deemed the most serious violations of international law because of the “scale, gravity and systematic perpetration” in which they occur.<sup>37</sup>

The idea that the four core crimes of the Rome Statute should enjoy an additional level of supranational protection evolved during a century of uncertainties and wars that culminated with the

---

<sup>27</sup> Schwöbel-Patel (n 8) 777.

<sup>28</sup> Gaeta (n 4) 260-261.

<sup>29</sup> Wharton (n 15) 137.

<sup>30</sup> Schwöbel-Patel (n 8) 777.

<sup>31</sup> Wharton (n 15) 139.

<sup>32</sup> *ibid.*

<sup>33</sup> Gaeta (n 4) 262-263.

<sup>34</sup> *ibid.* 263-264; Schwöbel-Patel (n 8) 777.

<sup>35</sup> Wharton (n 15) 141.

<sup>36</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, preamble.

<sup>37</sup> Wharton (n 15) 163.

establishment of the ICC. The seriousness and gravity of these crimes legitimise the need to have an international tribunal that ensures that these crimes are not left unpunished. Furthermore, as per Article 17 of the Rome Statute, the jurisdiction of the ICC is limited by the principle of complementarity, which entails the ICC being able to exercise authority only in cases where national states are unwilling or unable to do so themselves.<sup>38</sup> The additional level of supranational protection therefore only comes into play to avoid impunity when national states cannot do so themselves.

Notably, even without a clear definition of what ‘core’ refers to when deciding which crimes should fall under the jurisdiction of the ICC, historical and societal factors around the seriousness of these crimes for the international community can justify the need for additional supranational protection for the four core crimes included in the Rome Statute. Nonetheless, questions remain as to why other crimes should not be able to enjoy similar protection. The next section will therefore analyse such questions specifically with reference to drug trafficking, as it has historically been one of the most discussed crimes that could be under the jurisdiction of the ICC and presents therefore an interesting case study.

## **C. SHOULD DRUG TRAFFICKING BECOME A CORE CRIME**

### **(1) A Historical Account**

Including drug trafficking under the jurisdiction of the ICC has been a recurrent topic throughout the process of the ILC discussing the draft code and later the drafting of the Rome Statute, as well as in the years following the entry into force of the Statute. The process of developing a draft code extended throughout the better part of the second half of the 20<sup>th</sup> century, mainly because of its stagnation due to the Cold War.<sup>39</sup> In the 1980s, when the process of drafting the code regained prominence, the ILC aimed to include in the draft “the most serious international crimes”, which had to be identified through the “extent of the calamity or by its horrific character, or by both at once.”<sup>40</sup> Discussions around whether drug trafficking was serious enough to be included in such a code happened throughout that decade and culminated in 1989 with the inclusion of drug trafficking in the draft code.<sup>41</sup> The reasons for including drug

---

<sup>38</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 17; Gregory S McNeal, ‘ICC Inability Determinations in Light of the Dujail Case’ 39 *Case Western Reserve Journal of International Law* 325, 325.

<sup>39</sup> Schwöbel-Patel (n 8) 777.

<sup>40</sup> International Law Commission, *Report of the International Law Commission on the Work of Its Thirty-Fifth Session* (3 May-22 July 1983) UN Doc A/38/10, para 48.

<sup>41</sup> Wharton (n 15) 145.

trafficking were twofold: (1) in 1988, the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances showcased the seriousness of drug trafficking and the impact on individuals' health that illicit narcotics can have; (2) Trinidad and Tobago issued a proposal to resurface the idea of a permanent international court specifically for combating drug trafficking.<sup>42</sup> Drug trafficking remained in the draft code up until 1995, as it was deemed part of the six most serious offences against the peace and security of mankind.<sup>43</sup> Nonetheless, in the final version of the draft code in 1996, drug trafficking was left out as majority consent amongst states as to its inclusion was not found.<sup>44</sup> The discussions around including drug trafficking under the jurisdiction of the ICC did not end in 1996 with the draft code, but continued throughout the process of developing the Rome Statute. As mentioned above, the push to create the ICC came from the proposal from Trinidad and Tobago to have such a court specifically to prosecute drug trafficking.<sup>45</sup> Finding consent in the inclusion of drug trafficking in the Rome Statute was, however, impossible. While some states argued for the inclusion because of the seriousness of the offence, many others argued to limit the jurisdiction of the ICC only to the currently existing four core crimes.<sup>46</sup> The main reasons for the latter position were to avoid overburdening the ICC from its beginning, especially since drug trafficking was already prosecuted under suppression treaties, and making this crime both a transnational crime and a core crime would have caused complexities in its prosecution.<sup>47</sup> The final version of the Rome Statute that entered into force in 2002 excluded drug trafficking as a core crime, but it included a resolution recommending the revision of drug trafficking as a possible core crime during the first review conference of the Rome Statute.<sup>48</sup>

In 2009, Trinidad and Tobago, together with Belize, once again renewed their proposal to include drug trafficking as a core crime under the Rome Statute.<sup>49</sup> This came right before the 2010 Kampala Conference to Review the Rome Statute in Uganda which, as per Resolution E of the Final Act establishing the Rome Statute, should have included a discussion about possibly including drug trafficking.<sup>50</sup> Nonetheless, to avoid overburdening the conference and through distractions on the topic of how to define

---

<sup>42</sup> *ibid.*

<sup>43</sup> International Law Commission, *Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind* (24 March 1995) UN Doc A/Cn.4/466, 35.

<sup>44</sup> Wharton (n 15) 146.

<sup>45</sup> Permanent Representative of Trinidad and Tobago to the United Nations, Letter to the President of the General Assembly, UN Doc A/44/532 (19 September 1989).

<sup>46</sup> Wharton (n 15) 152-153.

<sup>47</sup> *ibid* 153.

<sup>48</sup> Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/10, Resolution E; Markus Wagner, 'The ICC and its Jurisdiction – Myths, Misperceptions and Realities' (2003) 7 *Max Planck Yearbook of United Nations Law* 409, 475.

<sup>49</sup> Daniel Bertram, 'Should Ecocide be an International Crime? It's Time for States to Decide' (*Blog of the European Journal of International Law*, 12 September 2024) <<https://www.ejiltalk.org/should-ecocide-be-an-international-crime-its-time-for-states-to-decide/>> accessed 14 April 2025; United Nations, 'Proposal on Amendments by Trinidad and Tobago to the Rome Statute of the International Criminal Court' (29 October 2009) UN Doc C.N.737. 2009.TREATIES-9, 2.

<sup>50</sup> Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/10, Resolution E.

the crime of aggression, the discussion about adding drug trafficking as a core crime was dropped.<sup>51</sup> The main reason given for not starting discussions on adding drug trafficking was that the ICC was still recently created, and it needed to focus on the four crimes already under its jurisdiction without being overburdened with other crimes.<sup>52</sup>

This section showcased that, when analysing the historical background around the exclusion of drug trafficking as a core crime under the jurisdiction of the ICC and consequently denying this crime an additional level of supranational protection, the main reasons given were focused on not overburdening the ICC with having to prosecute another crime. Far fewer arguments were given about the characteristics of the crime of drug trafficking itself, which do not warrant an additional level of supranational protection. The continuing attempts by Trinidad and Tobago to include drug trafficking under the subject matter of the Rome Statute showcase the country's belief in the seriousness of the crime and the importance of ensuring prosecution for its perpetrators. While the beliefs of one country are not enough to include drug trafficking in the Rome Statute, questions remain as to the possibility of including it, especially when considering that the main opposition presented focuses on pragmatic reasons to avoid overburdening the court, without considering the seriousness of the crime. The next section will therefore analyse formal and normative arguments as to how a possible inclusion of drug trafficking as a core crime could play out, questioning whether additional supranational protection through the ICC for this crime can be justified.

## **(2) Can Additional Supranational Protection for Drug Trafficking be Justified?**

To possibly justify an additional level of supranational protection for drug trafficking and a consequent amendment of the Rome Statute to include it, this section will first analyse the formal requirements that a crime needs to fulfil to be considered suitable to be included in the Rome Statute. It will then discuss normative arguments around the inclusion of drug trafficking in the Rome Statute.

### *(a) Formal requirements*

When proposals are suggested to the Assembly of States Parties to be considered as amendments to the Rome Statute, the Working Group on Amendments considers these proposals before deciding which ones

---

<sup>51</sup> Wharton (n 15) 154-155.

<sup>52</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, *Report of the Working Group on the Review Conference* (29 October 2009) ICC-ASP/8/20, 56.

to bring before the Assembly.<sup>53</sup> Even though the final decision on amending the Rome Statute falls within the competences of the Assembly of State Parties, the recommendations of the Working Group on Amendments are fundamental.

According to the Terms of Reference of such a group, when considering amendments specifically about the introduction of a new crime to the Statute, the decision is based on “whether the (new) crime can be characterised as one of the most serious crimes of concern to the international community as a whole and whether the crime is based on an existing prohibition under international law.”<sup>54</sup> For drug trafficking to become a core crime and warrant additional supranational protection, it should therefore be analysed in terms of these criteria.

When discussing the seriousness of the crime, the harms caused by drug trafficking need to be considered. Arguments have been provided that, unlike the current core crimes, drug trafficking is a non-violent crime that does not result in the death or suffering of many individuals.<sup>55</sup> Such arguments are, however, inherently flawed. Indeed, when considering the systemic context in which drug trafficking occurs, the violence perpetrated through it is impossible to overlook.<sup>56</sup> The drug war in Mexico, for example, has brought over 28,000 deaths over the years, which are higher numbers than some cases prosecuted by the ICC for the core crimes.<sup>57</sup> Furthermore, the seriousness of drug trafficking does not only come from the deaths involved with it, but also from the severe health impacts the consumption of illicit narcotics has and from the consequences drug trafficking can have for the (economic) stability of many states in which the crime is occurring.<sup>58</sup> Drug trafficking has been found to implicate a whole network of individuals and organisations involved in systematic criminality that impact the international community as a whole and causes high rates of violence, corruption, and instability.<sup>59</sup>

Drug trafficking seems to be an already existing prohibition in international law. Currently, three main treaties exist under international law prohibiting drug trafficking: the Single Convention on Narcotic Drugs; the Convention on Psychotropic Substances; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>60</sup> These conventions aim to regulate and control

---

<sup>53</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Resolution ICC-ASP/11/Res.8: Strengthening the International Criminal Court and the Assembly of States Parties' (Adopted at the 8th plenary meeting, 21 November 2012) ICC-ASP/11/Res.8, 55 para 1.

<sup>54</sup> *ibid* 56 para 9.

<sup>55</sup> Wharton (n 15) 176.

<sup>56</sup> *ibid*.

<sup>57</sup> Rory Carroll, 'Mexico drug war: the new killing fields' (*The Guardian*, 3 September 2010)

<<https://www.theguardian.com/world/2010/sep/03/mexico-drug-war-killing-fields>> accessed 14 April 2025.

<sup>58</sup> Wharton (n 15) 145-146.

<sup>59</sup> *ibid* 169.

<sup>60</sup> United Nations Office on Drug and Crime, 'Legal Framework for Drug Trafficking' (UNODC)

<<https://www.unodc.org/unodc/en/drug-trafficking/legal-framework.html>> accessed 14 April 2025; Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151; Convention on psychotropic substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175; United Nations Convention Against

narcotic drugs and combat the illicit trafficking of these. Furthermore, especially the last convention named above specifically prohibits the illicit trafficking of narcotic drugs and establishes measures to combat this by ensuring international cooperation.<sup>61</sup> Even though this convention still requires domestic states to implement these measures and supranational prosecution is not established, the convention recognises illicit drug trafficking as an “international criminal activity” and not merely as a transnational one.<sup>62</sup>

Considering the two requirements set out in the Terms of Reference of the Working Group on Amendments to the Rome Statute, drug trafficking can be seen as satisfying both requirements and should be able to qualify, at least formally, as a core crime. As, however, the final decision on whether to introduce drug trafficking in the Rome Statute falls within the competences of the Assembly of States Parties, not only formal arguments are considered, yet as seen above, normative and pragmatic considerations also play a role for states to vote in favour of such amendment.

(b) *Normative and pragmatic arguments*

As previously stated, a recurrent argument against including drug trafficking as a core crime is that broadening the jurisdiction of the court will result in overwhelming the system and in ineffective prosecution.<sup>63</sup> This argument was one of the main reasons why drug trafficking was not even discussed during the Review Conference in Uganda. If, however, at the time, the reasoning behind it was to not overwhelm the still relatively new court, such an argument now, after over twenty years of the ICC operating, lacks validity. Furthermore, the ICC still operates under the principle of complementarity enshrined in Article 17 of the Rome Statute.<sup>64</sup> The primary prosecution of perpetrators of this crime would therefore still fall on domestic judicial systems and would only fall back on the ICC if these systems are unable or unwilling to prosecute. Including drug trafficking as a core crime could incentivise domestic systems to prosecute to avoid the ICC having to prosecute and possibly be overburdened. The current system would therefore be upheld and, if effective, suffice to prosecute offenders; if, however, the current system would not be effective the ICC would be able to intervene and avoid impunity.<sup>65</sup> Consequently, the mere risk of

---

Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 19 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

<sup>61</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (n 60) art 3.

<sup>62</sup> *ibid* preamble.

<sup>63</sup> Molly McConville, ‘A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court’ (2000) 24 Am. Crim. L. Rev. 75, 98-99.

<sup>64</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 17.

<sup>65</sup> Anne H Geraghty, ‘Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World’s Most Pervasive Problems’ (2004) 16(2) Florida Journal of International Law 371, 395.

overburdening the ICC does not seem sufficient to decide not to include drug trafficking as a core crime while risking impunity for many perpetrators.<sup>66</sup>

Another argument presented by states opposing the inclusion of drug trafficking in the Rome Statute is that its existence as a transnational crime and as the subject matter of many suppression treaties, would make its characterisation and prosecution as a core crime under the ICC complex.<sup>67</sup> As discussed at the beginning of the paper, a common characteristic between transnational crimes and core crimes is that both have an international element to them. Satisfying this element, drug trafficking by its nature has an international level as it usually involves multiple states as part of the manufacturing, transportation, and consumption phases of the crime.<sup>68</sup> The paper further argued that there are no other clear ways to distinguish between a transnational crime and a core crime, which brought many states to argue that drug trafficking qualifies as a transnational crime mainly because of its presence in suppression conventions.<sup>69</sup> Genocide and war crimes are, however, also the subject matter of suppression conventions, which did not disqualify them as core crimes.<sup>70</sup> The qualification of drug trafficking as both a transnational crime and as a core crime would therefore make its prosecution no more complex than those of genocide or war crimes.

Finally, against adding drug trafficking as a core crime is the argument that it will function as an example to start adding any other transnational crime to the jurisdiction of the ICC.<sup>71</sup> Indeed, the two arguments provided above, and their counterarguments, can conceivably be applied to almost any other transnational crime, which could possibly then legitimise the risk of overburdening the court or make the whole reasoning behind having an additional level of supranational protection for certain crimes void. While such an argument can receive some credit, drug trafficking has a certain uniqueness which could still speak in favour of its introduction in the Rome Statute. The Statute contains a clear amendment procedure which implies the possibility retained by states to include more crimes as core crimes if certain specific characteristics are fulfilled. As argued above, drug trafficking satisfies both conditions. While arguments can be made that the currently existing core crimes under the Rome Statute also fulfil both criteria, this paper showed that their qualification as core crimes came from social and historical reasons and not through clear criteria that unified these four crimes and excluded any others. Drug trafficking, as the historical account provided above showcased, is not only present in many of the historical moments that made the Rome Statute what it is today (which already qualifies it as a possible core crime), but furthermore fulfils

---

<sup>66</sup> George S Yacoubian, 'The Most International of International Crimes: Toward the Incorporation of Drug Trafficking into the Subject Matter Jurisdiction of the International Criminal Court' (2007) *Criminology Research Focus* 1, 28.

<sup>67</sup> Wharton (n 15) 153.

<sup>68</sup> Yacoubian (n 66) 4.

<sup>69</sup> Wharton (n 15) 139.

<sup>70</sup> Schwöbel-Patel (n 8) 772.

<sup>71</sup> Geraghty (n 65) 397-398.

the later established criteria that a crime needs to have to be able to qualify as a core crime in need of supranational protection.

All of this makes drug trafficking unique in its characteristics and justifies its classification as a core crime in need of additional supranational protection. The fear that its inclusion would result in many other transnational crimes being claimed as possible core crime cannot be seen as discrediting such inclusion for two reasons. On one hand, many other serious transnational crimes that satisfy all requirements, like drug trafficking, to be included as core crimes, should in fact enjoy additional supranational protection to avoid impunity, discrediting this fear. The focus should therefore not be on the fear that the ICC would have many other crimes under its jurisdiction and should rather be on how to ensure a successful international system that makes the supranational prosecution under the ICC effective. On the other hand, even if this fear of having many transnational crimes be classified as core crimes finds some justification, the solution cannot be to exclude drug trafficking that fulfils all of the current requirements to be a core crime, but it should rather be to amend the Rome Statute to introduce a clear legal definition of core crimes which includes a more detailed and comprehensive list of characteristics that the current four core crimes have and any other crime possibly added to the Statute needs to have.

Considering all the above, the normative and pragmatic arguments are not sufficient to justify the exclusion of drug trafficking from the Rome Statute. On the contrary, the seriousness of the crime and its international character showcase the need for an additional level of supranational protection for this crime to ensure that perpetrators do not remain unpunished.

#### **D. CONCLUSION**

This paper provided a discussion on the justification of having an additional level of supranational protection for the core crimes under the Rome Statute. Starting with a general discussion on what makes core crimes a distinct type of crime from domestic and transnational crimes, the paper concluded that a clear differentiation based on legal definitions and theories is not present. History, however, can be used to justify the need for additional supranational protection when it comes to the core crimes currently under the jurisdiction of the ICC. This provided an answer to the first part of the research question of this paper.

The second part of the research question was answered by looking specifically at the crime of drug trafficking to understand whether it should enjoy the same additional protection as the current core crimes, warranting an extension of the jurisdiction of the ICC. A historical account of the international concern that drug trafficking brings, as well as the seriousness of this offence, demonstrates the importance of

including drug trafficking as a core crime in need of supranational protection and rebutted arguments against its inclusion in the Rome Statute.

The aim of the paper was not to provide an argument for the inclusion of all other transnational crimes to the Rome Statute, but it was to focus on the crime of drug trafficking and to analyse the status of the amendment procedure of the Statute and its criteria for classifying a crime as a core crime warranting supranational protection. Future research should be conducted to further evaluate these criteria and determine whether they are appropriate to decide if a crime can qualify as a core crime or not.